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Evolution of the Penal Legislation in Romania and Hungary, in the Post-Communist Era

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Evolution of the Legislation on Preventing and Combating Organised Crime*

Ph.D. ***IOANA CELINA PAŞCA*****
West University of Timisoara, Law Faculty

Abstract:

Organised crime is a dynamic phenomenon, which adapts to the social changes and the complexity of the risks arising from such changes, taking advantage of the slowness of the states' mechanisms of adaptation of the legislation to the new social realities.

The paper analyses the actions and measures to prevent and counteract organized crime in Romania, after the fall of the communist regime, both on a legislative level and on that of judicial structures, as well as the influence of international regulations on the national law.

Keywords: *organized crime; organized criminal group; the Palermo Convention.*

We might be tempted to say that the origin of organized crime in Romania is closely linked to the Romanian democratic society and that this phenomenon is relatively recent for Romania. Although in minimalist forms, Romania, just like the other countries under a totalitarian regime, has experienced the classical forms of organized crime, such as the association with a view to commit crime. Under the empire of the communist regime, organized crime was not a striking manifestation in everyday life, due to the lack of the pre-requisites for the development of such a phenomenon, as well as to the strict control of the economy and the lack of opportunities for recyclability of the crimes' product, the relatively minor flow of cross-border movements of the local population, which resulted in hindering the import of criminal techniques and association with other criminal cultures.

Nevertheless, corruption has attained, paradoxically, rising rates of criminality, superior to other forms of crimes.[1]

The fact that communism, with a centrally planned economy, has generated great shortcomings in supplying the population with basic necessary goods, which created, inexorably, the phenomenon of the "black market", intended to "supply for" the shortage of products on the Romanian market, particularly in the areas of public nourishment and circulation of goods. This situation proved to be a favourable environment for criminals, but also for some "factors" which got organized for this purpose, taking full advantage from the existing situation, accumulating sufficient financial resources which

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** E-mail: ioanacelina@yahoo.fr.

[1] V. Bujor, O. Pop, *Aplicații criminologice privind crima organizată,* Mirton Publishing House, Timişoara, 2003, p. 20; I. Pitulescu, *Al treilea război mondial, crima organizată*, Național Publishing House, 1996, p. 147

they have placed, speculatively, as soon as the market was liberalized, the pre-existing underground economy being rather familiar with the development of organized crime.[2]

The post-revolutionary democratic regime is facing, however, an evolution of organized crime unknown until now, as Romania, as well as the other Eastern European countries, has become the target of external "developers", their action receiving, during the initial years, a helping hand from an incomplete and powerless legislative background, which enabled the reactions of the organised crime to take by surprise the newly installed authorities, succeeding in bypassing the repressive system.

The transition to the market economy, the free movement of people and capital, the non-transparent privatizations, the dissolution of the authority of the state authority are just some of the factors which favoured the amplification of the manifestations of organized crime.

The corruption of civil servants was also another factor, the cases of corruption reaching, in 1995, shares 400% higher than in 1989,[3] so as to ascertain, in 2010, that structures of the state bodies, such as customs (the cases of the Siret Customs, Moraviţa Customs etc.) and the border police (and not only) have constituted themselves in criminal groups enabling smuggling and tax evasion.

Organized crime, considered to be a residual phenomenon of globalization, is spreading at a very fast pace and attracts the poor populations, eager to spring up at any price and to explore the realms banned by the communist regime. In this context, new phenomena, favoured by globalization, such as drug trafficking, human trafficking, cybercrime, tax evasion and money laundering, arms trafficking, terrorism, theft and smuggling of expensive cars, all these are activities successfully practised in Romania as well.

According to the specialists' opinion, the criminal groups operating in Romania can be grouped into three typologies:[4] a) local criminal groups, which have developed independently, without external influences, and act only within the country's borders, in local areas; b) local criminal groups, which have joined foreign criminal networks, Italian ones or those from South American drug cartels; c) criminal groups of foreign origin, which have expanded their scope in Romania as well (the Italian Mafia, Chinese and Arab criminal groups, rackets from the ex-Soviet area).[5]

The 1968 Penal Code, just like other European codes, contained the incrimination of the offense of association with a view to commit crimes.

