HISTORICAL INCRIMINATION OF FACTS AGAINST PATRIMONY

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Abstract
The aim of this study arises from the importance recognized to patrimony as a social value of all evolution stages of society. Assuming that all antisocial acts which affects patrimony were always sanctioned, I tried to illustrate their incrimination since slave and feudal period, the oldest Romanian law, also the regulations of modern criminal law systems. Also, I've presented the disposals of Criminal Codes since 1864 (inspired almost from French Criminal Law and Prussian Criminal Law) and nowadays, also some decisions in matter of Constitutional Court. Thus, the study becomes important even through comparative aspects setted of by evolutive way of incrimination of facts against patrimony.

***Keywords**: historical, evolution, offences, patrimony, incrimination*

Introduction

Given the patrimony importance, recognized as a social value at all evolution stages of society, the acts against society which affects patrimony were always punished, those with highest seriousness are even included under criminal law[1].

During slavery, were harshly punished the theft, robbery, plunder, other acts which affect property were less known, such as *fraud,* breach of trust, fraudulent management, which were considered as civil offenses.

During feudal period is gradually extending the criminal repression, including all facts which may affect patrimony. Usually, unimportant theft is punishable by flaying, but the third theft was punished by death penalty *(tres furtileus)*. If the theft is serious it could apply this penalty since from the first theft. This harsh of punish shows the frequency and severity of crimes. Against such acts, the mastery was forced to refer to the most inhuman punishment.

Modern criminal law systems, although removed some of exaggerations above, have maintained a fairly severe regime for certain forms of criminal activity against property. Also, is extended during incrimination framework other specific facts of economic relations by modern society.

Chronological disposals

In old Romanian law are founded regulations most detailed relating to these crimes. Thus, *Pravilele lui Vasile Lupu* (Vasile Lupu Precepts) - "Carte pentru învăţături" (Book for teaching) since 1646 - and Matei Basarab - "Îndreptarea legii" (Law correction) of 1652 - *Codicele penale ale lui Alexandru Sturdza în Moldova* (*Criminal Codex of Alexander Sturdza in Moldova)* - 1862 - and Barbu Ştirbei -1850 - in Muntenia (Wallachia), contained provisions relating to offenses against property.

Romanian Criminal Romanian Penal Code of 1864, although mostly copied by French Criminal Code, contained in chapters on "Crimes and offences against property" numerous incrimination inspired by Prussian Criminal Code (art. 306-380) relating to heritage protection in order to ensure by severe means its protection.

The Criminal Code of 1864, offenses against patrimony were included some crimes that were only indirectly related to heritage protection.

Romanian criminal code from 1936 called "The new Criminal Code Charles II" came into force on January 1, 1937 included this matter in Book II, Title XIV entitled "Crimes and offences

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[1] Vizitiu, Gh. *Delapidarea.* Bucureşti: Editura Lumina Lex, 2001.

against property" - art. 524-573; systematized in five chapters as follows: Chapter I - Theft, Chapter II - Robbery and Piracy, Chapter III- Offences against property through reckless confidence, Chapter IV - Abroad displace, abolition of border signs, damage and other disorders of property, Chapter V - Game, lottery, speculation against public economy.

As it shown, the Criminal Code of 1936 restricted in its natural limits, all crimes against property, grouping them according to the legal object.

Art. 553 of Criminal Code "Charles II", included in Title XIV "Crimes and offences against property," Section VII, the cheating by check, whose forms of executing acts were inspired by art. 84 pt. 2 din of Law no. 59/1934 on check.

Both during the Criminal Code since 1864 and Code since 1936, were in force certain crimes against property, which were provided in special laws, such as Military Justice Code, the Commercial Code, Forest Code, etc..

During the period 1944-1989, naturally were produced some important changes in legislative terms. In this context, was adopted Decree no.192/1950 which content the definition of *"public"* term and therefore the *"common property"*[2]. Through this normative act was introduced in Title XIV of Criminal Code of 1936 a new Chapter called "Some offenses against public property", which later was brought changes, especially in punishment aggravation. This decree marked the moment of first appearance of a discriminatory protection, as it was considered "private" or "public".

Criminal Code of 1968 took this concept of differential protection of heritage, which is why, in Title III of its Special Part were provided crimes against private property, and in Title IV, offenses against public or civic property. This structure stood until 1996, until the Law no. 140/1996 was adopted. Thus, were brought substantial changes to the Criminal penal code in force.

