The Error of Criminal Law – A Non-imputability Cause. Presentation from the Perspective of the European Criminal Law and the Romanian Criminal Law

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1. The error of law in the comparative criminal law

Over time, there have been doctrinal concerns in the field of comparative criminal law relating to the error of criminal law. Thus, there were conceptions and proposals for solutions regarding the placement of the criminal law error on the field of liability or on the field of criminal sanctions.

There were also legal opinions and solutions between the two extremes, which combined the interest of the society with the need to take into account individual human realities. These concepts and proposals for solutions are detailed in a particularly valuable work which we refer to.[1]

There were also concerns of the Romanian criminal doctrine, explained and reasoned at that time, even from the interwar period, according to which, invoking the ignorance of the criminal law constituted an exalted attitude.[2]

Depending on these doctrinal preoccupations, the legislative solutions were also enshrined in the matter of accepting or not accepting the error of criminal law, which we refer to below. For sure, both Criminal Codes and case law have equally influenced the legal literature on the error of law.

There are criminal legislations expressing the error of criminal law and its effects on criminal liability. Thus, the Norwegian Criminal Code, the Swiss Penal Code and the German Penal Code have acknowledged that the criminal law error has effects on criminal liability, being considered a cause of its exemption, according to the culpability theory. In essence, these rules are based on the lack of guilt of the author who, at the time of the deed, did not know that he was deeding unlawfully, being unable to avoid this error.

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[1] G. ANTONIU: *Vinovăția penală.* Editura Academiei Române, București, 1995. 327–337

[2] V. DONGOROZ – S. KAHANE – I. OANCEA – I. FODOR – N. ILIESCU – C. BULAI – R. STĂNOIU: *Explicații teoretice ale Codului penal român, partea generală* vol. I. Editura Academiei Române, București, 1969. 421.

The French Criminal Code regulates the error of law as a justifiable cause of exonerating criminal liability. The invincible error of criminal law is also enshrined in other criminal legislations, such as: Portuguese, Japanese etc.

Certainly, there are criminal legislations where the criminal law error has no exonerating effect (Belgian, Dutch, Spanish, etc.). However, by way of case-law, in exceptional circumstances, it was accepted that an invincible error of law may be a justifiable cause.

An interesting situation was found in the Italian criminal law, where the legal rule provided that the error of criminal law is not admissible. Thus, the Constitutional Court intervened in the text of the normative rule (Article 5 of the Italian Criminal Code), which it transformed into a provision that allows the error of criminal law, provided it is invincible. Prior to the change, it was considered that the *judge should apply the law even if it seems unfair to do so.*

Thus, the Constitutional Court ruled that the said text violates art. 27 par. 1 of the Italian Constitution, which enshrines the personal chardeeder of criminal liability, as well as the principle according to which the person who committed the offense cannot be criminally liable. The Court also considered that the principles of legality and equality had also been breached.[3]

Common law jurisprudence has allowed exonerating effects to occur if the legal text is inaccessible to the author or the text is too vague or the error is due to information received from the authority.

This presumption is enshrined in the Lebanese criminal law but sets out three exceptions to this rule: the error on a rule of extra-penal law, the three-day period after the promulgation, and the three-day period after the date of entry into the country of a foreigner. In these assumptions the error of criminal law can be invoked. This legislative solution was also shared by the Iraqi, Kuwaiti, Jordanian and UAE criminal codes.

A specific situation is found in the Egyptian Criminal Code, which does not regulate the presumption and does not allow the error of criminal law, for which reason the case-law has admitted for exceptional cases the invocation of the error of criminal law as a justifying cause.

Consequently, we find that there is currently a favorable trend for admitting the invincible criminal law error among the causes of non-imputability or justification, as the case may be, according to the specific laws of many states.

These are the arguments for which the Romanian legislator also enshrined the error of criminal law among the causes of non-imputability. Certainly, there are other considerations, to which we refer in the content of the paper, for which the present Criminal Code has shared this legislative solution.

Further we will refer to the concept of the old Romanian Criminal Code and the current Criminal Code, as well as to the comparative presentation of the old regulations in relation to the provisions of the Criminal Code in force.

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[3] G. BETTIOL: *Diritto penale, parte generale,* ottava edizione. Padova, CEDAM, 1973. 417-423; F. MANTOVANI: *Diritto penale, parte generale*, second edizione. CEDAM, Padova, 1988. 294-295.

