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BASIC PRINCIPLES OF SUBSTANTIVE CRIMINAL LAW AND IDENTIFICATION OF THEIR IDEOLOGICAL BASIS IN ROMAN LAW AND CANON LAW*

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Abstract. In the presented paper, the author deals with the issue of the basic principles of substantive criminal law with an emphasis on their material and ideological basis in Roman law and in canon law. The author places special emphasis on the importance of Roman and canon law in connection with the possible positive enshrinement of the basic principles of substantive criminal law in the Criminal Code.

Keywords: principles of substantive criminal law, *nullum crimen sine lege*, *nullum poena sine lege*, subsidiarity of criminal repression, Roman law, canon law

INTRODUCTION

The basic principles represent an important aspect of society not only in general, but also in particular, for example precisely for a certain area of social life, as well as for a normative system, as the law undoubtedly is. In the field of law, the basic principles (or basic fundamentals[1]) express the primary ideas on which the legal branch is built. It is also true that in the field of law we are able to name principles of more general importance, the impact of which applies interdisciplinarily. On the other hand, it is also possible to identify such principles that are inherent to a particular legal branch, which have been modified and adapted by that legal branch.

From the point of view of the presented article, however, the interest of the author is not directed in relation to the content analysis of individual basic

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[1] Naming can be said to depend on the doctrinal perception of which branch of law, or on the author's view. Ultimately, for the purposes of this paper, the subject is not to resolve the discourse regarding that name, but to search for content, with particular emphasis on the reference to Roman law and canon law for the creation of fundamental principles of substantive criminal law.

principles of substantive criminal law, after all, sufficient space is devoted to the issue of substantive criminal law across the criminal law doctrine. On the contrary, the author's interest extends into the historical sphere with an effect on the current state of knowledge connected with the basic principles of substantive criminal law.

The author's interest is therefore conceived in two basic lines. First of all, it is an analysis of the very meaning (reference) of Roman law and canon law for determining the basic principles of substantive criminal law, on the other hand, it is the application of the above knowledge to the perception of these principles at present. This procedure is not accidental, it is associated with inexhaustible possibilities of inspiration in the legal systems in question, or with describing that even today, Roman law and canon law can be a tool for solving problems of applied practice (at least from an ideological point of view).

The focus on the sphere of basic principles of substantive criminal law is not accidental. On the one hand, they represent a set that determines the area of substantive criminal law, but on the other hand, their explicit positive legal expression is absent. Present times are associated with the opinion that virtually every problem can be solved by amending the legislation *de lege lata*. In this context, however, it should be borne in mind that, before proceeding with a change in legislation, it is necessary to ask the question: whether such an adjustment is beneficial, or whether it will realistically correspond with the problems of everyday practice. The question in connection with the basic principles of substantive criminal law should therefore not be how the principles in question can be positively expressed, but whether a positive expression of these principles is necessary at all, or whether it is possible to use different approaches in relation to individual principles of substantive criminal law or whether they need to be perceived as a mutually conditioned entity of elements.

We believe that the legal systems of Roman law and canon law can represent an interesting line of sight, even in relation to the presented research questions.

1. LEGAL SYSTEMS OF ROMAN AND CANON LAW AND THEIR APPROACH TO THE BASIC PRINCIPLES OF SUBSTANTIVE CRIMINAL LAW

The first part of the present paper will be devoted to the analysis of which approach to the basic principles (with a focus on the criminal law sector) can be perceived in connection with the legal systems of Roman law and canon law. Subsequently, the interpretation will focus on the relationship between these legal systems and the area of criminal law (or more broadly on the area of public law).

If we call these legal systems classical legal systems, as they shaped the legal orders of states based on the continental legal system in a certain way, it can be stated that they conditioned their development, both in terms of theory and application. The basic question then is how modern law has been influenced and to what extent. With regard to the differentiation of Roman law and canon law, it can be stated that while Roman law was perceived as the basis of private law (also with regard to the condition of the development of the legal systems of states), canon law was perceived as an element that similarly conditioned public law, especially the area of criminal law [Vladár 2020, 186]. This was due to the influence of the legal system (*de facto* legal system of the Catholic Church), especially in the High Middle Ages, which, however, is a general reason. The particular reason in relation to the development of criminal law, was primarily in the interest of eliminating pagan concepts. Canon law, even in view of the above, is the oldest valid legal system. Due to its nature and basis, it has influenced the development of law (as well as society as such) perhaps most significantly.

