

Some Theoretical and Legal Reflections on the Order of Criminal Law, the Criminal Legal Relationship of Compliance and the Criminal Legal Relationship of Conflict

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Abstract

Our theoretical approaches combined with judicial practice are motivated by the multitude of divergent opinions that have appeared in the Romanian criminal doctrine regarding these concepts. Thus, most Romanian authors, starting from the premises according to which all legal norms are transposed by creating legal relations and otherwise ignoring the normative character and the regulatory function that criminal law has in disciplining social conduct, reach the thesis according to which there is also a criminal legal relationship of compliance, this being an expression, a form of dynamic manifestation of the social defense relations that emanated from the norm of criminal law since its entry into force. The defense of social values is achieved mainly through criminal legal means (criminal law), through extra-legal means of educational, social, cultural, economic, as well as through extra-criminal legal norms of commercial law, administrative law, labor law, of constitutional law etc. Criminal law is rightly considered the result of a dialectical process and not of an ideal creative process². The two sides of criminal policy, namely special preventive action and repressive reaction, are achieved through criminal law mainly, which by its rules provides both the conduct to be followed by the recipients of criminal law and the necessary reaction against crime to restore order right. As such, the criminal law order is achieved by observing the provisions of the criminal law, the criminal coercion intervening only in the case of committing certain crimes. It can be noted that the legal order has a complex and dynamic character, which is a succession of plans, the preventive preceding the repressive, and the latter aimed at the corrective - in the sense of criminal treatment. It can be noted that the legal order has a complex and dynamic character, which is a succession of plans, the preventive preceding the repressive, and the latter aimed at the corrective - in the sense of criminal treatment.

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1. Some theoretical aspects regarding the criminal law order

The order of criminal law is carried out in the opinion of the majority of the perpetrators³, mostly by observing the provisions of the criminal law, the criminal coercion intervening only in the case of committing certain crimes⁴.

Therefore, the legal order has a complex and dynamic character, which is a succession of plans, the preventive preceding the repressive, and the latter aimed at the corrective - in the sense of criminal treatment.

The realization of the imperatives of the criminal law, regardless of whether it takes place by the voluntary observance of the provisions of the law or by their imposition by the coercive force of the state, always implies the birth of criminal legal relations. The legal relations that arise from the compliance of people with the conduct prescribed by the norms of criminal law are called relations of compliance or cooperation and arise from the moment of entry into force of the criminal law. They have an abstract, immaterial existence and fulfill an educational and intimidating function, the declared purpose being to prevent the commission of crimes. When a person violates the provisions of criminal law - ignoring the prohibitions imposed by it, the criminal legal relationship takes a concrete form, outlining in all its elements and providing the legal framework under which the

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² George Antoniu, *Reflections on the interpretation of the criminal law, from a European perspective (II)*, in „Revista de Drept Penal”, no. 3/2006, p. 9.

³ C. Bulai, *Handbook of criminal law. The general part*, All Publishing House, Bucharest, 1997, p. 77; Gh. Alecu, *Criminal law. General part*, second edition, revised and added, Ed. Europolis, Constanța, 2007, p. 10; Al. Boroș, *Criminal law. General part, according to the new Penal Code*, 2nd ed., Ed. C.H. Beck, Bucharest, 2014, p. 64; V. Dobrinou, W. Brânză, *Criminal law. The general part*, Lumina Lex Publishing House, Bucharest, 2003, p. 55.

⁴ See Mioara-Ketty Guiu, *The object of criminal law*, in „Juridical Tribune - Tribuna Juridică”, Volume 9, Special Issue, October 2019, pp. 47-59.

judiciary, using its prerogatives, acts to prosecute criminal record of the offender. The report that arises in this case is one of conflict or contradiction and appears on the skeleton of the legal relationship of compliance by transforming it with the commission of the criminal act. In this case, prevention will give way to coercion.

In the science of criminal law, the opinion was outlined that the voluntary observance of the criminal law does not imply the birth of any relationship between the criminal norm and its virtual recipients.

Against this point of view, arguments were also made:

- the criminal norm becomes active right from the moment of entry into force (application of the principle of criminal activity). In terms of educational, preventive function, this can only be achieved within legal compliance reports, non-conflicting members of society to the rules of conduct imposed⁵;

- the criminal legal relations being born only at the moment of committing the prohibited deed, would mean to admit the thesis that a legal relationship can arise from the non-observance of an extra-legal obligation⁶.

