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Criminological Aspects Regarding the Offense of Money Laundering. Constituent Elements

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Abstract: Within the study, the author addresses the criminogenic causes of the offense money laundering, identifying them as greed, vice (components of egocentrism) and violence. Also, the determinant constituent elements of the money laundering offense are analyzed, the emphasis being on the need to prove the predicate offense. At the same time, the author analyzes and explains, in an original form, the special cause of non-imputability represented by the commission of the money laundering crime by a family member of the perpetrator of the predicate offense for the purpose of favoring the latter, providing solid arguments of the inopportuneness of applying such a cause in the situation of money laundering.

Keywords: social manipulation; criminal offense; consequentiality; legislator

Introduction

1. In the criminological analysis of a certain type of felon, the starting point must be a naturalistic-sociological (Hollins, 2001, pp. 44-45; Ciclei, 1998, p. 37)[2] one, ie from the condition of the human person and their social needs, and not from the legal-criminal qualification - a capacity that is attributed to them upon judicial investigation, so after carrying out the procedural stage of indictment.

Thus, from the perspective of a modern society, the human person/the individual has multiple needs and necessities, which determines them to act in order to resolve these needs and necessities or to procure financial resources to satisfy them.

Even individual vices require a high consumption of material/financial resources, which the individual wants to have in order to satisfy their own egocentricity.

The existence of the prosperity of those around determines the spirit of comparing the results/benefits from each of the society's individuals, regardless of the system or social area from which each one comes. Finding and especially choosing the ways to meet individual needs depends, in everyone's intellectual analysis, on the size of the benefit and the speed of procurement/acquisition thereof.

At the international level, in certain environments of subculture and social underdevelopment, in which social manipulation materializes even in the form of religious radicalization, and interethnic disputes have taken hybrid forms, escalating violence is a priority in the severely affected minds of some of the people who have become fanatics. However, even for such individuals, the constant procurement of

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[2] We consider the positivist-experimental vision on the studied phenomenon, considering that the science of criminology is a social science, based on objective, practical findings.

financial resources or goods for the purchase of weapons or explosive devices becomes a priority in order to support their terrorist actions[1].

Analyzing the content of values and the chance of acquiring them quickly, the human person, depending on individual cupidity, enters a state of mirage, which sometimes makes them ignore the legal procurement methods or the judicial risks involved in a particular type of behavior, choosing the option of committing crimes in order to acquire the desired amounts or goods.

This episode is related to the person's psychological attitude (the occurrence of the criminal thinking, the intellectual deliberation, and the decision).

Subsequently, out of the desire of ensuring the material benefit obtained by the criminal offense (the product of the crime), but also to prevent their discovery and prosecution, the individual devises a plan of concealment/dissimulation the nature of the origin of those goods in the form of presumably legal activities or acts, or even by resorting to intermediaries to carry out seemingly legal activities (thinking is a dynamic rational process that seeks solutions) (Roșca, et al., 1976, pp. 262; 302-303)[2].

These activities or acts, from a criminogenic perspective, are activities of covering, of hiding, ie of "laundering" of the illicit origin of the goods obtained by committing crimes[3].

2. Starting from these behavioral-criminogenic realities, the legislator described the crime of money laundering as that activity having as object the goods or values resulted from a previous crime (called the *premise* crime or the *predicate* crime), an activity carried out for the purpose of disguise/concealment of the actual criminal origin of those goods.

Although the analysis of regulation and construction of criminalization takes into account the realities of two distinct criminal actions, the Romanian legislator did not criminalize money laundering as a complex crime (the content of which includes, as a constituent element or as an absorbed element – an aggravated circumstantial element, an action or an inaction constituting, in itself, an offense provided for by the criminal law), but as a crime distinct from that from which the goods or sums intended to be concealed by certain specifically criminalized ways are derived.

However, given the dialectical link between the crime of procurement of goods and the crime of money laundering, between them, at least from a logical point of view, the issue of *consequentiality* would arise, and the judicial body shall carry out an investigation and a related legal and criminal accountability activity (characterized concurrence of offenses in the spirit of art. 38 paragraph (1), thesis II, of the Romanian Criminal Code of 2014.

Thus, at art. 49 of Law 129/2019 for preventing and fighting money laundering and terrorist financing[4], money laundering is criminalized under the following legal content: **"para. (1)** – It is an offense of money laundering and shall be punished with imprisonment from 3 to 10 years:

a) the exchange or transfer of goods, knowing that they come from the commission of offenses, for the purpose of concealing or dissimulating the illicit origin of such goods or for the purpose of helping the

[1] The primary causes of criminality, which underlie criminogenic behavioral determinism, are: greed, vice (components of egocentrism) and violence. However, these causes, and their remedies, will be the subject of a more extensive future study, as at this time we limit ourselves only to mentioning them from the perspective of the object investigated in this article.
[2] For a psychological analysis of the deliberative intellectual process.
[3] The economic process involved consists of moving the capital obtained by crime from the judicial area (black / dark area), to the gray or white area through the process of reintegration of capital into the economic circuit.
[4] Law 129/2019 on preventing and fighting money laundering and terrorist financing was published in the Official Gazette of Romania, Part I, no. 589 of 18.07.2019.

person who committed the offense from which the goods originate to evade prosecution, trial or execution of the sentence;

b) the concealment or dissimulation of the true nature, origin, location, disposition, movement or ownership of the goods or rights thereon, knowing that the goods originate from an offense;

c) the acquisition, possession or use of goods by a person other than the active subject of the offense from which the goods originate, knowing that they originate from the commission of offenses.

para. (2) - The attempt shall be punished.