Need to adopt this legislation act was claimed by many problems complaining by practice in relation to Criminal Code in force.

Constitutional disposals

As regarding the heritage protection the general regime of property established by Art. 44 (was Art. 42 before its republish since 2003) of Romanian Constitution of 1991 is different from that before 1989, and the differentiate protection of heritage according to its titular was not in compliance with new constitutional provisions.

Art. 44 of Constitution provide that "The property right and claims against State are guaranteed. The content and limitations of these rights are established by law. Private property is guaranteed and protected **equally by law,** regardless of its owner. Foreign citizens and stateless persons may acquire private property of land only in terms resulting from Romania's accession to the European Union and other international treaties which Romania is part, on the basis of reciprocity, as provided by organic law and legal inheritance. Nobody can be expropriated except the public utility, established according to law, with fair and prior compensation. Are prohibited the nationalization or any other measures of forcible transfer of public ownership of property by social, ethnic, religious, political affiliation or other discriminatory features. For projects of general interest, the public authority can use the subsoil of any real estate under obligation of owner for damage brought to soil, plantations and construction, and for other damages imputable to authorities. Right of property compels to duties observance relating to environmental protection and ensuring good neighborliness, as well as other duties that under law or custom, are accrued to owner. The property acquired legally assets could not be confiscated. Legality of acquiring is presumptive. The assets fated used or resulted from offenses or contraventions can be confiscated only in accordance with law.

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[2] Nistoreanu, Gh., Dobrinoiu, V., colectiv . *Drept penal, Partea specială.* Bucureşti: Editura Europa Nova, 1997.

Organizing and functioning Rules . 156 (2 february 2005).

Also, Romanian Constitution includes other rules with a principle value relating to property. Art. 136 par. 2 of Constitution indicates fundamental forms of property, namely, public and private, also are shown they which belongs assets as part of each property form, so public property belongs to state and administrative - territorial units.

Starting from these new constitutional principles, the Romanian courts practice is often stipulated that provisions of Title IV of Romanian Penal Code Special Part are unconstitutional.

Constitutional Court decisions

The most important of the Constitutional Court decisions rendered in this matter is Decision no. 1/1993 of the Constitutional Court Plenum[3] on Criminal Code provisions relating to public property in context of constitutional provisions on property.

In this case, the Constitutional Court was informed by Courts with unconstitutionality exception invoked during processes which having as object the property damage stipulated by Art. 145 of Criminal Code and whole Title of Criminal Code on offenses against public property.

The main legal issue invoked during these exceptions was to determine if the "public property" term used by the Criminal Code is consistent with Constitution of 1991 and, depending on the response, if the differentiate treatment of criminal justice is justified, both to crimes against private and public property.

Constitutional Court Plenum took into account the same court decisions which have admitted the exceptions raises in namely folders, finding that Criminal Code provisions on sanction of offenses against public property were partially repealed according to art. 150 par. (1) of Constitution and therefore these will be applied only on assets provided by art. 136 par. (4) of Constitution, which form the exclusive object of public property. Are expressly indicated by Decisions no. 9, 10, 12, 13, 16, 17 and no. 18/1993, against the General Prosecutor made appealed.

One of two reasons invoked is starting from affirmation that Criminal Code provisions relating to public property are unconstitutional and are not being repealed by Constitution, because the "property" term of the Criminal Code has a content too extended than the notion of "patrimony". The notion of "public property" is assimilated by the patrimony of Civil law, including all real rights, all patrimonial rights and all obligations on entities likely to be evaluated economically. Moreover, it is argued on appeal, the Criminal Code offenses are not named crimes against patrimony, but crimes against property, similar to the Criminal Code of 1936 which relating to crimes against property. Moreover, it was shown, the current Criminal Code does not contravene the Constitution because it not denies the existence of two types of property (public and private) and do not provides other property forms than those mentioned by Constitution.

On appeal, the Constitutional Court has decided to admit in part all appeals declared, admits unconstitutionality exceptions on Art. 223, 224, 229 par. 1 of Criminal Code, but in the last text, only for provision intended the damage against public property and was establish a deadline, on 30 November 1993 for giving to Parliament the possibility of modifying the Criminal Code mentioned above Also, it was shown if until deadline is not adopted the provision modifications of Art. 223, 224, 229 par. 1, from 1 December 1993 will produce effects until their repeal. Until the adoption of amendments by Parliament, but not after 30 November 1993, the listed provisions will be applied. In the same decision is noted "If after entry into force of Constitution of 1991 could not retain the meaning of "public property" term, being contrary to Art. 41 par. (2) (actually, Art. 44), of Constitution, but there is no legal basis to identify the public property with public patrimony, means that legal provisions of Criminal Code relating to public property and appealed to the Court are unconstitutional and therefore, entirely repealed. Thus, the legislator intervention is obligatory ".

