The object of criminal law

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Abstract

In current criminal law doctrine, the prevailing opinion is that criminal law regulates both the criminal offence and the punishment. Moreover, this opinion coexists with another, according to which criminal law regulates a subjective right of the state to punish and therefore generates a "legal relationship" between the state and the offender. Such opinions are, however, fallacious and, in order to clarify the matter, the author provides an insight through the philosophy of law, helping her highlight several aspects, such as: the fact that the sanction is not a juridical (legal) norm element; the fact that any juridical (legal) norm comprises a precept and a hypothesis; the fact that two vast categories of juridical (legal) norms can be distinguished, namely "determining norms", which regulate obligations, and "sanctioning norms" (coercive ones), regulating sanctions etc. Next, by analysing the criminal provisions, from this perspective, the author formulates five conclusions, as follows: the fact that there is no "subjective right" to punishment; that fact that a criminal offence is not "regulated" (legislated), but forbidden by the law; the fact that the object of criminal law has to be determined starting from general criminal norms instead of incriminating norms; the fact that criminal law is self-regulating (it sets forth the scope and content of criminal laws); the fact that the punishment is the fundamental notion in any criminal law.

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1. Preliminary explanations

The object of criminal law is still uncertain.

It was initially believed that this law branch regulates punishments, which gave it the designation of "punishments law" (*peinliches Recht*)[2]. Over time, however, other opinions emerged: first, that criminal law regulates a subjective right of the state to punish (*jus puniendi*)[3]; then, that criminal law regulates criminal offences as well[4], not just the "punitive reaction"[5] (the punishments and other

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[2] Franz von Liszt, *Traité de droit pénal allemand*, Paris, V.Giard & E. Briere, 1911, p.1.

[3] Reinhard Frank, *Die Wolffsche Strafrechtsphilosophie*, 1887, p.22 – quote from Fr. Liszt, *op. cit.*, p.1.

[4] Ioan Tanoviceanu, *Tratat de drept şi procedură penală,* vol. I, Bucharest, "Curierul Judiciar" Printing House, 1924, p.13.

[5] René Garraud, *Précis de droit criminel*, Paris, Librairie de la société du Recueil Sirey, 1909, p.1; Vintilă Dongoroz, *Drept penal*, Bucharest, "Tirajul" Institute for Graphic Arts, 1939, p.23.

criminal law sanctions); and, more recently, that criminal law exclusively regulates criminal offences[6].

Nevertheless, the criminal law doctrine has never highlighted the fact that these opinions are contradictory, which allowed them to coexist. In this regard, we may underline the fact that, in certain authors' opinion[7], the notion of *criminal law* may be understood both objectively, as a collection of norms regulating criminal offences and punishments, and subjectively, as a subjective right of the state to punish. Or, we may notice that, as other authors see it[8], this branch of law may be equally called "penal law" (from the Latin term "poena" – "punishment") and "criminal law" (from the Latin term "crimen" - „criminal offence") and, moreover, that these labels "fail to fully cover the content of the branch they designate", as it regulates "criminal liability", as well[9].

Undoubtedly, the idea that criminal law has various regulatory areas is false, merely being a consequence of the fact that, in determining the object of criminal law, the criminal law doctrine starts from a particular content of incrimination provisions and, ultimately, from a particular structure of the juridical norm, which is erroneous in itself.

However, in order to clarify this matter, we have to turn our attention to the general theory of juridical norms.

2. Legal norm structure

The authors of general theory of law share different opinions on the structure of a legal (juridical) norm. In certain doctrines (for example, the Russian doctrine or the current Romanian doctrine) the prevailing opinion[10] is that any juridical norm displays a tripartite structure, comprising a *hypothesis*, a *disposition* (*precept*) and a *sanction*, whereas other doctrines (for example, the Italian doctrine), the predominant opinion[11] is that any juridical norm displays as a bipartite structure,

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[6] Giovanni Fiandaca, Enzo Musco, *Diritto penale. Parte generale*, Bologna, Zanichelli Editore, 1995 (terza edizione), p.3; Philippe Conte, Patrick Maistre du Chambon, *Droit pénal général*, Paris, Éditions Dalloz, Armand Colin, 2000, p.10 et al.

