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Liberalization of the Principles of Criminal Law. Towards a Postmodern Criminal Law in Romania?

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Abstract:
One of the main objectives of Romanian new Criminal Code was to adapt the criminal legislation to the liberal principles. Thus, the principles of the Criminal law are nothing else but an application in this domain of the liberal precepts: legality of criminal offences and punishments, subsidiarity of criminal law, the principle of individualization, the principle of personal liability, humanism of criminal law. The study aims to analyse the epistemic rupture in our societies due to the ideas of postmodernism who is trying to overstep the modernity by including it, rupture also reflected in the Romanian criminal law. With this study we wish to see in which degree the modern principles of criminal law are affected by the postmodern ideas: the rising demand for security in a time when the future is perceived as menace full and risk full; the loss of faith in the universal abstract Ration; the multiplication of the instruments to response to crime; the attempt to privatize the alternative responses to the traditional criminal law by creating a "network reaction" instead of an hierarchized one which created a "culture of control"; and the emergence of the "culture of negotiation" in criminal law.

Keywords: *principles of criminal law; liberalism; postmodernism; network reaction; culture of control; securitarian society.*

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A system's general principles are those directing ideas that govern that respective system's structure and development. Considering its constitutional foundation, the principles of criminal law represent the limits of state intervention by criminal means, that govern the elaboration and application of criminal norms.

The principles of criminal law stem from supra-legislative norms and their concrete content is contoured and determined by the European practice used for the protection of human rights. The directing ideas that we suggest as fundament of criminal law are: the principle of the legality of incrimination and penalty; the principle of the subsidiarity of criminal law; the principle of personal criminal liability; the principle of individualisation; the principle of the humanism of criminal law.

1. The principle of the legality of incrimination and penalty

The principle of the legality of incrimination and penalty is the foundation of the modern criminal law system because it establishes the boundaries within the frame of which the state can initiate criminal proceedings. The first consecration of this principle in material criminal law was made by Cesare Beccaria and read as follows: "Laws alone can determine penalties and criminal offences and this power cannot reside but in the person of the legislator, who represents any society united through a social contract" (Beccaria, 2009: 65). Thus, due to lack of an express legal disposition, no law or freedom can be limited by state authorities. The principle imposes the existence of a law that establishes those actions which constitute criminal offences (*nullumcrimen sine lege*) and the criminal penalties that apply to the committed criminal offences (*nullapoena sine lege*). "The legality of incrimination and penalty appears as one of the most important limitation of *iuspuniendi*, representing the main guarantee of the citizens' legal security before criminal law" (Streteanu and Nițu, 2014: 35). Its imposition as main steering principle of criminal law has represented the triumph of predictable law over the arbitrariness of state authority. The imperative of the existence of a law that clearly and predictably establishes which actions are criminal offences and their penalties guarantees persons the possibility to guide their behaviour in the direction set by law and to know the consequences of behaviour that runs counter to law.

The constitutional statute of the principle is guaranteed by its provision in art. 23 para (12) of the Fundamental Law according to which: "penalties shall be established or applied only in accordance with and on the grounds of the law". This constitutional provision directly consecrates the principle of the legality of penalties, without making reference to the legality of incrimination. Nevertheless, the legality of incriminations derives from the corroborated interpretation of the provisions of art. 73 para (3) letter h), according to which organic laws shall regulate criminal offences, penalties, and the execution thereof and of the provisions of art.15 para (2) of the Constitution, which stipulates that the law shall only act for the future, except for the more favourable criminal or administrative law.

The Romanian Criminal Code provides for the principle the legality of incrimination in its first article and underlines in para (1) that "*criminal law makes provision for actions which constitute criminal offences*". Article 1 is consecrated to the principle of the legality of incrimination, the law alone establishing which actions are criminal offences and, consequently, for which actions criminal liability shall arise. The second paragraph stipulates this provision, stating that criminal liability shall arise only

for those actions which were labelled by a law as criminal offences at the time of the offence.