2. The concept of the Old Romanian Criminal Code

The Romanian criminal law, according to the old regulations, was mandatory for all persons in our country, who could not invoke their ignorance or misknowledge (Article 51, last paragraph of the old Criminal Code). Thus, according to this text, ignorance or misknowledge of the law does not remove the criminal chardeeder of the deed. The presumption enshrined in the law was absolute and imperative, meaning that the ignorance or misknowledge of criminal law did not remove the criminal chardeeder of the deed.

The Romanian state has not only been satisfied with the presumption of knowledge of the laws, but has also carried out an activity of popularizing and explaining the laws in order for them to be effectively known by all the persons on its territory.

According to this principle, it was not possible to invoke the lack of knowledge of the criminal law because it was not supposed to ignore it and it had to be known by all the recipients, who were obliged to comply with the conduct of its requirements.

In the view of the Romanian legislator, the provision in art. 51 last par. of the old Criminal Code, was based on the obligation of the citizens to get informed on the content of the criminal law, and the error regarding a criminal law norm could not be invoked.

There were opinions we shared that argued that this presumption should not be generalized with an absolute character because there may also be exceptional situations when the agent does not know or misinterpret the criminal law, his own juridical evaluation leading him wrongly to the conclusion that he is acting legally and that the deed does not violate the legal order[4].

In the perspective of the amendment of the Romanian criminal law in the commercial and economic sector and in other fields of activity, *de lege ferenda* we proposed the renunciation to the absolute character of the principle *nemo censetur ignorant legem* enshrined in art. 51 last par. of the old Criminal Code.

3. The concept of the current Criminal Code

It is worth noting that the current Criminal Code no longer explicitly enshrines this principle[5]. Thus, art. 30, which regulates the error - cause of non-imputability, no longer contains the provision of art. 51 last par. of the old Criminal Code on the absolute character of the rule that *"ignorance or misknowledge of criminal law does not remove the criminal character of the deed."*

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[4] G. ANTONIU: Eroarea de drept penal. *RDP*, nr. 1/1994. 15; ACADEMIEI ROMÂNE (ed.): *Vinovăţia penală*. Bucureşti, 1995. 329; V. MIRIŞAN: *Consideraţii privind unele cauze care înlătură cardeederul penal al faptei.* Zalău, Ed. Gil. 197.

[5] Law no. 286 / 2009, published in the Official Gazette no. 510 of 24.07.2009, amended and completed by Law no. 187/2012 for the implementation of the new Criminal Code, published in the Official Gazette no. 757 / (12.11.2012.)

Instead, art. 30 par. 5 governs the error on the illicit character of the offense, which may be a factual error or an error of criminal law.

According to this text, *"the deed provided by the criminal law committed as a result of the ignorance or misunderstanding of its illicit character by reason of a circumstance which could not in any way be avoided is not imputable."*

An error on the illicit character of the deed removes the imputability only when it is invincible (does not know or misidentifies the wrongful character of the fact because of a circumstance that could not be avoided in any way).

In relation to this legal provision, it must be concluded that it is possible to invoke the error of criminal law as a cause of non-immutability/non-imputability, under the conditions described above.

In fact, the doctrine and some national legal systems make a distinction between the error of the typicality and the error of the anti-juridicity of the deed. The typicality of the deed refers to the constitutive elements of the offense, and if the error is invincible and bears upon them, the deed will not constitute an offense.

The anti-juridicity refers to the illegal character of the conduct, and the one in error considers that his deed is authorized by the criminal law. Therefore, the error on the illicit character of the deed is that which removes imputability. Of course, we must be in the presence of an invincible error (unavoidable, inevitable). If the error is culpable, it can be redeemed as a mitigating judicial circumstance.

A problem will arise in both the doctrine and the practice regarding the avoidable or inevitable character of the error, which will have to be assessed on a case-by-case basis, depending on the specificity of the criminal law rule (technical, complex and complicated rules etc.), the degree of culture of the investigated person, his / her experience, etc.

If the illicit character of the deeds is notorious, the error of criminal law cannot be invoked, as cannot be relied on even the error of criminal law based on the fault of informing the perpetrator[6].

In this case, the error may be a fact error (legitimate putative defense) or an error on the rule of criminal law. In fact, the doctrine and some national legal systems make a distinction between the error of fact and the error of the anti-juridicity of the deed.

The typicality of the deed refers to the constituent elements of the offense, and if the error is invincible and bears upon them, the deed will not constitute an offense.

Typicality means that there must be a correspondence, a conformity between the features of the concrete deed and the abstract model of the deed (type) provided by the rule of incrimination. That is, the deed is typical.