[7] V. Dongoroz, *op. cit.*, pp.23-24; Constantin Mitrache, Cristian Mitrache, *Drept penal roman. Partea generală*, Bucharest, Universul Juridic Publishing House, 2014, p.23.

[8] Maria Zolyneak, Maria Ioana Michinici, *Drept penal. Partea generală*, Iași, Chemarea Foundation Publishing House, 1999, pp.7-8.

[9] *Idem*, p. 8.

[10] *Legal Norm* (article from *The Great Soviet Encyclopedia*, 1979) - document accessible online at https://encyclopedia2.thefreedictionary.com/Legal+Norm; along the same lines, see Gheorghe Mihai, *Teoria dreptului*, Bucharest, All Beck Publishing House, 2004, p.66; Mihai Bădescu, *Teoria generală a dreptului*, Bucharest, Universul Juridic Publishing House, 2004, p. 166; Oleg Pantea, *Note de cur*s, Chișinău, 2013, p.36 – document accessible online at http://www.usem.md/uploads/files/Note_de_curs_drept_ciclul_1/001_Teoria_generală_a_dreptului.pdf (as at 20.03.2019).

[11] *Il diritto e la norma giuridica* - document accessible online at http://www.simonescuola.it/areadocenti/s339/Lezione%201.pdf (as at 20.03.2019).

comprising a *precept* (*praeceptum legis*), which "disciplines the action"[12], and a *sanction* (*sanctio legis*)[13], which "disciplines the reaction".

Still, if we take an attentive look at the works in law philosophy, we notice here that a completely different opinion on the legal norm structure prevails, even if this opinion is not explicitly formulated, but can only be inferred.

In this regard, three observations may be made.

Firstly, we can see that, in law philosophy authors' conception, *imperativeness* is an essential feature of juridical norms, based on which they distinguish between *primary norms* and *secondary norms*[14], acknowledging that the former are standalone norms which directly set forth a rule of conduct, whereas the latter are derived norms that acquire meaning strictly in relation to a primary norm, which they clarify or, as the case may be, the scope of which they cancel or alter.

Secondly, we can see that, in law philosophy authors' conception, any *precept* (*legal commandment* or *imperative*) is "subordinated to the presence of certain elements or conditions in fact, provided by the norm, which come into force only when the requirements set by it are met"[15]. As professor Hans Kelsen[16] stated, even the fundamental interdictions ("thou shalt not kill", "thou shalt not steal", etc.) are valid only under certain conditions, very clearly delimited; conversely, under other conditions, as clearly delimited, killing or stealing etc. is no longer forbidden. In other words, these authors see that, in law, there are no unconditional (categorical) precepts, lacking a hypothesis, which also highlights the reason why they define the legal norm as a "hypothetic imperative"[17] or a "conditional imperative"[18].

Lastly, we can still see that, in conception of these authors, the sanction is not an element of the norm, but a "material act"[19], a "coercive act"[20] that is exercised in the name of the state and which must be distinguished from the corresponding norm, which authorizes this act. As professor Djuvara[21] stated, "the sanction can only be the act by which we obtain the forced execution of an obligation, which is not done voluntarly"; therefore, it should not be confused with the legal or conventional provisions which impose its application (a punishment, for instance, is a concrete, material act which has to be distinguished from the legal provision imposing its application).

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[12]V. Dongoroz, *op.cit*., p.8.

[13] *La sanzione giuridica* - document accessible online at https://it.wikiversity.org/ wiki/La_sanzione_giuridica (as at 20.03.2019).

[14]Giorgio Del Vecchio, *Lecţii de filosofie juridică*, Europa Nova Publishing House, 1995, p.212; *Herbert Hart: norme primarie e secondarie* – document accessible online at https:// www.tesionline.it/ appunto/978/87/ Herbert_Hart%3A_ norme_primarie _e_norme secondarie; *H.L.A. Hart* - document accessible online at https:// es.wikipedia.org/ wiki/ H._L._A._Hart (as at 20.03.2019).

[15]G. Del Vecchio, *op. cit.*, p.214.

