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Some Considerations on the Requirement of Foreseeability and the New Romanian Criminal Legislation

***Abstract**: The present article aims to analyze just how predictable the new Romanian criminal legislation turned out to be six years after its entry into force. It highlights all the changes that took place in this legislation after the 1st of February 2014, due to the intervention of the legislator, but also caused by the mandatory interpretation provided by the High Court and also by the decisions given by the Constitutional Court, both of them having a decisive influence on the transformations suffered by the criminal law. The study will pinpoint the controversies generated by the conflict which so very often arose between the two courts mentioned above in the process of construing the criminal provision and the harmful effects this conflict of decisions generated for the criminal justice professional, but also for the subject of the criminal provision.*

***Key words:** the new Romanian criminal legislation; frequent modifications and predictability.*

I. Introduction

The old Criminal Procedure Code and the old Penal Code were finally abandoned by Romania after some 45 years since their entry into force, when, in February 2014, a new criminal legislation started its legal life, after being adopted some years earlier by the Parliament.[1]

The old legislation was never openly criticized for being obsolete in the years after the 1989 Revolution, even though it had been adopted in the communist years, albeit in a period when some leniency was shown by the dictatorship regime and a limited amount of freedom did exist.

In truth, the old legislation itself suffered some alterations in its long lifetime, most of them caused by the legislator trying to adjust it to the new realities of the social and economic life, but for that reason an independent observer could hardly have considered it to be unpredictable.

The criminal justice professionals themselves never did see it that way. Rather, when the moment of the 1st of February was approaching, they thought of it as – by then – stable legislation, one which had managed to "settle down", considering the fact that the main controversies in its interpretation and application had been cleared by that time, leaving little to no space for the unknown.

Of course, there always is some amount of resistance to change so these voices, arguing for keeping the old legislation into force, were never really taken into consideration, the prevailing opinion being that the old law just wasn't coping with the new realities of the rule of law and democracy and just wasn't compatible with the European trajectory Romania had followed.

The goals set by the legislator when adopting the new legislation were very high, but also a bit contradictory:[2] it was mentioned the need for a swift act of justice, for making sure that all the tools are in place so that the criminals pay for their deeds, but also for respecting the fair trial guarantees and all the rights acknowledged at the European level for the accused.

It must be said, of course, that although not mentioned by the legislator, the foreseeability of the criminal law is undoubtedly a European value oh so often reaffirmed by the European Court of Human Rights (ECHR) so, therefore, one that could not and should not be disregarded in any way in a rule-of-law state.

In the terms of the ECHR, an individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpreta-

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[1] The Penal Code was adopted by the Law no. 286/2009 and the Criminal Procedure Code by the Law no. 135/2010.

[2] We think that prof. Packer proved and explained in a profound and irrefutable fashion how the criminal trial cannot follow both of these opposing objectives: assuring a perfect fair trial and also a crime control at its highest level – see Herbert Louis Packer, *The Limits of the Criminal Sanction*, Stanford University Press, 1968, Stanford, California.

tion of it and after taking appropriate legal advice, what acts and/or omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission.[3]

It is worth mentioning, also, that the new Romanian legislation wasn't entirely a political act of will, since the committee empowered with drafting the projects that later became the laws mentioned above (and, thus, the Criminal codes) was a mixt one, its members being selected (through a not so transparent procedure) from the ranks of magistrates, lawyers and other criminal justice professionals, but also from the civil society.

Whatever the general feeling was when the new legislation entered into force, and no matter how high its goals, the reality turned out to be somewhat different from what the authors of the new laws were expecting, a serious and unfortunately constant streak of alterations following from that moment on leading to some very harmful consequences, mainly dealing with a lack of predictability that has affected the way everyone looks at the new criminal legislation.

We will now turn our attention, then, on how profound and how frequent these modifications actually were.

II. Modifying a claimed perfect legislation

I feel the need to start this analysis with a personal experience that I remember vividly. In January 2014 I had the chance to meet my PhD Supervisor, professor Viorel Pasca. I was a young judge at that moment and had some high expectations from the new criminal legislation that was about to come, but also I had noticed some problems that I felt the need to discuss with a gifted and experienced professional like himself. I expressed my concerns regarding the new legislation and was a bit sad that it didn't really look like the change I was expecting, noticing some serious contradictions and discrepancies that I felt would make our lives harder when it came down to applying the law in everyday practice.