Dissenting opinion made in connection with this appeal decision has supported maintaining of solutions gave to the first trial and was found unconstitutional the establishment of a new term in

[3] *Decision.* 232 (Constitutional Court, 27 septembrie 1993).

future within the Court's decision will become enforceable and until then, the above mentioned texts of the Criminal Code to be apply, although they were repealed.

Also, in another appeal, which is the object of file no. 11 C/1993 of Constitutional Court, the judges has decided the trial delay because claims files and intention of majority judges to remove from legal interpretation given by Decision no 38 since July 7 1993, situation which was regulated by art. 26 par. (2) of Organization and functioning Rule of Constitutional Court. Through same conclusion was decided to appeal the Constitutional Court Plenum[4].

Therefore, the Constitutional Court Plenum was convened to give a uniform interpretation of Criminal Code constitutionality provisions regarding to crimes against public property.

The Plenum, examining cases brought to the Court, the constitutional and legal decisions pronounced by judges of Constitutional Court in cases concerning unconstitutionality exceptions, held the following:

1. In order to solve the unconstitutionality exceptions of certain provisions of Criminal Code, panels of Constitutional Court judges gave legal different interpretations in identical legal situations.

2. Pronunciation of conflicting decisions would be contrary to idea of constitutional justice and courts would be unable to achieve consistent interpretation and unitary application of Criminal Code provisions on crimes against property.

3. Organization and functioning rules of Constitutional Court requires the Court judges to comply the Court's interpretation with majority votes of judges.

4. The Court Plenum is asked to decide: a) if provisions of Criminal Code relating to offenses against public property are constitutional, b) if Constitutional Court Decision, definitely, is obligatory and binding and enforceable since date of publication in Official Gazette or Court may establish another term in future from which will produce effects and possible, a condition.

Regarding the first issue, the Plenum of Constitutional Court considered that "public property" term will not be confused with "patrimony" notion, and although is not nominated by Constitution, it does not appear as unconstitutional, as long as means a general interest of society, is related to public safely and it refers to public property. In the past, the public property was been protected by Law for patrimony protection, published in Official Gazette no. 75/31.03.1937, more efficient than private property of individuals, in sense that urgency procedure was applicable to obvious crimes and extended liability to persons who have not taken prevent measures of public property damage. It has to be noted at that time there is no similar constitutional text art. 41 par. (2) (namely, Art. 44) of current Constitution.

Therefore, it appears natural that offences against public property to be punishable as crimes against public patrimony. Not "public property" category is problematic category relating to criminal treatment, but its sphere and therefore, the criminal liability dimensions and limits.

Court held that private property is equally protected by law, regardless of titular (Art. 41 par. (2) of Constitution – namely Art. 44). Thus, any extension of public property category to private patrimony if wants to be against this provision, is unconstitutional.

Special protection given to general interests is not only a matter of criminal policy, but also constitutionality, if this extension would create a legal regime which contravene to disposals of Art. 41 (44) of Constitution.

Regarding the property it is in addition to any interpretation that actually constitutional disposals establish two forms of property, public and private property. According to Art. 135 par. (3), public property belongs to state or administrative-territorial units. Par. (4) indicate assets that are exclusively object of public property, indicating that other assets established by law can be included in this category.

[4] *Organizing and functioning Rules* . 156 (2 february 2005).

Therefore, except assets of art. 135 par. (4) and throughout laws which declare it public property, others are private property and private property have both state and citizens and legal entities such as companies.

As a characteristic of public property is inalienable, and under law, assets - public property can be managed by autonomous administrations, public institutions or may be leased or rented.

According to art. 42 par. (2) –current paragraph 44, private property is equally protected by law, regardless of titular, without difference if the owner is state, company or citizen.

It should be highlighted that assets of autonomous administrations and companies are not state owned, but private property, even if state have the most social capital the companies.

Art. 5 of Law no. 15/1990 state that "autonomous administration is the owner of its property assets. Art. 20 par. 2. In exercising ownership, the autonomous administration is possessed, used and disposed independently of its property assets... " of this law provides that "assets belongs to company property are its patrimony...". Art. 35 of Law no. 31/1990, states that "assets constituted as contribution to society become its property."