[16]Hans Kelsen, *Doctrina pură a dreptului*, Bucharest, Humanitas Publishing House, 2000, p.134.

[17]*Idem*, p.215.

[18]*Idem*, p.214.

[19]Mircea Djuvara, *Teoria generală a dreptului*, All Publishing House, Bucharest, 1995, p.305.

[20]H. Kelsen, *op. cit.*, p.142.

[21]M. Djuvara, *op. cit.*, p.305.

Thus, if we keep such considerations in mind, we have to conclude, with other authors[22], that any legal norm comprises two elements, namely a *precept*, which sets forth the rule of conduct, and a *hypothesis*, which sets the conditions for activating the precept (the hypothesis indicates when, under which conditions, the rule provided by the precept comes into play).

3. Determining norms and sanctioning norms

Another observation to be made is that law philosophy authors classify legal norms, in relation to their regulatory goal, into two major categories: the first category comprises *determining norms* (*cohabitation norms* or *coexistence norms*[23]), which regulate *obligations* and jointly form *determining (perceptive) law*[24]; the second category comprises *sanctioning (coercive) norms*, which regulate sanctions and jointly form *penalty (coercive) law*.

Unfortunately, however, law philosophy authors have not sufficiently clarified the link between determining and sanctioning norms, which has generously endorsed the idea that the sanction might be an element of the legal norm.

One such reproach can address, especially, to professor Hans Kelsen, who stated, on the one hand, that the determining norm and the sanctioning (coercive) one are not independent, but "essentially interconnected"[25], and on the other hand, he stated the contrary, namely that the sanctioning (coercive) norm is independent. Starting from the remark that «the "thou shalt not kill" norm is useless in the presence of the norm according to which "he who kills shall be punished"»[26], professor Kelsen inferred that "the general norm which (...) stipulates the coercive act is an independent legal norm"[27] – which has led to the erroneous opinion that the legal norm would comprise two legal imperatives, namely a *secondary imperative*, called *precept*, which sets forth the rule of conduct, and a *primary imperative*, called *sanction*, which sets forth the sanctioning rule.

For that reason, in order to counter this opinion, we need to clear up two aspects, which are: on the one hand, the fact that the determining and the sanctioning norms are *primary norms*, which establishing, directly, rules of social behaviour; on the other hand, the fact that neither of those norms has autonomy and can not exist without the other.

The idea that determining and sanctioning norms are *primary norms* is highlighted by the very criterion underpinning the distinction between them, that of the regulatory goal: determining norms regulate *obligations* which, however plenty

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[22] Henri Motulsky, *Principes d'une réalisation méthodique du droit privé* (*La théorie des éléments générateurs des droits subjectifs*), Paris, Sirey, 1948, p.18 (Dalloz Publishing House reissued this work in 2002).

[23] G. Del Vecchio, *op. cit.*, p.206.

[24] M .Djuvara, *op. cit.*, pp.43-44; H. Kelsen, *op. cit.*, p.76.

[25] H. Kelsen, *op. cit.*, p.76.

[26] *Idem*, p.77.

[27] *Idem*, p.79.

they might be, ultimately come down to not harming anyone (*neminem laedere*); sanctioning norms regulate *sanctions* (the coercive acts), which equally ultimately come down to a social conduct rule, one which states that the "culprits" (those who disregard their obligations) must be held accountable and bear the consequences.

However, in order to clarify the fact that neither of these two norms has autonomy and can not stand alone, formulating new observations becomes necessary.

Firstly, we have to observe that no sanctioning norm has an intrinsic raison d'être. A norm of this nature is only justified as long as a determining norm, which it protects, exists. As countless authors28 have remarked, it is inconceivable to have a sanctioning norm lacking the "purpose of protection" (or "purpose of control"), which does not guarantee the respect of a determining norm.