The teaching of law itself has historically been based on the concept of Roman law and canon law, while the shortcomings of Roman law in public law (we point out in particular the interest in regulating public relations by private institutes) were eliminated by evolving theory and practice of canon law (such as Catholic Church law). To date, it is possible to meet with the opinion that in connection with modern law, this influence is decisive. In the literature we encounter mainly the term "model of imitation" [Willock 1962, 89]. In terms of substance, therefore, it is not only the comparative framework that is important, but above all the interest in moving closer to the legal system in question.

However, why did canon law get into a position where it is perceived as a basic determinant of the development of modern criminal law (and *de facto*, in a sense, also of the fundamental principles of substantive criminal law)? The form of contemporary criminal law is mentioned as the reason, which required the formation and establishment of new starting points for criminal law, ultimately on the basis of the law of the Catholic Church. The founding of criminal law was therefore the Christian faith, theology, practicality, and justice [Vladár 2020, 196], thus the basic attributes that cross this legal system. Roman law could not be the basis for emerging criminal law because public law was not nearly as perfect as private law. It is true that in the field of criminal law, the norms of private law were applied relatively commonly [Berman 1983, 205]. The reason was not a denial of the peculiarities of criminal law (or public law in general), but an awareness of the imperfections of the legislation at the time, especially in terms of application practice.

A certain parallel with the use of canon law in the field of criminal law is visible in comparison with today's doctrinal understanding also in the sphere

of the purpose of criminal law as a branch of law. While, in accordance with the law of the Catholic Church, the primary deterrence of members of the community should be ensured from conduct which is perceived as a tort [Rees 1993, 140–46], the teaching of criminal law would be similar to the concept of the so-called general prevention, where the prosecution of the perpetrator and his conviction should have an impact not only on the perpetrator himself (in terms of individual prevention), but above all should be a deterrent to society as a whole. It is indisputable that the primary subject of the transformation into the form of criminal offenses were the most serious sins (for example in the area of life and health), which led to their determination from the internal forum to the external forum. In connection with the concept of criminal law on the basis of canon law, it is necessary to mention the so-called ecclesiastical ideals, where "[...] in the first place there was agreement between Christian doctrine, static and dynamically evolving theological principles, and finally with Roman legal standards, which ensured the norms not only theoretical justice but also real enforceability [...]" [Vladár 2020, 197]. With regard to all the above, it is therefore indisputable that canon law is a system which, over time, was perhaps the most important for the creation of the so-called secular criminal law, the impact being visible to this day (also in connection with the so-called modern law), especially in the context of the *de facto* shift towards the individualisation of criminal liability. On the basis of such a thesis, it is therefore possible to assume that the doctrine of canon law should (and could have) meaning also in connection with the basic principles of substantive criminal law (not only in terms of the relevant content connotations, but primarily with regard to their theoretical positive legal definition).

If we look at Roman law and its importance for the formation of criminal law in the basic principles, in the first place, it is necessary to distinguish between the concepts of Roman criminal law and the so-called modern (i.e. today's) criminal law. It is true that Roman criminal law is a much broader set, since, as mentioned above, in many institutes there is an identifiable overlap with general private law [Kincl, Urfus, and Skřejpek 1995, 317]. It is also necessary to realize that the development of Roman law was relatively noticeably shaped and modified by the development of history (or political development), which means that the individual institutes need to be interpreted in context, precisely with regard to the passage of time (an example could be the royal period associated with the almost exclusive jurisdiction of the fathers of the family, usually without limitation as to the amount of the sentence). Roman law therefore conditioned primarily the development and advancement of private law, meaning that knowledge of Roman criminal law is much more modest, but not negligible.

