

THE NEW PENAL CODE. EUROPEAN UNION REQUIREMENT OR NECESSITY FOR ROMANIA?

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Abstract

Preparation and adoption of a new Penal Code represent a crucial moment in the legislative evolution of any state. The decision to proceed in preparing a new Penal Code is not a simple manifestation of political will, but is, in equal measure, a corollary of the economic and social evolution and of doctrine and case law as well.

Keywords: *Romanian Penal Code, requirement, necessity, European Union.*

Introduction

Preparation and adoption of a new Penal Code represent a crucial moment in the legislative evolution of any state. The decision to proceed in preparing a new Penal Code is not a simple manifestation of political will, but is, in equal measure, a corollary of the economic and social evolution and of doctrine and case law as well.

The deep transformations in political, social and economic plan that took place in the Romanian society in the nearly four decades that passed since the adoption of the Penal Code in force, especially in the period after 1989, do not leave place for any doubts that the adoption of a new Penal Code is necessary.

Starting from these premises, for the preparation of the new Penal Code, within the Ministry of Justice a Committee has been established, constituted from university teaching staff, judges and prosecutors, with the participation of the Legislative Council representatives.

The decision to elaborate a new Penal Code is based on a number of shortcomings within the current regulations, shortcomings highlighted in practice as well as in doctrine.

Thus, the present sanctioning criminal regime regulated by the Penal Code in force, subject to frequent legislative interventions on the various institutions, led to a non-unitary application and interpretation, with no coherence, of the criminal law, with repercussions on the efficiency and the finality of the justice act.

Also, the decision to elaborate a new Penal Code was grounded on the shortcomings of Law 301/2004¹, raised by the doctrine in the period that followed its publication, out of which, the most important are the following:

➤ in terms of the models that constituted the basis of the regulation, our legislative body has limited to two main models - the Penal Code in force and the French Penal Code, diverting thus from the inspiration of the Italian-Austrian tradition, developed under the former Penal Code¹;

¹ Published in the Official Gazette of Romania no. 575 of June 29th, 2004, this law on the new Penal Code has never entered into force, another draft of the Penal Code being elaborated, resulting in the publication of Law 286/2019 concerning the Penal Code, published in the Official Gazette of Romania no. 510 of July 24th, 2009.

- the classification of the infringements of law in crimes and offences, although correct from a scientific point of view, has been regulated in a faulty manner, therefore, it creates problems whose solution can not be found within the code. This is the case, for example, with the classification of the attempted murder as crime or offence. Further more, it should be noted, presently, the concepts of crime and offence do not have a legal relevance anymore, neither for specialists and, obviously, nor for the public. Their re-introduction in these circumstances would represent only a source of confusion. To make sense of this, the distinction in criminal plan should be correlated with the adoption of a corresponding institution in the procedural plan. The legal systems in which there is a classification in crimes and offences have also specific procedural institutions, that give substance to this classification, such as, for example, the Court with jury. Such institution is grounded in the tradition, the experience accumulated in time and within a certain legal culture in the civic space. In their absence, the institution would be artificial and inefficient;
- Law 301/2004 reiterated a number of provisions already declared unconstitutional by the Constitutional Court, as in the case with the obligation to remedy a prejudice by ordering certain individualization measures to suffer the sanction - articles 108, 109 of Law, and within the prior complaint regime in case of offences against State-owned assets – article 266 par. 6 of Law, etc. In addition, several other provisions raise serious constitutionality issues (for instance, the criminal immunity of all public institutions);
- the regulation of the main sanctions hierarchy in terms of offences, stipulated in Article 58 par. 4 of Law 301/2004, is not reflected in the content of other institutions. Thus, according to the law, a fine is a more severe sanction than community service work. On this grounds, and by the application of Article 35 par. 2 of Law, it is concluded that the attempt to an offence sanctioned only with fine will be sanctioned with community service work. Article 69 of the Law stipulates however, that in the case of avoiding the payment of a fine with intent, community service work could apply;
- some of the new introduced institutions are superposing the regulation of the sanctionary regime of minors, that is still grounded on old principles, leading to the creation of a more severe sanctionary regime for minors than for adults (for example, in case of postponing the punishment application or the suspension of the sanction applied to the minor, if it is also applying the obligation to provide unpaid work);
- the criminal liability of the legal entity has been taken from the initial version of the French Penal Code from 1994, version that has not been proved as viable and which consequently the French Legislative body partially renounced (for example, under the aspect of the special clause of the legal entity liability);
- in terms of the special part, it is noted in the text of the Code the introduction of many provisions from the special law, measure completely justified, but they were mostly taken as such, without being subject to rigorous selections or to an improvement of the regulation. Thus, the existing regulation parallelism between the Code and the special criminal laws has been transferred sometimes inside the Code. At the same time, some texts from the special legislation brought into the Penal Code have been repealed or modified in the meantime.

