

The Essential Features of the Offense in the Romanian Criminal Code

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ABSTRACT: This study focuses on the essential features of the offense outlined in the Romanian Criminal Code of 2009, which came into force in 2014. The 2009 legislator preserved the tradition of the Criminal Code of 1968, maintaining the marginal name of "Essential features of the offense," although these features are sufficient to substantiate a formal definition of the offense. The norm that defines the offense is a true rule of law, not a norm with the character of a simple definition. Consequently, it must be realized in all aspects it provides. The existence of the offense requires the fulfillment of all its essential features, and the lack of any of these features leads to the non-existence of the offense, resulting in the removal of the criminal nature of the act.

KEYWORDS: deed, illegal deed, offense, essential features, criminal nature of the deed

Introduction

The essential features of the offense, or general features (Streteanu and Niţu 2014, 253), are these common characteristics of offenses that characterize any offense. Of course, there is no offense in general, but the common, essential features of offenses must be found in every deed that the law prohibits or order to be considered as such (Ctin. Mitrache and C. Mitrache 2016, 135). The essential features of the offense are elements that characterize the offense as a whole, differentiating it from the deed that does not constitute an offense. The deed that does not present the essential features of the offense may present the features of another violation of the law or be an illegal deed (Antoniou and Bulai 2011, 917).

The headquarters of the matter is in the content of Article 15 of the current Romanian Criminal Code. The offense is defined in the current regulation as "An offense is an action stipulated by criminal law that has been committed under guilt, without justification and for the commission of which a person can be charged" (para. 1). Thus, according to the new legislator, the notion of offense necessarily implies the cumulative incidence of the concepts of typicality, illegality and imputability. The definition of the offense inserted in Article 15 took into account both the tradition of interwar Romanian Criminal Law and European regulations enshrining such a definition in the Criminal Code. In accordance with the text of Article 15 of the Romanian Criminal Code, the majority Romanian doctrine considers, correctly, that there are four essential features of the offense: provision in the criminal law, guilt, unjustified character and imputability. The analysis of the meeting of these features of the offense must be carried out in the mentioned order, the non-existence of one of them drawing the futility of checking the feature, respectively the subsequent features. When a deed provided for by Criminal Law lacks an essential feature of the offense, it loses its criminal character and does not constitute an offense.

The analysis of the essential features of the offense is also carried out fully in the matter of international judicial cooperation, being reflected in the principle of double criminality. As it was shown in the specialized literature, the principle of mutual recognition is the "keystone" (Bitanga, Franguloiu and Hermosilla 2018, 30), the basic concept in the field of international judicial cooperation in criminal matters, but the principle of double criminality prevails over it, when in order to proceed with the

recognition, it is necessary to verify the double criminality condition. The prominence and importance of double criminality results from the content of several normative acts adopted at the international or regional level, including domestically (Pătrăuș and Franguloiu 2023).

Provision of the deed in the criminal law

This first essential feature of the offense follows from the principle of the legality of the incrimination. By stipulating the deed in the criminal law, the legal framework is created - the abstract pattern in which the concrete deeds, committed in the objective reality, will be recorded. The offense is differentiated from other forms of legal wrongdoing (Ctin. Mitache and C. Mitache 2016, 136). The provision in the law of the deed that constitutes an offense is also known in criminal doctrine under the name of typicality (Antoniou 1997, 15). The provision of the deed in the criminal law requires the fulfillment of several requirements, respectively: the existence of the concrete objective aspect, the existence of an incrimination norm, the identity between the features of the concrete deed and those of the applicable incrimination norm (Antoniou 2010, 140-141).

The objective aspect involves the commission of a deed that includes: the material element, the immediate consequence and the causal link between them. The pre-existence of an incrimination rule presupposes the existence at the time of the commission of the concrete deed of some criminal rules qualifying it as an offense. Typicality presupposes a full concordance between the features of the concrete deed and the conditions of the incrimination norm (Duvac, Neagu, Gamenț and Băiculescu, 2019, 308). Any offense must be prescribed by the criminal law, but not every deed prescribed by the criminal law is also an offense, because the provision in the law is only one feature of it, and other essential features must be carried out at the same time.