- the denial of the legal relations of cooperation within the criminal law brings back to the forefront the thesis of the purely sanctioning character of the criminal law, questioning its autonomous character.

The criminal legal relationship is the object of study for the science of criminal law because the norms and institutions that make up the general part of criminal law provide the common general conditions for the birth, modification and extinction of criminal legal relations.

The examination of the legal construction of the criminal legal relationship is determined by the specifics of the special relations that are born in the process of social defense against crimes.

In relation to the clear distinction between the confirmatory and conflicting criminal legal relations, we will present the main aspects raised by the study of the structural elements - the subject, the content and the object as well as their particularities.

2. Some particularities regarding the subject of the criminal legal relationship

The persons as participants in the criminal legal relationship can appear in two hypostases, namely: *as beneficiaries of the criminal legal protection and as recipients of the criminal provisions.*

In the first case the members of the society as direct or indirect holders of the criminally defended values enjoy the defense against the dangerous conduct of other members of the society.

In the second capacity as recipients of the provisions of the criminal law, the members of the society have the duty to comply with the conduct provided by law towards the social values protected by the criminal law.

From the analysis of the subjects as elements of the criminal legal relationship, the appearance of some differentiations is observed, as this report is one of conformity or conflict.

In the case of the criminal legal relationship of compliance, the subjects are: the state that from the moment of entry into force of the criminal law has the right to claim its observance; as well as the recipients of the criminal law who have the obligation to obey the provisions of the criminal law.

For example, if the criminal law addresses a certain category of individuals (or even legal entities based on the provisions of the new Criminal Code), managers, officials, military, Romanian citizens, foreigners, stateless persons, etc., respectively companies, LLCs, family associations, etc., subjects of the legal compliance report will be only those who have or will have this quality imposed by law.

⁵ I. Tanoviceanu, *Treaty of Law and Criminal Procedure*, vol. I, Bucharest, 1912, p. 261: "No crime will be punished if the punishments are not decided before its commission". This provision is only the application in criminal matters of the rule set out in art. (1) Civil Code, which states that: "The law provides only for the future, it has no retroactive power." The same author argues that: "if the rule is rational in civil by" a fortiori rational and in criminal, for nothing would be more unjust than to punish someone, without being informed by law in advance that he will be punished if he commits a certain act. "The law must give advice before it strikes."

⁶ Gh. Bică, Gh. Alecu, R. Ifrim, D. Bică, C. Dinu, A. Lupu, A. Sandu, *Criminal law. The general part*, „Romania de Maine” Foundation Publishing House, Bucharest, 2016, p. 36.

The substitution of the state for the right of holders of securities does not mean their removal from the criminal legal relationship. Along with the state, as the dominant subject, the holder of the criminal action, there is also the natural or legal person holding the social value. By virtue of this capacity, the injured person was granted the right to decide in certain cases, on the initiation of criminal proceedings or exercise, as well as the right to participate in criminal proceedings as an injured party.

In the case of the criminal legal relationship of conflict, the subjects of the criminal report are: the state (mainly) and the injured natural or legal person (secondary), as well as the recipient of the incriminating norm - in the person who committed the crime and is to be criminally liable.

Even if for the existence of the crime, it is necessary the prior complaint of the injured person - to initiate criminal proceedings - the state remains the subject of the conflict report, because in this situation only the state has the right to apply the punishment of the offender through legal authorities. Unlike the legal relationship of compliance, where the recipient is not a determined one, but a virtual one, in the case of the legal conflict report this subject is precisely determined in the person of the perpetrator (except for crimes with unknown perpetrators).

3. Some particularities regarding the content of the criminal legal relationship

The content of the criminal legal relationship consists of the rights and obligations of the participants in this report - of the subjects of the report⁷.

We also note from this point of view some differences between the criminal legal relationship of compliance and the criminal legal relationship of conflict, as follows⁸.

In the case of the criminal legal relationship of compliance, the state has - as holder of social defense - the right to claim conduct in accordance with the content - prohibitive or burdensome of the provision described in the criminal law, and the recipients of criminal law, the obligation to comply, adopting the conduct of respect and obedience required, but also the right not to be required to comply, except within the limits established by law.

Natural persons, as recipients of the criminalization norm, have the obligation to comply with the provisions of the criminal law - meaning to abstain or to undertake what the criminal norm orders - under the threat of criminal coercion, but they also have the right to submit only obligations established by law.

Being an imperative legal relationship of power, the idea of equality in rights between the state and the recipients of the criminal norm is excluded.