As regards the principle of the legality of penalty, according to which the law provides for penalties for each one of the criminal offences that it regulates, it is distinctly consecrated in art. 2 of the Criminal Code. As is clear from the interpretation of the marginal title of this article, it is not only a question of the legality of penalties, as all criminal law penalties must be provided for by law. Thus, the law must regulate both penalties and educational measures that can be taken in case of a person who has committed a criminal offence, as well as the safety measures that can be taken when an action provided for by criminal law has been committed. Concerning the legality of safety measures, the Constitution distinctly regulates it in the case of some of them (Streteanu and Nițu, 2014: 36). Such a safety measure refers to the special confiscation provided for in art. 44 para (9) of the Fundamental Law, according to which "any goods intended for, used or resulting from a criminal or minor offence may be confiscated only in accordance with the provisions of the law". The principle of the legality of penalty provides for penalties to be contained in a law, but it imposes to the legislator a positive obligation with regard to the penalties they adopt by completing the formal criterion with the material one. "No other penalty than the one provided for by the law, but also a penalty that is proportional to the gravity of the criminal offence and a *moderate* penalty: (…) modern criminal law imposes upon itself the principle of punitive economy that, both in utilitarian and humanist scope, intends to be a barrier of repressive escalation" (Cartuyvels, 2008: 7). The criminal legislator is obliged to lead a thrifty politics of imposing penalties, to economize (Dănișor, 2015: 80-81) the arsenal of the penalties available to them".

Moreover, the law must guarantee legal security; therefore the law ought to have provided for the respective penalty at the time of the offence. "To the legality of incrimination corresponds the *legality of penalty* which is also perceived as depositary of the ideal of legal predictability and security and equality between citizens before the penalty" (Cartuyvels, 2008: 7). The predictability of criminal constraint is also ensured by the imposition through art. 2 para (3) of the Criminal Code of some general limits within the frame of which the penalty is established. Here as well we have to understand the notion of penalty as including all criminal law penalties, because undetermined penalties infringe the principle. "Additionally, the principle of the legality of penalties is the depositary of the ideal of 'retained justice' destined to protect citizens and their freedoms counter the Sovereign's power to punish" (Cartuyvels, 2008: 7).

The principle of legality guides both the law-making, and the criminal law enforcement activities. Legislative politics is dominated by this principle in such a way as to oblige the legislator to provide for in a law which actions are criminal offences and their penalties. This obligation concerning the form that the criminal command must adopt is a guarantee of the legal security of the citizens before the administration that can take action only within the boundaries of a legal frame. However, the formal aspect must be completed with the material one, the legislator being also limited in the law-making process. Thus, the legality of incrimination and penalty imposes the law to be public, that is written and accessible, and indisputable, that is to be clearly written so that its readers are able to understand which actions or inactions may fall under it. Form a formal perspective, art. 73 para (3) of the Constitution imposes the form of the organic law that criminal norms must adopt.

In the activity of criminal law, the judge is obliged to strictly interpret criminal law and not permit analogy, and to apply the law non-retroactively in order to guarantee individual freedom and the security of the person.

a) The public character of the law

Criminal law must be public in the sense of being written and accessible. The written character of the law presupposes that the law can stem only from organic laws and from legally binding acts which are equal or superior to it. In this respect, art. 73 para (3) letter h) of the Constitution limits the competence of establishing criminal offences, penalties and their enforcement regime to the category of organic law. The option is justified by how much laws and freedoms are affected through criminal law that requires the legislator to be limited by the rules of procedure specific to the adaptation of organic law, which is more difficult and which denotes a higher legitimacy. The Constitutional Court has decided, in the interpretation of art. 115 of the Fundamental Law that emergency ordinances may intervene in the field of organic law, in the limits of this provision and as long as they respect the provisions of para (6) of art. 115 (Decision no. 1189, November 6th 2008). This means that the criminal law can stem from an emergency ordinance of the Government, provided that this does not affect the rights, freedoms and responsibilities provided for in the Constitution (Gîrleșteanu, 2011: 231-243). What is a paradox is the fact that an emergency ordinance that intervenes in the field reserved by para (3) letter h) of art. 73 of the Constitution to the organic law will inevitably impact adversely on rights and freedoms, as it is a repressive material, criminal law. Thus, the argument of the court of constitutional disputes is at the very least an oxymoron.

