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MODELS OF APPROACH OF THE CONCEPT OF OFFENCE IN THE ROMANIAN AREA

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This study is intended to approach the legislative models of the definition of the offence in the criminal legislations of the Romanian area (Romania and Republic of Moldova). Three concepts were identified through the prism of which in the reference legislations was defined the notion of offence: substantial or material concept, formal concept and substantial-formal concept. These models were determined by the social interests that formed the object of the legal-criminal protection in the corresponding period of the development of society.

Keywords: *offence, punishment, social danger, illegality.*

MODELE DE ABORDARE A CONCEPTULUI INFRACȚIUNII ÎN SPAȚIUL ROMÂNESC

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Acest studiu este destinat abordării modelelor legislative de definire a infracțiunii în legislațiile penale din spațiu românesc (România și Republica Moldova). Au fost identificare trei concepte prin prisma cărora în legislațiile de referință a fost definită noțiunea de „infracțiune": conceptul substanțial sau material, conceptul formal și conceptul substanțial-formal. Aceste modele au fost determinate de interesele sociale ce au format obiect al protecției juridico-penale în respectiva perioadă de dezvoltare a societății.

Cuvinte-cheie: *infracțiune, pedeapsă, pericol social, ilegalitate.*

Introduction. The main objective of the criminal policy is the identification and description of the facts that constitute the offences and determination on this basis of the penalties applicable in relation to the persons that commit them. An absolutely necessary prerequisite for the execution of this objective is the establishment and good understanding of the concept of offence.

The generic notion of offence comprises the essential features common to all criminal offences and not only to some of them or only to some their categories. An offence is the most important institution of the criminal law, because the regulations within it are applicable to all incriminating norms of the criminal law system.

In a broad sense, offence is an act of external behaviour of man that due to the disturbance of social order and of law is subject to criminal repression. In a restricted sense, offence is identified with a concrete prejudicial action, described by the criminal law, for which the legislator establishes a certain punishment.

Methods of research. The following methods of research were used at the elaboration of this study: historical method, comparative method of study of law and method of logical analysis.

Basic content. At the definition of the notion of offence is to be taken into account the fact that it can be approached from the perspective of several sciences, legal or non-legal. Thus, offence and different sides of criminal phenomenon form the object of study of sev-

eral sciences, such as criminology, sociology, psychology, aetiology, statistics, etc.

From this perspective, offence represents a complex reality with valences and expressions in material-objective, social, moral and legal-criminal terms. In the objective-material terms – offence is expressed always through an act of external conduct of man, capable of producing modifications in the surrounding world; in the human terms – it represents an externalization of the personality of offender; in social terms – it manifests itself as a negative antisocial reaction capable of endangering or damaging its values and conditions of existence of society; in the moral terms – offence implies always a negation of the rules of general behaviour admitted by the majority of other members of society; in the legal-criminal terms – it represents a violation of the criminal law order [1, p.113].

In this sense it can be noted that of different aspects of the phenomenon of offence, only the **legal aspect** forms an object of research for the science of criminal law, others being studied within other sciences. However, at the elaboration of the notion of offence, all aspects of the phenomenon of offence and data provided by the disciplines that study them are taken into account.

The legal definition of offence is determined by the historical type and by the political regime existing in the corresponding society that determines the interests of the legal-criminal protection, i.e. the social values and social relations existing in addition to these values subject to criminal protection.

In general, three fundamental concepts of the definition of offence are known:

– ***substantial or material concept;***
– ***formal concept;***
– ***substantial - formal concept***.

According to the substantial concept, on the basis of the definition of the offence lies the evil that it produces for the society. The basic feature of the offence constitutes its danger for the society and for the order established by it.

Such a concept of the approach to offence was promoted at the moment of the formation of the Soviet Union.

For example, in the Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR) of 1922, the offence was defined as follows: "Offence is any social-dangerous action or inaction that violates the basis of the Soviet social and legal order established by the power of workers and peasants during the period of transition to the communist power" [2, p. 26].

It can be found that at the definition of the offence in the Criminal Code of the USSR of 1922 the emphasis was not put on the illegality of the action, but only on its social danger, as a substantial or material feature of the offence. The classification of an offence as a crime was based on the idea of damaging the Soviet order or the order established by the labour and peasant power. Later this notion was implemented in all the Criminal Codes of the republics that were members of the USSR.

