The Romanian Penal Law within Post-Adhesion Conditions

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1. Which are the new realities, the Romanian penal law is confronting with, within the post-adhesion conditions?

First, we should explain why are we referring, from all law's branches, only to penal law, and not preoccupying by all Romanian legislation, within the post adhesion period. The answer is easy to give. From all law branches, the only one which is closely bounded by the particularities, by the culture, customs and the way to be of the nation is the penal law. Identifying the fundamental social values which deserve a special protection, like evaluating the different human behavior in comparison with this values, was conditioned always and to all nations by the particularities of the social and political life, by the traditions and mentality of the nation. Only so it explains why, for example, a way of behavior could be considered as indifferent by a nation, and, on contrary, as affecting very serious the fundamental social values of another nation, or a violation not so serious in another penal law, while, in other cases, the violation gates an apart significance. There are countries, for example, that punish with many years of prison consuming drugs, while in other countries (Holland, Greece, Spain) those drugs are selling freely. As so, the lack of respect for some values could attract serious penal consequences, while in other countries such deeds are seen with more tolerance or punished as misdemeanors.

Such a closely bound of the penal law with the culture and the customs of the nation determined the European Community to consider that the issue of incrimination and criminal punishment of the breach of laws constitutes a matter of sovereignty of each nation, placing itself – of principle – beyond the communitarian exigencies.

2. Along with the apparition of new phenomenon in the life of European Union, like the ones **internal** (for example, committing a serious offence against the financial interest of the European Union[1]) or **external** (for example, the amplifying the multinational criminal associations activities, of the organized crime, committing of serious crimes like terrorism, drug trafficking, guns, human beings, etc.) sensed, gradually, the need to nuance the upper conclusion, defending the necessity of using the penal law in some ways, and against the serious offences, committed within the life of European Union.

Fighting against this deeds with the help of penal law, in order to be efficient, would impose an unitary penal law by excluding the different legislative solutions in relation with the national particularities of each country, and would have signified the creation of a repressive authorities, at an European level, such as Police, Prosecutor's Office, justice, and it would have mean the creation of some places for executing the punishments, assuring an unitary level of execution, institutions that only an unitary state, based on a unique sovereignty could create. Or, the European Union was not conceived as a European unitary

[1] Delphine Garcin, *La repression de la fraude au prejudice du budget communautaire*, Marseille, 2004, p. 16.

state, not even as a federal state but as a group of autonomous states with certain goals: free movement of the persons, goods, services and capitals, a world without barriers, discriminations, for the people to have all possibilities of free development and cultural, economical, political and social affirmation.

3. In the first phase, the communitarian goals were realized exclusively by national law even if the legislative solutions were not unitary. So, for example, if there was a violation of some community law there were used the incriminations from the national law, as the violation would have injured national interests and not communitarian interests. Other times, the communitarian law included provisions in order to prevent applying the national law, determining the authorities of the member states not to do its application, even if the national law was in force, if, the national law was in contrariety with the community law.

Simultaneous, with the solution above mentioned, the communitarian legislation promoted also the idea of an appropriation of the penal law of the member states, consisting in a similar defining of some incriminations and even the limits of the punishments, in order to assure an unitary repression for some offences that violated the communitarian interests. Further more, amplifying this process, the member states needed to establish some specific communitarian institutions of coordination, like: Europol, Eurojust, European Judicial Network, OLAF, European Public Ministry, with the role, amongst others, in assuring the concentration of efforts of the member states in a determined direction towards an efficient common activity. Supra-national coordination institutions could evolve even towards the unification of the penal provisions in a certain matter, if they could have a bigger competence such as taken the decisions with a coercive character and to impose them to member states without acting through the competent national authorities. Such an evolution of appropriation process of the penal law was not conceived presently only in connection with the offences that violate the financial interests of the European Union, but by trying to draft a minimal unified penal code *(Corpus Juris*), an attempt that was finalized presently only in creation of a European package.[2]

4. After the adhesion, Romania, is facing the harmonization process of the national law with the community law, process that is going on in all member states of the European Union and, at the same time the appropriation of those principles that already had been outlined regarding the relation between the national juridical order and supranational order. We are referring to the principle of the priority of community law, the principle of executing all obligations in good faith; the principle of interpretation of the national law accordingly with the community law and the principle of the harmonization of the national penal law with the communitarian law.

Another category of principles refers to the manner of organization and to the relation between the national authorities (judges, prosecutors, police officers and the assimilated personnel, such as the custom-house authorities) and communitarian institutions (Europol, European Judicial Network, Eurojust, OLAF, etc.) as well as the relation between the communitarian institutions.