From those shown, it is clear that autonomous administrations and companies assets are private and not public property. Private property is equally protected, regardless of ownership (state, legal person or individual), according to art. 41 par. (2) (actual 44) of Constitution .

As such, thefts of private property - even if it belongs to state - could not be qualified theft of "public property", these terms will apply only for public property defined by art. 135 par. (4) of Constitution.

General Prosecutor, in his appeal, argued that should continue to apply provisions of Art. 145 of Penal Code, which defines public property as follows: “public” term means all about state organizations, public organizations or any organizations which conduct a useful social activity and which operate according to law".

It is observed that concept of public property, in sense that was defined in previous legal practice includes not only assets of state organizations, but even those which conduct socially useful activity. Were included even assets of tenant associations and companies, with motivation to develop a social and useful activity.

To Art. 41 (actual 44) and Art. 135 of Constitution, the public property term could not be understood as such, it should be reported only to assets which forming the exclusively object of public property.

Complete elimination of special criminal protection, more rigorous of assets which forming the object of public property violates the constitutional provisions, because these goods are inalienable. Lack of protective measures increased of public ownership it was appreciated that have deeply damaging effects. Therefore, the provisions relating to preferential protection of public property must be understood in light of Constitution, to apply to assets which forming the exclusively object of public property.

Regarding the second issue, related to setting the deadline of 30 November 1993 to give to Parliament the possibility of provisions modifying of Criminal Code, which is contrary to art. 41 par. (2) current Art. 44 of Constitution , with mention that, if until settled deadline are not produced specified changes, starting from December 1, 1993 will produce effects of their repeal, and until the adoption of amendments by Parliament, but not after 1 December 1993, namely provisions will be applied - Plenum of Constitutional Court was considered that such solution take into account its constitutional foundation. Furthermore, it was considered that solution is contradictory. Because the Criminal Code provisions on criminal liability in cases concerning public property are declared inconsistent with Constitution, their implementation, for another period, is obviously contrary with their repeal.

First, it should be noted that no legal text do not give to Constitutional Court the right to dispose to Parliament for modifying certain legal texts, because this would be contrary the principle of state powers separation. Second, it is incomprehensible that certain legal texts of legislation are

repealed since the entry into force of Constitution - December 8, 1991, and, on the other hand, to declare their application until 30 November 1993. Once a legal text has been repealed, any judicial authority could not extend its existence.

The proposed solution is not based on Constitution into force. When Constitution, by Art. 123 par. (1), states that justice is administered in the name of law is take into account the law in force and a law is and will remain in force through the legislature volition. Justice could not be achieved by a law whose express repeal was achieved by a constitutional text, which was officially established by Constitutional Court. In this case, the Court's constitutional role is to ascertain the Criminal Code provisions have been repealed and therefore to dispose them applicability or enforceability. Court could not interfere to Parliament. No doubt that public authorities with power in legislate create must be involved, but this involvement is a problem that only they decide, under Constitutional rules. Involvement of Constitutional Court in legislate sphere (except provisions of Art. 144 pts. a), b) and h) of Constitution) and criminal policy beyond its competence, being an interference of other state authorities. This is a deviation from law principle in order of manner competence the laws are strictly interpreted. Constitutional Court would arrogate abusive the duty to prolong effects of repealed legislation, by violating competence rules and the balance of power resulting from constitutional provisions.

Due to Parliament is supreme representative authority of people and the sole legislative authority of country, Constitutional Court could not compel him to a certain activity, however important is the problem contained by a decision.

In this case, there are criminal provisions relating to jail sentences, the effects of such solutions are unpredictable, and could create legal and moral irreparable situations by applying a criminal law repealed.

When Constitution allowed the authorities to establish themselves entry into force of a law after a certain period, she made it explicit. Thus, according to art. 15 par. (2), law produces effect only for future, and according to art. 78, law shall enter into force on its publication in Official Gazette (three days after that date, in according to amendment made in 2003) or to date provided in its text.

Taking into account all these allegations, the Plenum of Constitutional Court has established the following:

1. The provisions of Criminal Code relating to offenses against public property are partially repealed in accordance to art. 150 par. (1) of Constitution and therefore they are able to apply only on assets provided by art. 135 par. (4) of Constitution, which form the exclusive object of public property.

2. Decisions of Constitutional Court ruled on resolution of unconstitutionality exceptions become enforceable once they are final, under observing of constitutional and legal rules on its publication and disclosure, not being able to set a further time from which to apply.