This manner of the approach of the notion of offence was the result of the profound socio-economic and ideological changes that took place in the context of the formation of the Union of Soviet Socialist Republics (USSR). The Commissioner for Justice D.I. Kurtki, the author of the project of the Criminal Code of the RSFSR of 1922, mentioned "…. the notion of offence represents a basic concept that bases all legal-criminal regulations" [2, p. 26].

A similar notion of offence was covered also in the Criminal Code of the RSFSR of 1926, in which in the art. 6 the following were stipulated: "It is considered social-dangerous (offence) any action that endangers the Soviet arrangement or the law order established by the labour and peasant power during the transition to the communist power". [3, p. 39].

Through this concept the offence is identified with a social-dangerous action and not with a criminal illegality, the fact that justifies the application of the criminal law by analogy.

Initially, the Moldavian Soviet Socialist Republic (MSSR), established on August 2nd,

1940 as a union republic of the great Soviet empire, did not have its own criminal law, on its territory being applied the Criminal Code of the Ukrainian Soviet Socialist Republic (USSR) of 1927. Temporary application of the Ukrainian criminal law on the territory of the MSSR lasted until the adoption and enforcement of the Criminal Code of March 24th, 1961. It should be mentioned that the notion of the offence provided in the art. 4 of the Criminal Code of the USSR of 1927 [3, p. 84] was a faithful reproduction of the notion of offence provided in the art. 6 of the Criminal Code of the RSFSR.

Examining the notion of offence covered in the Criminal Code of the RSFSR of 1922 and of 1926, it can be concluded that the main feature that characterized them was the substantial element, i.e. the danger that these actions presented for the Soviet power. The notion of offence was the product of the class struggle that took place in the society at that time. Therefore, any offence, irrespective of its nature, was considered, first of all, as being an action that impinged on the labour or peasant power installed for the passage of the society to the socialist or communist regime. This political desire, i.e. the installation and maintenance of the Soviet power, oriented all the legal-criminal regulations that were adopted in those times.

As stated the distinguished criminalist A. Piontkovski, in his well-known work *Ucenie o prestuplenii*, the recognition of an action as an offence during the period of the transition of the society from a capitalist state to a socialist one is determined by the interests of the working class, and during the period of the transition from a socialist state to a communist one – the interests of the whole people that are under the leadership of the working class of the communist party. At the same time, the same author pointed out that the characterization of the offence in the socialist society as ***a dangerous social action of class*** can lead to contradictory solutions. Every offence impinges upon the interests of class and every offender is the enemy of people. This, however, can influence negatively the activity of the courts in the sense of the amplification of the concerned phenomenon [2, p. 41].

According to the ***formal*** concept of the definition of offence, it is made the abstraction from the social character, the criminal action (offence) being considered with priority as a legal phenomenon. By such a manner of approach is reflected exclusively the legal appearance of the criminal action (incrimination and punishment). In this sense, the offence is nothing more than an action provided and punished by the criminal law.

On the basis of this model of the definition of offence, criminal science aims to approach the criminal phenomenon only from the angle and limits of its incrimination and sanctioning, subordinating its concerns to a severe legalism, the only one of nature to provide an effective legal protection to an individual against some possible abuses of the executive or judicial authorities. The formal concept orientates the criminal legislation towards a precise regulation not only of the conditions of incrimination, but also of those for the execution of punishments [1, p. 114].

Criminal legislation that approaches this legislative model, either they do not define the notion of offence, the objective being entrusted to the criminal doctrine, or define it by shading of the illegal nature and of the liability of criminal punishment.

The formal model of the regulation of offence was an appropriate one also for the Romanian pre-war and inter-war legislation. Thus, in the Criminal Code of Romania of 1864 and of 1934 there was not provided a legal notion of offence. In the preliminary dispositions was put the emphasis only on the illegal nature of the criminal action. For example, according to the art. 2 of the Criminal Code of Romania of 1864: "No offence shall be punished, unless the punishments have been decided before its commission" [4], and according to the art. 1 of the Criminal Code of Romania of 1936: "No one can be punished for an action that during the time when it was committed was not provided by law

as an offence, nor condemned to other penalties or subject to other security measures, than those provided by law" [5].

