



The Essential Features of the Criminal Offence a Comparative Study the Republic of Moldova and Romania

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Abstract: The importance of criminal law is given by the urgent need to defend the essential values of the society on which it is based. Within these values a decisive place is occupied by the man regarded as the supreme social value; he must benefit from criminal protection in all its attributes: life, bodily integrity, health, physical and mental liberty, sexual inviolability, dignity, inviolability of home and correspondence. All the acts, actions or inactions which violate all the values mentioned above through their content are called criminal offences. According to what is presented further, we will carry out a comparative study between the legislation of the Republic of Moldova and that of Romania, regarding the essential features of the criminal offence as they are listed and described in the legislations of both countries. We express our opinion concerning the four essential features of the criminal offence: social danger, illegality, guilt, liability for criminal punishment.

Keywords: extreme social value; social danger; liability for criminal punishment

1. Introduction

From ancient times to the present, there have been a multitude of social-human conflicts, different in terms of content, form, time or other characteristics which brought more or less prejudices to the person and society. Thus, the need to regulate, found, sanction and prevent all these violations was present reaching the historical stage of social-human development when criminal law was established.

One of the most important objects of criminal law is the offence. Its social danger determined the society to readjust it legally because crime infringed and continues

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to do this with social values and ordinances, the acts created disturb the normal development of stable relationships between members of the society, cause dissatisfaction, fear and concern for what has been done and could be committed by means of violating the criminal law in the community.

In order to determine whether an act (action or inaction) is considered a criminal offence, it is necessary to know its essential features because through essential features of the criminal offence we can recognize whether an act which has a negative character on individuals and society as a whole is considered a criminal offence.

2. The Definition of the Criminal Offence

In criminal law, the content of the notion of criminal offence is directly related to the social and historical nature of society and the state.

Until the disintegration of the USSR in the theory of Moldavian criminal law there was the idea that criminal offence by its nature has class features. In Romania, these Marxist ideological conceptions were introduced by the Penal Code in 1969, ideas which were repealed by subsequent amendments especially after the revolution in December 1989.

Indeed, in the slave order, the law protected only the life, health and interests of the slave owner, but the slaves had no rights and were considered the property of the owner. The situation remained almost unchanged during the period of feudalism because the feudal lords could sell the peasant, punish him, etc. As a result of the bourgeois revolutions in France and England, the principle of equality against the criminal law was declared. But this principle began to be really understood much later. Although it exposed the nature of class contradictions, the socialist revolution in Russia in October 1917 did not create conditions for the application of this principle.

At present, the criminal offence does not carry as a rule a class character and the notion of offence includes the necessity of defending the general human goods against criminal attempts in its content. Therefore, nowadays we take into consideration that the criminal offence is not a class phenomenon, but a social phenomenon that fights through the means of criminal law.

Thus, from the information mentioned above, we state that the notion of criminal offence, its social essence and the legal signs that characterize it occupy the central

place in criminal law. The regulatory function of criminal legislation is achieved by determining the dangerous nature of the act for both the society and the state, by recognizing the acts committed as crimes for which measures of legal and criminal influence need to be applied (Macari, 2002, p. 66).

According to paragraph 1 of article 51 in the Criminal Code of the Republic of Moldova (Borodac, 2005, p. 87), the crime committed represents the real basis (de facto) of criminal liability because juridical-criminal relationships of conflict occur from the moment of its perpetration.

Provisions of this kind in the Criminal Code of Romania are found in paragraph 2 of article 15 where it is mentioned that "*Criminal offence is the only basis for criminal liability.*" In the provisions of article 15, paragraph 1, the following definition is given to the notion of criminal offence: "*Criminal offence is the act provided by the criminal law, committed with guilt, unjustified and imputable to the person who committed it*" (article 15, Law 286/2009).

The Criminal Code of the Republic of Moldova gives the following definition to the notion of criminal offence: "*Criminal offence is a prejudicial act (action or inaction), provided by the criminal law committed with guilt and punishable by criminal punishment*".