One can also raise the issue of penalizing new categories of deeds and defining their essential features, especially from the perspective of typicality, such as, for example, offenses derived from hate and hate speech, it being known that many offenses that based on discrimination are already regulated in all legal systems based on the rule of law. In order to concretely penalize them, it is necessary to establish a minimum standard regarding the requirement of the typicality of the offenses, as well as the imposition of a minimum or maximum limit of the applicable punishment. This actually implies the definition of these offenses at (at least) a minimal level, by adopting directives for each specific regulatory field (Franguloiu and Hegheș 2023).

The legal classification is carried out in the criminal prosecution phase by means of an order to start the criminal prosecution *in rem* and *in personam*, to indict, to extend the investigations or to change the legal classification or by indictment. In the trial phase, this is done through conclusion, criminal sentence and criminal decision.

The issue of meeting the essential features of the offense is important in any phase of the criminal process, including the criminal investigation phase, including in the situation where the issue of taking or extending some preventive measures arises. On this occasion, it is necessary to verify, at least at the level of indications, the existence of the essential features of the offense, as an essential condition for taking a preventive measure. For example, regarding the offense of drug trafficking, it was argued that certain plants (in this case, a mixture of plants called ayahuasca), would not be part of the annexed table of drugs and precursors in Law no. 143/2000 and that it would not be found in the annexed table of the Vienna Convention against Illicit Trafficking in Psychotropic Substances from 1971 and consequently, we could not speak of the existence of the offense of drug trafficking. The court ruled on this aspect, in the procedure for extending the measure of preventive arrest, as follows: "The Vienna Convention on Psychotropic Substances of 1971, ratified by Romania, provides in Article 1 which provides the definitions, at letter e: "The term psychotropic substance refers to any substance, whether of natural or synthetic origin, or any natural product in Tables I, II, III or IV."

From the analysis of these legal texts, including those provided for in law no. 143/2000, republished, which in Article 1 lit. b provides the definition of the drug: “drugs - plants and narcotic or psychotropic substances or mixtures containing such plants and substances, listed in tables no. I – III”, it follows that the content of the notion of “drug” includes the main substance, regardless of the physical state in which it is and that it does not refer only to obtaining that substance through chemical processes (in this sense, see also Buzatu 2012 and Buzatu 2015). Therefore, the plants that contain the prohibited substance indicated in the attached tables are prohibited plants, because what represents a danger to people’s health is not the plant, as such, in its natural state, but the ingestion of the substance contained in that plant, no matter what form. Analyzing the manner in which the legislator understood to criminalize the facts related to drugs, it is found that the legislator preferred a rather broad way of describing the typicality of these facts, in an attempt to cover all material activities related to drugs, starting from cultivation, production, experimenting, manufacturing, transporting, selling, possessing, etc., thus resulting in an abstract danger of this category of offense... With regard to this aspect invoked by the defense, the Court of Appeal has to state that the criminal law includes in the content of the term “drug” plants and narcotic or psychotropic substances or mixtures containing such plants and substances, such as the plants from which the ayahuasca decoction or “tea” is prepared contain DMT (dimethyltryptamine), the substance prohibited by the 1971 Convention, but also by Law no. 143/2000 republished, so this defense is devoid of substance.” Therefore, the court found that the requirement of the typicality of the drug trafficking offense seems to be fulfilled from the perspective of the fundamental indications of committing the offense that requires taking/extending/maintaining a preventive measure (Franguloiu 2020, 404).