The publicity of criminal law presupposes its accessibility as well, which means that any interested person can become aware of the existence and content of the norm. This requirement is achieved in Romanian law through the publication of the law in the Official Gazette. The problem of the accessibility would arise only with regard to the emergency ordinances of the Government, which come into force at the date of the publication, after their prior submission for debate within the frame of the emergency procedure at the competent authority in question.

b) The law must be certain

The automatic fulfilment of the formal requirement in case of the adoption of the criminal law is insufficient for ensuring the legal security of people. Therefore, it is imperative for the criminal law to be certain, i.e. to be drafted with precision and to be sufficiently clear in order for people to easily understand what deeds, actions or inactions, are deemed by the legislator as offences and what consequences they attract.

In other words, the recipients of the criminal law must be able to guide their conduct and to know what type of conduct may fall under the scope of the criminal law. Clear laws determine the predictability of state constraint, it being one of the objectives of the principle of the legality of incrimination and liability. Clarity and predictability, derived from a thoroughly determined legislation, are of key importance to the European Court of Human Rights and represent benchmarks of a system that respects and protects individual freedoms.

In order for the criminal law to be certain, clear and with predictable consequences the legislator must evince precaution when they regulate. It is imperative that the norms of legislative technique be complied with even more strictly in this field. This does not mean that the criminal legislator is condemned to a work devoid of vividness and adaptability, but only that the technique that they use must be

subordinated to the aim of protecting people's freedoms and social values. "It is why the issue of finding optimal solutions for the transposition in reality of the ideal of clarity and precision so often arises in the legislative practice, precisely because the legislator cannot always explicitly mention all the actions by means of which an offence can be committed" (Streteanu and Nițu, 2014: 40). The criminal law must use notions whose meaning is available to those whom it concerns and, when the terms are indeterminate, the existence of a legal definition that can certify the legislator's real will is necessary. "The more restrictive is the norm in the field of freedoms, the higher must be its precision. It is the logic of the principle of the legality of offences and liabilities, which imposes the clear definition of offences and the drastic limitation of the magistrate's power of interpretation through the imposition of a favourable solution to the accused person in case of doubt in the interpretation of the norm" (Dănișor, 2009: 39-40).

None of the techniques of formulation of criminal norms can be exclusively used, be it the descriptive or the synthetic one (Streteanu and Nițu, 2014: 40). When they define the notions for the purpose of clarifying their meaning, the legislator does so under a distinct title from the Criminal Code, the general or the special part, when they regulate the contents of the offences. The legislator defines those notions which are susceptible of several interpretations in the text of the law, the Criminal Code containing a final title in its general part, within the frame of which the meaning of certain terms or expressions used both in the general and the special part is explained.

c) The law must be strict

This requirement concerns the application of the criminal law by the legislator from two points of view: the analogy is forbidden in criminal law and, respectively, the criminal legal norms are strictly interpreted.

The judge is bound to the principle of legality to rule within the limits imposed by the criminal law, which means that the extension of the norm to situations that have not been expressly provided by it is forbidden. "Consequently, the principle is not complied with when the limits of the law are outstretched through an analogical interpretation which goes beyond the possible meaning of the legal text and which aggravates the delinquent's situation" (Pozo, 2008: 52). From this we deduce the conclusion that what is meant by the interdiction of the analogy is the creation through interpretation, in the absence of an express legal provision, of a more difficult situation for persons. Consequently, if through analogy it came to the extension of the beneficial effects of the law to other categories of persons as well, other than the ones expressly targeted by law, then the analogy could be accepted, but only to avoid a rigid interpretation of the law (Streteanu and Nițu, 2014: 46).