3. Essential Features of the Criminal Offence

The Moldavian author Ivan Macari considers that from the content of article 15 in the Criminal Code of the Republic of Moldova there results directly the three essential signs of the criminal offence - the prejudicial danger (the material sign), the criminal illegality of the act (the act provided by the criminal law) and the guilt. This allows us to conclude that it can be considered a criminal offence provided by the criminal law only the prejudicial act committed with guilt and punishable by criminal punishment. In the Criminal Code of the Republic of Moldova in article 51 it is mentioned that the real basis of criminal liability is the prejudicial act committed which meets the constitutive signs of the criminal offence component (Macari, 2002, p. 67).

Therefore, only crime is the real basis of criminal liability and the guilty person is subject to it.

"Punishment is a measure of state coercion, i.e. an indispensable consequence of the criminal offence." This provision is provided in articles 1 and 61 in the

Criminal Code of the Republic of Moldova, according to which the Criminal Code establishes the punishments to be applied to persons who have committed crimes. This provision was also found in the old Criminal Procedure Code of Romania, in article 1: *“Punishment is a measure of coercion and a means of re-educating the convict. The purpose of the punishment is to prevent the perpetration of new crimes”* (Criminal Law 15 of 1968). The legislator considered that these provisions should not be included in the new Criminal Code.

Taking into account the above mentioned, we notice that the theory of criminal law in the Republic of Moldova defines crime as prejudicial (socially dangerous), illegal act, committed with guilt and punishable by criminal punishment.

Also, in the criminal law of Romania, it is considered that there are four features: it is the act provided by the criminal law committed with guilt, unjustified and imputable to the person who committed it.

4. Prejudicial Act

From the definition of the criminal offence given by the Criminal Code of the Republic of Moldova, it appears that the criminal offence is always an act, i.e. a way of behaving of a person's activity. In this case, the term *“act”* is used by the legislator in order to designate the apparent forms of criminal behavior - action or inaction.

The notion of act provided in article 14 in the Criminal Code of the Republic of Moldova sums up both actions and inactions, as well as their prejudicial consequences, i.e. the objective damage caused by the criminal behavior.

In criminal law only those acts that are socially dangerous are recognized as criminal offenses. Social danger is the most important feature of the criminal offence, an objective component of the offence that reveals its social essence. The social danger of the act lies in the fact that the criminal offence is harmful to the society because it causes or creates a real danger which may generate essential damage to social relationships (to the established law and order).

In article 2 in the Criminal Code of the Republic of Moldova there are listed those values (objects) that the criminal offence threatens at causing them one kind of damage or another. In the foreground, there are the person, human rights and freedoms.

In the Romanian Criminal Code, these values (objects) are provided in the Special Part of the Criminal Code.

The theory of criminal law and criminal legislation in the Republic of Moldova distinguish two sides of social danger – the character and the degree. Article 75 in the Criminal Code of the Republic of Moldova states that when establishing the category and term of the sentence, the court takes into account the seriousness of the criminal offence, its reason, the guilty person, the circumstances of the case that mitigates or aggravates liability, the influence of the punishment towards correction and re-education of the culprit, as well as the living conditions of his family. In the Romanian criminal doctrine, the social danger as a feature of the criminal offence is known in two forms: generic or abstract and concrete. Article 16 in the Criminal Code of the Republic of Moldova determines the classification of criminal offences according to their prejudicial character and degree. In Romania, such provisions are found in article 74 of Criminal Code.

The prejudicial degree as a constructive, inalienable sign of the criminal offence is concretized in paragraph (2) article 14 in the Criminal Code of the Republic of Moldova in which the notion of reduced importance of the criminal offence is provided.

For some offenses, the law provides not only for the occurrence of detriment, but also for a considerable, large or extremely large damage. In these situations, causing damage in small or unessential proportions means that the act committed does not formally include the signs of a criminal offence. For example, in paragraph 1 of article 329 in the Criminal Code of the Republic of Moldova it is specified the criminal liability for negligence on duty that has caused large amounts of damage to public interests or rights and to the interests protected by the law which belong to individuals or legal entities. Therefore, if a small amount of damage has occurred as a result of negligence, the criminal case is not initiated, and the action filed must stop because the act does not meet the signs of the crime without indicating paragraph 2 article 14 in the Criminal Code of the Republic of Moldova.