However, prof. Pasca was a lot more optimistic. I remember him saying that the old legislation was like and old jacket: it just was too shabby to keep, so he considered the new laws like a new jacket that you look forward to wear, even though it might not be perfect from the very beginning; it might need some adjusting, but, at least, it is new, he said.

On this optimistic note, we all expected things to go smoothly once the little shortcomings were overrun. Unfortunately, this never really seems to have happened; but on this, later on.

Now, what exactly changed in the new criminal legislation after the 1st of February 2014? Well, as you may already guess... a lot.

For instance, the Penal Code was modified by the Parliament issuing the Laws no. 159/2014, no. 151/2016, no. 193/2017 and no. 49/2018, but also by the Government through its emergency ordinances no. 18/2016 and no. 28/2020.

The Criminal procedure Code was even more intensely hit by the wind of change; the Parliament issued Laws no. 318/2015, no. 151/2016 and no. 49/2018, while the Government issued the emergency ordinances no. 82/2014, no. 24/2015, no. 6/2016, no. 18/2016, no. 70/2016, no. 13/2017 and no. 14/2017.

One should not disregard, though, the numerous other projects more or less intensely debated in the same period, which was also meant to provide profound change to this legislation, but never really passing into law. For instance, on three separate occasions[4] the Constitutional Court was called upon to reject what was basically the same law passed by the Parliament, allowing for what the politicians called minor offences (but actually including crimes related to corruption, for instance) to bar the right of the judiciary to sentence the offender to time in prison.

However, even these decisions didn't seem to change the politicians' minds, just recently insisting in moving forward a similar draft,[5] which even managed to pass the Senate by an almost unanimous vote, and, somehow surprisingly, being initiated by a forefront member of the political party which criticized harshly the two previous laws passed by their opponents.

It just comes to show that when the altering of the criminal legislation is at stake, the color of the political parties makes no difference whatsoever!

But one shouldn't take from the facts above the idea that the Constitutional Court (C.C.) proved itself to be a pillar of predictability of the criminal legislation. Unfortunately, the Penal Code we now refer to has suffered numerous and significant modifications caused by the decisions rendered by the Court.

The number itself speaks volumes. In the six years passed from the entry into force, the Court issued more then 80 decisions declaring infringements of constitutionality in the new criminal legislation, a number which multiplies significantly if we take into consideration the decisions in which the Court, although rejected the exception of unconstitutionality, provided however a constitutional interpretation that the judiciary must take into consideration for the fu-

[3] See the decisions Cantoni v. France, par. 29; Kafkaris v. Cyprus par. 140, or Del Río Prada v. Spain par. 79.

[4] We mention here the Courts decisions no. 453/2018, no. 561/2018 and no. 22/2019.

[5] Its no. being 128/2020 and all the information about its legislative route being available here: http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=18458.

ture, when applying the legal provision in question, thus essentially altering the content of the provision.

And it is not just the solution to the legal problem analyzed by the Court that is mandatory for the criminal justice authorities, it's the reasoning itself that must be taken into consideration and strictly obeyed by, so basically each and every sentence[6] the Court puts in its reasoning has now a legal force similar if not superior to the law itself, and that too is the effect of a decision rendered by the Court,[7] and not the law itself.

So, in the past few years, the criminal justice professional has found himself facing an avalanche of decisions coming from the C.C. making his work a whole lot more unpredictable than before.

That is even more so the case when the C.C. decides to go against a mandatory solution issued by the High Court (I.C.C.J.) and declare it unconstitutional as well. Unfortunately, there are many examples of such conflict of mandatory decisions, but one stands apart from the rest: just after the entry into force of the new Penal Code, the I.C.C.J. issued its decision no. 2/2014, stating the rules to be followed when applying the *mitior lex* principle. Barely a month and a half later, the C.C., hearing a case at the request of the same I.C.C.J., declaring its interpretation unconstitutional,[8] thus basically overturning the whole essential rules that were so important at the time when applying the *mitior lex* principle was the main task the criminal justice system was dealing with.

The effects of such confusion were substantial: by then, many defendants and criminals had already benefited from the more lenient I.C.C.J. decision, while the others, still under trial, but in the same legal situation had to face a harsher sentence.