Concerning the interpretation of the criminal legal norms, the judge uses the same methods as they do in the case of any legal norm, with the exception of the fact that they subordinate them to the rule of strict interpretation. This rule is a consequence of the requirement for the legal security of those people to whom criminal law applies and of the fact that the restriction of the exercise of the rights and freedoms is exceptional, and the exceptions are strictly interpreted. And this happens due to the fact that "in legal matters, the game of interpretation is perceived as source of arbitrariness and inequality, of adversely affecting the separation of powers, but also of the unjustified extension of a hideous law that must be maintained within the boundaries of rigid norms, established by law" (Cartuyvels, 2008: 5).

d) The law must not be retroactive

For the purpose of guaranteeing the persons' legal security, the criminal law must be predictable both for the future and for the past, i.e. it should be non-retroactive. Thus, those deeds that were not classified as offences at the time they were committed cannot fall under the scope of criminal law and sanctions other than those provided by the criminal law in force at the time of their commission cannot be applied to them. In Romanian law, the principle of legality under the non-retroactivity of the law is constitutionally regulated by art. 15 para (2), according to which "the law shall only act for the future, except for the more favourable criminal […] law". A consecration of this rule is found in the European Convention for the Protection of Human Rights and Fundamental Freedoms that stipulates in art. 7 the fact that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed".

2. The principle of the subsidiarity of criminal law

Criminal law is an instrument of social control, one among many other instruments that form part of a complex system. The appeal to criminal law must only be a second option, a last resort, when the means of intervention specific to other branches of law (civil, contraventional, disciplinary etc.) prove their insufficiency and inefficiency. From this perspective, criminal law is a subsidiary law whose interventions must remain to a minimum. "The appeal to it can never be imposed unconditionally, may not even benefit from any favourable presumption. In other words, like any other intervention, be it medical, military, political or humanitarian, an intervention of criminal law requests a justification" (Kerchove, 1994: 449). If freedom is inherent to human nature, the role of criminal law is neither obvious nor incontestable. Nevertheless, we observe a high proneness of persons to accept criminal intervention. "Contrary of a current prejudice, unfortunately often shared by contemporary legislators, the classification of a random conduct by criminal law should not be *a priori* considered as obvious or 'natural'" (Kerchove, 1994: 449).

This is the reason why the subsidiarity of criminal law must be postulated as principle. "From the Latin term *subsidium* which means 'reserve', the notion of subsidiarity refers to the idea of aid or assistance in case of need and to the vocation, as principle of sharing the powers, to govern all types of existing relations between bodies or hierarchically organised groups whose domains of competence – due to the fact that they coincide – need to be structured" (Audouy, 2015: 1).

The principle of subsidiarity is founded in the Constitution, art. 53 implicitly imposing state intervention through measures of restricting the exercise of rights and freedoms to be necessary and proportional. Considering that criminal law highly restricts the exercise of rights and freedoms targeted by criminal sanctions, it should only intervene in situations in which it is absolutely necessary and by complying with strict proportionality.

The compliance with this principle is required both in the drafting, as well as in the application process of the criminal norm. The first whom it opposes is the legislator who must adapt the criminal reaction to the deeds that affect the rights and freedoms of the persons and the social values. Of these, the legislator must choose the ones for which it must guarantee criminal protection. This process is highly important because, on the one hand, criminal law cannot claim to guide and lead all aspects of life in society and,

on the other hand, there are no clear criteria according to which the selection of the deeds that constitute offences and those that exceed the criminal sphere is made. Nevertheless, a few rules of guidance of criminal politics can be emitted, in order for it to uphold its subsidiary position. The discussion must be conducted on two different planes: on the one hand, the subsidiarity of criminal law must occur in the process of regulation; on the other hand, criminal law is subsidiary if,within the frame of legal liability, the criminal liability intervenes only as *ultima ratio*, where the means of other branches of the law are insufficient.