Secondly, the act does not present the prejudicial degree of a criminal offence if it causes insignificant damages to the social values protected by the criminal law. For example, the theft of a kilogram of vegetables will be considered an insignificant, unimportant act as specified in paragraph 2 article 14 in the Criminal Code of the Republic of Moldova (Borodac, 2005, p. 88).

In the Romanian criminal law, the notion of reduced importance of the criminal offence from the Criminal Code of the Republic of Moldova starts from the delimitation in crimes with social danger and specific social danger. Therefore, in some cases the abstract social danger is lower and thus, for a criminal offence to be taken into consideration it is necessary for the law to provide additional requirements so that the act would present a sufficient degree of danger in order to be considered a crime. However, there are also situations when a certain act can be considered a crime in a formal manner according to the criterion of abstract danger, but if it is looked into in a concrete way, it proves to be insignificant, derisory.

The problem regarding the recognition of the act as insignificant in the Republic of Moldova is solved by the criminal investigation authorities and by the court being taken into account the set of real circumstances of the act committed. The criminal trial in such a case is suspended due to the lack of crime component.

In Romania, if it is concluded that the act is irrelevant and cannot be considered a criminal offence, the prosecutor or the court will apply an administrative fine to the perpetrator.

The prejudicial degree is taken into account by the legislator when he differentiates the criminal offences into a simple (basic) crime, with aggravating or mitigating circumstances. According to article 15 in the Criminal Code of the Republic of Moldova, the prejudicial degree of the crime is determined according to the features that characterize the elements of the crime: the object, the objective side, the subject, the subjective side. However, the Romanian Criminal Code does not have a special classification of the object, the objective side, the subject and the objective side in the Criminal Code.

These components of the crime are also specified in other provisions of the General and Special Part of the Criminal Code of Romania.

The social-psychological characteristic of the subject's personality of the crime (family situation, citizen's particularities, worker, etc.), other circumstances such as sincere repentance or self-denunciation after committing the crime, voluntarily remedying the damage that was caused or removal of the damage caused, committing a crime as a result of personal or family circumstances or out of reasons of compassion, active contribution to discovering the crime or arresting of criminals may not have any influence in determining the nature and prejudicial degree of the crime. Besides the gravity (character and degree) of the offence these details are taken into account when the individualization of punishments takes

place according to article 75 in the Criminal code of the Republic of Moldova. That is why some authors' opinion (Karpov, Florea, 1976, p. 13) is incorrect according to which the gravity of the offence also depends on the offender's personality. In what Romania is concerned, besides determining the generic and specific social danger, it is also taken into account the individualization of punishments according to article 74 in the Criminal Code of Romania.

In article 58 in the Criminal Code of the Republic of Moldova (as well as in other articles that provide for the release of criminal liability or criminal punishment) it is indicated that the person who has committed a minor or less serious crime for the first time may be released from criminal liability if after committing the crime, he voluntarily denounced himself, actively contributed to its discovery, compensated the amount of material damage caused or, otherwise, repaired the damage caused by the crime.

The Romanian Criminal Code provides the conditions under which the application of the punishment may be waived, included by the legislator in article 80. In article 81 of the Romanian Criminal Code it is specified that in case of waiver of the sentence, the court applies a warning to the offender. Due to the administrative character this sanction does not attract the consequences of a punishment (forfeitures, incapacities, etc.).

5. Illegality

Another essential feature of the offence is its criminal illegality.

The prejudicial act cannot be qualified as an offence if it was not provided by the criminal law at the time of its perpetration, i.e. it was not illegal (Macari, 2002, p. 70). Since Roman law, it has been determined the law that there is no crime if it is not indicated in the law - *nullum crimen sine lege* (Borodac, 2005, p. 90). In Romanian criminal law, illegality is incorporated in the notion of the act provided by the criminal law. Criminal illegality is inextricably linked to the prejudicial nature of the offence. The criminal law recognizes only prejudicial acts as illegal.