Within those principles we find: the principle of *mutual recognition of the judiciary decisions,* the judgments pronounced in a country would have direct effect in the others member states of the European Union. Such a solution is based on the mutual trust between the judicial authorities and on the existence of an homogeneous standard protection of the

[2] *Corpus Juris* would have realized a direct application of the European penal law, constituting a subsidiary and complementary penal law of the national law, Delpine Garcin, op.cit., p. 217-230

fundamental rights. Another one is the *principle of availability of the information*, meaning that any agent or authority entrusting with the clarification of the penal offences, that needs an information, in exercising their functions, may obtain that information from any other member state of the European Union; the principle of direct communication between the judiciary authorities and police offices, by destroying the political and governmental channel regarding the international penal cooperation, that means the passing from a cooperation between the states to a direct cooperation between judges, prosecutors and police officers. A final principle would be the direct execution, which means that the coordinator authority doesn't act directly but through the national authority, that assumes the responsibility. Presently, this principle is realized in within the relation with Europol and Eurojust[3], and, in perspective, also in the relation with the European General Prosecution.

5. The existence of some powerful communitarian influence upon the national penal law, does not remove totally the classic model of the independent cooperation between the autonomous states, in the matter of penal law, this further remain to operate, but limited and eventually only in regard with less serious offences. In the case of other offences that are committing in the community life, the reality shows a creation process of a genuine European penal law by trying to conciliate two apparently opposite objectives but both equally necessary: integration and plurality, conciliation with all cost must be tried because is urgent and is the only alternative to a possible and undesirable hegemonic integration in the benefit of the most powerful[4]. As foreboding signs as such a penal integration would be the apparition of specific supranational authorities that are supporting the cooperation of the member states in criminal matter ((Europol, European Judicial Network, Eurojust, OLAF). The progressive adoption of the principle *forum regit actum* instead if *locus regit actum* means that in some cases the judicial assistance is carried out by the state whose been requested, accordingly with the legal provisions in force within the solicitant state, if they are not in contradiction with its fundamental principles (art. 4 of the Convention from 2001 on Judicial cooperation)[5]; the assimilation of judicial helping solicitation under the aspect of celerity and efficiency with the way is treated a judicial request of a national authority; the possibility of a direct action on the territory of another member state, for pursuing an offender or to make observations on him, or for intercepting the communications;

6. The most efficiently European penal integration would be, of course, the one consisting in a direct form: drafting and adopting of penal provisions by the communitarian authorities that regulate directly the communitarian relations, addressing directly to the national addresses of the penal norm. This objective proven to be difficult to realize facing the resistance of many member states but also the fears of many penalists, regarding the institutional structure of the Union (which is not an unitary state nor a federal state). Facing this situation, the European Union have orientated toward a indirect integration, meaning

[3] Eurojust is in force since 22nd of November 2000, Decision of the European Community

[4] Mireille Delmas-Marty, in Genevieve Guidicelli-Delage, Stefano Manacorda, *L'integration pénale indirecte*. Société de législation comparée, Paris, 2005, p. 19

[5] Regarding the applying the *forum regit actum*, see the Convention, that in art. 10 and 11 provides the possibility of the hearing through video-conference or phone conference, as the intercepting of the communications without the technical assistance of another member state. In these cases, the principle of sovereignty looses from its importance because the procedural acts are developed according with the provision of the state whose been requested, under its control and on its territory even the effects will be produced on the territory of the state which requested these procedural acts. There is an "export" of the penal legislation of the requested stat within the solicitor state.

through both appropriation and unification of the procedural instruments and, through that, intervening on the substantial penal norms. In the penal doctrine[6] was criticized this "proceduralization" of the communitarian legislation, underlining that, logically, the procedural transformations must be preceded by the substantial ones. Or, the recently initiatives of the European Union tend to confer an auxiliary role to the substantial penal law at a normative and conceptual level, granting a preference to the judge instead of the legislator. Thus, by adopting the procedural principle of the mutual recognition of the judgments, although its aiming to enlarge the procedural cooperation between the judiciary authorities and the protection of the rights of people, realizes, indirectly, an appropriation of the incriminations and sanctions, these being the conclusions of the meeting that was taken place in Tampere. A similar example is the European arrest warrant, conceived to produce effects, on principle, only at a procedural level, but, it produces effects also at a substantial level (by abandoning the rule of double incrimination, by including political offences and by giving up to non-extradition of the nationals, and, partially, to the rule of specialty). In this way, the European arrest warrant makes a serious forward step on the way to harmonization of penal legislations and toward the unification of those provisions[7].