Secondly, we have to observe that a determining norm should never be mistaken for a sanctioning norm, which is why a segment of the criminal law doctrine wrongfully analyses the determining norm as an element of the incrimination norm. It is true that explicitly stating the determining norm is pointless so long as it may be inferred from the sanctioning norm, which always is (must be) expressly provided by the law. Still, this communication rule only emphasizes the close connection between the two norms and nothing of the derived (secondary) nature of the determining norm. Stating the contrary means disregarding both the fact that the determining norm has its own hypothesis and precept ("thou shalt not kill", „thou shalt not steal", etc.) and the fact that this precept has logical priority in relation to the precept of sanctioning norm, which invariably entails a "reaction" (a "sanction") against the culprits, against those who disregard the determining norm precept – for example, the incrimination norm precept ("is punishable") invariably entails a punishment against those who infringed on their obligation.

Thirdly, we have to observe that no determining norm may be regarded as "juridical" („legal") in the absence of the sanctioning norm, which sets the applicable sanction in case of non-compliance. Even if, unlike the sanctioning norm, the determining norm has an intrinsic raison d'être, the latter will have any juridical relevance as long as it exists alone. It will acquire such relevance only upon the emergence of a sanctioning norm which protects it and imposes the sanction upon those who infringe upon it – this is also what led to the definition of law as "a coercive order"[29] or the statement[30] that only the *coerciveness feature*, which is an essential feature of law, allows us to discern between juridical norms and other divisions of norms. We will admit that the idea of sanction is implicitly comprised in any determining norm, an outcome of the fact that any obligation is simultaneously a right, and any right lends to its holder, among other, the prerogative to defend himself, to resist his violation. Nevertheless, it is obvious that, in a modern state, sanctions can no longer be applied at random and, thus, have to be strictly

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[28] Claus Roxin, *Strafrecht. Allgemeine Teil*, 2 Auflage, München, Verlag C.H. Beck, 1994, p.321; Andreas Hoyer, *Strafrecht. Allgemeine Teil*, Berlin, Luchterhand, 1996, p.13; Hans-Heinrich Jescheck, *Lehrbuch des Strafrechts*. *Allgemeiner Teil*, Berlin, Duncker und Humblot, 1988, p.259.

[29] H. Kelsen, *op. cit.*, p.52.

[30] G. Del Vecchio, *op. cit.*, p.218.

regulated, which leads to the fact that the determining and sanctioning norms become interdependent.

Fourthly, we have to observe that the "legal norm" and "rule of law" phrases are not at all synonymous. Contrary to the general view, the phrase "rule of law" does not denote a juridical norm, but the logical unity of two legal norms, one of which will determine, while the other will sanction. Even if, at first sight, these two norms appear to be independent (for they are usually stipulated separately), they are, nevertheless, inseparable from a logical standpoint. From this perspective, one cannot conceive a determining norm lacking a corresponding sanctioning norm since, only together will the two norms form a *rule of law*, thus highlighting the fact that law also has a *coercive nature*, by which it clearly differentiates itself from morals.

Lastly, we should also observe the fact that all the other categories of norms are *derived (secondary) norms*, which are only intended to state the content of the primary norms or, as the case may be, alter or dissolve their scope. Moreover, it has to be reminded that there are, essentially, three categories of such norms (derived, secondary), namely: *explanatory (declarative) norms*[31], which define certain words or phrases, imposing that they be understood in a particular way – for example, the norm defining the attempt is a derived (secondary) norm which only clarifies the norm the imposes the punishment for said attempt, indicating how this notion should be understood; *permissive (derogative) norms*, which alter (restrict or extend) the scope of a primary norm – for example, the scope of the norm which incriminates, over certain periods, the sale of alcoholic beverages may be limited by means of another norm, according to which the sale of alcoholic beverages is not punishable "to the extent to which it is conducted with the authorities' consent"[32]; and *repealing norms*, which equally lack their own juridical relevance, acquiring instead such relevance only in relation to another norm which they dissolve.

4. The content of incriminating norms

Regarding the content of incrimination norms, opinions are, once again, divided: one opinion considers that the incrimination norm *precept* comprises the "implied rule of conduct" [33], whereas the *sanction* includes the "punishment provision" (the penalty); a different opinion states that the incrimination norm *precept* regulates the criminal offence, whereas the *sanction* of this norm regulates the punishment.

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[31] *Idem*, p.212.

[32] H. Kelsen, p.77.