The close connection between these signs is manifested in the fact that illegality is the legal expression of the prejudicial character in the criminal law (Macari, 2002, p. 71), and the prejudicial gravity represents the socio-political content of the crime (Borodac, 2005, p. 90). Illegality is a normative sign of the offence (Macari, 2002, p. 70) which characterizes its legal property.

This feature in Romanian criminal law is provided in article 2 of the Romanian Criminal Code in which the principle of legality of incrimination is confirmed: *“The criminal law provides for the applicable punishments and the educational measures which can be taken against the persons who have committed crimes, as well as the safety measures that can be taken against the persons who have committed acts provided by the criminal law”*.

Criminal illegality is a testimony that the fight against these harmful acts becomes a matter of vital importance to the state. Any human conduct cannot be considered a crime until it is recognized as illegal by the law. Any other consideration given to an act provided by the criminal law, even if it belongs to official persons, does not change its prejudicial character until it is abrogated by the law. No assessment of the opportunity to incriminate the act by law enforcement agencies is admissible as long as the legislator himself made such an assessment before providing the act as a crime (Borodac, 2005, p. 90).

In Romania, for example, criminal offences and punishments cannot be determined by regulatory documents, but only by organic laws. Neither the abrogation or the modification of a crime nor the modification of the punishments provided for crimes can be done only by organic law. Therefore, the Government cannot “index” the amount of criminal fines provided for some crimes by means of government decision, but they must submit a blueprint law to Parliament for this purpose.

The provision contained in paragraph 1 of article 14 in the Criminal Code of the Republic of Moldova according to which *“Crime is a prejudicial act (action or inaction), provided by the criminal law”* excludes the possibility of applying criminal law by means of analogy which was practiced in the Soviet period until the ‘60s of the twentieth century. Then the prejudicial acts which were not directly provided by the criminal law were criminally sanctioned according to an article of the Criminal Code which provided a similar crime in form and importance with reference to the norm about analogy (Borodac, 2005, pp. 90- 91).

In the Romanian criminal legislation, no public authority or court have the right to add something to the provisions of the law and they cannot consider if an act is a criminal offence on the basis of analogy, if that act does not correspond exactly with the text of a norm of criminalization which belongs to an organic law.

Therefore, through prejudicial act provided by the criminal law it is understood that the concrete prejudicial action / inaction must be provided (prohibited) by the

criminal law by means of applying criminal punishment. Its legal signs must be shown (described) in the provisions of the juridical, penal norm including the prescriptions of the General Part and of the Special Part in the Criminal Code of the Republic of Moldova. The Romanian specialized doctrine gives approximately the same definition, namely: for a crime to be considered there are necessary three essential features: the act which presents social danger, committed with guilt and provided by the law combined cumulatively. The absence of any of these three essential features leads to the removal of the criminal character of the act (Macari, 2002, p. 70).

Moreover, in Romania an act is provided by the criminal law when its incrimination was included in the Criminal Code (the special part) or by a special criminal law. There are also cases in which the determination of some elements belonging to the content of the fact provided by the criminal law is done with the help of some norms included in legislative acts without criminal character (Toader, 2005, p. 72).

6. Guilt

The third essential feature of the criminal offence is the guilt of the person who committed a prejudicial act provided by the criminal law. According to paragraph 2 article 6 in the Criminal Code of the Republic of Moldova, guilt presupposes that only the person who intentionally or recklessly committed an act provided by the criminal law is subject to criminal liability and criminal punishment. In some cases, the committed acts require the concomitant presence of both forms of guilt (article 19 in the Criminal Code of the Republic of Moldova). Thus, if there is no guilt, there is no act in the legal or criminal sense (given the content of the criminal offence).

The Romanian Criminal Code provides for guilt as an essential feature of the crime in paragraph 1 of article 16: *“The act constitutes a crime only if it was committed with the form of guilt required by the criminal law.”*

Fundamentally, guilt means the attitude, the psychic position of the perpetrator towards the act committed (action or inaction) and towards its consequences. Guilt can be defined as a psychic attitude of the person who committing a prejudicial act provided by the criminal law with unconstrained will, realized the prejudicial nature of his action or inaction at the time of execution, predicted his prejudicial consequences which he wished, admitted or considered that they could easily be

avoided; or he did not realize the detrimental nature of his action or inaction, he did not provide for the possibility of its harmful consequences, although he had to and could anticipate them (Borodac, 2005, p. 91).