7. Within the penal doctrine it was observed that the European arrest warrant determine a certain modification of the internal penal provisions, that become extra-national, because, in certain conditions, the internal penal norms of incrimination could be applicable to offences committed in another member state, and even there those offences are not punishable. Some authors use the concept of the "European territoriality" (concept used in the Preamble of *Corpus Juris* 2000, meaning the aggregate of the member states territory of the European Union, that represent a unique space). As so, the *ratione loci* competence of the European prosecutor spreads on the entire space that represents the European territory. Within the limits of this space the European arrest warrant is valid. This means that the incrimination norms from a state may produce effects on other state territory, determining the provisory detaining or the execution of the punishment for the offences committed on the other state territory, disregarding that on the state territory where the punishment is executed, the offence is lawful. From the point of view of the individual rights, every citizen will be held liable, in the future, and theoretically, to the penal legislation of the 27th national states, related to the same offences[8].

8. The concept of the European penal space implies, therefore, exceeding the basic principle of the international law, the principle of territoriality and sovereignty, according to, each state is competent to define the appliance domain of its norms and the way of cooperation, but only within the limits of its territory[9].

Within the penal doctrine it even detached the conclusion that presently there is a weakening of the territoriality principle because of the existence of an unilateral competence of the supranational authority to impose the conformation to its international law, within the

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[6] Stefano Manacorda, in "*L'integration penale indirecte*", op.cit., p. 35-37.

[7] The European arrest warrant was to be in force before 1st of January 2004 but only seven (7) countries respected this date. Other countries, like France, Italy, Germany, did not respect the mentioned date, Marie Elisabeth Cartier, Le *Mandat d'arrêt europeén*, Bruylant, Bruxelles, 2005, p. 18.

[8] Stefano Manacorda, in: *L'integration penale*, op.cit., p. 48-49; Marie Elisabeth Cartier, *op.cit*., p. 18-20, shows that the European arrest warrant provoked multiple controversies: if some authors (the euphoric ones) praised this warrant, others (the europhobiac ones) fight against it sustaining that it endangers the liberty of the citizens.

[9] Ibidem, *op.cit*., p. 26-28.

judiciary European space. The European Council could impose to member states, through juridical instruments, other that the international Conventions, (directives, decisions, that conduct to a certain alteration of the national legislative power) obligations, thus realizing an extension of the territoriality principle; the foreign law becomes applicable on the national territory.

In the same way is acting the principle of mutual recognition of the judgments, which means the applying on the national territory of any judgment from the European space, other said, in the base of the principle *forum regit actum* appears the possibility that on the territory of a state to apply the juridical provisions of another state.

Another consequence of the European judiciary space, is that through recognizing the priority of the implicit communitarian law, it is admitted the right of the supranational legislator to establish the validity domain of the national penal provision, assigning to the coordinating supranational authority, the competence of solving the competence conflicts between the different national jurisdictions.

9. After the adhesion, Romania is facing the "europenization" process of the penal law – process that is characterized through an ensemble of influences, produced on the national penal law by the existence of some penal norms drafted at an European level and by a series of juridical principles and instruments, created at this level.

The first instrument of the "europenization" of the penal law is the assimilation, derived principle of the communitarian good faith, stipulated in the art. 10 from the European Community Treaty and mostly in the art. 280-2 from the ETC for protection of the financial interests. The principle of good faith from the International law plays the same role as the principle of good faith from the contractual relations. It forces the party to realize allowance even unspecified within the contract, but absolutely necessary for its correct fulfilling. By assimilation, the national states have the obligation to protect the European interests on their territory in the same way as their interests (the interpretation of CJCE of the art. 10 from ETC), protection that should be effective, dissuasive and proportional. So, the assimilation impose an efficient protection not only a equalization of the two categories of interests; on the other hand, the assimilation does not necessitate, as a rule, sanctions but only efficient measures, of realizing, through national law, of the communitarian interests.

Another fundament of the "europenization" is the principle of the priority of the community law; the community order takes a preponderant role in the relation with the national juridical order and so:

a. at the national level the legislator cannot draft a norm that is contrary to the communitarian law;

b. a national penal norm cannot be applied if it's contrary to the communitarian law with direct effect (the negative effect and obstacle of the communitarian law);

c. the interpretation of the national law must be done in conformity with the communitarian law; so, there cannot exist an ambiguous interpretation, nor extensive one, but a restrictive one.

In the same way of the "europenization" of the penal law takes action also the harmonization or the appropriation of the national penal provisions in order to realize the proposed goal.