[33] *Norma penale - document accessible online at* https://it.wikipedia.org/ wiki/ Norma_penale (as at 29.03.2019); *Il diritto e la norma giuridica* (p.4) - document accessible online at http://www.simonescuola.it/areadocenti/s339/Lezione%201.pdf (as at 29.03.2019); along the same lines, see Nicolae T. Buzea, *Infracțiunea penală și culpabilitatea* (Criminal Offence and Culpability), Iași, the Faculty of Law, 1944, p.1.

In the Romanian doctrine, the latter opinion has been supported by both professor Ioan Tanoviceanu[34] and professor Vintilă Dongoroz, who considered it even as a particularity (specificity) of incriminating norms. In that respect, he showed[35] that, unlike the precept of non-criminal norms, which explicitly provides the rule of conduct (the *legal act*), subsequent to which the corresponding illegal act would be determined by way of inference, the precept of incrimination norms explicitly provides the facts contrary to the rule of conduct (the *illegal act*), subsequent to which the rule of conduct would be determined by way of inference. Moreover, he considered that, in relation to the two elements comprised in the incrimination norm, we may envisage two divisions of criminal law, namely: an *incriminating criminal law*[36], which sets forth the actions for which punishment is applied; and a *sanctioning criminal law*[37], which sets forth the punishments applicable to these actions.

Both of these opinions are, however, incorrect. To that end, we have already shown that the *sanction* is not an element of the norm and any legal norm is a "conditional imperative", meaning it exclusively comprises a *precept* and a *hypothesis*.

Still, in order to fully refute such opinions, other further observations are in order.

Firstly, we need to realise the nonsense of claiming that the incriminating norm precept sets forth the "implied rule of conduct", as one may infer from it that this norm only comprises a sanction. Thus, if we start from the premise that the rule of conduct is "implied" (therefore, not explicitly provided), we have to conclude that the precept is empty, void of content and the rule of conduct is, in reality, inferred from the "sanction", which states both the action deemed a criminal offence and the applicable punishment.

Secondly, we have to realise that claiming that the incriminating norm regulates both the criminal offence and the punishment is the same as claiming that this norm comprises two precepts, each with its own distinctive regulatory goal, making for another nonsense. Since we accept the idea that a legal norm has a single precept (imperative, commandment), we implicitly admit that any legal norm has a single regulatory goal, which consequently dismisses the existence of two regulatory goals embedded in the incriminating norm. As a matter of fact, the language rules themselves make us acknowledge as a correct statement that the incriminating norm regulates the punishment and discard the idea that the incriminating norm "regulates" the criminal offence[38]. If we consider the meaning of the verb "to regulate" (to impose, to order, to legalize), we have to conclude that "the criminal law regulates

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[34] I. Tanoviceanu, *op. cit.*, pp.13, 258 etc.

[35] V. Dongoroz, *op. cit.*, pp.15-16.

[36] *Idem*, p.33.

[37] *Idem*, p.33.

[38] Giovanni Fiandaca, Enzo Musco, *Diritto penale. Parte generale*, Bologna, Zanichelli Editore, 1995 (terza edizione), p.3; Philippe Conte, Patrick Maistre du Chambon, *Droit pénal général*, Paris, Éditions Dalloz, Armand Colin, 2000, p.10 et al.

punishments" is an accurate statement, since the punishment truly is a *lawful act*, *imposed* or *ordered* by this law, in particular and precisely determined conditions; however, stating that "the criminal law regulates criminal offences" is completely flawed, clearly knowing for a fact that the penal law does not order people to commit criminal offences (*unlawful acts*), but actually forbid them under the threat of the most severe legal sanction, which is the punishment.