Article 323 of the Code incriminated the deed of associating or initiating the establishment of an association for the purpose of committing one or several offenses, other than those shown in article 167, or joining or supporting in any way such an association, punishing it with imprisonment from 6 months to 5 years, without exceeding the penalty provided by law for the offense falling within the association.

If the deed of association was followed by committing an offense, those who committed the respective offense were punished with the corresponding penalty, as well as with the penalty provided for the offense of association. One category was

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[2] P. Albu, *Crima organizată în perioada de tranziţie – o ameninţare majoră la adresa securităţii internaţionale*, Ed. Ministerului Internelor şi Reformei Administrative - 2007, p. 168

[3] D. Banciu, S.M. Rădulescu, V. Teodorescu, *Tendinţe actuale ale crimei şi criminalităţii în România*, Lumina Lex Publishing House, Bucharest, 2002, p. 277

[4] D. Miclea, *Cunoaşterea crimei organizate,* Pygmalion Publishing House, Ploieşti, 2001, p. 38.

[5] X. Raufer, St. Quéré, *Le crime organisé*, PUF, Paris, 2005, p. 42.

exempted from penalty: those who denounced to the authorities the association before being discovered and before starting committing the offense falling under the purpose of the association.

On November 15th, 2000, in New York, the United Nations General Assembly adopted the United Nations Convention against Transnational Organized Crime, as well as two Additional Protocols, namely the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, and the Protocol against the smuggling of migrants by land, sea and air.

On December 14th, 2000, Romania signed, in Palermo, the United Nations Convention against Transnational Organized Crime, the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, as well as the Protocol against the smuggling of migrants by land, sea and air.

In order to repress the acts of organized crime, in addition to the ratification of the United Nations Convention against Transnational Organized Crime and of the two additional protocols signed by Romania, it was necessary to draft a normative act to ensure, on the one hand, the creation of the appropriate legal framework in the field and, on the other hand, the transposition into national law of the provisions of the above mentioned international legal documents.

This draft law was enrolled in the Program of the priority actions for the preparation of Romania's accession to NATO, having as a deadline for its entry into force the date of September 15th, 2002.

The authorities' response came rather late. It was only through Law no. 39/2003 that the legislator created the legislative framework to prevent and combat organized crime[6] and by Law no. 508/2004 was established the Directorate for Investigating Organized Crime and Terrorism,[7] within the Prosecutor's Office attached to the High Court of Cassation and Justice, as the unique structure from the Public Ministry specializing in combating and investigating terrorist and organised crime offenses.

Law no. 39/2003 incriminated, in Article 7, the offense of establishing an organized criminal group, defined as the activity of initiation or establishment of an organized criminal group or that of joining or supporting in any way such a group. The offense was punishable by imprisonment from 5 to 20 years and the prohibition of certain rights, without the penalty applied being greater than the penalty provided by law for the most serious offense which entered the purpose of the organized criminal group.

The organized criminal group was defined identically to the provisions of Article 2 of the United Nations Convention against Transnational Organized Crime as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

The offenses for the purpose of which was constituted the organized criminal group were serious offenses, such as murder, organ trafficking, trafficking in drugs and precursors, money laundering, corruption crimes, smuggling, tax evasion, fraudulent bankruptcy, crimes committed through computer systems and communication or information networks, as well as any other offense for which the law provides a prison sentence with a special minimum of at least 5 years.

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[6] Published in the Official Journal of Romania, Part I, no. 50 from 29/01/2003.

[7] Published in the Official Journal of Romania, Part I, no. 1089 din 23/11/2004.

If the constitution of the organized criminal group was followed by the perpetration of a serious offense, it was necessary to apply the rules governing concurrent offenses.

Under the law, it was not considered as organized criminal group that group which was formed occasionally, with a view to the immediate perpetration of one or several offenses and which has no continuity, determined structure or pre-established roles for its members within the group.

The law also provided no penalty for the person who denounced to the authorities the association before being discovered and before starting committing the offense falling under the purpose of the association. If the person who committed the offense of constituting the organized criminal group and any of the scheduled offenses, during the prosecution or trial, denounced and facilitated the identification and prosecution of one or more members of an organized criminal group, benefited from the halving of the limits of the penalty as provided by law.