These objectives are realized through directives, conventions, common actions, decisions and frame-directives. An harmonization through directives is more incisive for a state because the supranational authorities are imposing more strongly within the national

legislative process, an harmonization through conventions (these are being adopted unanimously) has a slowly action because the unanimity is difficult to realize. We also observe that the directives are mandatory for all state authorities; the frame-decision is mandatory only for the Government and not to national Parliament.

10. The penal doctrine accords a special attention to the principle of mutual recognition of the judgments, viewed as a structural principle of the entire community law. This principle has its origin in the ECJ jurisprudence, that, at the end of the seventies enounced through the decision referring to the freedom of movement of the goods, extended after that to services, civil judicial space and finally to penal judicial space[10].

In its actual form the principle was underlined within the European Council from Cardiff in the year 1988 and it was resumed in the plan of action of the Council and the European Commission in the same year. The principle was developed within the conclusions of the European Council which took place at Tampere in 1999 and after that established through the Amsterdam treaty and the Constitutional Treaty, becoming a "keystone" of the internal penal cooperation.

In essence, the principle is reduced in a recognition that what is a product, a service or a judgment of a juridical state order, must be recognized by the other member states of the European Union. Beyond these common particularities, the principle is gaining its own particularities in relation with the sector it's operating.

The first effect of the recognition is that of the direct application of the foreign judgments on the national territory, giving up to the principle of double incrimination. This effect of the foreign judgment basing on the mutual recognition between the member states of the European Union, existents on the premises that in all these countries is assured, equally, a respect for fundamental principles of the penal law and with the same possibilities to stop the possible violations of the penal law[11].

If the mutual trust is bigger any boundary regarding the application of the judiciary decisions are suppressed.

An important consequence of the principle of mutual recognition is also the *res iudicata pro veritate accipitur* (the authority of judged matter); if a national judge pronounced a decision there cannot open again a new process on the entire judiciary space (*non bis in idem*).

At a procedural level the recognition means the acceptance of the convincing value of the acts made by the state from whom the judgment is originated, as the obligation to preserve the proofs in order to avoid losing the existing probatory acts.

The recognition of the judiciary judgments at the European level impose the clarification of the notion "judiciary". According to the majority of the authors the title of "judiciary" could be assigned only to acts that are originated from the authorities that exercise independent judiciary functions. Presently, these functions are exercised by the

[10] Mireille Delmas-Marty avant propose to Genevieve Giudicelli-Delage, Stefano Manacorda, *L'integration penale indirecte*. Societe de legislation comparee, Paris, 2005, p. 15; "the mutual recognition of the judgements is a cooperation through an appropriation of the normative provisions, is a manner of normative integration", these consequences are noticed not only at a procedural level, but also at a substantial level. Mutual recognition presumes a minimum of normative integration, implies a judiciary and police cooperation, a certain trust on the conceptions, at least of the partial common ones.

[11] According to the opinion of the cited authors, the principle of mutual recognition underlines a sliding from a horizontal process of integration, a inter-etatic type toward a vertical process of supra-etatic type.

judge, prosecutor and judiciary police officer – although there is a recognition of quality distinction between the activity of the judge, prosecutor and police officers.

Other authors are asking them selves if there shouldn't be abandoned the idea of mutual recognition of the judgments, if the notion of judiciary act is so wide defined, and if there shouldn't be, after the American model, a superior authority to specify the basic criteria of the characterization of a judiciary authority.

We observe the critics related to the principle of mutual recognition of the judgments in the way that it doesn't assure a suitable procedural guarantees (for example, by replacing the double subordination with a list of offences). It is also criticized, in applying this principle, the possibility of foreign legislation export, because in this case the foreign la could contain more reduced guaranties (for example, by eliminating of the non extradition of the nationals) than the penal national law[12].

11. The most spectacular result of the application the principle of mutual recognition, as we shown before, is the drafting of the European arrest warrant, a real revolution in the matter of penal cooperation between the states. The birth of the European arrest warrant is very interesting and controversial. Although the European Council which took place at Tampere was suggesting exceeding the extradition through an alternative mechanism, based on mutual recognition, after the events that took place at 11th of September 2001, the creation of this institution was accelerated. Previously, the extradition Convention between Spain and Italy forwarded the idea of suppressing the extradition and replacing with that a list of offences. Also, it was foresee the idea of direct juridical cooperation. Within the penal doctrine it was observed that the naming of "European arrest warrant" is suggesting the idea that the warrant should be emitted by a communitarian supranational authority. In reality, the frame-decision from 2002, in art. 1, specifies that the European arrest warrant is emitted by each member state. Also, some authors, view the European arrest warrant as a "premature child" of the mechanism of mutual recognition of the judgments, these being subdued of a internal free movement as goods, capitals, services, in order to realize a common objective, the liberty, security and justice space (art. 5 from the frame-decision)[13].