The anti-juridicity refers to the illegal character of the conduct, and the one in error considers that his deed is authorized by criminal law. Therefore, the error on the illicit character of the deed is the one that removes the imputability. Of course,

[6] C. MITRACHE – CR. MITRACHE: *Drept penal român, partea generală.* Editura "Universul Juridic", București, 2014. 209.

we must be in the presence of an invincible error (unavoidable, inevitable). If the error is culpable, it can be redeemed as a mitigating judicial circumstance.

We note that anti-juridicity is the opposition between the deed and the legal order. The deed is illicit, therefore unlawful.

For example, the offense of murder in legitimate defense is a typical, but not anti-judicial act, because it is removed by the intervention of a justifiable cause. In conclusion, the anti-juridicity will be removed whenever a justifiable cause occurs.

A problem arises both in the doctrine and in practice regarding the avoidable or inevitable character of the error, which will have to be assessed on a case-by-case basis, depending on the specificity of the criminal law rule (technical, complex and complicated rules, etc.) the degree of culture of the investigated person, his / her experience, etc.

We appreciate that the legislator should have defined what is meant by the inevitable character of knowing the criminal offense. That is, what is meant by ignorance or misknowledge of the criminal law, in the conditions in which we are in the presence of an invincible error (unbeatable, unavoidable).

We consider, *de lege ferenda*, that it is not too late, given that the current Criminal Code entered into force on February 1, 2014, that the legislator intervenes through a law amending it.

If the illicit character of the criminal acts is notorious, the error of criminal law cannot be invoked, as cannot be invoked either the error of criminal law based on the *fault of informing* the perpetrator.

We have to accept that even in the present in judiciary practice there are solutions that are based on the error of fact, although they are based on the guilt of informing the person who committed the criminal act (doubt). These kinds of solutions are found more often in the criminal investigation phase and less frequently in the trial phase, because these files have not reached courts. Why? For the invincibility (the inevitable character) is confused with doubt about the ignorance or misknowledge of reality. That is why it is necessary to define the inevitable (invincible) character of ignorance or misknowledge of the reality or of the criminal or extrapenal crime.

Let us not forget that the current Criminal Code regulates distinctly the error of fact, the error on the extrapenal norm and the error of criminal law.

A problem related to the entry into force of the criminal law could be a reason to invoke the error of a criminal law norm. For example, the criminal law enters into force three days after its publication in the Official Gazette, but it does not actually reach the addressees.

Also, the situation of emergency ordinances containing criminal provisions could be a reason to invoke the error of criminal law. Why? For these ordinances, according to art. 115 par. 5 shall enter into force only after their filing for an emergency procedure in the competent chamber to be notified. It is true that they are published in the Official Gazette, but the time of the filing may differ from the time of publication in the official monitor.

Consequently, these ordinances may not reach the recipients in a concrete and independent way, even though they are in force. *We appreciate that in practice, for these situations, the error of criminal law could be invoked.*

With regard to the moment when emergency ordinances come into force, in the legal literature opinions are divided (on the date of registration in the chamber, on the date of publication in the monitor, three days after publication). Here is another topic of discussion that could be analyzed, but in a distinct work.

4. The error of law – comparative presentation of the old regulation and the current Criminal Code

As we have seen in a previous section, we consider that the comparative analysis of the provisions on the error of law in the old regulation and those provided by the current Criminal Code is necessary, based on the question of the application of the criminal law in time for the transitory situations (cases pending before the judicial bodies). In these hypotheses, the error can be invoked on a rule of criminal law, a cause of non-imputability according to the Criminal Code, in relation to the previous regulation, according to which the ignorance or misknowledge of the criminal law does not remove the criminal character of the deed.

4.1. Error of criminal law. The consequences of the principle "no one can apologize for ignorance of criminal law". According to art. 51 last par. of the old Criminal Code, the ignorance or misknowledge of the criminal law does not remove the criminal character of the deed.

Consequently, even if the perpetrator, at the time of the act, is in error of a criminal rule, the act will constitute an offense and will entail a penalty or criminal measure.

Ignorance of the criminal law cannot be invoked because it is absolutely presumed that the criminal law is known by all the recipients who have to comply with its requirements.

In criminal doctrine, most authors have accepted this principle, arguing that only in this way is the firm and prompt application of criminal law ensured and does not paralyze the course of justice by invoking the error of law.