The view of the perfection of Roman law is therefore perhaps acceptable only in relation to the sphere of private law. This, or rather, some proof of the

illusion of perfection of Roman public law, can also be argued through two basic principles of substantive criminal law, which practically represents the core of the present contribution. We are thinking in particular of the lines of the principle of legality, *nullum crimen sine lege* and *nulla poena sine lege*. These represent the solid core of the catalogues of the basic principles of modern legal systems when it comes to the basic principles of substantive criminal law. It expresses the fact that without being enshrined in a generally binding legal regulation, a certain act cannot be classified as a criminal offense, or that only such a punishment as defined in the legal regulation can be imposed for a criminal offense. In the conditions of the Slovak Republic, the above principles have a constitutional basis. Modern criminal law is perceptible precisely through these basic principles, the definition of which is usually granted by Roman lawyers, or Roman law. However, the origin of these principles is undoubtedly later.

In terms of content, these principles are (in the current sense) a manifestation of type binding [Kincl, Urfus, and Skřejpek 1995, 317–18], together with the prohibition of retroactivity, they constitute the meaning of the current criminal law codes. This is precisely the set of basic principles that follow from criminal law (if we are talking about substantive criminal law).

However, from the point of view of the starting points of Roman law, it is relatively easy to show that none of these principles was accepted in a certain part of historical development, and therefore that they did not represent the starting point on which the original Roman law was created. In connection with the principle of *nullum crimen sine lege* (simply "there is no crime without law"), it can be stated that the non-acceptance of this principle was visible primarily in connection with the so-called criminal juries, which acted retroactively.[2] After the act that should be a criminal offense was identified, a commission of inquiry was established, and only on the basis of the official's proposal was the law adopted, by which the conduct was identified as a criminal offense (thus, only after the commission of the said act, which is inadmissible in the conditions of Slovak criminal law). The aforementioned criminal jury assessed such conduct, and may also have imposed a sentence. The same applies to the principle of *nulla poena sine lege* (simply "there is no punishment without law"), the non-acceptance of this principle is visible primarily in the period of the Roman Empire, when the imposition of punishments (not only in terms of the type of punishment, but also in terms of its amount) was practically subject to arbitrariness. In the context of the description, it is visible

[2] There is also a visible difference in the application of this principle in the comparison of public and private law. While in the area of private law it was relatively clearly accepted, in the area of public law, criminal liability was extended to cases not explicitly mentioned in the law – it is practically possible to talk about the use of an analogy to the detriment of the perpetrator, which is inadmissible in the field of substantive criminal law in the conditions of the Slovak Republic.

above all that the principle of non-retroactivity was not firmly anchored, the reason could be precisely that the basis for the creation of criminal law was often identified in private law [ibid., 318–19]. Even in connection with the period of the Roman Republic, it can be stated that the explicit and precise definition of crimes and punishments was actually absent. However, a certain change is noticeable in the last two centuries of the republic's existence, as several laws have been adopted which formulated some facts of criminal offenses and the associated penalties; as a rule, one criminal offense was defined through one law (the wording of these laws was modified over time, in order to extend the criminal sanction to other types of conducts, or to alternatives to the conducts already described). The extension of the wording of pre-existing crimes (and practically approximation to the principle of legality) is associated primarily with the period of the Roman Empire. During this period, one can observe an approach to some of the primary principles of sentencing – especially with regard to the parallels of the principle of individualization of punishment (however, at the expense of the principle of *nulla poena sine lege*, since the determination of the type and amount of the sentence was subject to the judge's discretion, the criterion was precisely the circumstances of the case),[3] as the imposition of the sentence was based on all the circumstances of the case, while the judge also took into account all mitigating and aggravating circumstances.

The introduction of the principle of legality (as described through the individual lines in the text above) and other principles can be talked about in the legal system of Roman law practically from the middle of the 2nd century BC – associated with this, however, is their not too strict acceptance, or application (especially as regards the *principle of nullum crimen sine lege* and *nulla poena sine lege*).[4] However, this does not exclude (and in particular does not deny) the ideological significance of gradually specified substantive criminal law principles for modern criminal law (and thus also for Slovak criminal law). It is worth mentioning at this point that the mentioned principles became an immanent part of the Austro-Hungarian legal system only in the period of absolutism, under the influence of the enlightenment [Szabová and Deset 2020, 126].