para. (3) - If the offense was committed by a legal person, in addition to the penalty of the fine, the court shall apply, as the case may be, one or more of the complementary penalties provided in art. 136 para. (3) letter a) to c) of Law 286/2009, with subsequent amendments and completions.

para. (4) – Knowledge of the origin of the goods or the purpose pursued must be established from the objective factual circumstances.

para. (5) - The provisions of para. (1) - (4) shall apply regardless of whether the offense from which the good originates was committed in the territory of Romania or in other Member States or third countries:

a) Criminalization has some peculiarities, because, in terms of the crime of the third party interposed in order to help the person of the predicate offense's author, although the crime of the interposed person, in its substance, is an activity of favoring the perpetrator - criminalized in art. 269 para. (1) of the Penal Code, however, the third party shall not be held criminally liable for the crime of favoring the perpetrator, but pursuant to art. 49 of Law 129/2019. This conclusion is in fact a concrete application of the principle *specialia generalibus derogant*, respectively the text of criminalization of favoring the perpetrator, it represents the general norm of criminalization in relation to the special norm of criminalization of money laundering from art. 49 of Law 129/2019.

The analysis is not only purely interpretive, but it also produces real legal consequences from the perspective of criminal liability. Thus, while the criminalization text from art. 269 provides, in para. (3), a cause of impunity for the offense of favoring (a special cause of non-imputability) when the offense is committed by a family member, at art. 49 it does not provide for such a situation of impunity.

Therefore, in the case of money laundering, in the current regulation of criminalization, the family member(s) of the predicate crime's author, as an active subject of the crime, can also be held criminally liable.

The situation presented involves multiple discussions, both from a criminological perspective and from the perspective of the criminal policy of the repressive line adopted.

Thus, from a criminological point of view, it is obvious that actions aimed at concealing goods originating from other offenses (exchange or transfer of goods, concealment or dissimulation of the true nature, provenance, location, disposition, movement or ownership of goods or the acquisition, possession or use of goods by a third party) are, as a rule, committed by the family members of the author of the goods procurement offense themselves.

In a way, it is logical to be so, because such an activity of concealment, of dissimulation can only be entrusted or planned to the extremely close/trusted persons of the perpetrator of the procurement/predicate crime.

In this case, two psycho-social aspects reach antagonistic positions, which the legislator, in the interest of adopting an equal criminal policy, must solve as follows:

- on the one hand, there are many more serious offenses than money laundering, whose favorers are defended from punishment as a result of the capacity of being a family member of the perpetrator (the cause of impunity is being justified by the mutual help feelings that family members owe to each other);

- and on the other hand, he has to intervene, to repress through criminal penalties, any *modus operandis* of money laundering[1].

The answer solutions appear diametrically opposed:

- on the one hand, if the third-party favorer is punished for money laundering, even though he/she is a family member of the favored one, the idea of discrimination (double measure) in relation to the family member favorer of the perpetrator of any other offense would be induced, a favorer who benefits from the impunity from art. 269 para. (3) of Criminal Code.;

- on the other hand, the non-sanctioning of the family member who favors the perpetrator of the predicate crime by the actions of money laundering of the crime's product would generate an explosion of money laundering cases under this formula (assisted by family members).

In order to solve this dilemma, our legislator preferred to give priority to the preventive-punitive needs within the criminal policy, sanctioning with the same punishment the family member who helps/favors the perpetrator of the predicate offense as well.

b). other discussions that have given rise to differences of opinion in our judicial practice on money laundering are related to whether the action, from which the money/goods intended to be „laundered" originate(s), by subsequent crimes, must meet all the constituent elements of an offense or it is sufficient that it is another unlawful act (for example, a misdemeanor), and whether it is mandatory that the author of the predicate offense had been convicted or not for the offense of origin of the goods.

Unfortunately, as it has been noted in other legal studies (Toader, 2014, p. 146), judicial practice is less interested in documenting and proving predicate offenses due to the inherent inconveniences that arise at evidentiary level by passing large intervals of time between the commission of the procurement offense and the acts of laundering.

However, from the perspective of the rigor of the legality principle, we believe that it is necessary, as a prerequisite, to prove the predicate nature of the crime, for the following reasons:

- in the content of the legal norm of criminalization from art. 49 of Law 219/2019, the legislator himself conditions the origin of the goods at the "commission of offenses", which means a certain terminological qualification within the legal model, in which the imputed crime must be included (typicality method);

- and, on the other hand, the constituent legislator has provided in the content of para. (8) of art. 44 of the Romanian Constitution[2] that "legally acquired wealth cannot be seized. The lawful nature of the acquisition shall be presumed." Consequently, since this presumption of the lawfulness of the origin of the goods exists, the evidence to the contrary must be made/administered by the judicial bodies;

- another argument for which we lean towards the need for the quality of "offense" of the predicate crime is represented by the concept derived from the criminalization (qualification) technique, respectively from the inclusion in the premise situation of the money laundering offense (the constitutive content) of the existence of a previously committed offense from which the money/goods to be

[1] We have in mind the situations in which the perpetrators of the predicate crimes, realizing the cause of imputability, organize the activity of "money laundering", providing "business" exclusively to family members.

[2] We have in mind the text of the Romanian Constitution, republished in the Official Gazette of Romania of Romania, Part I, no. 767 of 31.10.2002, based on Law 429/2003 on the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 758 of 29.10.2003.

laundered in the actions described within the material element of the objective side of the money laundering crime originated.

However, fulfilling or not the premise situation represents a conditionality related to the essence of the existence/non-existence of the offense, in this case, that of money laundering.

Consequently, we are of the opinion that the proof of the existence and that of the typical/legal requisites specific to the offense from which the money or goods to be laundered originate(s) must be made by the judicial bodies, as it is an obligation incumbent on them.

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