From the point of view of the regulation, criminal law must be alternative to constitutional law within the frame of the relations that concern the authorities of the state, when it comes to the exercise of their constitutional competences. The exercise of these competences cannot give rise to legal liability, i.e. to criminal liability, due to the fact that the infringement of the constitutional limits of the respective competences can only give rise to political liability, bound to the opportunity of its act or to its constitutionality. We speak about the relations between the authorities of the state, governed by political or constitutional law rules, which are traditionally unrelated to legal sanctions, possibly only the sanctioning of the opportunity of the exercise of the respective competence or the exercise of the competences of reciprocal control between the powers, as is for instance the abolition of the Government by the adoption of a no-confidence motion. In conclusion, these relations determine the incidence of a special political liability. Criminal law must not intervene in this case given that sanctions are not usually attached to constitutional norms (Dănișor, 2008: 217). If the likely conflicts between the authorities of the state can be remedied through means which are specific to the separation of powers, criminal law in no option.

Likewise, criminal law cannot intervene and clarify possible ideological or religious differences. It is a consequence of the freedom of conscience, constitutionally consecrated by art. 29 according to which freedom of thought, opinion, and religious beliefs shall not be restricted in any form whatsoever, not even by criminal law. This does not mean that the exercise of these freedoms cannot be constrained, but that any restriction must comply with the conditions of necessity and proportionality imposed by art. 53 of the Constitution. Consequently, any difference that may arise as a result of the noncompliant exercise of the freedom of conscience, in the form of the manifestation of the freedom of thought, opinion or religious beliefs, if legally relevant, must be resolved through a minimally necessary interference in order to ensure the cohabitation of the freedom of conscience and the other rights and freedoms of persons. The subsidiarity of criminal law thus appears more highlighted in matters related to the freedom of conscience, due to the risks that the intervention of the state involves, which would impose ideology, opinions or the official religion.

A further limit of criminal law is represented by the majoritarian moral. Law and moral are two realities that intersect, but the intersecting points are fewer in contemporary societies which promote the freedom of persons to develop their own individuality, in accord with their own opinions about good life, at least in those areas that concern their private life. The dominant moral at a specific moment in history influences opinions, thus creating a majoritarian public moral, the moral of a given society, which legitimises the intervention of criminal law, with regard to both the deeds that shall be considered offences, as well as to the applicable penal sanctions. Criminal law is both held and interested in this social moral, because "the social recognition of the immorality of the incriminated conduct shall be taken into consideration as a condition

of the efficiency of the criminal rule and, solely in this regard, as a criterion which indirectly permits the justification of incrimination" (Kerchove, 1994: 456). Therefore, we do not speak about moral as ethics, but about the particular moral of a society, the only form of moral that is compatible with criminal law. The balance between criminal law and moral is achieved through their inter-conditionality which leadsto mutual limitation. "We consider the immorality of the act […] as a condition which is simply necessary, which, without resulting in the confusion of the moral and criminal rules, leads to a form of mutual limitation of the two rules, the exigency of the immorality of the act delineating limits that are important to the instrumental considerations which we might give preference to in favour of the incrimination of a random act" (Kerchove, 1994: 460). Consequently, for criminal law the majoritarian public moral must be and must remain an instrument for the purpose of education people through the appeal to the values of the society which they form part of.

