REZUMAT

Problema conceptului general al infractiunii este o problema centrala a oricarui sistem juridic penal. Intrarea in vigoare a unei noi legislatii penale, care a revenit la conceptia formala asupra infractiunii, din urma cu aproape un veac, ne-a determinat sa abordam aceasta tema fara niciun fel de prejudecati.

Prima definitie legala a infractiunii a fost formulata in Codul penal francez din 25 octombrie 1795, aceasta stand si la baza primei definitii a infractiunii formulata intr-o lege penala romaneasca, Codicele Sturdza din 1826: “fapta criminaliceasca este orice fapta oprita de pravila sau o neurmare a unei lucrari pricinuite de pravila”.

Era, ceea ce spunem azi, o definitie formala a infractiunii care se intemeiaza pe lege ca izvor formal si nu pe fapta, pe conduita antisociala ca izvor natural al incriminarii. Definitia formala se raporteaza la aspectele juridice (substanta formala) ale faptei, si nu la continutul sau natural (substanta reala). Intr-o conceptie materiala, ceea ce primeaza in caracterizarea faptei concrete ca infractiune nu este atat norma de incriminare, cat realitatile , procesele substantiale care l-au determinat pe legiuitor sa incrimineze o fapta.

Conceptiile formale evidentiaza exclusiv aspectul formal al infractiunii, contradictia faptei concrete cu preceptul din norma de incriminare.

Conceptele materiale atribuie faptei un caracter socialmente periculos, adica neconvenabil in raport cu interesele societatii. Adoptarea uneia sau alteia dintre conceptii evidentiaza recunoasterea pe care legiuitorul o acorda influentei vietii sociale asupra dreptului penal. Un numar mare de autori definesc infractiunea din punct de vedere formal: un act sanctionat cu o pedeapsa (R. Merle, A. Vitu), un comportament legalmente prevazut si sanctionat cu o pedeapsa (Jean Pradel), un act pasibil de sanctiune penala care a cauzat un prejudiciu altuia (M. Cousson).

Un numar la fel de mare de autori definesc infractiunea din punct de vedere substantial sau material: fapta prevazuta si pedepsita de legea penala, din cauza tulburarii pe care o provoaca ordinii sociale (G. Stefani, G. Levasseur), fapta contrara ordinii sociale, prevazuta si pedepsita de legea penala (Dictionnaire de sciences criminelles), actul care ofenseaza starile puternice si definite ale constiintei sociale (Durkheim).

Unii autori au abordat pozitii considerate mixte: F. Antolisei a introdus sintagma “contrasteaza cu scopurile statului”, intelegand prin stat reprezentantul general al societatii, iar G. Fiandaca si E. Musco au introdus lezarea unor valori sociale care necesita protectie in cadrul ordinii constitutionale. In opinia noastra conceptiile mixte se situeaza foarte aproape de conceptiile materiale.

Codul penal roman de la 1868 a adoptat o conceptie materiala a infractiunii, ca si celelalte state central si est europene, dar Codul penal in vigoare a adoptat o conceptie formala, definind infractiunea ca “fapta prevazuta de legea penala, savarsita cu vinovatie, nejustificata si imputabila persoanei care a savarsit-o”, (art.15 alin. 1). Aceasta definitie a suportat numeroase critici in doctrina, din mai multe puncte de vedere.

Introduce ca trasatura esentiala a infractiunii antijuridicitatea, care nu e specifica dreptului penal, ci oricarei forme de ilicit juridic, si este o conditie negativa, ceea ce este inadmisibil intr-o definitie. In plus, antijuridicitatea intra in continutul tipicitatii, fiecare fapta prevazuta de lege avand un caracter antijuridic, antisocial (G. Antoniu).

Introduce imputabilitatea alaturi de vinovatie, fara a face precizarea ca se refera doar la imputabilitatea obiectiva, materiala, nu si la cea subiectiva, care intra in continutul vinovatiei (I. Pascu, V. Pasca).

Intr-o analiza a celor doua conceptii formale si materiale, putem afirma ca definitiile substantiale ofera o imagine mai complexa asupra infractiunii, invoca ordinea de drept ca o conditie a evolutiei societatii si pune la dispozitia organelor judiciare mijloace de delimitare a ilicitului penal de cel nepenal.

Autorii care opteaza pentru definitii formale se raporteaza la vointa legiuitorului ca element esential al definitiei infractiunii fara a face referire la contextul social istoric in care a fost adoptata norma penala sau la ierarhizarea valorilor sociale amenintate, ceea ce ingusteaza considerabil posibilitatile de interpretare a normei. O definitie formala este comoda, atat pentru organul legislativ, cat si pentru doctrina, pentru ca lasa intreaga raspundere asupra legiuitorului.

Incriminarea unei fapte trebuie sa aduca insa remedii sociale, spunea R. Garofalo, iar elementele caracteristice delictului sunt antisocialitatea motivelor determinante si atingerea adusa conditiilor de existenta implicand ofensa moralitatii unui grup social determinat, spunea E. Ferri.

