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IMPROVING THE CRIMINAL LEGISLATION OF THE REPUBLIC OF MOLDOVA WITHIN THE CONTEXT OF THE EUROPEAN INTEGRATION: PERSPECTIVE SOLUTIONS AND ARGUMENTS

Radion COJOCARU,
PhD, University Professor,
"Stefan cel Mare" Academy of Ministry of Internal Affairs,
Republic of Moldova,
University Lecturer, Affiliation to "Dunarea de Jos" University of Galati, Romania
ORCID: 0000-0002-3809-7392

Summary

The issue of improving criminal legislation from the perspective of the European integration of the Republic of Moldova is addressed in this study. The author substantiates the need for the legislative harmonization of the national criminal norms to the standards derived from the European Union (EU) acquis. In the meanwhile, the author identifies several vulnerabilities of the national normative framework that require either a legislative reconceptualization in accordance with the unanimously recognized European values, or an updating of the norms to the new social realities resulting from the tendencies to commit new harmful deeds. Resorting to critical approaches, the author offers forward-looking legislative solutions, the implementation of which would maintain the sustainability of the development of national criminal legislation. Even if the study mostly presents subjective views, we hope that some approaches will find a pragmatic utility in the legislative work to reform the criminal law of the Republic of Moldova.

Keywords: criminal policy, criminal law, criminal offence, criminal penalty, democratic values.

Introduction. The Criminal Code of the Republic of Moldova was adopted by Law no. 985-XV of April 18, 2022, implemented on June 12, 2003. Up to that time, in the Republic of Moldova, a young state, formed in 1991 after the collapse of the USSR, the Criminal Code of the Moldovan Soviet Socialist Republic of 24.03.1961 was applied. The distinguished criminalist A. Borodac, one of the main authors of the Criminal Code of 2002, mentioned that when drafting the new criminal law "the new principles of the criminal policy were analyzed, specified and argued: aligning the criminal legislation of the Republic of Moldova with the hierarchy of social values accepted by states based on law; coordination of criminal legislation with the criminogenic situation; ensuring maximum differentiation of criminal liability; raising criminal legislation to the level of universally recognized international norms; stipulation of criminal legislative principles in the text of the criminal law… etc." [1, p. 9].

Therefore, through the adoption of the Criminal Code of 2002, the reformation of the criminal policy of the Republic of Moldova from those times was pursued, by modernizing the legal-penal institutions and the incriminating system in order to align criminal justice with the authentic democratic values that the young state was striving to achieve. The need to develop new criminal legislation also derives from the multiple positive obligations assumed towards the European structures, which made it possible to develop new national standards in the field of criminal justice.

From the moment of its entry into force until now, under the influence of several factors, especially under the influence of political instability, the 2002 Criminal Code of the Republic of Mol-

dova has been subjected to numerous legislative amendments. Many of these legislative amendments were not able to lead to the desired improvement and shaping of criminal provisions to the new social realities and standards. On the contrary, some laws supplementing and amending the Criminal Code of the Republic of Moldova have created multiple uncertainties and confusions in the application of the national criminal law. In the following, in order to measure the qualitative level of evolutionary-progressive development of the national criminal legislation, we will substantiate some priority directions, which in our view will boost the legislative work of adopting national criminal norms in accordance with the European aspirations of the Republic of Moldova.

Discussions and results obtained. *Scientific substantiation of the draft laws*. The normative projects must be developed based on critical studies of the elements of criminal law (institutions, entities and crimes) that are to be subject to regulation within the criminal norms subject to legislative amendment. The distinguished criminalist V. Dongoroz claimed "... critical study involves a thorough knowledge of positive law and the scientific data that are contingent on it" [2, p. 215]; "…critical study paves the way for legislative progress" [2, p. 215]. On the one hand, the investigations resulting from the critical study have as their purpose the correction or, as the case may be, the progressive development of the criminal norms. On the other hand, the *ferenda law* proposals inspired by the critical study give an increased dose of the quality of the criminal rules, thus ensuring the legality of their application. Therefore, legislative projects developed based on intuitive knowledge, even if such knowledge results from experience, cannot be likely to bring an expected amelioration, improvement or evolution of positive criminal law.