The causality *ratio* that must be analyzed within the fulfillment of the essential feature of the typicality of the offense results *ex re* in the case of result offenses. Thus, in the case of certain offenses committed by a plurality of criminals, the existence of understanding between them will have to be analyzed, as well as a coordination of their activities, including from the perspective of an anticipation of any intervention leading to a certain result. For example, in a multi-person incident, defendant X observed the victim trying to backstab his friend, so he pushed him onto the hood of a car and then kicked him in the abdomen. Regardless of the action of the defendant X., the defendant Y., on his own initiative and without any prior understanding, intervened and hit the victim repeatedly with his foot, with the heel of his shoe in the chest area and after the victim fell to the ground he continued to kick her hit in the head area, cranial injuries leading to her death. The medico-legal report established that the injuries caused by the defendant X. were of minimal importance and would have required 4-5 days of medical care, that the death occurred exclusively due to cranial injuries, an area in which the defendant X. did not hit the victim, but only the defendant Y. Given that the evidence proved that there was no prior agreement between the two defendants, no coordination of their actions and that the defendant X. could not in any way anticipate the action of the defendant Y., the court ordered admission of the appeal and in the retrial, the change of the legal classification against the defendant X. from the offense of complicity to the offense of beatings or injuries causing death in the offense of beatings or other violence, on the grounds that the existence of a causal link between the defendant’s deed was not proven and the result produced; this result must be analyzed concretely, on its own, independently of the deed of the defendant Y. with whom the defendant X. had no previous or concurrent agreement (Criminal Decision no. 194/2001, CA Braşov, Criminal Section, with note of Franguloiu 2001, 83-85).

The deed committed with guilt

A second essential feature of the offense that emerges from its legal definition in Article 15 of the Romanian Criminal Code concerns the commission of the deed with guilt.

The meaning of the notion of “guilt” in Romanian Criminal Law must start from the mental attitude of the perpetrator towards the committed deed and towards its consequences, an attitude that can only be foreseen for a concrete deed, therefore only in the respective incriminating norm. What is of primary interest is the form of guilt required by the law for the prohibited deed, and not guilt viewed as a mental attitude towards the deed and its consequences without reference to a specific deed (Ctin. Mitrache and C. Mitrache 2019, 137).

In order to understand what guilt means in all profound psychological aspects, there are logical flowing processes to examine, going back from the objectiveness of law to the relativeness of psychology and physiology of the brain. Starting from the definition of criminal offence, Romanian law states that a criminal deed is an antisocial activity manifested with guilt. Legal investigation gives a quantitative characteristic to guilt, it weights the amount of guilt proportionally with the complexity and severity of the action by gathering specific measurements, objective fact, proofs and scientific expertise. Guilt can be seen as a social, psychological and law phenomenon, all these parts being subsidiary to each other (Bobîlcă and Paraschiv 2009; Tănăsescu and Tănăsescu 2004, 132-153 in Hegheş and Şchiopu 2021, 31). Psychological processes like brain mechanism, conscience, personality, emotional filters construct the mental state integrity that is the foundation of discernment, critical judgement which is the base of responsibility. Responsibility is the base of social integration and moral compass. Also, it is the characteristic that makes a person capable of assuming the blame for a wrong deed, understanding its negative impact and further, assuming the punishment and rehabilitate (Colţan 2008; Tănăsescu 2014, 111-128 in Hegheş and Şchiopu 2021, 31).

In the doctrine, the observation is made that guilt as an essential feature of the offense should not be confused with guilt as a subjective element in the content of the incrimination norm. It is possible that in concrete terms, there is one of the forms and modalities of guilt provided by Article 16 of the Romanian Criminal Code and yet the subjective element of a certain offense is missing and vice versa, it is possible that, concretely, there is a subjective element and yet there is no guilt. Thus, in the case of offenses for which guilt in the form of intention is necessary, the fact that the deed is committed by mistake is irrelevant. For example, for the offense of destruction, provided by Article 253 of the Romanian Criminal Code, it is required that the perpetrator deeds with intention, but if he committed the deed out of fault, there is guilt as an essential feature of the offense, but not as a subjective element of the incriminated deed, so that the commission of such an deed will not attract criminal liability (Sima 2015, 92). As an essential feature of the offense, guilt takes three main forms: direct intent, with basic intent or oblique intent. Proceeding to the psychological analyzation, if the criminal deed is the center of criminal law, as a quantitative measuring unit, then guilt is what adds qualitative weight to an act. In other words, we can describe guilt by dissecting it into two manifestations: the external manifestation which is the physical action or inaction in order to obtain a specific goal and the internal manifestation, which is the intention of doing an action. Intent has multiple layers with intent being the primary characteristic and “culpa” which define an involuntary skip of details when constructing a plan of actions. In U.S.A. law, one form of “culpa” is manslaughter and as we see, there are specific names for each type of “attenuated” intent but Romanian law gives them all the generic title of “culpa” (Grama 2007; Tănăsescu 2012, 11-17 in Hegheş and Şchiopu 2021, 31).