The formal concept of the offence is implemented also in the criminal law in force of Romania, i.e. in the Criminal Code of 2009. Thus, according to the art. 15 paragraph (1): **"Offence is an action provided by the criminal law, committed with guilt, unjustified and imputable to the person that committed it".**

Therefore, at the definition of the offence in the Criminal Code of 2009, the Romanian legislator, unlike the Criminal Code of 1968 renounced the social danger as a basic feature of the offence. Thus, at the establishment of the concept there were taken into account the traditions of the Romanian criminal law of the interwar period and of the European criminal legislations that in most cases define the offence on the basis of the formal concept.

In the same sense, other criminal legislations that approach the formal concept of the definition of offence also can be brought as examples. Thus, according to the art. 111-2 of the Criminal Code of France, "The law determines offences and contraventions, as well as punishments that can be applied in relation to offenders", and according to the art. 111-3 of the Criminal Code of France: "No one shall be liable to punishment for an offence or a contravention the elements of which are not established by the criminal law" [6]. Although it does not define the offence, the French legislator highlights two formal features of offences: *illegality* and punishability.

According to the art. 1 of the Criminal Code of Sweden: "As an offence it is recognized an action determined by the given Code or by other laws or statutes, for which a criminal punishment is provided" [7].

In paragraph 1 of the Criminal Code of Germany, it is stipulated that "An action can be punished only if punishability has been previously established by the law" [8].

According to the art. 1 paragraph (1) of the Criminal Code of Belgium: "Infringements sanctioned by the law with criminal punishment constitute offences" [9]. From this last legal provision results that the basic feature of the offence is the criminal punishment that in its turn can be established only by the criminal law, thus being marked also the illegality of the offence.

In the English criminal law a legal notion of offence is not formulated. In the view of most English authors, from a legal point of view it is impossible to formulate a generic notion that would include all criminal actions or inactions.

However, in the English criminal doctrine most authors approach it on the basis of the substantial-formal concept. Thus, it is considered that offence represents an action or inaction that causes damage to society and that is prohibited by law under the threat of the application of the punishment imposed by the state [10].

In another broader definition it is considered that offence or criminal action is constituted by damage, prohibited by law, the main effect of which consists in the fact that if the offender is detained and liable to criminal punishment, being able to be prosecuted criminally in the order provided by law in the name of the state and if will be convicted, a certain punishment may be imposed on him/her [11, p. 1].

The **substantial-formal** concept combines in itself two basic elements that lie at the generic definition of the offence. The *material element*, by which in the general notion of the offence is included the indication that it represents a social danger, i.e. is an action that harms and disturbs the constituted social order. The *formal element*, by which the illegal conduct is introduced in the provisions of the criminal law, i.e. subject to incrimination and for which the criminal law provides a certain sanction. In addition, the material-formal concept may include also the human-moral aspect of the offence, demanding that the offence be committed with *guilt*.

This model of regulation of the notion

of offence is specific to the countries of the former ex-Soviet area that include the former union republics of the USSR and the former socialist states (Bulgaria, Poland, etc.).

If initially in the USSR on the basis of the legal notion of offence was the substantial concept, subsequently it evolved under the aspect of shading, on the one hand, the illegality of the action, and on the other hand, the diversification of social values subject to criminal protection, alternatively with those related to Soviet ideology.

Thus, in the model of the Criminal Code of the USSR of 1958, in the defining norm of the offence there was followed the path of the diversification of values likely to be injured by its commission. In the art. 7 was stated: "Offence is the social-dangerous action provided by the criminal law (action or inaction) that impinges upon the Soviet social and state system, economic socialist system, socialist property, personality, political, labour and other rights of the citizens, as well as other social-dangerous illegal actions that impinges upon the socialist order provided by the criminal law" [2, p. 32].

A similar notion of the offence was provided also in the art. 7 of the Criminal Code of MSSR of 1961, according to which: "Offence is the socially dangerous action (action or inaction) provided by the criminal law that impinges upon the social order of the USSR, its political and social system, socialist property, personality, political, labour, patrimonial rights and other rights and freedoms of the citizens, as well as other socially dangerous facts provided by the criminal law that impinges upon the order of socialist law" [12, p. 9].