An eloquent example in this sense is the legislative amendment operated by the Law for the modification of some legislative acts No. 179 of 26.07.2018 by which the incriminating norm of excess of power or exceeding the service duties was supplemented in Art. 328 of the Criminal Code with a new statutory method established in paragraph $(1)^1$. According to the incriminating text, it constitutes a crime: "the unfounded refusal to release the permissive act that led to the restriction of the right to carry out the entrepreneurial activity, including the unfounded carrying out of some controls, if this caused damage to the rights and interests protected by law of natural or legal persons, in the amount of at least 10 average monthly wages for the forecasted economy, established by the Government decision in force at the time of the act".

It follows from the formulation of the criminalization norm that the act cannot be approached as a special or exclusive form of power excess or the official duties exceeding. Between the excess of power provided for in Art. 328 paragraph (1) of the Criminal Code of the Republic of Moldova and the one stipulated in Art. 328 paragraph (1^1) of the Criminal Code of the Republic of Moldova, there cannot be a general-norm and special-norm relationship. In essence, by these two incriminating norms, criminal liability is established for two crimes with a different legal substance. The crime of typical power excess can be committed only through the form of the action, which consists of the performance of an act through which persons make an excess of competence, through which the scope of functional attributions is exceeded. While the offense established in Art. 328 paragraph (1^1) of the Criminal Code of the Republic of Moldova can also be carried out in the form of the inaction of "unfounded refusal to issue the permissive act", which essentially involves an abuse of office.

Thus, according to the functional competence, the public person, on the one hand, has the competence to carry out such an action, and, on the other hand, is obliged to carry it out when the applicant meets the legal conditions for issuing the permissive act to carry out the entrepreneurial activity.

Furthermore, the crime established in Art. 328 paragraph (1^1) of the Criminal Code of the Republic of Moldova can assume the form of excess of power only when it is committed by performing unfounded state controls. Based on the reasons presented, we conclude that the normative method established in Art. 328 paragraph (1^1) of the Criminal Code of the Republic of Moldo-

va, only partially can constitute a special norm against the excess of power or the exceeding of the duties provided for in Art. 329 paragraph (1^1) of the Criminal Code of the Republic of Moldova, namely when the act is committed by *carrying out unfounded controls*. In case of *the unjustified refusal to release the permissive act,* the fact provided for in Art. 328 paragraph (1^1) of the Criminal Code of the Republic of Moldova constitutes a special form of abuse of power or abuse of official position provided for in Art. 327 of the Criminal Code of the Republic of Moldova. Based on the above observations, we consider that the legislator unjustifiably established criminal liability for the unfounded refusal to issue the permissive act and the implementation of controls under Art. 328 of the Criminal Code of the Republic of Moldova.

Reconceptualization of the fundamental principles provided for in the Criminal Code of the Republic of Moldova. The principles of criminal law constitute the basis of criminal legal regulations and institutions, linking and uniting criminal law into a unitary entirety. Good knowledge and application of criminal rules is indispensable conditioned by the correct understanding of the principles of criminal law. Although in the Criminal Code of the Republic of Moldova from 2002, unlike the one from 1961, the fundamental principles of criminal law found their express consecration; this regulation being carried out in a clumsy manner, without taking into account the evolutionary trends of the European criminal law. Therefore, some of the principles enshrined in the Criminal Code of 2002 were defined in a confusing manner, inappropriate to the rigors of the time.