A further comment is also useful at this point. Even if it tends to respond to a social necessity, the criminal rule is not justified by the mere fact that it is accepted by the majority of the members of the society. Enjoying the endorsement of the majority, criminal law cannot ignore the moral of the minority. "By considering its specific nature, we can therefore say that the criminal rule, political through its source and coercive through its effects, does not necessarily constitute *a priori* and often not even the most adequate vehicle of moral convictions, even if the latter are shared by society as a whole" (Kerchove, 1994: 459). The acceptance of the often passive criminal intervention, must be enforced by the compliance with proportionality, or otherwise we confront with the imposition of a moral order through force. "When the moral order claims to impose itself through force, even if through the force of law, it risks to give rise to a state of mind that is hostile to law and virtue, which represents a prejudice both for morality and for legality" (Dabin, 1969: 382).

Subsidiarity must also be analysed during the stage of the application of criminal law, because the adoption of the criminal norm is unjustified outside its application. "The absence of a reasonable efficiency of criminal law cannot indeed appear from this perspective other than a sign of the inability of the criminal system as a whole and as giving rise to an ensemble of unjustifiable wrongs like the generalisation of the feeling of insecurity and the weakening of the respect for the law" (Kerchove, 1994: 458). The efficiency of the criminal law can be quantified in the process of judicial individualisation of the penalty. Thus, the judge establishes, by taking into account the personal and fact-related circumstances, the right sanction for a certain infringer and may order a harsher one if the first sanction has not attained its finality. We speak about the individualisation of the sanction in case of a plurality of sanctions, in case of ordering safety measure etc. The afflictive and infamous character is inherent to the penalty, regardless of the perspectives surrounding it, retributive or instrumentalist, even reparatory and is, therefore, important for its economy to be covered (Kerchove, 1994: 449 and the next).

3. The principle of the personal criminal liability

This principle presupposes both the personal character of the criminal liability, and that of the criminal sanction. Once a person is held criminally liable, they alone can be responsible for the committed offence, due to the fact that the person cannot be obliged to execute a criminal sanction that is applied to someone else.

The principle is based on the constitutional provisions of art. 23 para (1), according to which "individual freedom and security of a person are inviolable". The only possibility to affect these freedoms through criminal law appears when the person has committed an offence which results in the application of an offence. Thus, through the consecration of the principle of the personality of criminal liability, the security of the person is guaranteed.

Although the principle guarantees the fact that the person who has committed an offence shall be subject to the consequences of the applied sanction, it may be observed that in reality certain "knock-on effects to the detriment of other people" (Streteanu and Nițu, 2014: 57) cannot be excluded. We speak about the effects on those persons whom the defendant sentenced to fine or imprisonment looks after, about consequences that arise with regard to their material situation. In this context we can affirm that the principle imposes the express interdiction of the direct application of "a criminal sanction to a person by taking into account an offence that has been committed by another person" (Streteanu and Nițu, 2014: 58). The principle also presupposes the fact that a person cannot be forced to execute a criminal sanction that has been applied to another person, even if the matter concerned affinity relations. This is the case of parents who could not be forced to execute pecuniary sanctions imposed to their children. For instance, the safety measure of special confiscation applied to minor children who do not receive income, cannot concern the parents, because this would infringe the personality of criminal sanctions (Streteanu and Nițu, 2014: 58).

If in the case of deprivation of liberty or fine, the principle of personality imposes that sanctions shall no longer be executed should the offender has died, things are different in case of the safety measure of the special confiscation, and the good object of the measure has become part of the estate. Due to the fact that the safety measure concerns the good, operating in rem, it is obvious that the good, even if it has become part of another person's estate, shall be subject to confiscation (Streteanu & Nițu, 2014: 60).

4. The principle of the individualisation of criminal sanctions

The individualisation of criminal sanctions is a consequence of the necessity and proportionality of the state measure with the situation that has determined the intervention of the criminal norm, an analysis which is imposed by the provisions of art. 53 of the Fundamental Law. Thus, the criminal sanction must be very precisely adapted both to the person and to the act that they have committed. The principle of individualisation represents the frame within which the consequences of criminal liability (the nature of the criminal sanction, its duration and amount), constantly adapted to the necessities of a democratic society and proportional for the protection of social values, are concretely established.

