The Distinction between the Generic Content and the Specific Content of the Incrimination

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Abstract: This paper deals with the relation between the notion of „offence" and the notion of its „content". As the Romanian legislation defined the offence as a real act, the relation between the two can be one between a notion of gender and one of species; on the contrary, they are two independent notions.

Keywords: offence, offender, victim

In addressing the issue of the elements of the offence, most Romanian specialists in criminal law emphasize that the concepts of offense and the elements of the offence are not identical (Bulai, 1997, p. 167).

In this respect, it is shown (Bulai, 1997, p. 167) (Mitrache, 1995, p. 80) (Giurgiu, 2000, p. 127) (Boroi, 2006, p. 101) that the concept of offense sets the "essential" features of any offense, while the elements of the offense establish the "specific" features of a crime. Where is inferred that the distinction referred has as criterion the extent of the essential features: the concept of offense sets the key features common to all crimes, while the elements of the offence set the specific issues contained by a certain offence. Moreover, confirmation of this conclusion is provided by professor V. Dongoroz, who makes a very similar distinction in his book published in 1939 (Dongoroz, 1939, p. 215), namely between the "generic content" and the "specific

content" of the offense, stating that the first ("generic content") should include the common "generic" conditions (Dongoroz, 1939, p. 215), which appear as elements of the offence for all offences, while the second ("specific content") should include the "specific" conditions of certain offenses, reduced in number.

However, on a closer analysis, it appears that the many uncertainties govern this distinction.

Thus, we see, first, that this distinction is addressed in the context of incrimination issues (specific), which rises from the start, a big question. Since we start from the premise that the definitions or the elements of various offenses (the concept of species) is subject to the general definition of the offense (the concept of gender), it means that this distinction belongs to the paradigm of the offence - because, logically, the definition of the generic notion of offence should be preceded by the indication of interest (necessity) to have such a concept and, more specifically, by showing that while the specific definitions (or "elements") include only "specific" requirements, which separate an offence from the other, the general notion of crime includes "generic" requirements, which link together specific elements, bringing the great variety of crimes to a common denominator.

Then, we note that the language in use is debatable. On the one hand, one speaks of the "elements of the offence" (formula inspired by the name of Article 17 of the Romanian Penal Code), and not about the "legal requirements related to the existence of the crime" – according to the requirements of the legal science, and, on the other hand, the so-called "essential features" (that belong to the generic notion of crime) are opposed to "specific features" (specific to the elements of incrimination) - which brings about the idea that the elements of the offence would include circumstantial, accidental or non-essential, that might be missing and their absence would not lead to the lack of offense. However, such an idea is a serious mistake, because it contradicts the very principle of legality, which claims to be considered a criminal offense, only those facts that correspond fully, to a certain content of indictment, meeting all the requirements.

But in order to understand how such an idea has been reached, we must return to the distinction made by Professor V. Dongoroz, between the generic content and specific content of the crime, emphasizing the fact that he claimed that unlike the general conditions, which would appear in any indictment, the specific conditions would appear only in the content of certain crimes. Since, as the professor has shown, all conditions, both "generic", and "specific" are also "essential" conditions

(Dongoroz, 1939, p. 215), it means that the specific conditions should also be included in the content of any offence - because, in the absence an essential condition, whatever it may be, the offense would fall down. Moreover, we should note, that contrary to what the professor said, within the content of a particular crime can appear only those essential conditions that are also "specific", meaning that such an offense has its own particular configuration. In fact, any content of indictment only contains specific conditions and not generic terms.

Another fact that must be stressed here is that we cannot speak of a "generic content of the crime". The so-called "generic conditions" are actually generic terms that make up the content of the generic concept of crime - understood as an abstract legal notion, and not as a concept taken from reality. As long as, the provision of Article 17 paragraph 1, from the Romanian penal code has established a substantive definition of crime and not a legal definition ("formal") of it, it is required in order to avoid confusion, to give up the alternative name of "generic content". Using this phrase in our doctrine seems to be explained exclusively in that it is assigned a different meaning. In this respect, some authors (Bulai, 1997, p. 167) (Boroi, 2006, p. 102) argue that generic content of the offence "was used to study the contents of various crimes, referring to "the basic pattern or model of content development" (Boroi, 2006, p. 102) - which shows that, in this view, the phrase" generic content became equivalent to that of "structure of the offense" (Dongoroz, 1939, p. 210) or the "structure of the elements of the crime" (Mitrache, 1995, p. 81) (Boroi, 2006, p. 102).