[3] However, it should be emphasized that such an approach was generally associated with the offender's disadvantage, the sentence imposed should have been a fair reflection of the assessment of the individual subjective and objective circumstances of the act, the offender, and other relevant circumstances.

[4] For example, "[...] the normative power of imperial constitutions in late antiquity cannot be underestimated [...]", primarily through the view of the principle of legality. Cf. Gregor 2020, 86.

2. BASIC PRINCIPLES IN THE FIELD OF SUBSTANTIVE CRIMINAL LAW AND THEIR SIGNIFICANCE

As we stated in the introduction to the present paper, the basic principles of a particular sector (as well as the criminal law sector) represent certain starting ideas [Kurilovská 2013, 8–9], which expresses their essence, while these are not proclaimed, but should be deducible from individual institutes of individual branches of law. In addition to what is described (cognitive function), the importance of basic principles for norm-setting and application practice is also decisive.[5]

At the given place, the purpose is not to describe the individual principles that the teaching of criminal law perceives as basic principles, but a reflection on their significance, especially on the possibilities of their positive legal incorporation into the wording of Act no. 300/2005 Coll. The Criminal Code as amended.[6] In the first place, the basic principles in question are not a rigid category, on the contrary, as an important normative criterion, they must be a timeless aspect, and changes in criminal law should be arguable through basic principles. A relatively suitable comparative aspect may be the reference to the acceptance of real criminal liability of legal persons, as on the one hand the calculation of hitherto consistently accepted basic principles has been extended (on new principles for attributing a criminal offense to a legal person and transferring criminal liability to the legal successor of a legal person), as well as the principle of individual criminal liability was modified. We talk about the modification because the application framework of the given principle was not broken, but on the contrary, extended. However, we believe that such an interference with the fundamental principles of substantive criminal law has been rather exceptional, due to the fact that there are currently few challenges to which the teaching of criminal law would have to respond in a similar way (thus, that the generally accepted starting points associated with criminal liability are argumentatively sustainable).

With regard to the considerations on the positive enshrinement of the basic principles in the Criminal Code, a relatively basic question arises, whether the application framework of these principles is limited precisely by the fact that, by means of an explicit statement, they are not part of a generally binding legal regulation (as there is no doubt about their implicit meaning). We believe that this is not perceived as a problem, the only criterion is perhaps a different view of the category of legal principles (in terms of the criteria of legal argumentation), as long as they are part of the legal text. At this point, it

[5] On the functions of the basic principles of criminal law, see Mencerová, Tobiášová, Turayová, et al. 2015, 21–22, possibly Jelínek 2019, 31–32.

[6] Hereinafter: Criminal Code or CC.

is necessary to realize the importance and role of the sources of law, which is inherent not only in modern law, but undoubtedly also in Roman law [Gregor 2020, 86].

So where to look for positives, or the importance of positively enshrining the basic principles of substantive criminal law? From the point of view of the scientific discussion, the basic answer is the clarity of the legal regulation, i.e. rather the technical side. Although we are able to identify the first proposals for such legislation (inspired by the legislation of other states),[7] there is still no scientific debate on the usefulness and the very need for positive grounding. It is probably not right for criminal policy to work in the style of some kind of ex-post control when the shortcomings of the legal regulation are revealed only by practice and not by the preparation of the legislative intention itself (or the legislative text).

An argument for the adoption of such legislation (i.e. a catalogue of basic principles) in the text of the Criminal Code could be an interdisciplinary view of the legislator's approach. The basic argument is, first of all, that Act no. 301/2005 Coll. The Criminal Procedure Code, as amended,[8] in contrast to the Criminal Code, contains a concentrated calculation of the basic principles of criminal proceedings, in the sense of Section 2. It should be added here, however, that this is undoubtedly an exemplifying calculation of principles of the greatest importance, as this is extensible through constitutional or supranational connotations. The basic principles in terms of the legislative text are inherent in the code of labour law, as well as in the codes of civil procedural law. In each of these cases, however, it is true that the relevant principles radiate through legislation (through individual institutes) and their use would be possible even if they were not part of the positive legislation (as they are perceived as an important rule of interpretation).

