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PHD THESIS

EQUITY IN THE CRIMINAL SUBSTANTIAL LAW

L'ÉQUITÉ EN DROIT PÉNAL SUBSTANTIEL

RESUME

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Key words: fairness, criminal justice, the right to a fair trial, criminal comparative law, criminal law, proportionality, clarity of the law, the legality of criminal offenses and penalties, the individualization of sentences, *ne bis in idem*, Romanian criminal law, French criminal law, extended confiscation, confiscation by equivalent, safety measures, educational measures, criminal liability of minors, more favorable criminal law, legal justification causes, jurisprudence justification causes, *ius puniendi*, the rights of defense

The present thesis deals with finding the equity as fairness in the substantial Romanian and French criminal law. The research methods are the comparative, historical and analytical one.

The Introduction identifies and presents the concept of the right to a fair trial from the international conventions and from the penal procedure of both states – France and Romania.

The preliminary chapter treats fairness from a historical and philosophical perspective and analyses the connection between "law, justice and fairness." The first Section of the preliminary chapter reveals the philosophical perspective upon the concepts of law, justice, equity as fairness, more precisely, the law and equity in the Ancient philosophical concepts, the notion of fairness in the Roman law and justice and equity (fairness) in the minds of philosophers and enlightened utilitarianism representatives.

The second section of the preliminary chapter deals with modern conceptions about law, justice and equity and analyses equality, non-discrimination and equality before the law, the political moral law model and democratic law model, basically equity as *social justice*. Here we have John Rawls and Habermas who have different opinion about the fundament of a fair law in a fair society.

Finally, the last part of the preliminary chapter gives definitions outlined in the fundamental principles to the concept of equity.

The first part of the thesis presents fairness in relation to criminal punishment. In its first chapter, it is analyzed the connection between fairness and individualization of criminal sanctions.

The first section searches fairness into the individualization of the sentence and it is divided into two specific parts A and B. A for the individualization of the sentence in the Romanian criminal law, through subjects as fairness and the individualization of the sentence in Romanian criminal law – an overview, the principle of proportionality of restricting fundamental rights as a guarantee of equity - fairness in the individualization of legal punishment, the main criminal penalties and equity, some aspects from the individualization of criminal penalties applicable for the moral person, legal individualization of life imprisonment, legal individualization of imprisonment, legal individualization of the criminal fine and other aspects that aim equity on the individualization of penalties. It also deals with complementary and accessory penalties and equity, the general criteria for punishment individualization as guarantee against the discretionary power of the judge, the game between mitigating and aggravating circumstances which are applying to a fair punishment, judicial individualization of imprisonment in custodial regime the way for establishing a fair punishment. After treating these aspects, the research goes on with equity in post sentencing individualization of punishment in Romanian criminal law.

The analysis is quite similar for the French part B as following aspects of the sentence in French criminal law: individualization of legal punishment under French law, the principle of legality of criminal offenses and sanctions in French criminal law, proportionality seen as the guarantee of equity in legal individualization in French criminal law, a flexible general minimum yet provided by the Criminal French Law, the legal maximum variation depending on the severity of criminal act, French legislator inconsistencies in determining punishment more exactly the Alternative punishments in French criminal law. For the judicial individualization, the research deal with judicial individualization during the judgment, who and how individualizes sentences in French criminal law, specific instruments in the judicial individualization trial phase, judicial individualization modalities during the judgment phase in French criminal law, selecting a specific penalty and some issues regarding fairness in judicial practice of individualization of sentences in French criminal law.

The research also treats the post sentencing individualization in French criminal law, legal entities which are competent in individualizing sentences in France, specific regimes in the judicial post- sentencing individualization phase in French criminal law, measures concerning restrictive punishment and deprivation of liberty in French criminal law. Finally the last aspect regarding this part is analyzing certain aspects aimed at respecting the right of defense during sentencing in French criminal law.

The second section deals with equity and the individualization of educational measures and safety measures. For the Romanian criminal law it deals with: the individualization of educational measures and safety measures in the Romanian criminal law following the justification of the favoring penal treatment for minors and the fairness of criminal penalties, the custodial educational measures regime and equity, the educational measures in special detention places for minors and equity, the mitigation and aggravation causes effects on educational measures, particular issues concerning criminal liability and equity for minors,

Regarding the safety measures from the Romanian criminal law, the thesis deals with equity in implementing the safety measure of confiscation by equivalent and extended confiscation and the implication of respecting proportionality in these measures, fair limits of confiscation by equivalent, and extended confiscation and the limits of equity

The French part B deals with: the individualization of educational measures and safety measures in French criminal law, the individualization of educational measures in French criminal law such as a brief history of criminal liability of minors in France, educational measures and safety measures for minors in French criminal law, the criteria for individualizing the sanctioning treatment of minors under criminal French law, explanation of the derogation scheme in the individualization of the juvenile criminal sanctions through the fairness of the criminal penalties.

Regarding safety measures for the French law the research deals with: safety measures in the treatment of the mature criminal offenders, the application of safety measures without existence of the crime and it raises the question of a lack of fairness in these situations.