Thirdly, we have to realise the equally meaningless claim that the incrimination norm *precept* sets forth the "criminal offence concept and content"[39], whereas the *sanction* "consists of a punishment ruled against the person who committed the criminal and unlawful act"[40]. Keeping in mind that the *sanction* is not an element of the norm and, therefore, we need to distinguish between *penalty* (the incrimination norm precept) and *punishment*, which is a concrete (material) act, we may easily understand how such ideas came to exist, merely as an outcome of the fact that general theory of law does not differentiate between *determining norms*, whose precepts set forth obligations, and *sanctioning norms*, whose precepts set forth sanctions, and it inevitably ends up assigning an erroneous structure to the juridical (legal) norm. We find it obvious that, due to this precise reason, the juridical doctrine has not realised that the part of the norm it designates as "sanction" is, in fact, a precept (more specifically, a precept specific to the sanctioning norms), or that the description of the unlawful act is not included in the precept, but in the hypothesis structure. Consequently, two remarks become necessary: the first remark is that, within the incrimination norm, the precept invariably sets forth a special punishing rule it uses to indicate not only the sanction type (the punishment), but also the nature of the punishment (imprisonment, fine, etc.) and its special limits (for example, imprisonment for 10 to 20 years); the second remark is that the criminal offence definition (theft, escape, etc.) sets forth a single condition, the first one the special punishing rule coming into force depends upon, clearly showing that this definition stays outside the precept and inside the *hypothesis* structure.

Fourthly, we have to realise that, in any sanctioning norm, the *precept* sets forth the sanctioning rule, whereas the *hypothesis* sets forth the conditions to enable this rule, meaning that, in any sanctioning norm, the *hypothesis* also shows (has to show) the object of the *unlawful act*, which triggers the application of the special sanctioning rule. We understand that we cannot infer from the above any particular feature of the incrimination norms, as professor Dongoroz claimed. Under these conditions, we may claim, at most, that the incriminating norm, with its structure, asserts itself as a prototype of sanctioning norms, which also explains the fact that the criminal law principles (the principle of legality, the principle of culpability, the individualization of sanctions principle etc) have become, over time, general principles, common to all forms of juridical liability, from which one can only derogate in exceptional cases, expressly and narrowly provided by the law.

[39] I. Tanoviceanu, *op. cit.*, p. 258.
[40] V. Dongoroz, *op. cit.*, p. 16.

The fifth observation to be made is that, when a legal provision comprises both a sanctioning precept and a description of the unlawful act, from which one may easily infer the obligation infringed upon by the agent, that provision can no longer be deemed a "sanctioning norm", but designated a "rule of law", given that it sets forth not only the sanctioning norm (the special sanctioning rule), but also the determining norm (the obligation). In other words, we have to observe that incrimination provisions are not norms, but rules of law. As we have mentioned before[41], incrimination provisions have to be considered "rules of law", as they condense, in a single formula, both the determining norm, which is implied and intended for all citizens („thou shalt not kill", „thou shalt not steal", etc.), and the sanctioning (punitive) norm, expressly provided and intended for the judges, imposing them to rule a certain punishment if the determining norm is disregarded. This aspect has already been notified by the Italian criminal law authors (Carrara, Impallomeni, Rocco, Vanini et al.), who were the first to claim that incrimination provisions have a double normative nature, as in they simultaneously set forth two "hypothetical imperatives", one of which determines (sets forth the obligation) and the other sanctions (sets forth the sanction). Then again, this particular fact explains why mankind's early laws exclusively comprised incrimination provisions. The need to expressly stipulate determining norms emerged much later, when legal sanctions became more diverse, and breaching a norm of that nature no longer entailed a punishment, but another legal sanction.

The sixth observation to be made is that the term "incrimination" is wrongfully used to exclusively designate the definition of criminal offence, meaning the incriminating norm hypothesis, thus excluding the most significant element of this norm, which is the precept (the penalty). An error shall also be deemed the legislative establishment of the "Incrimination legality" phrase, which was entered as a marginal designation of the first article in the new Romanian Penal Code and unduly restricts the significance of the principle of legality, the inference from it being that this principle exclusively claims that incrimination norms should be stipulated in a "law", in the form of a normative issued by the body with the competence to legislate (the Parliament) and bearing a higher juridical power. However, such a significance does not concur with either the text entered under this designation or the provisions of art. 7 in the European Convention of Human Rights, related to the *legality of criminal offences and punishments*[42], claiming, on the one hand, that no one should be punished for a deed which was not stipulated as a criminal offence at the time it was committed and, on the other hand, that no one should receive a punishment more severe than the one provided by the law at the time the crime was committed.