On the other hand, a certain compromise in connection with the need to positively enshrine the basic principles of substantive criminal law could be the approach in the Czech Republic, with regard to the wording of the recodified Act no. 40/2009 Sb. The Criminal Code as amended.[9] Despite the common historical and legal development, the Czech Republic has approached a different concept in the given issue, namely the kind of relative positive enshrinement of the basic principles (through the definition of some of the principles, but not concentrated in the introductory provisions of the legislation).[10]

[7] See e.g. Strémy, Balogh, and Turay 2020, 80ff.

[8] Hereinafter: Criminal Procedure Code.

[9] Hereinafter: Criminal Code of Czech Republic.

[10] We point out in particular to Section 1 and 12 of the Criminal Code of Czech Republic, within which the legislator enshrined three principles of substantive criminal law, which can be included among the basic principles. While Section 1 regulates the prohibition of retroactivity, section 12 regulates in para. 1 the principle of legality and in para. 2 the principle of subsidiarity of criminal repression (the legislator directly referred to these provisions as "principles").

In addition to implicitly identifiable principles, we are then able to identify some of the principles explicitly. In terms of normative wording, these represent a constant starting point for the science of criminal law, simplified to an acceptable normative form.

CONCLUSION

Conclusions can be drawn in several directions. First of all, it can be unequivocally stated, based on more general assumptions, that Roman law and canon law are the legal systems that have most influenced the creation of modern law. It is true that while Roman law had the greatest influence on the development of private law, canon law perhaps had the greatest influence on the creation of public law and thus criminal law.

It should be noted here that if we focused in the subject of the article on the level of influence of Roman law and canon law on the basic principles of substantive criminal law (or on the reference of these legal systems to their determination), the delineation of the conclusions will rather be a deduction. Roman law allowed us to identify that the principle of legality was part of a given legal system, although its application was limited, often suppressed (especially with an emphasis on non-compliance with the prohibition of retroactivity in criminal law). From a doctrinal point of view, however, it is of the utmost importance to know that the principle in question (in particular through *nullum crimen sine lege* and *nulla poena sine lege*) was not established until later, Roman law has therefore not been established on it from the outset, although it is identifiable in certain forms.

Within the stated, canon law acquires substance, which represents, as described above, the very basis for the development of the starting points of criminal law as we know it in a modern form (both through theoretical legal bases and through positive legal regulation). Although the available approaches to canon law to the basic principles of criminal law are not identifiable within the available starting points, it is necessary to proceed from the substance of the matter, and the fact that, as long as canon law is the ideological basis of criminal law, the given ideas precisely represent the basic ideas on which this branch of law is based, that is, its basic principles (or fundamentals, regardless of naming). Therefore, we believe that if it is not possible to speak of an explicit reference to Roman law and, above all, canon law for the basic principles of substantive criminal law, at least one can speak of an implicit but most important reference. In particular, canon law and Roman law have determined, in the course of development, criminal law and its form primarily through criminal institutes, of which the basic principles of substantive criminal law are recognizable and therefore extractable using generalization.

A certain partial conclusion, based on the second part of the present paper, is that, although Roman law and canon law form an indisputable basis for the existence of fundamental principles of substantive criminal law, they form the content basis, when we are able to recognize individual principles, identify individual functions and so on. On the other hand, a positive (legal) definition of such principles is a special process for which the reference to canon law and Roman law cannot be explicitly used. As we have said in the text itself, we believe that the question of the positive enshrinement of the fundamental principles of substantive criminal law should not only lie in how to do it, but whether it is necessary at all. It is necessary to realize that although the basic principles are recognizable in terms of content (also through individual institutes of criminal law, which is the basic reference of canon law), their positive anchoring could negatively affect them, especially at the application level. It is true that legislation should be sufficiently abstract to be used in indefinite cases of the same kind; if such a positive definition is too narrow, it may cause a problem for application practice. If, on the other hand, it is too broad, it will not reflect the real content of any principle. As an example, we can take the principle of subsidiarity of criminal repression, which is so materially extensive (and application-influenced by decision-making practice) that it is practically impossible to capture its content normatively and materially. It is possible to define the principles as certain rules of application, but provided that their doctrinal nature is not suppressed. Only in this way will the legacy of canon law and Roman law still be given.

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