Intention is a main form of guilt defined in Article 16 para. 3 of the Romanian Criminal Code and represents the mental attitude of the perpetrator resulting from foreseeing the result of his deed and pursuing that result by committing the deed or only accepting that result. Intention is known in doctrine and legislation under two modalities: direct and indirect. The names of these ways of the intention belong to the criminal doctrine. Direct intention is characterized by foreseeing the result of the deed and pursuing that result by committing the deed (Article 16 para. 3 letter a of the Romanian Criminal Code). The indirect intention is characterized by the provision of the result by

the perpetrator, a result that is no longer pursued, but accepts the eventuality of its production (Article 16 para. 3 letter b of the Romanian Criminal Code).

As a form of guilt, basic intent is defined by the provisions of Article 16 para. 4 of the Romanian Criminal Code and consists in the mental attitude of the perpetrator who foresees the result of his deed, does not accept it, considering without grounds that it will not occur or does not foresee the result of his deed although he could and should have foreseen it. Basic intent is known in doctrine and law under two modalities: basic intent with provision and simple basic intent. The names of these modes of guilt belong to the criminal doctrine. Guilt with foresight is characterized by the fact that the perpetrator foresees the result of his deed, a result he does not expect, does not accept and considers without grounds that it will not occur (Article 16 para. 4 letter a of the Romanian Criminal Code). Simple basic intent or basic intent without provision is characterized by the fact that the perpetrator does not foresee the result of his deed, although he should and could have foreseen it (Article 16 para. 4 letter b of the Romanian Criminal Code).

Oblique intent (*praeterintentia*) is a mixed form of guilt comprising direct intent and basic intent combined. According to the provisions of Article 16 para. 5 of the Romanian Criminal Code, there is an oblique intent when the deed consisting of an intentional action or inaction produces a more serious result, which is due to the fault of the perpetrator.

In the case of an offense that is committed with oblique intent, the intentional material activity that leads to the more serious result that is imputed as fault depends on the typicality of the offense and requires a concrete analysis of the factual situation. For example, in the case of the offense of bodily harm in the form of endangering the person's life, provided by Article 194 para. 1 lit. e of Romanian Criminal Code, it is necessary for the perpetrator to be guilty of creating the real possibility that the person will die; to the extent that, from the materiality of the deed, it is found that he had the representation of this possibility, the deed will meet the essential features of the offense of attempted murder, provided for by Article 32 rap. to Article 188 and 189, as the case may be, of Romanian Criminal Code. In this sense, the judicial practice also decided in the following case: the defendant and the injured person divorced, but continued to live together, the conflicts between them continued in more serious forms and culminated in a new scandal starting from household expenses, in which the defendant hit the injured person repeatedly with his fists and feet, knocked her to the ground, and she managed to crawl into the kitchen. There, the defendant continued the assault and pushed her over the hot stove top and left her unconscious. Later, the defendant told his daughter that the injured person fell and hit himself, and the daughter notified the ambulance, the injured person being saved thanks to medical intervention. Although the defendant requested the change of legal classification in the offense of bodily injury in the form of endangering the person's life, the request was rejected on the grounds that his material activity, even if he did not pursue the death of his ex-wife, provided for the possibility of producing this result (through abandoning her in a state of unconsciousness falling over the hot plate of the stove) and accepted the possibility of its production, so it cannot be claimed that she was at fault with regard to *majus delictum* (Criminal Decision no. 43/2001 of CA Braşov, Criminal Section, with note by Franguloiu 2001, 102-103).