Chapter II of the law contained provisions regarding the prevention of organized crime, establishing, *inter alia*, in the burden of the institutions responsible with the prevention and combat of organized crime, the obligation to develop and implement the National action plan for the prevention and combat of organized crime, to make periodic studies in order to identify the causes which determine and of the conditions which favour organized crime and to initiate an information campaign about this phenomenon within the National Crime Prevention Committee, established by Government Decision no. 763/2001.

Chapter IV contained procedural provisions necessary to conduct in optimum conditions the activities for the combat of organized crime. Thus is extended the range of goods originating from serious offenses committed within organized criminal groups and which are subject to confiscation. The provisions regarding confiscation used to transpose into national law the provisions in the field of the United Nations Convention against Transnational Organized Crime.

Also, there were provided specific activities which can be undertaken by the prosecution to gather evidence or identify the perpetrators when there is probable cause that an offense from the organised crime field is about to be committed. Such activities included surveillance of bank accounts and of their related accounts; surveillance of communications systems; the surveillance and/or access to information systems.

The legislator also regulated the possibility to use undercover police officers, controlled deliveries with the authorization, by reasoned ordinance, of the prosecutor appointed by the general prosecutor attached to the former Supreme Court or, where appropriate, the general prosecutor attached to the Court of Appeal.

The law contained provisions regarding international cooperation, providing that the Ministry of Interior, the Ministry of Justice and the Public Ministry cooperated directly and openly, in compliance with the law and the obligations under the international legal instruments to which Romania is a party, with the institutions having similar responsibilities from other countries, as well as with the international organizations specialized in the field. The cooperation related, as appropriate, to the international judicial assistance in criminal matters, extradition, identification, freezing, seizure and confiscation of the proceeds and instruments of the offense, the conduct of joint investigations, information sharing, technical assistance or other measures to collect and analyze information, training specialized personnel, as well as other activities necessary to fulfill the aimed purpose.

The decision to raft a new Criminal Code was based on a number of existing regulatory failures, shortcomings highlighted both in practice and in the doctrine.

Thus, the criminal sanctioning system regulated by the previous Penal Code, subject to frequent legislative intervention on different institutions, led to inconsistent application and interpretation, lack of coherence of the criminal law, with repercussions on the effectiveness and purpose of the act of justice.

Regarding criminal groups, the new Penal Code abandons the existing parallelism between the texts which incriminate this kind of acts (organized criminal group, association with a view to commit offenses, conspiracy, terrorist group) in favour of the establishment of a framework incrimination - setting up an organised criminal group – with the possibility to keep as separate incrimination the terrorist association, given its specificity.

The new Penal Code takes over, with some changes, the incrimination from Law no. 39/2003 on preventing and combating organized crime[8] regarding the organised criminal group, which turns this special incrimination into the ordinary law in the matter, abandoning the common incrimination of the association with a view to commit offenses, existing so far in all Romanian Penal Codes.

It is true that Article 5 of the United Nations Convention against Transnational Organized Crime, adopted in New York on November 15th 2000, opened for signing in Palermo, on December 12th 2000 and ratified by Romania through Law no. 565/2002,[9] provides the obligation of the signatory states to take measures to incriminate transnational organized crime structures, but there are also other European Penal Codes which have retained this dual incrimination.

The incrimination provided in the new Penal Code corresponds only partially to the content of the offense stipulated in Article 7, in the sense that in the definition of the organized criminal group, Article 2 of Law no. 9/2003 required that it be constituted "with the aim of committing one or several serious offenses in order to obtain, directly or indirectly, a financial or other material benefit", a purpose which no longer appears in the new incrimination, its requirement being only that of its constitution "with the aim of committing one or several offenses", the organized criminal group being thus reduced to virtually any criminal association.