As a consequence of the principle of legality of criminalization of punishment, the state has the obligation to act in the spirit of the principles of criminal law, respecting all procedural guarantees, applying only legal sanctions for the crime committed and proven, individualized according to legal criteria.

The natural person who violated the criminal law has the obligation to be criminally liable, bearing the sanctions ordered by the court and the right to claim the state to strictly observe the provisions of the criminal law.

The non-observance by the judicial bodies of their obligations entails either the nullity of the drawn-up acts, or even the criminal prosecution in case of some crimes (abuse of office against the interests of persons, illegal arrest and abusive investigation, unjust repression, etc.).

4. Some particularities regarding the object of the criminal legal relationship

The object of the criminal legal relationship consists in the conduct that the subjects of the report must adopt according to the rights and obligations that constitute the content of the legal

⁷ Lacey, Nicola, *Principles, Policies, and Politics of Criminal Law*, in Lucia Zedner, and Julian V. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, Oxford, 2012, online edn, Oxford Academic, 20 Sept. 2012, <https://doi.org/10.1093/acprof:oso/9780199696796.003.0002>, accessed 5 Apr. 2023, pp. 19-36.

⁸ Gh. Alecu, *Criminal law. General part*, second edition, revised and added, Ed. Europolis, Constanța, 2007, pp. 11-12.

relationship.

The object of the legal relationship also differs in the two situations under which we examined the other components of the criminal legal relationship.

In the case of the legal relationship of compliance, the object is the very attitude of compliance, of cooperation, which derives from the provisions of the criminal norm. This means achieving the criminal law order through coercion or voluntary compliance.

The object of the criminal legal relationship of the conflict consists in the sanctions to be applied legally (punishments, complementary punishments and security measures).

The object of the criminal legal relationship of the conflict is relevant in relation to the offender's person regarding the possibility of his social reintegration, since once it is completed, the re-education process of the offender is considered completed.

The criminal sanction is not seen as an end in itself, it is subordinated to the idea of preventing new crimes and resocialization, of correcting the offender, being necessary to restore the authority of criminal law, to ensure the rule of law through criminal coercion.

The issue of the birth, modification or extinction of the criminal legal relationship has different particularities, as it concerns the compliance legal relationship or the conflict legal relationship.

5. Some peculiarities regarding the birth of the criminal legal relationship of compliance

The criminal legal relationship of compliance is born from the very moment of the entry into force of the criminal norm. Once born, the compliance report is carried out by imposing the requirement to comply with the specific rule of conduct, until the date of entry into force of the criminal law. In principle, the duration of the criminal compliance reports is not established in advance, but in special situations, or in the case of temporary criminal laws, it is preliminary and brought, as such, to the knowledge of its addressees⁹.

Constituting the natural legal framework for achieving the very order of criminal law, the criminal legal relations of compliance do not contain to subsist throughout the activity of the criminal norm. In exceptional cases, the criminal legal relationship of compliance may have a shorter duration of existence than that which falls within the limits of the entry into force of the rule governing it, when the rule conditions its incidence on the requirement of acquisition by its addressees. of a quality, a situation in which the duration of the relationship can only be concomitant with the existence of the quality (the hypothesis of qualified recipients, such as military in term, officials, etc.).

Of course, during the activity of the criminal legal norm of compliance, changes may occur in the very content of the criminalization norm, in the sense of extending or restricting the obligation to comply, which implicitly affect the content of the criminal legal relationship of compliance (in case of succession of criminal laws different over time).

It is, on the other hand, self-evident that the criminal legal relationship of compliance does not end by committing a crime, even if at that moment a criminal legal relationship of conflict is born.

6. Some peculiarities regarding the birth of the criminal legal relationship of conflict or contradiction

Unlike the criminal legal relationship of compliance, which is born through the legislative act of the incrimination itself, the conflicting criminal report is born only by committing the crime. If the acquisition of the quality of subject of the criminal legal relationship of compliance does not depend on the expression of the will of its addressee, the conflicting report derives, in most cases, from deeds committed with will, from an express manifestation of his will¹⁰.

⁹ Gh. Alecu, *op. cit.*, 2007, p. 12.

¹⁰ Shai Lavi and Galia Schneebaum, *Criminal Law and Sociology*, in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law*, Oxford, 2014, p. 1 and Duff, R. A., *Introduction: Towards a Theory of Criminalization?*, in R A Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law, Criminalization*, Oxford Academic, 2014, pp. 1-53, online edn., <https://doi.org/10.1093/acprof:oso/9780198726357.003.0001>, accessed 10 Nov. 2023.

