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INTRODUCTION TO THE DEVELOPMENT OF MODERN CRIMINAL LAW*

As it is widely known, the first school of modern Criminal Law appeared in the late 18th century. The most representative authors of this school of thought are two distinguished scholars, Anselm Feuerbach from Germany and Francesco Carrara from Italy. Even before, Cesare Beccaria wrote his famous book *Dei Delitti e delle Pene* (1764), enclosing the most powerful criticism of European criminal justice systems of his time. In his essay, Beccaria expressed new ideas of the Age of Enlightenment and applied them to Criminal Law. This school is known as the Classical School of Criminal Law. The essential idea of this school is based on the presumption that every human being has a free will and is by nature given the freedom of choice between good and evil, and therefore has to be punished without exception for his wrong choices. This idea was based on the philosophical concept known as „indeterminism". More generally, regarding the Classical School of Criminal Law we should mention that its founders were inspired by Kant who in turn found his inspiration in Greek philosophy, most of all, in the works of Plato. One of the fundamental theses of the Classical School is the principle of legality, whose roots can be found in the platonic thought. For example, Plato's dialogue *Laws* tells us that the punishment must be based on the law, *dike... genomene kata nomon* („δίκη... γενομένη κατά νόμον" 854d). This concept, many years later in the end of the 19th century, was formulated in the famous Latin saying *nullum crimen, nulla poena sine lege*.

In the nineteen century, as a reaction to the Classical School, there appear new schools which were quite opposite to it, as it is the „Modern

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School", represented mostly by Franz von Liszt in Germany and by Adolf Prins in Belgium. The other two schools are the „Anthropological School", represented by Cesare Lombroso from Italy, and the Italian Positivistic School, represented by Enrico Ferri and Raffaele Garofalo. These three schools, contrary to the Classical School, accept that the human being is not free but determined in his behavior by different factors, internal or external to his nature, as is for instance society. This idea was based on the philosophical concept known as „determinism".

The early 20th century developed the so-called Eclectic School representing a compromise between the traditional classical and the new schools. This eclectic school influenced the majority of criminal codes promulgated in the first half of the 20th century, including the Greek Criminal Code of 1950. The second part of the 20th century brought new tendencies and orientations whose contribution to the development of Criminal law as a science, as well as a branch of statutory law was immense.

From today's perspective, discussing a clearly identified school of criminal law appears to be very hard. There is nothing spectacularly new. On the contrary, it rather seems that some ideas have been overtaken from each previous school, forming a compilation that could be defined as the common heritage of Criminal Law Science. The extreme standpoints are abandoned today and a new eclectic approach has been adopted. In the frame of this approach we can notice the reflections of certain schools and trends, from the second half of the last century, such as: 1) Orientation toward treatments and rehabilitation. 2) Neo-classicism (or the theory of „just deserts") and 3) Abolitionism.

1) The orientation toward treatments and rehabilitation, even nowadays strongly supported by certain scholars, in some way introduced the medical approach in the criminal law. According to this approach, the offender is considered an ill person in need for treatment and cure instead of punishment (which, even if applied should include treatment). The offender is supposed to be treated as a patient who needs special treatment, which would enable him to become a better individual who is not going to commit crimes any more. To this position, however, have been raised two main objections. Firstly, treatment has never resulted in any success, due to the fact that psychology, psychiatry and medicine have never managed to develop efficient treatments and procedures suitable to prevent or „cure"' somebody from committing crimes. Pharmaceutical treatments as well as brain surgery (known as „lobotomy") were actually being applied in several countries, efficiently preventing the treated person from committing crimes in future. However, the consequences of such methods involved the destruction of the entire personality of the offender, who would subsequently become disabled (remember the film „One flew over the Cuckoo's Nest"). Secondly, the offender has a right to his own

personality, including the right to be punished (as Hegel already said in his time). An offender has to suffer a proportional punishment for the crime that he committed. In other words, he has the right to be considered as a subject, or as a human being capable of being guilty and responsible and to receive the punishment for his own wrongdoing, and not to be considered as an object of treatments, which are applied against his own will.

In spite of these two main and other numerous objections, the orientation on treatments and rehabilitation, was adopted and implemented in more or less many countries. In the U.S. and the Scandinavian countries, where this orientation was mostly implemented, it has failed, and hence caused a great disappointment among scholars and practicing lawyers. In this regard, the words of the American criminologist Robert Martinson „nothing works" (1974) became famous. This happened in spite of the fact that in those countries a lot of money and effort have been spent for this task. It is well known that during the seventies the prisons in the Scandinavian Countries looked like hotels, where convicts were given the opportunity to study, learn foreign languages, take part in sports activities, etc. Unfortunately, all these efforts resulted in creating educated criminals who were even more capable of committing crimes.