There are also opinions that claim this rule to be the cause of unjustified generalization. In the author's view, this presumption should not be generalized with an absolute character, because there may be exceptional situations when the agent does not know or misinterpret the criminal law, his own legal assessment leading him wrongly to the conclusion that he is acting legally and that the act does not violate the legal order.[7]

We share this point of view, noting that the proliferation of special criminal laws, frequent changes in their content, interpretative difficulties and

[7] ANTONIU (1994): op. cit. 15; ANTONIU (1995): op. cit. 329.

jurisprudential oscillations make it possible to adapt the principle to existing realities.[8]

Moreover, the criminal doctrine and even the jurisprudence of some states attempted to temper the rigidity of this principle, considering that the error of criminal law is inevitable in the case of the obscurity of the text, the chaotic interpretative discontinuity, the failure of the state bodies to inform the citizens about normative deeds, in case of qualified good faith etc.[9]

4.2. The Concept of the current Criminal Code on the error of criminal law. Unlike the old regulation, which explicitly and absolutely excludes the possibility of invoking the error of criminal law, the new Criminal Code no longer contains such a provision, which leads us to believe that this error can be invoked as a cause of non-imputability, which excludes the guilt.

The arguments presented in the previous section confirm that it is a utopia the exegetic and total knowledge of the criminal laws of our state. We have to accept that there are situations where a person is unable to know the criminal law, a hypothesis to be proved during the criminal trial. Here, for example, the case of the perpetrator who has been in a state of unconsciousness or isolation for a long time.

Article 30 par. 5 of the current Criminal Code regulates the error on the anti-juridicity on the illegal character of the conduct. Imputability is ruled out on the ground that the perpetrator considered his deed to be lawful, authorized by the criminal law. Certainly, the error of the illicit character of the deed will be a cause of non-imputability only if it is invincible.

Consequently, in order to be in the presence of the error of criminal law – a cause of non-imputability – in addition to the conditions of the error of fact, the perpetrator still needs to be in an invincible error on the legal norm.

The invincible character of the error will be judged on a case-by-case basis in relation to the specificity and complexity of the legal norm, the degree of culture of the perpetrator, his experience, the concrete circumstances in which the deed was committed, etc.

As such, the error of criminal law must be considered a kind of legal error, together with the error of extra-penal law, which we refer to further.

4.3. The error on extra-penal law rules in the old Criminal Code. In the old regulation, unlike the error of criminal law, the error on extra-penal law rules made the act not an offense, being assimilated to the essential error of fact. Thus, it was decided that the ignorance or misknowledge of an extra-penal legal norm, if it concerns a state, situation or circumstance that constitutes an element of the offense or an aggravating circumstance, produces the effects provided by art. 51 of the old Criminal Code regarding the error of fact.

For example, instructions no. 103 / 1970 – containing the list of drug products and substances – is an extra-penal normative act, which completes the conditions of application of the criminal provisions of art. 312 of the old Criminal Code. The

[8] V. MIRIŞAN: *Drept penal, partea generală*. Ed. Universul juridic, București, 2017. 182–184.
[9] J. LARQUIER: *Droit penal general*. Troisieme edition. Dalloz, 1991.

ignorance or misknowledge of these instructions is equivalent to an error of fact that would remove the criminal character of the act[10].

In contrast, in similar cases, the court concluded that extra-penal law error cannot be held in the event that the perpetrators said they did not know that mercury was forbidden, although it appears on the list of toxic substances banned from possession according to the Order of the Ministry of Health no. 43/1980. The court found that the error was not invincible on the ground that the defendants were working in a chemical factory, so that in terms of their level of training and the field they worked, they knew that mercury was a forbidden substance[11].

We believe that the solution is criticized because it was not enough for the defendants to know that the substance is toxic. They also needed to know that possession, transport or any mercury operation is punishable by criminal law. To the extent that these workers in a chemical factory were not trained, the fact that they had daily contact with this substance could convince them that possession was allowed by law[12].

That is why the courts must assess on a case-by-case basis the invincible character of the error in relation to the specificity and degree of complexity of the legal norm, the degree of culture of the perpetrator, his experience, the concrete conditions in which the deed was committed, etc.

A distinction should be made between extra-penal rules and norms contained in laws or decrees which provide that non-compliance with provisions of these normative acts constitutes offenses and are punishable under criminal law. They, referring to crimes in the Criminal Code, are rules of criminal law, and their ignorance and misknowledge does not lead to the act lacking criminal prosecution.

This is not the case with the rules of the Criminal Code, which contain as a constitutive element the condition of committing "unjustly" or "contrary to the legal provisions"; they refer to non-penal laws, which means that the error of such an extra-penal rule will make the act not an offense or the aggravating circumstance cannot be retained.

Consequently, the error of some criminal law rules does not remove the criminal cardeed of the act, and the error of extra-penal rules removes this character, being assimilated as effects, with the invincible and essential error of fact.

Given the fact that the current Criminal Code no longer includes the provision of art. 51 par. 4 of the old Criminal Code, we conclude that the error of criminal law can be invoked as a cause that excludes guilt, together with the error of extra-penal law.