It also analyses the particular case of mental disorders and if it is possible to create a delimitation between criminal penalties and safety measures, the connection between safety

measures, neutralizing function of penalty and equity in the technique of disposing these measures by the French authorities.

The second chapter of the first part deals with equity and the cumulated sanctions / cumulated criminal qualifications. In the first section fairness is researched in the *ne bis in idem* rule

The A part deals with issues concerning the *ne bis in idem* fundamental rule and the qualifications contest from the Romanian criminal law, the *ne bis in idem* rule in Romanian criminal law and the concurrent qualifications in Romanian criminal law.

As for the French part B, we have analyzed aspects as equity and non-cumulating qualifications / processes rule in French criminal law. It also deals with issues concerning the rule of *ne bis in idem* in French criminal law, the absence of rules which are containing a solution for qualification conflicts in French criminal law and exceptions to the non-cumulating qualifications rule. Single offense and plurality of values attained.

The second section finds the fairness of penalties, the *ne bis in idem* rule and the cumulating penalties aspects. Because the issue is more complex and it is not limited to the *ne bis in idem* rule. There are situations of cumulating penalties in the event of concurrent offenses, cumulating prison with criminal fine, cumulating main penalties with accessory penalties with complementary penalties, main penalty and accessory penalty accumulation, or of the main penalty with the safety measures

The part A. presents certain aspects from Romanian criminal law regarding the subject and concurrent crimes, cumulating imprisonment with criminal fine and equity. It also raises the question if the mandatory increase with one third of all the other set punishments which adds to the heaviest punishment is fair? After treating these aspects, it deals with equity and cumulating complementary punishments with the main punishment and accessory punishments, cumulating complementary punishments, accessory penalties and safety measures in case of multiple offenses.

As for the French part, these subjects are in part B: equity and non-cumulating sentences in French law, the principle of non-cumulating penalties for real concurrence of the criminal

offenses, non-cumulating criteria in French law and equity, the unique procedure with one imposed penalty, application in time and equity, complementary punishments concurrence and equity, exceptions. Accumulation of penalties is allowed by the French law for example for the contraventions hypothesis, but also for other cumulating hypothesis which actually are permitted by French criminal law under the condition of respecting the proportionality of the main penalty. Celerity and efficiency are a justification for the existence of a double litigation for criminal responsibility in the French criminal system.

The second Part of the thesis deals with equity and criminal liability. Chapter one deals with equity and criminal law enforcement in time and the first section deals with the extra activity of the more lenient penal law – *mitior lex*.

For the Romanian part A, we found as important with regards to equity: the more lenient criminal law in the Romanian criminal, regulation and fair basis of the more lenient criminal law in Romanian criminal law and the mandatory application of more lenient criminal law after the final judgment.

For the French part, the retroactivity of the more lenient criminal law in French law is viewed as an instrument of fairness, with a corrective role of the application of criminal justice in time

In the Section two are presented the exceptions to the non-retroactivity of criminal law, aspects from the Romanian criminal law such as: interpretative laws in Romanian criminal law, the coming back of the unfavorable jurisprudence of criminal law and the non-retroactivity of the criminal law in the Romanian criminal law and the Immediate application of the prescription provisions for criminal liability and execution of punishments for offenses committed prior to the prescription law to which the prescription term is not yet fulfilled in the substantial Romanian criminal law.

With regards to the aspects from French criminal law the research concerns: interpretative and civil laws, exceptions to the principle of non-retroactivity of more stringent criminal law in French law, the coming back of the unfavorable jurisprudence of criminal law and the non-retroactivity of the criminal law in French criminal law and the special situation of crimes against humanity in French criminal law and equity.

Finally, the second chapter deals with equity and the justification of crimes (*justification causes*). The first section regards equity and justification legal causes: equity and justification legal causes in Romanian criminal law, self-defense and the elements of fairness, status of necessity and fairness, equity in exercising a right or in the performance of an obligation and finally in the consent of the injured person – legal cause and the limits of equity.

The French part B deals with Fairness and justification legal causes in French criminal law in the following order: equity in legal general justification causes in French criminal law: the exception of truth - *exceptio veritatis* and the challenge excuse- justification cause in the French criminal law

Section two deals with equity and jurisprudential justification causes (*praetorienes*)

In the Romanian law these jurisprudential justification causes don't exist. That's why the research deals with the doctrinal ones and the special ones; part A is called aspects from the Romanian criminal law regarding doctrinal justification causes.

Regarding the French law in part B, the research deals with equity and justification jurisprudential causes in French criminal law such as: good faith as a praetorian justifying fact in defamation, freedom of expression justification cause in the light equity and equity as the foundation of justification by the defense rights.

In *conclusion* what we have demonstrated through our research is that there is equity as fairness, it exists through the application of fundamental analyzed principles. Fairness is not absolute, but it is adaptable, evolving in line with the law and historical time governed by law, but also with society and its moral principles. What is fairness? Equity as fairness is a corrective to substantive criminal law and a tool that restores the balance where it was defeated. Citing equity can fix some shortcomings in the law or faulty regulations which are generating discrimination and violating the equality of all before the law.

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