This is just one of many such examples that show just how confusing applying the new criminal legislation turned out to be in the years that followed, even as a result of conflicting mandatory decisions taken by the two courts.[9]

And we didn't even mention the cavalcade of mandatory decisions coming from the High Court and stating mandatory interpretations of the criminal legislation. The Court itself issued more than 130 such decisions, whose overlooking by the magistrate is by law considered a serious disciplinary offence possibly generating the effect of removal from office. To this number one must add, just like in the C.C.'s case, a much larger number of decisions where the I.C.C.J. states in its reasoning what the correct interpretation of the legal provision is, but refuses to rule on it explicitly.

And it's not just the number to be taken into consideration, it's also their effect. For instance, a recent decision, construing a legal provision concerning the system for calculating the punishment to be applied to the repeated offender, has basically gone against the vast majority of the legal doctrine and the a significant part of the established practice and that is even more surprising when one considers the fact that the legal provision in question was virtually unchanged from the old Criminal Code, thus having a stable existence for over 45 years! That could hardly have been foreseeable even for a criminal justice professional!

More importantly, the series of decisions issued by the two above-mentioned courts seem to be evenly distributed in time, this meaning that more changes to the way the law is being applied and read at this time are to be expected, thus rebutting the argument that one might have raised, namely that a certain uncertainty is to be expected after the entry into force of such vast and important legislation, but that thigs will settle down afterwards.

Realistically, only the state of emergency declared nation-wide and the limited activity carried out by the two mentioned Courts during the Covid-19 pandemic seem to have somewhat slowed down the enthusiasm shown in the matter, just as the imminent elections taking place later this year seem to have limited the appetite of the politicians in altering this legislation.

Of course, one could argue that the decisions rendered and mentioned above were mostly necessary in clarifying the unknowns of the legal provisions and that the Courts have only acted within their competence, the latter, of course, being formally correct. But even so, one would have to ask oneself just how good the new codes were when they started their legal life of the 1st of February 2014, and, if the conclusion reached is that they were of poor quality, then this too would reflect on their lack of predictability.

Ironically, though, the forefront members of the committee drafting the Codes are enjoying an ever growing reputation, taking the credit for whatever has worked out well from the legislation and quickly passing the blame to the politicians when it's high time to answer questions about the obvious shortcomings of their work. When it comes to pointing the finger, it looks like we are, indeed, dealing with professionals!

Anyway, I guess that by now the conclusion is quite evident with regard to my personal experience described above: the new criminal legislation has turned out to be a jacket that to some may have looked swell in the shop's window, but has not really fitted those who tried to wear it, it being constantly modified, but to no effect. The old one just felt a whole lot cozier!

[6] Although it may seem that we are exaggerating, that is not at all the case. In its decision no. 392/2017, the Court answered this very question, stating that all the things written in the content of its decisions are to be considered in full support of its solutions and, therefore, they are to be considered as mandatory as the solution itself.

[7] Namely, the decision no. 1/1995, reaffirmed over and over again.

[8] We are referring to the decision no. 265/2014 of the C.C.

[9] The conflict of mandatory decisions is far wider than the limited space we have here for analysis and should have a dedicated study just for itself. For instance, the I.C.C.J. issued its decision no. 16/2016 defining the author of the money laundering crime, but more than two years later, the C.C. declared it unconstitutional through its decision no. 418/2018. How confusing this must have looked like for the subject of the legal provision in question!

III.
Is predictability still a fundamental value of our criminal legislation?

Unfortunately, in all the years that have passed since February 2014 I have never heard this, or any other similar question, being raised in a formal environment by the criminal justice practitioners and even less so by the politicians.

Truth be said, it has become a frequent affair to hear a lawyer or a magistrate complain about just how often and how significant the criminal legislation has changed over the past six years. More so, one can hear them wondering about what the next imminent changes will look like, whether they come from the legislator or the Court's decisions. It seems like we have grown accustomed to the everyday change in the field of criminal law and mostly in the criminal procedure law, but never familiar with what the next change will be.

But just how normal this change is? And how badly does it affect the authority of the criminal legislation?

Intuitively, the honest answer to these questions doesn't look good at all. I see many criminal justice professionals considering retiring or switching jobs and thinking about working in a different field of law, the constant changes in the legislation being a serios reason for this, together with an increased pressure from the disciplinary body and the newly created and very controversial criminal investigation body regarding only the magistrates.