Additionally the elaboration of a new Penal Code is required by the need to re-set the sanctioning treatment within the normal limits. In this respect, the practice of the last decade has shown that not the excessive enlargement of the sanction limits is the efficient solution to fight the crime. Therefore, even the sanction for the aggravated theft is prison from 3 to 15 years according to the law in place, this legal sanction – not met in any other legal system in the European Union - has not led to a significant decrease in the number of these offences. Moreover, in the period between 2004 and 2006, approximately 80% of the ongoing sanctions of depriving of liberty for theft and aggravated theft were no more than 5 years of imprisonment, which indicates that the courts have not felt the need to apply sanctions to the upper limit provided by the law (maximum 12 years in case of simple theft, and 15, 18 and 20 years in case of aggravated theft). On the other hand, the extreme period between the

minimum and the maximum limit of the sanction (from 1 to 12 years, from 3 to 15 years, from 4 to 18 years) led in practice to many different solutions in terms of effectively applied sanctions for similar offence or to extended sanctions for low hazard offences, fact that does not ensure the predictable nature of the Act of Justice. The desirable solution is not an irrational increase of a sanction, which does not do anything more than to disregard the social values hierarchy in a democratic society (for example, stealing a car that is worth more than RON 200,000 is sanctioned just like murder by the law in place). In a State of law, the extent and intensity of the criminal repression should remain within the determined limits, firstly, by reference to the importance of the social value affected for those that infringe the criminal law for the first time, growing gradually for those who commit more crimes before being finally convicted and even more for those who are in a state of relapse. Therefore, the limits of the sanction stipulated in the special part must be correlated with the provisions of the general part, that will allow a proportional aggravation of the sanctionary regime provided for the plurality of crimes.

The analysis of the Penal Code in force evidenced another necessity for new regulations from the special part, namely to simplify as much as possible the incrimination texts, avoiding the superposition between various incrimination and with the texts in the general part. Thus, if a circumstance is provided in the general part as a general aggravating circumstance, it must not be reiterated in the incrimination content from the special part; the general text shall apply.

To provide the unity in the offences regulation, was necessary to include in the content of the new Penal Code some offences stipulated presently in special criminal laws and that have a higher frequency in the judicial practice (offences against traffic safety on the public roads, offences against the safety and integrity of computer systems and data, offences of corruption, etc.).

Thus, in the new Penal Code must be introduced all those offences incriminated in special laws, which effectively deserve a penal sanction, and in these cases, the incriminating text must be conceived so as to integrate organically in the code structure.

2. Foreseen Changes¹

Answering the requirements of the European Commission monitoring process, the legislative process has as a starting point the need to elaborate a new Penal Code, which shall retrieve the elements that can be maintained in the current Code and from Law 301/2004 and to integrate in a unitary manner with elements taken from other reference systems and from the regulations adopted at European Union level in order to achieve a space of freedom, security and justice.

The new Penal Code follows the fulfilment of the following objectives:

1. creation of a coherent legislative framework in criminal matters, avoiding the unnecessary superposition of the existing norms in force in the current Penal Code and the in the special laws²;
2. simplifying the regulations of material law, designed to facilitate their unitary application and with celerity within the activity of the judicial bodies;
3. complying with the exigencies resulting from the fundamental principles of criminal law, established by the Constitution and the pacts and treaties on fundamental human rights, of which Romania is a part;
4. transposition into the national criminal legislative framework of the regulations adopted at European Union level;
5. harmonization of the Romanian Criminal Law with the systems of other Member States of the European Union, as a premise of judicial cooperation in criminal matters based on mutual recognition and trust.

² Taken from the Statement of reasons concerning the Draft law on the Penal Code <http://www.just.ro/>, accessed on May 12th, 2011.

By achieving the mentioned objectives, the connection of the national criminal law to the contemporary requirements of the fundamental principles of the criminal law will be realized.

Also, in social terms, the simplification of the material law regulations, corroborated with the planned changes in the new Criminal Procedure Code, should lead to the predictability of the criminal law, as well as to an increased general confidence in the Criminal Justice Act.

In the elaboration of the new Penal Code has been followed on the one hand, the revaluation of the Romanian criminal law tradition, and on the other hand, the connection to the current regulatory systems of several reference legal systems in the European criminal law. These two directions envisaged in the code elaboration could be reconciled just through an attentive analysis of the Romanian Criminal law evolution. Thus, in the capitalization of our criminal law tradition has been started from the Criminal Law of 1936, many of its provisions being maintained in the Penal Code in force. As it is known, the code of 1936 had two main sources of inspiration - The Italian Penal Code and the Transylvanian Penal Code (in essence, of Austrian inspiration). At the same time, it is a fact that, nowadays, the criminal regulations with the widest influence in the European law belong to the German and Italian space. The convergence of regulations proposed by the new Code with these legislations, and with those they inspired (the Spanish law, the Swiss law, the Portuguese law), allowed the creative capitalization of the national tradition, together with the achievement of some regulations connected to the current trends of the European criminal law. The fidelity towards Italian and German tradition does not imply taking over some provisions of the legislation in the form they were during the elaboration of the Penal Code in 1936, but, on the contrary, considering the evolution incurred in these systems, the modern theories and regulations developed in the meantime.

For all these considerations, the Committee members have not agreed with the choice of the Committee for elaborating Law 301/2004, that has adopted the French model (abandoned by our criminal legislative body in 1936) as the main inspiration for the newly introduced regulations. This orientation of the elaboration Committee of the new code has not considered by any means to ignore the solutions adopted by other European systems, as the French, Belgian, Dutch law or of some of the Scandinavian countries.

It has been equally maintained a number of specific Romanian criminal legislation institutions, some introduced by the Penal Code in force that have proven their functionality (for example, the improper participation has been maintained, although most of the laws operate in these situation with the mediated author institution). Last but not least, a series of elements in accordance with the present trends of the European criminal laws (renouncing to the social hazard institution, the victim's consent, etc.) has been taken from Law 301/2004, but especially from the preliminary draft prepared by the Legal Research Institute underlying the elaboration of that bill.

The general part of the new Penal Code assembles the applicable rules of all offences regulated by the criminal law, regardless of their nature, creating the general framework for the application of the criminal law, defining the offence, establishing its general characteristics and the composing elements, regulating at the same time the penal responsibility, sanctions and their modality of application.

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