2) As a reaction against the orientation on treatments and rehabilitation in the seventies of the last century a new school emerged. The core postulates of this school were not that innovative at all – they were primarily based on the essential ideas of the Classical School of Criminal Law. This is the reason why it has been given the name of „neo-classicism". The basic idea is that the offender ought to be given a punishment that he deserves: meaning a punishment, which is proportional to the offence he has committed. Like in the time of the classical school punishment becomes the key notion of Criminal Law. The entire Criminal Law relied again on punishment, but not only in order to inflict pain and suffering on the offender, as it was suggested by the classical School, but to deter potential offenders from committing crimes. Proportionality of punishment became the crucial question. The main contribution of the School is that in Criminal Law of some countries there are notable efforts to set precise criteria for prescribing in the law and measuring the punishment by the judge. The „Sentencing Guidelines" in the USA, which apply on the federal level from 1987, could serve as a good example here. The Guidelines Manual, containing very detailed rules that a federal sentencing judge should follow in order to determine what sentence to impose on an individual or an organization, is 655 pages long. These Guidelines provide for almost all conceivable aggravating and mitigating circumstances. A certain number of points correspond to each of these circumstances, which are added or reduced, forming a sum of points easily convertible to an exact number of months of imprisonment.

Regardless of its practical use, doubts are raised whether this method can lead to a proportional and just punishment. Measuring of punishment is not merely an abstract mathematical process, but a creative one in which the judge, though bound by the law, must have the possibility to evaluate every single case individually. At this point it is worth to evoke the words of the Italian professor of Criminal Law Enrico Ferri that „it is not possible to measure punishment in kilograms or meters".

3) The third trend, which appeared in Europe, especially in Holland and Norway is known as abolitionism. In accordance with this tendency, Criminal Law as a whole should be abolished, because it does not suppress crime, but on the contrary it itself generates some serious forms of crime. The alternatives to Criminal Law, offered by abolitionism, though, could be useful in some cases, as in mediation between the offender and victim, but cannot replace the system of Criminal Law as a whole. In the case of the abolishment of Criminal Law, the society would probably be faced with spontaneous private reactions, as for instance revenge, lynching, etc. Anyhow, there is no contemporary legislator who would take the idea of the abolishment of Criminal Law seriously into account.

What has remained from these three schools? Do they have any influence on Criminal Law today?

Firstly, regarding the orientation on treatments and rehabilitation we can notice today a much more realistic attitude towards this matter, in the sense that it is not in fact the fundamental orientation in Criminal Law nor is it thought of as compulsory any longer. Only for juvenile and insane offenders does this orientation have a justification. Special therapies today are an offer to the convicted person to participate in his own rehabilitation.

Secondly, regarding neo-classicism we can observe that it contributed to the re-establishment of Criminal Law, which is based on criminal offence and responsibility of the offender, and not on his dangerousness. It led to the renaissance of the principle of justice and proportionality.

Thirdly, regarding abolitionism, which today is a utopia, nevertheless has contributed indirectly to the decriminalization of certain behaviors and to the introduction of new alternatives to punishment. For the first case we could mention gambling or pornography, while the latter is depicted in mediation between the offender and victim.

Regardless of all the above, today we can notice a negative trend in the legislation of almost all countries that was not influenced by the science of Criminal Law. On the contrary, the science of Criminal Law fiercely criticizes the deviation from the basic principles and standards of the modern Criminal Law. These deviations are the results of the wishes of the legislator to combat organized crime and terrorism. Although these

forms of crime are of great danger for the society, we cannot combat crime at any price. Such a state, which, with the aim of suppressing organized crime and terrorism, uses means contrary to the principles of Criminal Law, does not differ much from the perpetrators of organized crime and terrorism. We cannot combat crime by state behavior substantially equal to crime. This is the case, for instance, in the unlimited time of arrest and deprivation of the procedural rights of the arrested person. Let us hope this is only a short episode in the development of Criminal Law and that Criminal Law in the future will adhere firmly to its basic principles and standards.

In conclusion, we could say that the science of Criminal Law and criminal legislation are permanently undergoing evolution. They develop in accordance with the progress of the society. However, for the achievement of the goals of Criminal Law beyond the science and good legislation it is indispensable to have a proper enforcement of criminal laws. This is a principle that we inherited from Plato as well. As maintained by the Greek philosopher in the *Laws* (751 c), „it is a fact clear to any one that, the work of legislation being a great one, the placing of unfit officers in charge of well-framed laws in a well-equipped State not only robs those laws of all their value and gives rise to widespread ridicule, but is likely also to prove the most fertile source of damage and danger in such States“.

These thoughts of Plato comprise an unchangeable truth. Indeed, we can notice today that there are many countries, which have good criminal laws but bad if not disastrous application of these laws in practice. That is one of the most important obstacles, which is existent in contemporary Criminal Law. Legislators and appliers of Criminal Law in their effort to face this problem should always be guided by the platonic teaching.