In the course of establishing the sanction that will be concretely ordered, be they penalties or safety measures or educational measures, all circumstances that concern the offender in relation to the committed deed must be taken into account. Consequently, when we speak about the individualisation of the criminal sanctions, we must distinguish three categories of the process of individualisation (Dongoroz, 1939: 683 and the next): legal individualisation, judicial and administrative individualisation. These categories exist for a most exact adaption of the legal sanction to the gravity of the committed act and to the offender.

Legal individualisation could be understood as "a kind of intervention of the law for the purpose of organising the individualisation of the penalty" (Saleilles, 1927: Cap. VII). Thus, it presupposes the legislator to intervene and decide which the sanctions for each offence are. Consequently, the obligation of this intervention is imposed to the legislator for the purpose of choosing a legal sanction that is appropriate to the protected social value and the degree to which the deed infringed those values. We, therefore, speak about a legal hierarchy of social values that the criminal law protects, by establishing the nature and duration of the criminal sanctions that they provide. From the nature of the penalty which the legislator establishes, we can conclude that certain social values are considered more important for a certain society and, therefore, no harsher penalty can be provided for a deed that infringes the patrimony, by reference to the penalty provided by the legislator for a deed that affects a person's life.

The need for the legislator's intervention in the process of individualisation of the sanctions must be referenced to the concrete establishment by the judge of the sanction that shall be placed for execution for each person who commits a deed covered by criminal law. Thus, a balance between the judge's competence to establish a concrete penalty and the need for certain interpretation and uniform application of the criminal law must be maintained. The judge's freedom is only limited by the need to eliminate arbitrary interpretations. It is the natural consequence of the principle of the legality of penalty. In order for the above mentioned balance to be obtained "the legislator must not take away the judge's right to proceed to judicial individualisation, through the establishment of absolutely determined penalties or through the provision of certain penalties that, due to their automated application, elude any judicial control" (Streteanu and Nițu, 2014: 67). By individualising criminal sanctions, the legislator establishes the limits of these sanctions – the special minimum and maximum of the penalty – within the frame of which the judge shall rule on concrete sanctions, adapted to the peculiarities of the offender and the deed – the attenuation or aggravation circumstances and causes of the penalty.

With regard to the technique used by the criminal legislator, we take notice of several systems of individualisation of the sanctions. Thus, the Romanian criminal legislator establishes a minimum and a maximum level of the penalties for each offence, which the judge is obliged to comply with. In Swiss criminal law the legislator uses a different technique of penalty individualisation that combines several methods. For instance, after establishing the general minimum and maximum of each type of penalty the legislator either imposes to the judge a special minimum, in order for the maximum to which they should make reference to be the general maximum of the penalty (in case of murder art. 11 of the Swiss criminal Code provides that the offence is punishable by imprisonment for at least five years for the maximum to be 20 years, the general maximum of imprisonment), or they establish the special maximum of the penalty for the minimum level to be the general minimum (in case of theft, art. 139 of the Swiss criminal Code provides an imprisonment of maximum five years), or, like the Romanian legislator, they set the special minimum and maximum of the penalty (art. 140 of the Swiss criminal Code punishes burglary with imprisonment from six to ten years).

The second form of individualisation of criminal sanctions is the one that the judge uses to concretely determine the sanction that a person executes for a certain offence. Judicial individualisation is subsumed to the rules established by art. 74 of the criminal Code, which impose the criteria that the court must take into account when the duration or the amount of the penalty is established, the possible complementary or

accessory penalties, the safety measures, if needed, depending on the gravity of the offence and how dangerous the offender is. When they individualise the penalty, the judge must go through several stages. Before determining the duration or the amount of a penalty, the judge must be convinced by the necessity of the application of a penalty in the respective case and, only after having established that the ordering of a penalty is unavoidable, they will choose the type of penalty that should be applied to the respective case, in the case in which the judge provides for alternative penalties. By applying a principal penalty, the court must subsequently decide if it is necessary to order, together with it, the execution of a complementary penalty and to concretely establish the content, if the law provides the mandatory character of the application of the complementary penalty. Judicial individualisation concerns both the concrete determination of the sanction that will be given for execution, as well as the individualisation of its application. Thus, the court shall rule on the way in which the penalty will be executed as well, being able to order and suspend its execution.