12. The European arrest warrant raises some issues regarding the respect of the principle of legality of incrimination. The positive list of the offence that accompanies the warrant does not contain also the describing of the constitutive elements of the offence (for example, which are the constitutive elements of the terrorism offence, corruption, fraud; within the national penal legislation are a diversity of such definitions). Recognizing this diversity, the ECJ provides that member states will adopt, progressive, minimal rules regarding the constitutive elements of the offences and the applicable sanctions, a requirement that is realizing with many difficulties because of the extremely differentiate contain of the internal law regarding the mentioned offences, even they have the same *nomen*

[12] The critics related to the mutual recognition have the provenience, especially, in the German doctrine Schünemman Stefan Braum, P. Albrecht. They are replacing the principle with a Swiss federal model and with the principle "order that offers more guaranties" ; Schunemman, Alternativenentwurf Euripaische Straferfolgung, Koln, 2004, p. 35. Other critics had been raised by Silva Sanchez, Los principios insiradores de un derecho penal europeo, Revista penal, no. 13/2004, p. 138; Moccia, L'involuzione del diritto penale in materia economica e la fatispecie incriminatrice del Corpus Juris in dirritto penale europeo. Spazio giuridico e rete giudiziaria, Padova, 2001, p. 33 and folowing, cited by Adan Nieto Martin, in "Fundamente constitutionale ale sistemului european de drept penal", p. 1 (manusript, portfolio of the Romanian Criminal Law Review, translation from spanish language).

[13] Stefano Manacorda, *L'integration pénale*, op.cit., p. 41.

juris. Through this, respecting the legality principle appears difficult to realize, this being the consequence of the incomplete character of the incrimination, or, because the lack of some precisely incrimination norms. The authority that emits the warrant makes a double comparison: first, of the concrete offence in relation with national incrimination norm, and second, a comparison of the national norm in relation with the norm existing in the positive list. This list remains open (an European "white" norm), the European governments may add other offences. If we have in mind that the frame-decision permits applying the decision to the offences committed before its drafting and enforced, there is rising the issue of retroactivity of the penal norm[14].

In spite of these difficulties its clear that the arrest warrant realizes a direct communication between the judicial authorities and it is in accord with the principle of the direct efficiency, reducing to the minimum the formality of verifying the warrant by the state that executes the warrant, excluding also any way of attacking it. Also, in case there is a authorization of handing over of the arrested one, the double incrimination is suppressed, this principle being replaced with that list of euro-delicts[15] (art. 2) that establishes a functional equivalence with the double incrimination.

The eventual contradictions that could appear between the national norms an the substantial communitarian ones related to execution the European arrest warrant will attract the intervention of the Court of Justice of the European Communities.

So, if a arrest warrant is emitted by the Romanian authorities for a person accused of a corruption offence committed in the private sector (for example, a private officer taking bribery) the warrant could not be executed by the German authorities even if the defendant is on German territory because according with the German penal law, corruption is possible only in the public sector. In this case, the Romanian authorities will have to inform the Court of Justice of the European Communities (Bruxelles). In the same way is the art. III 369 from the European Constitution[16].

[14] Stefano Manacorda, *L'integration pénale*, op.cit., p. 60-62

[15] Assembling the positive list is made after disparate criteria, the criteria of protecting the interests of the E.U., or other criteria, such as committing the offences on many states territory: gun trafficking, narcotic trafficking, organs traffiking, radioactive materials;) anonther mentions are without criteria (arson, crime, rape etc;). Some authors wondered why it appears in the list the animal trafficking and not the offences regarding the automobile trafficking or why it is mentioned the traffiking of hormonal substances and not the offences related to genetic patrimony, or other offences, although mentioned such as the arson, counterfeiting, forging documents, organized theft, sabotage does not have any justification (Stefano Manacorda, *L'integration pénale*, op.cit., p. 62-67)

[16] A certain examination is made by the state that must execute the warrant. The execution could be refused if there are suspicions regarding a persecution or sanctioning of a person on the grouds of sex, race, religion, ethnic origin, political opinions etc, or when exists *bis in idem*, or if the person have beneficiated from an amnesty etc;. Some states provided an express clause that they will refuse to execute the warrant if it is incompatible with the fundamental rights recognized in their Constitutions.