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[10] The Supreme Court, Criminal Verdict no 31/1975, C.D./1975, p. 595, RRD nr. 7/1976, p. 48; The Supreme Court, Criminal Verdict no 361/1972, C.D./1972. 302.

[11] Bucharest Court of Appeals, Criminal section 2; Decision no 314/2000, Decision no 125/a/1999, Collection of criminal judicial practice.

[12] V. PAȘCA: *Drept penal, partea generală*, Ediția a IV-a, revăzută și adăugită. Editura "Universul Juridic", București, 2015. 275.

5. The provisions of the current Criminal Code. Legal definition and comparative presentation

According to art. 30 of the Criminal Code, the error is included among the causes of non-imputability, the text having the following content:

"(1) The offense stipulated by the criminal law committed by the person who, at the time of the offense, was not aware of the existence of a condition, situation or circumstances which the criminal character of the deed depends to.

(2) The provisions of paragraph 1 also apply to willful offenses punishable by criminal law only if the lack of knowledge of the state, situation or circumstance is not itself the result of the culpability.

(3) It is not an aggravating circumstance or aggravating circumstantial element the condition, the situation or the circumstance that the criminal did not know at the moment of committing the offense.

(4) The provisions of paragraph 1-3 apply also in case of non-observance of extra-penal legal provisions.

(5) It is not imputable the act stipulated by the criminal law committed as a result of the ignorance or misknowledge of its illicit character by reason of a circumstance that could not in any way be avoided."

The current Criminal Code distinguishes between the error of the constituent elements of the offense and the error of the forbidden character of the committed deed.

The first three paragraphs refer to the error of the constituent elements of the offense. These types of error remove, as the case may be, the intent (paragraph 1), the guilt (paragraph 2), or the aggravating circumstance or the aggravating circumstantial element.

Also, in par. 4 it is regulated the error of an extra-penal legal provision.

The last paragraph refers to the error on the illicit character of the deed, which removes imputability. It can be an error of fact, an extra-penal error, or an error of criminal law.

The imputability in these cases will be removed only when the error is invincible (a circumstance that could not be avoided in any way). For example, there is an invincible criminal law error if the deed was incriminated by an emergency ordinance the previous day and the author commits it within the first few hours after it enters into force, without being able to know the content of the incriminating text.

It is also possible to invoke the error on the unlawful character of the deed and in the case where the author is misled by a representative of the authority or in case of a printing error in the Official Gazette or its non-dissemination for various reasons (fires, earthquakes, printing houses strikes, military occupation etc.)[13].

[13] In this view, E. G. SIMIONESCU: Analele Universității "Constantin Brâncuși" din Târgu Jiu. *Seria Științe juridice*, nr. 2/2014.

6. Conclusions and de lege ferenda propositions

The comparative criminal law doctrine and case law have confirmed the need to regulate the error of criminal law among the causes of non-imputability or justification, as the case may be.

The Romanian criminal doctrine and judicial practice in the matter have consistently been in favor of admitting the invincible error of law.

In relation to the arguments presented in the paper, we appreciate that the current Criminal Code has rightfully enshrined in the category of the causes of non-imputability the error of criminal law (Article 30 paragraph 5) as an error of the illicit character of the deed.

We appreciate that the legislator should have defined what is meant by the inevitable character of knowing the criminal offense. That is, what is meant by ignorance or misknowledge of the criminal law, in the conditions in which we are in the presence of an invincible error (unbeatable, unavoidable).

We consider *de lege ferenda that* the legislator should intervene through an amending law in this respect. Otherwise, criminal law practitioners are obliged to use the definitions given by the dictionaries of the Romanian language regarding the words "invincible and inevitable". Often the definitions given by the dictionaries are not clear enough to define what the exact meaning of the terms is, and a legal definition would be capable of removing the doctrinal controversies and those of the judicial practice in the matter. Is always invincible equal to the inevitable? What should we report to, to the fact that no person in the given situation was able to know the current criminal law or to judge, on a case-by-case basis, according to its degree of diligence, whether the person invoking the error of criminal law could be aware of the inevitability or invincibility of knowing the criminal norm.

We launch this *de lege ferenda* proposition for analysis and reflection, awaiting a reaction for or against this point of view.

Thus, according to the explanatory dictionary of the Romanian language, invincible means something that cannot be defeated, uninhibited, unbeatable, unbridled. While inevitably means something that cannot be avoided, which is unavoidable, ineluctable.

We appreciate that bringing together the meaning of the two terms (inevitably and invincibly) in a legal definition would avoid the confusion existing in the doctrine and the judicial practice in the matter.