Regarding the effects of constitutional decisions, they are regulated by art. 147 of Constitution. Under this text, the provisions of laws and ordinances in force, and those of regulations found as being unconstitutional, stops their legal juridical effect after45 days since decision publication of Constitutional Court if, in the meantime, the Parliament or Government, not agree with unconstitutional provisions of Constitution. During this period, provisions found as unconstitutional are suspended under law. Under these conditions, the declaration of unconstitutionality, from the moment of its publication in Official Gazette[5], creates an obligation only for Parliament or Government, as appropriate, to intervene in order to remedy this situation without through these concrete cases the Constitutional Court, which has no a role of positive legislative and could not

[5] Constantinescu, M., Amzulescu, M. *Drept contencios constituţional.* Bucureşti: Editura Fundaţiei România de Mâine, 2005.

propose for modifying texts a form in accordance with Constitution, to intervene on namely act or provision[6].

Since its publication in Official Gazette, the Constitutional Court decisions of unconstitutionality admission of legal provisions are mandatory, final and irrevocable, being universally valid and produce effects *erga* omnes[7] and could not be challenged during internal law system either directly or indirectly. Constitutional Court decisions are not appealable.

In this context, it can be stated that provisions found as unconstitutional are legally suspended since publication of Constitutional Court decision in Official Gazette, following that, within 45 days the Parliament or Government to agree these provisions to Constitution. Otherwise, the provisions will not produce the legal effect[8].

Decision of Constitutional Court Plenum, was accompanied by a different opinion. The opinion signatories are not agreed with opinion of judge majority, expressed by interpretation decision above, as following reasons:

1. The criminal term of "public property" has a unitary character, defining the object of a special criminal protection. Between content and extension degree of this notion is an indissoluble connection, so the modifying of some element of content could not lead to change of concept itself.

Therefore, restricting the notion of public property only to assets which forming public property is a modification of this notion, not only for extension degree but also in terms of content. Thus, many aspects stipulated by art. 145 of Criminal Code remain without object.

Since the notion of public property is regulated by law, its changing means law changing, which is exclusive competence of Parliament, "the sole legislative authority of country, according to art. 58 par. (1) of Constitution - the current paragraph 61. Therefore, Constitutional Court, interpreting the concept of public property will be applied only to assets forming the object of public property, has substituted to legislature criminal repression regulating.

The only solution to avoid this substitution is finding the Criminal Code relating provisions regarding to public property are abolished entirely, while the notion of public property through its effects on private property protection, is contrary to art. 41 par. (2)– of Constitution - the current Article 44. This does not mean extending the effects of repeal, but is the consequence of the unitary character of public property notion, mentioned above, which makes impossible to distinguish the effects covered by art. 41 par. (2) of Constitution - the current Article 44. 2 - by other effects without changes the notion of public property.

Supporting that application of public property notion to assets which forming exclusively the object of public property are based on inalienable character of these assets, enshrined by Art. 135 par. (5) of Constitution - the current paragraph 136. 5, are not justified. This provision has only significance to prohibit sale of assets and does not imply automatically more severe criminal repression. Nothing can stop the legislature to establish such repression for public property assets in whole, or only for some categories, but as following interpretation, the Court will not be able to establish such juridical regime. Also, the legislature can establish a different repression for certain categories of private assets, without making distinguish between their affiliation to state or other subjects. Therefore, the difference between public and private property, based on interpretation decision, is irrelevant in order to constitutionality of criminal repression regime, generally.

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[6] Selejan- Guțan, B. *Excepția de neconstituționalitate.* București: Editura All Beck, 2005.

[7] Vida, I. *Legistică formală – Introducere în tehnica şi procedura legislativă, Ediția a III-a.* Bucureşti: Editura Lumina Lex, 2006.

[8] Stancu, E. *Efectele deciziilor Curții Constituționale.* Revista critică de drept şi de filosofia dreptului, vol. 2, , Bucureşti: Editura Cartea universitară, 2005.

Conclusions

We choose to present detailed arguments during this approach in order to understand why was imposed such a normative act, to state the existing situation regarding to Criminal Code rules, which had as purpose, public property protection. Moreover, the doctrine states this need, considering that different stipulation of "crimes against public property or private" and "crimes against public patrimony" was unjustified, while "the pair offences" (as their name) had different structures and contents. The only difference consists in patrimony affected and sanction regime, more severe than last.

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