And it's not just the magistrates finding themselves in this situation; the police department too has seen many retirements in the past year or two, also favored by the illogical legislation passed which encouraged this phenomenon. Not only that one can retire at a very early age (some, even at the age of 40 or earlier), but one will find that the amount of one's pension exceeds that of the salary being paid for the active professional. Ridiculous doesn't even begin to describe the situation! And thus, the criminal justice system has been deprived of active and experienced professionals, a phenomenon whose costs have not even been properly discussed and analyzed, except for some economical and financial implications.

So, not only that the criminal justice system has been weakened by these measures, the professionals left to deal with the stressful activity now having to cope with the ever-shifting legislation and putting up with the additional pressure of following all sources that can – and surely do – generate unforeseeable changes to the current state of affairs.

I can only imagine how bad things look like for the regular subjects of the criminal law. Just by following the news, one was able to grasp how unstable things are in this field of law. Some changes being made in the middle of the night, by an emergency ordinance issued by the Government,[10] without any previous notification of intent and in a completely obscure fashion actually triggered vast street protests from the civil society, mainly because they were considered to bring changes favorable to top politicians at that time (now, convicted felons doing jail time). The ordinance was altered a few days later, before its entry into force, by another emergency ordinance (no. 14), but the public resentment for this mode of action remained.

It was the first time that some questions arose about the fairness of the process of passing changes to the criminal legislation in such a swift and obscure fashion. However, no one really challenged the severe implications this phenomenon had on the predictability of the criminal legislation. No one was even discussing this essential value of the legislation in a rule-of-law state!

Years later, in May 2019, the Referendum called upon by the President asked the people to answer the question whether the Government should issue emergency ordinances in the field of criminal offences and sanctions and also with regard to how the judiciary system was structured and organized. The Referendum passed with a resounding success, more that 86% of the persons participating answering a clear no to this question.

Of course, this Referendum does not have immediate binding effects, as a change in the Constitution is needed to prevent the Government from exercising the power to issue ordinances in the fields mentioned above. Also, it is to be noted that the Referendum did not mention the criminal procedure law, which has suffered more frequent alterations than the criminal law, as showed above.

However, the Referendum did have some effect on just how eager the politicians were when changing the criminal legislation. In late 2019, the presidential elections were won by the President who called the Referendum and who made a campaign theme from protecting the justice system from politicians' brutal interference. The political parties seemed to have received the message that the voters were against obscure and politically motivated changes to the criminal legislation. Even the by-then-new leader of the political party who had pushed most of the tempestuous modifications said, after the elections, that they received the message sent by the voters loud and clear.

This state of affairs lasted quite briefly, though, and even if 2020 is another significant year, hosting both the local and the parliamentary elections, which should have made the political parties more likely to abstain themselves from proposing and passing new waves of legislation changes, the new party holding the Government power issued its own emergency or-

[10] We are referring to the emergency ordinance no. 13/2017.

dinance (no. 28/2020), taking everybody completely by surprise, since no previous notice of intent was ever issued on the matters subjected to change, thus drawing another wave of criticism and proving that although the political parties holding power can change, the bad habits of the political class do not go away so easily.

IV. Conclusions

From our short analysis carried out before, we can draw some brief conclusions.

Romania recently went through a profound change in its criminal legislation, bringing a new Penal Code and a new Criminal Procedure Code, which, as expected, created some uncertainty as to the way the new rules should be construed and applied.

Unfortunately, the uncertainty continues some six years after the entry into force of the new legislation, mainly due to the political disregard for the stability of the criminal legislation, but also to the effect generated by the numerous and sometimes contradictory mandatory decisions issued by the High Court and by the Constitutional Court.

Restoring the fundamental value of predictability of the criminal provisions will require a concerted effort from all powers of the state, the judiciary and the Constitutional Court having to make their own contribution felt.

The predictability of the criminal legislation is not just the result of the legislators' policies, but rather the result of a different kind of attitude that all powers of the state and the Constitutional Court should show regarding the criminal law.

Treating the criminal codes as simple tools to achieving a momentarily goal leads to somewhat justified feeling of disrespect not only for the authority of the law itself, but also for the fundamental values it protects. And this is something never to be messed with, if one expects the criminal law to be taken seriously.