From the definition given by Alexandru Borodac which corresponds to the provisions of articles 17-20 in the Criminal Code of the Republic of Moldova, it appears that guilt is characterized and determined by the action of two inherent factors in the person's mental life at the same time: consciousness or intellectual factor and will or volitional factor (Borodac, 2005, p. 91).

In Romania, Dalia Toader mentions that the perpetrator's psychic attitude towards the act committed and towards its consequences - guilt - is the result of the interaction of two factors: consciousness and will (Toader, 2005, p. 68).

Consciousness or the intelligential factor is the psychic faculty through which the person realizes his desires, the action or inaction that he is going to fulfill for this purpose, the prejudicial consequences that could occur. The idea of committing the act arises in the conscience, therefore, the arguments for and against the perpetration of the criminal offence are weighed. The intelligential factor has a decisive role in regulating criminal activity. Its presence means the existence of guilt.

The will or the volitional factor is the psychic faculty through which man's physical energies are consciously mobilized and oriented in order to perform the act of external conduct projected inside the conscience. The volitional factor proves that the act belongs to the perpetrator and therefore, it is an essential condition for the existence of guilt as a feature of the criminal offence.

According to the Criminal Code of the Republic of Moldova, guilt can take the following four forms: the crime committed intentionally, the crime committed recklessly, the crime committed with two forms of guilt, the crime committed without guilt (fortuitous case)

Instead, according to the Romanian Criminal Code, guilt can take only three forms:

- intention (direct or indirect), fault (with or without precaution), praeterintention (oblique intent).

In the Romanian criminal legislation, the third form of guilt, namely "praeterintention (oblique intent)", is analogous to the crime "committed with two forms of guilt" from the Criminal Code of the Republic of Moldova. Thus, the oblique intent (praeterintention) is a mixed form of guilt which includes intention

and guilt. Oblique intent is the form of guilt which is done by committing an act with intention and producing a more serious consequence than the one pursued or accepted by the perpetrator through committing the act, a result that is imputed to him in the form of guilt, because he did not see it although he had to and could foresee it. As a characteristic of the committed crimes there is the circumstance that the perpetrator commits an act pursuing a certain result, but whose result is amplified becoming more serious and realizing the content of another crime (for example blows or injuries causing death - article 195 of the Romanian Criminal Code), or an aggravated variant of the initial crime (for instance the robbery that resulted in the death of the victim - article 236 of the Romanian Criminal Code).

A premise of criminal liability is responsibility. A person can be considered responsible if he has the capacity to understand the prejudicial character of the act as well as the capacity to manifest his will and direct his actions. The prejudicial act committed by a person in an irresponsible state of mind does not constitute a criminal offence (article 23 in the Criminal Code of the Republic of Moldova).

In the Romanian legislation, irresponsibility is provided in article 28 of the Romanian Criminal Code, namely "It is not considered imputable the act provided by the criminal law committed by the person who could not realize his actions or inactions at the time of its perpetration or could not control them either due to a mental illness or because of other reasons". It is not considered a criminal offence in the criminal law of the Republic of Moldova, either the act (fortuitous case) committed without guilt (article 20 in the Criminal Code of the Republic of Moldova, or the one committed under the influence of physical or mental constraint, if the person could not direct his actions as a result of this constraint (article 39 in the Criminal Code of the Republic of Moldova).

Also, it is not considered a criminal offence the prejudicial act provided by the criminal law committed in a state of self-defense (article 36 in the Criminal Code of the Republic of Moldova), of extreme necessity (article 38 in the Criminal Code of the Republic of Moldova) in order to detain the offender (article 37 in the Criminal Code of the Republic of Moldova) and in case of substantiated risk (article 40 in the Criminal Code of the Republic of Moldova).