Once we are here, we must also emphasize another aspect, namely that the need to establish "the structure of crime" (Dongoroz, 1939, p. 210) went from a double misunderstanding: on the one hand, the misunderstanding of what we call offense; on the other hand, the failure to understand the realities from which we start to build the concept of a crime. Regarding the notion of crime, we have already shown (Guiu, 2007, pp. 123-141), that its definition, through the provision of Article 17 paragraph 1 in the Criminal Code is wrong. You can not define the crime as a real fact (a physical act), because, thus we contradict the thesis, widely accepted today, that there are no natural offences. "The so-called natural crimes - said Professor Tanoviceanu – are not called offenses, only because they fall under the positive law. For example, homicide, theft, arson, etc are considered natural offences (*offences*, because they are incriminated by the positive law, *natural*, because by their nature they are reprobable), but if one of these offences would not fall under the positive law, it could not be called natural offence anymore but anti-social act, anything else

but not offence (Tanoviceanu, 1924, p. 988). Since we start from the idea that any offence is created by the law, we must conclude that the generic notion of offence represents, in the first place, those facts (fattispecie in Italian) or patterns which come from the incrimination elements and for which the law provides a penalty (in fact it is the penalty which obliges us to call them offences)[1] (Dongoroz, 1939, p. 209).

Taking into consideration the fact that the law has been created to be applied to the social facts (anti-social facts in our case), we have to conclude that the generic notion of offence designates, in the second place, the conformity of a real act with a pattern (included in the law).

In this regard, we note that most authors that study the general part discuss separately about "structure of the offense" (Dongoroz, 1939, p. 210), (Mitrache, 1995, p. 81) (Zolyneak & Michinici, 1999, p. 118), the "elements of the offence" (Dongoroz, 1939, p. 198), the "pre-existing conditions" (Zolyneak & Michinici, 1999, p. 119) or the "offense factors" (Mitrache, 1995, p. 82) and that, accordingly, most authors dealing with specific aspects (Guiu, 2009) divide the incrimination conditions, mainly in two categories: the preexistent conditions (which refer to the object and the subject of an offence) and constitutive conditions (which refer to the act and its two sides: the objective and the subjective one).

If we don't take into consideration the fact that, under these circumstances the analysis of the offences seems incomplete (for example, there are shown only the pre-existing conditions, not the concurrent or subsequent ones), it is necessary to notice that the separation of the preexisting conditions from the "constitutive" or "essential" is at random and unjustified. And this, because on the one hand, most of the criminal doctrine (Dongoroz & colab., 1971, p. 10) (Bulai, 1997, p. 170) (Giurgiu, 2000, pg. 129-130) limits the constitutive content ("essential") to the act of conduct – from where it would constitute the only real entity (material) around which are grouped the requirements of criminalization is the action (or "act") – but on the other hand, it continues to sustain that the criminalization requirements would also group around the object and the subjects, or even other "terms" (Dongoroz, 1939, p. 198)[2]. This creates a lot of confusion. Since it is claimed that the object and the subjects are real entities and also the requirements related to the object and the

[1] "When we talk about a crime it is understood that we talk about an act that is sanctioned by the criminal law".

[2] Besides object and subject he talks about other three concepts: the stipulation of the incriminating law, time and space, criminal sanction.

subject cannot miss from incrimination - therefore, these requirements are also essential or constitutive requirements - it becomes incomprehensible why the constitutive content was still limited to the requirements concerning the act of conduct.

While looking for an explanation we can notice another error: most often the reality area is mistaken with the normative one.

For instance, professor Tanoviceanu (Tanoviceanu, 1924, p. 370) says that "before talking about the elements of a crime" it would be necessary to have: 1) the active subject (the criminal): 2) the passive subject (the victim); 3) a material object (the human being or the thing against which the crime has been committed); 4) a legal object (the law that has been broken): 5) "an action or inaction that generates the punishable result". All these show that in his opinion all these entities are real (physical) and prior to the offence.

But, if we make a more clear analysis, we can see that he was wrong and the analysis leads to different conclusions even opposite. For example, except the action (inaction) and the material object, the above entities are, on the contrary, abstract entities, which belong to the normative paradigm; or, except the legal object, the other entities are subsequent to the offence.

It is evident, for instance, that in the real world (physical), there are not "criminals" or "active subjects", but people. Contrary to appearances, the concept of "criminal" is not taken from reality, but it is an abstract concept, which was developed with elements of law - as it has been demonstrated that, in law, "criminal" (or "active subject of the crime") can be considered only the one who meets, in addition to the requirement of having committed a crime, a number of other legal requirements and, in particular, those which form the" criminal capacity "(Antolisei, Bettiol and others), also called "general conditions of existence of an active subject (age, responsibility, freedom of will and action). Thus, the things are totally different, that is before having a criminal there has to be a crime – because first we have to establish if the act is a crime and after we have established the existence of the crime, we have to determine whether he has "criminal capacity", or if, following the requirements of the presumption of innocence, he may be already declared "criminal".