Fundamentally, the legal notion of the principle of legality enshrined in Art. 3 paragraph (1) of the Criminal Code from 2002 can be exemplified, which essentially represents nothing more than an almost faithful reproduction of Art. 3 of the 1961 Criminal Code[1]. Currently, the principle of criminal legality is no longer approached in its classical sense only as a fundamental principle of criminal law, but as a fundamental right of the person - guarantor of the intolerance and non-application of criminal arbitrariness as a repressive tool against citizens. Subsequently, the normative concept of criminal legality has taken significant evolutionary turns in contemporary criminal law, turns that cannot be found in the notion stipulated in Art. 3 paragraph (1) of the Criminal Code of the Republic of Moldova. For these reasons, we suggest to the national legislator that the definition of the principle of criminal legality should be based on taking regional and international standards into account (The Charter of Fundamental Rights of the European Union – art. 49; Convention for the Defense of Human Rights and Fundamental Freedoms – art. 7; The Rome Statute of the International Criminal Court – art. 22, 23, etc.), as well as on the positive experience of criminal legislation in European states (for example, art. 2 of the Romanian Criminal Code).

De-Sovietization of criminal legislation. One of the main objectives pursued by the legislator when adopting the Criminal Code of the Republic of Moldova from 2002 was "...the exclusion of the declarative character and ideological clichés, characteristic to previous criminal legislation…" [1, p. 9]. In other words, the aim was to rid the national criminal legislation of Soviet ideology, which is not congruent with the democratic values and ideals of a state governed by the rule of law. At that time, it was not possible to achieve this objective, for the simple reason that the basis for the elaboration of the national criminal law was the Model Criminal Code of the Commonwealth of Independent States (CIS) of 17.02.1996, strongly influenced by the old Soviet legislation and criminal doctrine.

Under these conditions, in the criminal legislation in force of the Republic of Moldova, Soviet models of approach to legal-penal institutions have been preserved, including the model of

[1] The principle of criminal legality is defined in art. 3 paragraph (1) of the Criminal Code as follows: "No person can be declared guilty of the commission of a crime nor be subject to a criminal punishment other than on the basis of a decision of a court and in strict compliance with criminal law". A similar definition was stipulated in art. 3, thesis II of the Criminal Code of the MSSR from 1961, called "The Grounds of Criminal Liability": "No one can be declared guilty of a crime, as well as subject to a criminal penalty, except on the basis of a court sentence and in accordance with the law".

criminal acts incrimination. Several examples can be given in this regard. For example, the legislative concept of "abductions" approaching was substantiated in the 80s of the last century by Soviet doctrinaires. According to this concept, the legal classification of the forms of abduction is to be carried out based on a general notion, which would reflect a set of defining features that would characterize all forms of abduction. Currently, such a concept seems to be completely outdated, as it is difficult to imagine that the physical abduction of an asset and the abduction of an asset through computer fraud fall under the pattern of a single notion of theft. Moreover, due to the clichés of this concept, the fraudulent acquisition of the right to immovable property cannot be included under the rules of abduction, a fact that creates favorable conditions for the crime "prosperity" in this segment.

Abolition of defining or estimative signs describing crimes in favor of using descriptive signs. It is a necessary process to improve the quality of the criminal law, which fits perfectly into the idea of de-Sovietization of the criminal law. In the Soviet specialized criminal doctrine, V. Kudreavţev defined the estimated marks or evaluation marks as those legal requirements determined by the norm of incrimination upon the practical finding of which lies the conscience of the official interpreter who applies the criminal law, "by taking into account the provisions of the Criminal Code and the factual circumstances characterizing the specific criminal case" [3, p. 134]. In our view, such an approach no longer corresponds to the rigors of time, since neither the judge, nor the official or doctrinal interpreter of the criminal law should replace the legislator and intervene where the criminal law does not inspire clarity and predictability.

The difficulty of interpreting of the "estimated signs" undefined by criminal law is determined by both objective and subjective factors. The category of objective factors can be attributed to the lack of criminal regulations that would establish certain measurable criteria on the basis of which these signs or component sub-elements of crimes are to be determined. To the category of subjective factors can be attributed the incompetence, ill-will, lack of experience or inadequate training of the person interpreting the criminal law. The existence of estimative signs offers the possibility of a subjective assessment of the criminal rules, assessments that do not always subscribe to the will of the legislator. Moreover, these assessments favor the arbitrary application of the criminal law by seriously violating the principle of the legality of incrimination.