In aceste conditii, o definitie a infractiunii ar trebui sa inceapa cu “actiunea sau inactiunea care aduce atingere ordinii de drept” (prima trasatura esentiala) sa continue cu aspectul subiectiv: “savarsita cu vinovatie, sau imputabila persoanei

care a savarsit-o” (a doua trasatura esentiala) si sa se incheie cu “prevazuta de legea penala”, (a treia trasatura esentiala) care delimiteaza ilicitul penal de ilicitul nepenal.

Dincolo de diferentele dintre cele doua conceptii, o definitie a infractiunii trebuie sa fie cat mai completa, pentru a asigura o intelegere corecta a temeiurilor care l-au determinat pe legiuitor sa incrimineze o fapta.

SUMMARY

The problem of the general concept of crime is a central issue of any criminal legal system. The coming into effect of a new criminal law, which has returned to the formal conception of the crime, from almost a century ago, has prompted us to address this issue without any prejudices.

The first legal definition of the offense was formulated in the French Criminal Code of October 25, 1795, and it is also the basis of the first definition of the offense formulated in a Romanian criminal law, Codices Sturdza of 1826: "the criminal act is any deed stopped by the regulation or not following what is in the regulation".

It was, what we are calling today a formal definition of the offense that is founded on the law as a formal source and not on the deed, on antisocial conduct as the natural source of incrimination. The formal definition refers to the legal (formal substance) aspects of the deed, and not to its natural content (the real substance). In a material conception, what characterizes the concrete act as a crime is not both the rule of incrimination, the realities, the substantive processes that led the legislator to criminalize a deed.

The formal conception emphasizes only the formal aspect of the offense, the contradiction of the concrete act with the precept of the rule of criminality.

Material concepts attribute the deed to a socially dangerous character, that is, inconvenient in relation to the interests of society. Adopting one or other of the concepts highlights the recognition that the legislator grants to the influence of social life on criminal law. A large number of authors define the offense formally: an act punishable by a punishment (R. Merle, A. Vitu), a legally prescribed and

punishable offense (Jean Pradel), a punishable criminal offense which has caused injury to another (M. Cousson).

An equally large number of authors define the offense in a substantial or material sense: the act provided and punished by the criminal law, because of the disorder it causes to the social order (G. Stefani, G. Levasseur), the act contrary to the social order, provided and punished by the law (Dictionnaire of Sciences Criminelles), an act that offends the strong and defined states of social consciousness (Durkheim).

Some authors approached mixed positions: F. Antolisei introduced the phrase "contrasts with the objectives of the state", understanding the general representative of the state by state, and G. Fiandaca and E. Musco introduced the violation of social values that require protection within the constitutional order . In our opinion, mixed conceptions are very close to material conception.

The Romanian Criminal Code of 1868 adopted a material conception of the offense just like the other Central and Eastern European States, but the Criminal Code in effect adopted a formal conception, defining the offense as "the act provided by the criminal law, committed with guilt, unjustified attributable to the person who committed it "(Article 15, paragraph 1). This definition has borne numerous criticisms of the doctrine from several points of view.

It introduces as an essential feature of the crime the anti-justice, which is not specific to the criminal law, but to any form of legal illicit, and is a negative condition, which is inadmissible in a definition. In addition, anti-jury enters into the content of the typicity, each act provided by law having an anti-social, anti-social character (G. Antoniu).

It introduces the imputability with guilt, without specifying that it refers only to the objective, material, not the subjective imputability that enters the content of the guilt (I. Pascu, V. Pasca).

In an analysis of the two formal and material conceptions, we can say that the substantive definitions offer a more complex picture of the offense, invoke the rule of law as a condition of the evolution of society and provide the judicial bodies with means of delimiting the criminal offense from the non-penal offenses.

The authors who opt for formal definitions refer to the will of the legislator as an essential element of the definition of the crime without referring to the historical social context in which the criminal norm was adopted or to the hierarchy of threatened social values, which considerably narrows the possibilities of interpreting the norm. A formal definition is convenient, both for the

legislative body and for the doctrine, because it leaves the entire responsibility to the legislator.

The criminalization of a deed must bring social remedies, said R. Garofalo, and the elements characteristic of the offense are the anti-socialism of the determining motives and the attainment of the conditions of existence involving the offense of morality of a determined social group, said E. Ferri.

Under these circumstances, a definition of offense should begin with "action or inaction that interferes with the rule of law" (the first essential trait) to continue with the subjective aspect: "committed with guilt or imputable to the person who committed it" the second essential feature) and ending with "provided by criminal law" (the third essential feature) that delimitates the illicit criminal offense of illicit non-criminal acts.

Beyond the differences between the two concepts, a definition of the offense must be as complete as possible to ensure a correct understanding of the grounds that led the legislator to criminalize a deed.