Lastly, we reach our seventh observation, which states that any incrimination norm appears as a more detailed repetition of the general norm stipulating that "the

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[41] M. K. Guiu, *An approach to criminal law characteristics*, "Wulfenia Journal", Klagenfurt (Austria), vol. 20, issue 12, Dec. 2013, pp.124-134; M. K. Guiu, *Structura normelor penale*, in "Law" Magazine, no. 12/2006, pp.165-173.

[42] *Principe de légalité en droit pénal* – document accessible online at https://fr.wikipedia.org/wiki/Principe_de_l%C3%A9 galit%C3%A9_en_droit_p%C3%A9nal (as at 05.04.2019).

criminal offence is punishable" or, in other words, that "the criminal offence is the sole basis for criminal liability" [art. 15 par. (2) in the Romanian Penal Code in force]. However, this centuries old general norm fails to match the truth and ought to be replaced with "the offender is punishable", as shown by the mere fact that a punishment is not ruled against a criminal offence, but against an offender. Moreover, taking a closer look, it becomes evident that, by law, the agent cannot be labelled an "offender" simply by virtue of the fact that they committed an act deemed, according to the law, a criminal offence. On the contrary, to be so labelled, they also have to meet all those personal requirements (age, judgment, free will, etc.) to be inferred from the regulation of the so-called "non-culpability causes" ("irresponsibility" or "non-imputability" causes). And, in addition to the above, we see that, through general criminal norms, the incrimination norm (the special punishing rule) may be extended, eliminated or amended. In other words, we see that, in relation to the general criminal norms, incrimination norms are no longer standalone, appearing instead as derived (subsidiary) norms, with a lower juridical value. From this one may conclude that the criminal law doctrine wrongfully continues to put an emphasis on the incrimination norm, particularly on the definition of criminal offence, neglecting both the fact that any incrimination norm must be subordinated to the general criminal norms, acting as criminal law principles, and the fact that, to date, no consensus has been reached concerning the content of the criminal law general corpus and, in particular, the general conditions for exercising the punishment. In that respect, we only have to realise that no positive legislation explicitly indicates the conditions or general rules of punishment.

5. The object of criminal law

Based on the previously listed considerations, we may draw up several conclusions on the object of criminal law.

The first conclusion is that a segment of the criminal law doctrine wrongfully claims that criminal law regulates a subjective right of the state to punish (*jus puniendi*) or, in other words, it generates certain "conflict-related juridical relations"[43] in which the state is subjectively entitled to punish, and the offender, by way of correlation, is bound to bear the punishment or "other criminal-law measures"[44]. Against this idea we have already shown that criminal law is, by excellence, *sanctioning (coercive) law*, and not *determining (perceptive) law*, which sets out obligations and correlative rights. However, in this context, we ought to recall a number of other aspects, such as: a) the fact that, in the sanctioning law, the state never acts as a holder of rights and obligations (subject of law), appearing exclusively as a representative of the people, a supreme authority, purposely created to organise social defence against any attacks, be they domestic or foreign; b) the

[43] Constantin Mitrache, Cristian Mitrache, *op. cit.*, p.62; Narcis Giurgiu, *Drept penal general*, Iași, Cantes Publishing House, 2000, pp. 61-65; M. Zolyneak, M. I. Michinici, *op. cit.*, p.45.
[44] Matei Basarab, *Drept penal* (*Partea generală*), Iași, Chemarea Publishing House, 1996, p. 23.

fact that juridical sanctions (coercive acts) may only be ruled and exercised by certain bodies of the state, for which the law does acknowledge "competence" in that respect, but no "subjective right" whatsoever, meaning that the criminal court judge possesses the "competence", but not the "subjective right" (the capacity or power) to punish; c) the fact that the judicial function of the state, just as its executive function, "is exercised in subordination to the legislative one"[45] (the fundamental function of the people organised as a state is the legislative function, set to create legal order), meaning that the criminal court judge may exercise their duties ("competence") strictly under the conditions expressly provided by the law; d) the fact that the notion of "subjective right" is a notion specific to civil law, which may only be used in relation to the legal relationships which are specific to this law branch and feature placing the parties (the subjects) on equal positions, but never in relation to the authoritative legal relationships (we shall restate that only the notion of "competence" may be used in reference to the latter relationships); e) the fact that civil law clearly distinguishes between a "subjective right" and a "juridical sanction" (invalidity, prescription, indemnification, etc.), meaning that we may not analyse any juridical sanction as a "subjective right". Moreover, we should mention that professor Enrico Ferri has for a long time criticised the tendency of German and Neo-classical Italian authors (Manzini, Lucchini et al.) to analyse criminal offences as "juridical relationships", designating it "a pure exercise of non-productive dialectics"[46], a "juridical microscopy"[47] or "a theoretical sky where the practice of law is stifling" and where concepts are unrelated to real life[48].