As a logical consequence of the principle of legality of incrimination, the commission of a crime being the sole basis of criminal liability, the criminal legal relationship of conflict type can be born only by committing an act provided by criminal law to constitute a crime, the concrete crime being the only legal fact that may give rise to a criminal legal relationship of conflict.

7. Legal finding of the existence of the criminal legal relationship of conflict

It is necessary to distinguish between the moment of birth and that of the legal finding of the existence of the criminal legal relationship of conflict.

Establishing the moment of birth of the criminal law report of conflict is of particular importance in terms of solving all problems related to criminal liability that may arise from the violation of the criminal law and until the court finding the specific content of the legal relationship.

In this context, by the specificity of their regulation, the provisions of principle must resolve certain effects on criminal liability (thus the content of the criminal legal relationship of conflict) depending on the time of its birth, such as, for example, in the case of prescription, amnesty or the application of the criminal law in time, when the flow of these effects is related to the moment of committing the crime.

From the moment of committing the crime, not only the regulations of a material institutional nature, but also those concerning the branch of criminal procedural law, which make it possible to prosecute criminals, are directly or indirectly linked. However, all these legal effects directly concerning the criminal liability regime and its ascertainment can only take place within conflicting legal relations once the crime has been committed. Consequently, we agree with the prevailing opinion in this matter¹¹ that in no case the birth of the criminal legal relationship can be located at another time, such as the discovery of the crime and identification of the perpetrator or the issuance of a final judgment.

The finding of the existence of the criminal legal relationship and, as such, the characterization of its content belongs, as is natural, to the courts, the procedural act by which it is recorded being only the final criminal decision. As such, the moment of his birth will not be considered *ex nunc*, i.e. being the same as the moment of finding, but *ex tunc*, i.e. simultaneously with the moment of committing the crime.

Consequently, even in the event of a final criminal decision of acquittal, given the idea of non-existence of the criminal legal relationship of conflict, for example, in case of intervention in a case that prevents the crime, such as self-defense, the finding of that non-existence will be made *ex tunc*, i.e. taking into account the time of the alleged crime.

In the hypothesis of finding the criminal legal relationship of conflict through a final criminal decision, the criminal process ceases, following the stage of execution of the sanction, which is carried out within specific reports of criminal enforcement law.

It can be stated that most of the Romanian criminal doctrine¹², starting from the premises according to which all the norms of criminal law are transposed by creating legal relations, and that otherwise "the normative character and the regulatory function they has criminal law in disciplining social conduct"¹³, reaches the thesis according to which there is a criminal legal relationship of compliance, this being an expression, a form of dynamic manifestation of social defense relations emanating from the criminal law rule since its entry in force.

In justifying this opinion, it is argued that "it is difficult to admit that there could be criminal legal relations of conflict or contradiction that are not preceded by relations of cooperation or

¹¹ C-tin Mitrache, Cristian Mitrache, *Romanian criminal law. The general part, the ninth edition revised and added, according to the New Criminal Code*, Universul Juridic Publishing House, Bucharest, 2013, p. 39.

¹² See: C. Bulai, *op. cit.*, 1997, pp. 60-61; Gh. Nistoreanu, *The criminal legal relationship (general notions)* in N. Dobrinoiu, Gh. Molnar, I. Pascu, Al. Boroii, I. Molnar, V. Lazăr, *Criminal law - the general part*, Europa - Nova Publishing House, Bucharest, 1999, pp. 87- 92; St. Daneş, *Criminal law - general part*, Sylvi Publishing House, Bucharest, 2001, pp. 40-41; I. Pascu, *Criminal law - general part*, Europa Nova Publishing House, Bucharest, 2001, pp. 111-114.

¹³ C. Bulai, *op. cit.*, p. 57.

compliance"¹⁴. If the above argument were reduced to absurdity, it was argued¹⁵ that the possibility of initiating a legal relationship as a result of a breach of an extrajudicial obligation could be accepted. Thus, C. Bulai claims¹⁶ that the criminal legal conflict report comes from the transformation of the criminal compliance report, which occurs as a result of committing a crime of a certain subject.

Another part of the Romanian criminal doctrine¹⁷ claims that in criminal law there would be no so-called legal compliance report, because the realization of the criminal law order, by voluntarily observing the norms of criminal law, takes place without the creation of criminal legal relations, and the fulfillment by the recipients of the criminal law of the duty not to commit deeds prohibited by the criminal law takes place outside any legal relations.