Currently in the criminal legislation there is a positive tendency to abolish or avoid the use by the legislator of the estimated signs when describing the signs of the components of the crime.

First of all, such a trend is determined by the jurisdictional activity of the Constitutional Court of the Republic of Moldova. In the case of norms incriminating, notifications regarding the control of unconstitutionality are, as a rule, admitted by the Constitutional Court in relation to the texts of the criminal law that contain "defining" or "estimative" signs of the components of the crime that are not defined by the criminal law, whether they know a non-uniform interpretation in judicial practice. The total or partial acceptance of the requests regarding the exception of the unconstitutionality of the texts of the incriminating norms, which do not meet the quality requirements of the criminal law, has the effect of the unconstitutionality of the objective or subjective sign(s) of the composition of the crime described in the respective part of the norm. Like the part of the norm, these constitutive signs, become null and can no longer justify the classification of a prejudicial act as a crime from a legal point of view.

In the second place, when adopting laws amending or supplementing the Criminal Code, the tendency of the legislator to no longer enshrine in incriminating texts defining signs, not described by the criminal law, is evident. For example, through the *Law No. 316 of 17-11-2022 for the modification of some normative acts (ensuring the rights of victims in the case of crimes related to sexual life and domestic violence)* the crime of rape (art. 171 of the Criminal Code), as well as the crime of non-consensual sexual actions (art. 172 of the Criminal Code) in the new wording, it no longer contains aggravating actions that *caused other serious consequences*. We appreciate this

evolutionary process as a beneficial one for measuring the level of quality of the criminal law, but it must be continued with regard to other crimes whose descriptive signs were declared unconstitutional by the jurisdictional activity of the Constitutional Court.

Systematization and clear normative differentiation between the rules of substantive criminal law and the rules of formal criminal law. In the legal system of the Republic of Moldova, there is an "unhealthy" tendency to enshrine some substantive criminal law norms in the Criminal Procedure Code. Without pretending to analyze all situations of this kind, we will stop at the most recent case operated by *Law no 286 of 05.10.2023 for the amendment of some normative acts* by which the Criminal Procedure Code was amended and supplemented in the part related to investigative activity. Thus, in Art. 118 paragraph (8)[11] of the Criminal Procedure Code, the following notion has been foreseen: simulated misdemeanor/crime, as that "misdemeanor/crime which, although it formally meets the elements of the misdemeanor/crime, does not constitute a misdemeanor/crime and is committed only for the purpose of maintaining the legend, proving the existence of the crime and identifying the perpetrator"[2].

Through this legislative amendment, a new concept is introduced in the field of criminal law – *simulated crime*, a concept which, nevertheless, was not passed through the filter of the legal provisions relating to the crime stipulated in the criminal legislation. This is also valid for the *simulated misdemeanor***,** a concept that had to be correlated with the provisions of the Contravention Code regarding the misdemeanor. In such conditions, we are witnessing a less harmonious combination of the legal norms in the matter, a fact that creates hard-to-decipher collisions between the norms of substantive law and the norms of formal law. In our view, this will lead to a huge desecration of criminal law institutions, and criminal science will regress from a higher form of development to a lower one. The differentiation between material criminal law and formal criminal law, which was made at the beginning of the 20th century by the distinguished criminalists of the time "… the criminal procedure law provides in what way and with what means it will proceed, under a formal report, for the fulfillment" of the operation of establishing the rule of law which should be applied to a particular case [2, p. 13]. In more recent doctrine it is argued that "… procedural rules determine the way in which the state applies criminal law by proving the existence of a crime and by holding accountable and punishing those guilty of their commission" [4, p. 13].