As a ground for instituting causes that remove the criminal character of the act (articles 36 - 401 in the Criminal Code of the Republic of Moldova) there are both the lack of guilt when the perpetrator does not act with free will, but constrained by the need to defend social values which are seriously threatened and the removal of the prejudicial character of the act, this way the act itself being presented as a

social and useful activity. In the Romanian legislation it is not considered a criminal offence the act committed through self-defense (article 19 in the Criminal Code of Romania), the state of necessity (article 20 in the Criminal Code of Romania), the physical constraint and the moral constraint (articles 24 and 25 in the Criminal Code of Romania), the fortuitous case (article 31 in the Criminal Code of Romania), some forms of drunkenness (article 29 in the Criminal Code of Romania) - which is not provided at all in the Criminal Code of the Republic of Moldova, the perpetrator's minority (article 27 in the Criminal Code of Romania) and error (article 30 in the Criminal Code of Romania).

No matter how dangerous it is and regardless of the consequences which have occurred, no act can be recognized as a crime if committed without guilt.

7. Liability for Criminal Punishment

The last essential feature of the criminal offence is the liability for criminal punishment of a prejudicial act provided by the criminal law and committed with guilt. Through liability for criminal punishment as a feature of the criminal offence it is understood the possibility of criminal punishment for each crime.

Punishment is a measure of state coercion which is applied by sentencing and consists of different deprivations or limitations in rights and freedoms. There are acknowledged as crimes only those acts for which the legislator considers necessary to apply the criminal punishment.

Each article of the Special Part in the Criminal Code provides a certain punishment for a specific crime which is committed.

In the Romanian specialized doctrine, this characteristic together with the feature of *“illegality of the act”* from the Moldavian doctrine is included in only one feature namely *“the act must be provided by the criminal law?”* In this sense, in article 1 of the Criminal Code of Romania it is stated that *“the criminal law provides for the acts that constitute crimes”*. The quoted text establishes a fundamental principle of the criminal law called *“the principle of legality incrimination and punishment.”* This principle has the meaning that only by means of law can it be provided that a certain act constitutes a crime and only by means of law can punishments and other criminal sanctions be established. But based on the principle of humanism, the liability for punishment of the crime is expressed in threat, i.e. in the possibility of applying the punishment.

The punishment is not applied immediately for every criminal offence. The Criminal Code of the Republic of Moldova provides a series of conditions which release the person who is guilty of committing the crime from criminal liability or criminal punishment (articles 53-60, 90-96 in the Criminal Code of the Republic of Moldova).

In the Criminal Code of Romania, the conditions that release the person who is guilty of committing the crime from criminal liability or criminal punishment are included in the provisions taking into account the causes that remove the criminal nature of the act: articles 80 - 82, Waiving the applying of punishment.

However, this does not avoid the thesis about the liability for criminal punishment as a mandatory feature of the crime which is confirmed by the Moldavian legislator in article 14 from the Criminal Code of the Republic of Moldova because the criminal punishment can sometimes be applied to the persons previously released by it.

As a feature of the criminal offence, liability for criminal punishment must not be identified with the criminal punishment for committing a concrete crime from which the culprit can also be released. Liability for punishment is a broader notion which characterizes the norm that has a legal and criminal sanction (Borodac, 2005, p. 93).

Therefore, liability for punishment of the act must be understood not only as a coercive measure applied in the name of the law, but also as a threat to applying the punishment.

8. Conclusion

In order to determine whether an act is considered a criminal offence, it is taken into account if this act meets the essential features of the crime incorporated in the content of the Criminal Code of each state.

Thus, in the Republic of Moldova, for an act to be considered a criminal offence it is necessary that the act be prejudicial, be illegal, be committed with guilt and be liable to criminal punishment.

In Romania, for example, for an act to be considered a criminal offence, there are required only three essential features, namely the act must constitute social danger, must be committed with guilt and be provided by the criminal law.

Therefore, as it is unanimously accepted, if at least one essential feature which is provided in the Criminal Code of the respective state is missing, then it cannot be considered a crime, but it can be any other measure of punishment and correction applied to the person.

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