In the motivation of this point of view it was stated that the nature of compliance must be sought in the specifics of prohibitive rules, such as most rules of criminal law, which is achieved, given the binding nature of these legal rules, by the simple inactivity of their recipients, and not as a result. the existence of legal compliance reports.

I consider that the second opinion brings an additional argument, in terms of science, criminal law and is sound in relation to the objective social reality, which even the science of criminal law can not ignore.

And yet, I consider that the opinion of the non-existence of a criminal legal relationship of compliance was not sufficiently motivated, and the phrase "criminal legal relationship of compliance" did not sufficiently highlight all the shortcomings.

Of course, the entry into force of a criminal law rule does not lead instantly and compulsorily to the birth of a legal compliance report, as some local authors argue when trying to argue the concept of legal compliance report, but only the fundamental premise of a report criminal law. However, in order for that criminal legal relationship to be born, in addition to the existence of the activity of the criminal legal norm, there must be a material activity separate from the legal norm, but which is incriminated by it, or a state of omission prohibited by the criminal norm must appear operative.

At the same time, I mention like the theorist N. Popa,¹⁸ the fact that "prohibitive norms, by their essence, defend and influence social relations through the method of imposing abstentions from committing deeds that endanger the rule of law, and the purpose of these norms, the task their fundamental purpose is not, therefore, the creation of legal relations, but the abstention of its addressees from committing acts that could harm the rights and interests of other natural or legal persons".

Approaching the legal reality of prohibitive norms from such a perspective, we do not claim that on the basis of such norms a criminal legal relationship could not appear, but only that at the time of such a report (which can only be constraining), the purpose (purpose) of the prohibitive legal norm was not achieved, perfect, and the appearance of the coercive legal relationship is the exclusive result of the non-observance of the norm, of the violation of the interdiction.

We believe that this was also the purpose of the legislator when he enacted the prohibitive or onerous criminal norm, aiming at achieving the purpose of the norm, not by creating legal relationships of compliance, as assessed by part of the criminal doctrine, but by respecting the prescribed conduct, abstention. to the prohibited actions or to execute the actions imposed by the operative norms, as a result of the obligatory character of the activity of such norms.

Likewise, we consider that there can be no legal relationship of compliance in the field of criminal law and due to the fact that such a report should include all people around the world, because foreign citizens must comply with criminal rules enacted by the Romanian state and on the basis of which the legal compliance reports appear. If we were to follow consistently the point of view that

¹⁴ Idem.

¹⁵ Idem.

¹⁶ Idem.

¹⁷ See: L. Biro, M. Basarab, *Criminal Law Course of the R.P.R. The general part*, Didactic and Pedagogical Publishing House, Bucharest, p. 35; D. Pavel, *Theoretical considerations in connection with the criminal law report*, in „New Justice”, no. 9/1966, p. 44, L. Barac, *Criminal norm and legal relationship on criminal law*, „Revista de Drept Public”, no. 1, 1999. pp. 117-120.

¹⁸ See: N. Popa, *General Theory of Law*, Actami Publishing House, Bucharest, 1999, p. 291.

supports the existence in criminal law of a legal relationship of compliance, it would mean that even the most distant being on earth, who knows neither the existence nor the content of the Romanian criminal norms, should comply with them and not to commit crimes abroad against the security of the Romanian state, such as, for example, espionage, or any crime of serious bodily injury or murder of a Romanian citizen. This conclusion to which the concept of compliance legal criminal report refers us is a legal imagination making disappear, any legal difference between the rule of criminal law and the legal relationship.

Even if we accept the existence of a report of compliance in criminal law, it would not allow the report to be qualified as legal, except in an improper sense, because the power to impose precepts under the threat of a criminal sanction is an attribute of sovereignty and not a right subjectively, and the obligation to respect the criminal precepts is only an aspect of the general duty to submit the recipients of the criminal norms before the state authority that issued them¹⁹.

The concept of "criminal legal relationship of compliance" is also debatable in connection with its elements; thus, the object of this type of report would have given the attitude of compliance of the addressees of the legal norm, without appearing any action to which the active subject would have been entitled, although the object of any legal relationship, if it exists, must consist of the conduct of each party. As such, there can be no object of a legal relationship in which the state as an active subject to stand in a passive state of pure expectation, without doing anything concrete.

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20. V. Manzini, *Trattato di diritto penale italiano*, volume primo, Torino, 1933.

¹⁹ See: V. Manzini, *Trattato di diritto penale italiano*, volume primo, Torino, 1933, p. 76.