The second conclusion is that, still erroneously, another segment of the criminal law doctrine claims that criminal law "regulates" (legalises) criminal offences. The mere fact that any criminal offence entails a punishment, and not at all a reward, clearly indicates the false nature of the claim, as law does not legalise, but forbids the crime. Additionally, as resulted from our previous opinions, this idea is but a consequence of the fact that general theory of law assigns a flawed content to the juridical norm, considering that it also includes a "sanction" (*sanctio legis*), when, in reality, any juridical norm exclusively comprises a *precept* and a *hypothesis.* Thus, if we start from this premise, we may easily ascertain that, in the incrimination norm, the precept invariably sets forth a *special punishment rule*, applicable to a particular, well defined crime (murder, theft, etc.), whereas the definition of crime (the "criminal unlawfulness" description) is present in the structure of the second element of the incrimination norm, which is the *hypothesis*: as per the definition of the criminal offence, the incrimination norm sets forth the first condition that enables the precept (the special punishment rule), in the form of committing a *typical act* entirely falling under the legal definition of a particular crime.

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[45] G. Del Vecchio, *op. cit.*, p.280.

[46] Enrico Ferri, *Principii de drept criminal*, Bucharest, "Revista Positivă Penală" Publishing House, 1940, p. 54.

[47] *Idem*, p. 66.

[48] *Idem*, p. 55.

Our third conclusion is that, in establishing the object of criminal law, one must not start from the content of incrimination norms, but from the content of general criminal norms. This aspect is even mandatory if we keep in mind that incrimination norms may never derogate from general criminal norms, the reason, which we will restate, being that they are derived (subsidiary) norms, with lower juridical value, entirely subordinated to general criminal norms acting as branch principles.

The fourth conclusion is that criminal law is self-regulating. As shown by the content of the criminal law general corpus, the regulatory goal of this law branch lies in the "criminal laws" themselves, as those that set forth general or special punishment rules. More specifically, *criminal law regulates the scope and content of the penal law.* First of all, it sets forth the scope of the penal law, indicating the principles governing its application in space, in time and in relation to individuals. Furthermore, it sets forth the content of this law, indicating the principles governing the application and exercise of punishments and the other criminal law sanctions, the system of these sanctions, as well as the various "causes" that restrict, extend, dispose of or, as the case may be, alter (mitigate or aggravate) the special punishment rules.

Lastly, the fifth conclusion is that, in any *penal law*, the basic (fundamental) notion is the notion of *punishment*, as the designation of these laws indicates. Therefore, if we start from this, we may realise numerous other highly significant aspects, such as: the completely unnatural act of granting priority, in the systematisation of the general corpora of penal codes, to the notion of *criminal offence*, which only designates a single condition, the first one, for exercising the punishment; the fact that it is equally unnatural for penal legislations not to explicitly provide the general conditions for the exercise of punishments; the fact that we ought to abandon the norm stating that "the crime is punishable" and replace it with a different general norm, stating that "the offender is punishable; the fact that the so-called "causes of non-culpability" ("irresponsibility" or "non-imputability") are, in reality, "causes that limit the scope of special punishment rules", imposing that they exclusively apply to those persons who, in addition to having committed a crime, also meet certain personal requirements (age, judgment, free will and discretion), etc.

From all of the above we may also conclude that, as long as the criminal law doctrine fails to accurately determine the regulatory goal of criminal law, it cannot truly fulfill its mission of contributing to the reform of penal legislations.

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