The deed must be unjustified

The third essential feature of the offense, in the order presented in Article 15 para. 1 of the Romanian Criminal Code, is that the deed is unjustified. The unjustified character (anti-juridicality) of the deed provided for by the criminal law implies that it is not allowed by the legal order, in other words it has an illegal character. Thus, it is possible that a deed, although provided for by the criminal law, is not illegal, since its commission is permitted by a legal norm. For example, killing

a person in self-defense fully corresponds to the description made by the legislator in the text criminalizing murder, but the deed is not illegal because the law authorizes its execution under the given conditions. Circumstances that remove the unjustified character of the deed are regulated and are called justifying causes (Duvac, Neagu, Gamenț and Băiculescu 2019, 308). In the Romanian Criminal Code, the following justifying causes are provided: legitimate defense - Article 19, the state of necessity - Article 20, Exercising a right or meeting an obligation - Article 21 and the Consent of the victim - Article 22.

The deed must be imputable to the person who committed it

The last of the essential features of the offense, included in the legal definition in Article 15 para. 1 of the Romanian Criminal Code, is that the deed is imputable to the person who committed it. The deed is imputable to the person who committed it if it is established that deed belongs both physically and mentally to the person who committed it. The imputable nature of the deed concerns, therefore, the guilt of the person who committed the deed both in terms of volition and intellectuality. For the deed to be imputable, it is not enough to prove that the deed physically belongs to the perpetrator, but also the fact that his will was not constrained (Ctin. Mitrache and C. Mitrache 2016, 143).

The essential feature of the imputability of the deed exists only if there is no non-imputability cause provided by law: physical constraint - Article 24, moral constraint - Article 25, non-accountable excessiveness - Article 26; underage perpetrator - Article 27, mental incompetence - Article 28, intoxication - Article 29, error - Article 30 and fortuitous case - Article 31 of the Romanian Criminal Code.

The essence of imputability (not only from the perspective of meeting the requirements of criminal liability) depends, for example, on the existence of direct intention, qualified by purpose, in the case of the offense of cheating consisting in issuing CEC files without the necessary supply (aspect related to the typicality of the deed), hidden reality in order to induce the supplier to release the goods and honor the order, being convinced that the method of payment by issuing CEC slips covers the respective price (Criminal Decision no. 85/2001 CA Braşov, Criminal Section, with note by Franguloiu 2001, 69-71). The solution remains valid even today, the reasoning presented being confirmed by Criminal Decision no. 146/2015 pronounced by the ICCJ.

Could alcohol and/or drug use have effects on the concept of imputability from a legal framing perspective? For example, if a person has consumed alcohol and/or drugs, is he committing an offense that meets the requirements of the offense of manslaughter or the offense of murder with direct intention? A relevant scientific opinion was expressed in a paper to the effect that “the scientific concepts of the notions of basic intent and indirect (or direct) intention should be analyzed, as well as the effects of alcohol and drugs on the ability to reason, to think, including on the body and the extent to which they affect reason, the ability to understand or accept what a person who has not ingested such substances can easily understand” (Franguloiu, Hegheş and Costescu 2023).

Conclusion

An antisocial deed cannot constitute an offense unless a pre-existing text of law qualifies it as a criminal deed by means of a norm of criminalization under the threat of punishment. However, in order to fall under the scope of the criminal law, a specific deed must be committed with the form of guilt provided by the criminal law, be unjustified and imputable. In order to be able to apply a punishment to the person who committed a criminal deed, it is necessary to have a full concordance

- typicality between the features of the concrete deed and the legal model of the offense, from an objective and subjective aspect, the moral element being analyzed in principle by referring to the provisions related to guilt from the General Part of the Romanian Criminal Code.

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