Within the frame of the process of judicial individualisation of the penalty, the judge's decision must faithfully reflect the legislator's criminal politics, so that the penalty decided by the court must be in line with the importance that the legislator gives to the values protected by criminal law. Concretely, the penalty established by the judge must reflect the degree to which the deed adversely affected the protected value. We speak about the compliance with proportionality between the gravity of the deed and the damage borne by the value protected by criminal law. "The verification of the way in which the exigency of the proportionality between the concrete deed and the applied sanction has been respected is made by the courts of judicial control through judicial redress" (Streteanu and Nițu, 2014: 70).

The administrative individualisation concerns the way in which the criminal sanction is concretely executed, decided as a result of its individualisation by the judge in the definitive conviction judgement. The different regime of execution depends on the category of offenders which the condemned person is part of, either first or repeat offenders, on the duration of the penalty, as well as on the way in which the person behaves during the execution of the penalty. These rules are based on the principle of proportionality, because the chosen regime of execution is efficient only as long as it maintains the equilibrium between the need for protection and coercion and the degree to which the condemned person's rights and freedoms are infringed.

The general rules concerning the regimes of execution of the penalties involving deprivation of liberty are stipulated by the provisions of Law no. 254/2013 regarding the execution of penalties and measures involving deprivation of liberty decided upon by judicial bodies during the criminal proceedings, which establish the progressive and regressive systems to which the persons move, depending on the executed part of the penalty and on their behaviour during the execution of the penalty. The principle of proportionality is implicitly consecrated by these provisions, due to the fact that, during the execution of a penalty, the aims of the penalty are subordinated to the imperative of respecting and protecting the life, health and dignity of the condemned persons, of their rights and freedoms, being inadmissible that the measures of execute cause physical suffering or abasement to the condemned person.

5. The principle of humanism in criminal law

This principle is based on the provisions of art. 22 para (2) of the Constitution according to which "no one may be subjected to torture or to any kind of inhuman or

degrading punishment or treatment", as well as on the provisions of art.1 para (3) of the Fundamental Law which places human dignity among the supreme values that are guaranteed by the rule of law.

Regardless of the committed offence, criminal law must treat the offender as a human being. From this point of view, criminal sanctions must not induce the persons who execute them physical or psychical suffering, to degrade them by affecting their dignity, by taking into account that any sanction brings about through its binding nature a certain inherent suffering.

This is the reason why the death penalty has been prohibited in the Romanian legal system, why physical punishment is forbidden, why the treatments that affect the physical or psychical health of the persons who are imprisoned are forbidden, being sanctioned as inhuman, degrading treatment or torture, why the places of detention must guarantee the minimum conditions for the persons' dignity not to be affected. Given that the condemned person who executes a penalty must reintegrate into society, the criminal penalty amounts to the role of education and re-networking, without being able to eliminate the binding aspects that it involves.

Conclusions

If the principles that govern the autochthonous criminal law comply with the directions of a liberal regime, we can observe that the Romanian legal system is still trying to adapt to modernity. Nevertheless, the Romanian criminal law has not eluded the current trends that dictate the necessity of transitioning from modernity to postmodernity. The Romanian criminal law makes efforts to respond to the diversification of the sources of law that have changed their configuration by evolving from pyramidal law to network law. These mutations are mostly a consequence of the request for more accentuated legal security against the threats resulting from the commission of offences. But the simple, even exponential extension of criminal law and its occurrence in society can only lead to the increase in the number and influences of social control mechanisms and to a 'culture of control'.

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