After the disintegration of the USSR and the formation of the Republic of Moldova as an independent and sovereign state, this notion was subjected to a legislative amendment, being reformulated as follows: "It is considered an offence a socially dangerous action (action or inaction) that impinges upon life and health of person, rights and freedoms of citizens, property, state system, political and economic system, as well as other socially dangerous actions provided by the criminal law" [13].

The substantial-formal concept was the basis of the definition of offence also in socialist Romania. In the Criminal Code of the Socialist Republic of Romania (SRR) of 1968, in the art. 17 with the marginal name "Features of offence", was formulated the following legal notion of the offence: "Offence is the action that presents social danger, committed with guilt and stipulated by the criminal law" [14, p. 11]. From this notion resulted the following essential features of the offence: social danger; guilt and criminal illegality.

At present, this model of formulation of offence in the criminal law has been preserved in several states of the former socialist camp.

For example, in accordance with the art. 9 paragraph (1) of the Criminal Code of Bulgaria of 2001: "Offence constitutes the socially dangerous action (action or inaction) that is committed with guilt and declared by the law as being punishable". According to paragraph (2) of the same article: "It does not constitute an offence the action that although formally comprises the signs of an offence punished by the law, but that due to its lack of importance is not socially dangerous or if the social danger is clearly insignificant" [15]. Four defining features of the offence can be highlighted: social-dangerous action; action committed with guilt; action is illegal and action is punished by law.

According to the art. 1 paragraph 1 of the Criminal Code of Poland: "Only the person that committed a prohibited action under the threat of the application of the criminal punishment that is established by the law in force at the moment of the commission of the action can be subject to the criminal liability". According to paragraph 2 of the same article "It does not constitute an offence the forbidden action, the social damage of which is insignificant" [16]. From the first provision of the law results the illegality and punishability, and from the second the dangerousness of the action.

In the criminal legislation of the Russian Federation the material-formal concept of the offence is specified in the art. 14 paragraph (1) of the Criminal Code: "By offence it is understood the commission with guilt of a socially dangerous action, prohibited by the criminal law under the threat of punishment". According to paragraph (2) of the same article: "It does not constitute the offence the action (inaction) that although meets formally the signs of an offence provided by the given Code, but which due to the lack of importance does not present a social danger" [18].

The material-formal concept of the offence is covered also in other criminal legislations of the former Union republics, such as: Criminal Code of Ukraine [art. 11]; Criminal Code of Belarus [art. 11]; Criminal Code of Kazakhstan [art. 10 par. (2)] etc.

It is worth mentioning that some of the former Union republics abandoned the material-formal concept of the offence, establishing the formal one. For example, according to the art. 7 paragraph (1) of the Criminal Code of Estonia: "Offence is the action provided by the given Code – action or inaction, - that is sanctioned in the criminal order" [20].

In the criminal legislation of the Republic of Moldova, the substantially formal notion of the offence is provided in the art. 14 of the Criminal Code "Offence is a prejudicial action (action or inaction), provided by the criminal law, committed with guilt and liable to criminal punishment". According to paragraph (2) of the same article: "It does not constitute the offence the action or inaction that, although formally, contains the signs of an action provided by the given Code, but, having no importance, does not present the prejudicial degree of an offence" [21].

Conclusions. In the light of the above mentioned, it can be concluded that in the Romanian area (Romania and Republic of Moldova), the notion of offence evolved on the basis of two legislative concepts:

– **substantial-formal**, characteristic of the Soviet regime, in which, in addition to the illegal nature of the criminal action, it is put the emphasis also on the social substance of the offence and namely its susceptibility to bring a damage to the social interests protected by the state. From the perspective of the material-formal model the notion of offence was defined in the Criminal Code of MSSR of 1961 and in the Criminal Code of SRR of 1968. This concept is preserved also in the Criminal Code of the Republic of Moldova of 2002;

– **formal**, is characteristic to of the Criminal Code of Romania of 1864 and of 1936 in which was put the emphasis only on the legal character of the offence, determined by the illegality of action, i.e. its provision in the criminal law. This model of the definition of the offence is covered also in the current Criminal Code of Romania of 2009.

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