Or, it is clear that, in the real world (physical), there are "victims", but, again, just people. Contrary to appearances, the concept of "victim" (or "person injured) is not a concept taken from reality, but also a concept developed, built, which includes

some value judgments specific to the system of law – in fact the individual may be considered "victim" only if, in advance, he was recognized the legal personality (as a "person", the "subject of law" or "holder of rights and obligations"). Thus, once again, the professor was wrong, because there cannot be a victim before a crime. In fact, to speak of a "victim" is not enough to have a crime, but the crime must have broken a subjective right - because we call "victim" or "person injured" only the person, legal or physical, whose subjective right has been broken by the crime. And, because not all crimes affect the subjective rights we should conclude, contrary to those stated by Professor Tanoviceanu, that we may have a crime even in the absence of a "victim". After all, this explains why, for many crimes, the penalists speak only about "general passive subject" (the state), ignoring the very issue that the alleged" passive subject of a crime", the state, has never appeared in a criminal trial, as a "person injured" (or the "victim" of an offense).

Similarly, it seems clear that, in the real world (physical), there is no "legal object". Professor Tanoviceanu defines, quite correctly, this object as the "text of the law that has been violated" and, such a definition shows clearly that it is not about of any physical entity (for example, letters or other signs that make up the text of the law), but we talk of a rule of conduct, of a "legal imperative" and, more specifically, that " determined precept" (Guiu, 2006, pp. 165-173) (do not kill, do not steal etc.), which is implied, in any incrimination rule. However, the professor is wrong, saying that the legal subject would be prior to the crime. Once the percept is inferred in the incrimination rule (which says that the one who kills, steals etc. "is punished"), we don't talk about any pre-existing entity, but just a logical priority; only from the logical point of view the determined precept (rule of conduct) is prior to the precept of impunity (the rules of punishment). From this perspective, the offense, like any other illegal act, is an act contrary to a previous rule (hence the definition of the crime as "violation" of a pre-existing rule - although this statement is not strictly accurate, because we do not refer to a reality, but only to relation between the rules of conduct and that act or pattern). That is why today, many Western authors (Germans, Italians etc.) consider the report of the contrariety between the fact and rule of conduct as an essential feature of any offense, which they call "the feature of antijuridicity" (Antoniu, 1995, pp. 59-62) (Antoniu, 1997, p. 15) (Lica, 2007) (although "antijuridicity" far from being a specific feature of a crime is, on the contrary a common feature of all forms of illicit[1] - that is why it is necessary to say

[1] Since they haven't noticed that antijuridicity is a common feature to all illicit forms, some authors (Belei, Maurach, Roxin) make a distinction between antijuridicity (which is considered a broader

that in addition to the feature antijuridicity, an offense presents two key features that confer specificity, namely that it is a pattern, described by the law and also sanctioned with a penalty)[1].

As regarding "action or inaction" or "the material object", we have to notice that, although they belong to the reality, they do not have the same importance and cannot be understood as essential for the existence of a crime, as the professor implies.

Anyway we cannot demonstrate that the "material object" would be essential for the existence of a crime since there are many crimes that lack such an object – as the crimes against the liberties or the person dignity. Then, the effort to establish if a crime has or not a material object has brought benefits neither to the criminal science nor to practice; on the contrary, these efforts have blurred the correct understanding of the crime. For instance for homicides, the analysis of the material object has created a false impression that the crime exists only when the criminal acts directly upon the body of a victim – which explains the numerous controversies regarding where to place the acts of constraint which leads to death.

Taking into consideration the prior statements, all we have to do is to notice that the requirements of incrimination group themselves around a real entity (physical), that is the act. All the circumstances included in the incrimination rule refer to the act: the act has to belong to a certain subject (for instance a public servant – art. 215 (1) Criminal Code), has to have as a victim a certain subject (for instance a minor – art. 198 Criminal Code), has to refer to a certain thing (for instance an asset – art. 298 Criminal Code), has to be committed in a certain place (for instance in the free seas - art. 212 Criminal Code) or in a certain time (for instance war time – art. 156 Criminal Code).

That is why it is wrong to state that the requirements of incrimination may be grouped under the "criterion of the acts they refer to". The requirements of the incrimination fall exclusively under the act.

concept implying the contradiction between the act and the rule of law as a whole) and illicit (which would be a concept subordinated to antijuridicity, implying strictly the contradiction between the act and the determined precept). But this distinction comes from the wrong idea that the determined precepts would be unconditioned.

[1] In practice these features are established in the reverse order, that is, in order to call an act offence, first we have to verify that it corresponds to the fact described in the incrimination rule, and only after that we see that it is totally in contradiction with the rule of conduct.

There is still the possibility to group these requirements considering other criteria (as some authors noticed, while some of the circumstances stated in the incrimination rule refer to elements exterior to the act – like the object, the subject, the place, the result etc.; other imply characteristics – for example the norm stipulates that the act be committed "illegally" or "in bad faith").

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