The new regulation no longer contains the provision included in the second paragraph of Article 2 of Law no. 39/2003, according to which "it is not considered as organized criminal group that group which was formed occasionally, with a view to the immediate perpetration of one or several offenses and which has no continuity, determined structure or pre-established roles for its members within the group" and, consequently, the rules of incrimination of the association with a view to committing offenses provided by Article 8 of Law no. 39/2003 and Article 323 of the previous Penal Code have been repealed by Law no. 187/2012 for the application of the current Penal Code.[10]

However, what characterizes organized crime as distinct from criminal associations is its capacity to parasitize economy by obtaining, directly or indirectly, financial benefits or other material benefits as a result of committing offenses.[11]

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[8] Published in the Official Journal of Romania, Part I, no. 50 from January 29th 2003.

[9] Published in the Official Journal of Romania, no. 813 /2002.

[10] Published in the Official Journal of Romania, no. 757/2012.

[11] Maria Luisa Cesoni, *Criminalité organisée: des représentations sociales aux définitions juridiques*, L.D.G.J., Paris, 2004, p. 695.

Law no. 39/2003 required that the association should have as a program the perpetration of offenses of a certain degree of seriousness, some of them being expressly enumerated by Article 2 letter (b) points (1)-(19), others determined by the quantum of the penalty whose special minimum should have been of at least 5 years, provisions which are no longer present in the current Penal Code.

In terms of the sanctioning regime, the new Penal Code could represent the more favourable law because, as opposed to the provisions of Article 7 of Law no. 39/2003 which provides a penalty with imprisonment from 5 and 20 years and the prohibition of certain rights, conditioned however not to exceed the penalty provided by law for the most serious offense which enters into the scope of the organized criminal group, the new Penal Code provides a sanctioning regime partially distinct from that of the offenses program in that the offense is punishable by imprisonment of one to 5 years and the prohibition of certain rights, and if the offense which enters the scope of the organized criminal group is punishable by law with life imprisonment or imprisonment exceeding 10 years, the penalty is imprisonment from 3 to 10 years and the prohibition of exercising certain rights.

If the existence of the criminal group continues also after the entry into force of the new Penal Code, the problem of applying the more favourable law will no longer raise itself because, in the case of continued offenses, the applicable law is that of the time of the end of the criminal activity.

The new Penal Code takes over, in para. (4) and (5) of Article 367 the provisions of Article 9 of the Law no. 39/2003 regarding the cause of impunity and that of the reduction of the penalty for offenders who cooperate with the prosecution.

Denunciation and facilitating the identification and the criminal prosecution of one or more members of a criminal group can no longer have any effects if performed during the trial.

From an institutional perspective, Law no. 508/2004 created the Directorate for Investigating Organized Crime and Terrorism as a structure with legal personality, specialized in combating the offenses of organized crime and terrorism, within the Prosecutor's Office attached to the High Court of Cassation and Justice.

The Directorate for Investigating Organized Crime and Terrorism is headed by a chief-prosecutor, assimilated to the first deputy of the general prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice. The chief-prosecutor of the Directorate for Investigating Organized Crime and Terrorism is assisted by a deputy chief-prosecutor, assimilated to the deputy of the general prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice, as well as by two counsellors, assimilated to the counsellors of the general prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice. The Directorate for Investigating Organized Crime and Terrorism is composed of regional offices in the territorial jurisdictions of the prosecutor's offices attached to tribunals.

The Directorate for Investigating Organized Crime and Terrorism is responsible for the prosecution of the offenses of organised crime: leads, supervises and controls the criminal investigations led, following the order of the prosecutor, by the officers and agents of the judicial police found in the coordination of the Directorate for Investigating Organized Crime and Terrorism; informs the courts to take the measures provided by law and to prosecute cases regarding the offenses within the competence of the Directorate for Investigating Organized Crime and Terrorism; leads, supervises and

controls the technical activities of the criminal investigation, carried out by specialists in the economic, financial, banking, customs, IT fields, as well as in other areas, appointed at the Directorate for Investigating Organized Crime and Terrorism; studies the causes generating the perpetration of organized crime offenses, drug trafficking, cybercrime and terrorism and the conditions which foster them and develops proposals aimed at eliminating them, as well as improving the criminal legislation in the field; develops and updates the database regarding the offenses which are given in the competence of the Directorate for Investigating Organized Crime and Terrorism.