We also mention that the incorporation of substantive law norms into criminal procedural legislation seriously distorts the classical meaning of the principle of criminal legality. In accordance with the provisions of Art. 1 paragraph (1) of the Criminal Code: "The present Code is the only criminal law of the Republic of Moldova". From this principle-valued provision, it appears that only the regulations provided by the Criminal Code constitute substantive criminal rules. Therefore, pursuant to Art. 72 of the Constitution, *the constitutive source of criminal norms is formed by the Parliament of the Republic of Moldova*, and in accordance with art. 1 paragraph (1) of the Criminal Code, *the direct formal source of criminal rules is the Criminal Code of the Republic of Moldova*. Thus, on the one hand, the monopoly of the adoption of criminal laws belongs exclusively to the Parliament, and, on the other hand, the criminal norm must necessarily be incorporated into the Criminal Code.

The humanization of punitive criminal policy. Although, from the date of entry into force of the Criminal Code of the Republic of Moldova, numerous legislative measures were taken to reduce criminal penalties, along the way, the flow of laws amending the provisions of the criminal legislation with large sanctions, not based on the objective of reforming the punitive policy

[2] In accordance with art. 8 paragraph (7) of the Criminal Procedure Code: "If necessary, the prosecutor who ordered and/or authorized the special investigative measure may request the investigating judge to authorize the investigator to commit one or more minor or less serious felonies or felonies under cover", and according to paragraph (9) "The simulated misdemeanor/crime can only be authorized in the case of the investigation of organized crime, corruption, related to corruption, terrorism, state security, money laundering and terrorist financing crimes".

based on international and European practice, continued. For example, for the murder committed without aggravating circumstances provided by Art. 145 paragraph (1) of the Criminal Code of the Republic of Moldova, the legislator establishes the prison sentence from 10 to 15 years, and for the embezzlement of foreign property – Art. 191 paragraph (5) of the Criminal Code, if the value of the stolen property exceeds 100 average monthly wages per economy, established by the Government decision in force at the time of the act, the applicable penalty is imprisonment from 8 to 15 years. It follows that the legislator establishes an approximately identical sanctioning regime for the injury of two social values subject to criminal protection: the first is human life, and the second is the patrimony of natural or legal persons. It should be noted that the damage caused to the first social value is irrecoverable, and the second is recoverable, the criminal and procedural-criminal legislation having a sufficient arsenal of legal means, including coercion applicable in this sense.

Several studies and reports suggest that, despite many efforts and frequent changes to the law, there is still a lot of work to be done to decriminalize and humanize criminal law. In the same sense, it is mentioned that one of the most traditional tools for the humanization of criminal legislation is the reduction of the harshness of the sanctions and maintaining their proportionality according to the purpose pursued and the seriousness of the crime [5, p. 8].

In order to humanize the punitive policy of the state, to modernize and connect criminal sanctions to average European standards, we propose to the legislator two cumulative criteria to be used when establishing criminal sanctions. Based on the first criterion, the extent and intensity of criminal sanctions must be strictly proportional to *the importance of the social values damaged by committing a criminal act*. Based on the second criterion*, the criminal sanctions must be proportionate to the prejudicial act*, by taking into account all the signs by which the legislator characterizes its prejudicial nature. As a matter of fact, this last criterion is enshrined in Art. 49 paragraph (3) of the Charter of Fundamental Rights of the European Union, according to which *punishments must not be disproportionate to the crime*.

Conclusions. In the end, we mention that the basis of the sustainable development of the national criminal policy can be other conceptual benchmarks than those mentioned above, such as the clear delimitation between the rules of criminal law and those of contravention law, the strict observance of the criminal legislative technique in the formulation and placement of legal rules in the style of criminal law, etc. In viewpoint, we believe that taking into account the recorded benchmarks will have the effect of raising the level of democratization of the criminal law and, at the same time, will offer a luxury of clarity and predictability of the criminal norms that make it up, a fact that will essentially contribute to the efficiency of its application in the direction of social values protecting.

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