

# THE HUMANISM OF CRIMINAL LAW

Mihai Adrian HOTCA\*

## Abstract

*The humanism of criminal law is a principle of criminal policy and postmodern criminal law. It is listed in numerous internal and external sources. An international treaty based on the principle of humanism is the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment, adopted in New York in 1984. The European Court of Human Rights has a rich jurisprudence that sanctions violations of the European Convention (see art. 3) in the field of human rights protection, including in terms of humanism of criminal law.*

**Keywords:** *humanism, criminal law, human rights, torture, criminal policy, inhuman punishments, degrading punishment.*

## 1. Introduction

The word „humanism” comes from the Latin word *humanitas* and means benevolence or humaneness, and currently it designates a true social and cultural movement, too. Humanism is a doctrine that places the human being, his welfare and the trust in human reason at its centre.

According to the Amsterdam Declaration (2002), humanism supports, *inter alia*, democracy and human rights, and emphasizes that individual freedom must be harmonised with social responsibility.

In the field of criminal law, humanism can be associated with the classical thinkers. The classical doctrine has opposed to the cruelty of penalties and has taken a stance against the death penalty, the inhuman, degrading and infamous punishment. We can safely say that the representatives of the classical school of thought in Criminal Law have advocated the humanism of Criminal Law<sup>1</sup>.

The classical doctrine<sup>2</sup> of Criminal Law has appeared in the third quarter of the 18<sup>th</sup> century, and the father of this doctrine is deemed to be Cesare Beccaria, who has written the unsurpassed (appreciated especially *illo tempore*) work „*Dei delitti e delle pene*” in 1764<sup>3</sup>. A very probable reason for the birth of the classical doctrine of Criminal Law has been the conflict between the bourgeoisie and the feudal lords. The work of Beccaria is remarkable and, at the same time, fundamental for criminal law, whereas it is the only work of that time that deals with the essential topics of criminal law<sup>4</sup>.

Cesare Beccaria has sketched the lines of modern criminal law. His ideas, together with those of

Montesquieu and of other academics of that time, have been taken over and developed by the thinkers that followed him, have been included in the documents of the 1789 French Revolution, and some are enshrined in the contemporary criminal laws<sup>5</sup>.

When we talk about the humanism of criminal law, we must not ignore that the criminals are, at least to some extent, a product of society. The idea of eradication of the criminal phenomenon is a regularly recurrent one and we find it including in formal legal documents, national or supra-national (strategies, recommendations, action plans, policies, etc.). This goal - the eradication of the criminal phenomenon - is a beautiful hope or a superb illusion, that feeds the social morale, thus helping many people not to resign and to find the motivation to progress.

## 2. The content of the principle of humanism of criminal law

*Brevitatis causa*, the humanism of criminal law is the obligation of the legislator and of criminal law enforcers to observe the fundamental human rights and freedoms. In other words, the humanism of criminal law is an indispensable requirement for the creation and the enforcement of criminal law.

Humanism is not only a principle of criminal law, but also a principle of criminal policy, because the state is bound to find the instruments or the means able to re-socialize the criminal offenders and to protect those who become the victims of crimes. Indeed, from a different perspective, the state is bound to create the optimal legal framework for successfully re-inserting into the society those who commit anti-social acts and

\* Professor, PhD. Faculty of Law, “Nicolae Titulescu” University of Bucharest (e-mail: mihaihotca@univnt.ro).

<sup>1</sup> C. Duvac, N. Neagu, N. Gament, V. Băiculescu, Criminal Law. General Part, Universul Juridic Publishing House, Bucharest, 2019, p.42.

<sup>2</sup> For an in extenso presentation of the main schools of thought in criminal policy, see C. Duvac, N. Neagu, N. Gament, V. Băiculescu, op. cit., p. 42 et seq.

<sup>3</sup> The name of classical school was given by Enrico Ferri.

<sup>4</sup> The other titans of Illuminism - Rousseau, Montesquieu, etc.- have dealt more with the issues of general legal policy and less with those of criminal policy.

<sup>5</sup> M.A. Hotca, Criminal Law. General Part, Universul Juridic Publishing House, 2<sup>nd</sup> edition, Bucharest, 2020, p. 30.

for granting the necessary protection to the victims of crimes. In order to achieve this policy, the state is bound to adopt assistance measures aimed at the detained persons and their victims.

The principle of humanism is enshrined in both internal sources and international treaties. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in New York, in 1984. Our country has adhered to this treaty in 1990, by the Law No.19/1990<sup>6</sup>.

According to Article 3 of the European Convention on Human Rights: „*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*”

The principle of humanism is also found in Article 22 paragraph (2) of the Fundamental Law, in a wording similar to the one of the Convention. According to this constitutional provision: „*No one shall be subjected to torture or to any kind of inhuman or degrading punishment or treatment.*”

Torture means to deliberately inflict severe physical or mental pain in order to obtain confessions, information or testimonial depositions. Inhuman treatment means to inflict less severe physical or mental pain. Degrading treatment means a humiliation of the natural person aimed at weakening or breaking her mental strength.

The criminal offender, as a member of the society, with which he has come into conflict, must benefit from certain rights, inherent to the human being. He has to be brought back to the society of which he is part by measures aimed at changing his conduct. If an officer uses an inhuman or degrading treatment on a person, he shall be liable for the criminal offence of ill-treatment.

The Strasbourg Court has ruled that flogging or physical exercise is a degrading punishment<sup>7</sup>, while spanking the hands of some Scottish pupils with a belt is not inhuman or degrading treatment<sup>8</sup>. On the other hand, the Court has ruled that the expulsion of an 18-year-old, at the time of the facts, to the US in order to be sentenced to death, is contrary to Article 3 of the

Convention, because the suffering caused by the wait in death row (the death row syndrome), given the situation of the person in question, is able to put in danger the equilibrium between the general interest and the private one<sup>9</sup>.

The European Court has also found the violation of Art. 3 of the Convention in the cases where the state bodies have used the physical force (electric shocks, for example) or mental pressure (blindfolding or detention in dark places, etc.)<sup>10</sup>.

The last important legal document, that legally enshrines the principle of humanism of criminal law at the level of the European Union is the Charter of the Fundamental Rights of the European Union, which stipulates in Art. 4 that: „*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*”

The principle of humanism is twofold: the protection of the natural or legal person by prohibiting the actions dangerous to the social values; the observance of the criminal offender’s dignity and rights.

The principle of humanism opposes to the adoption of criminal penalties, inhuman or degrading. Also, the aim of enforcement of penalties has to be the re-education and the social reinsertion of criminal offenders.

According to this principle, the legislator and the law enforcement bodies are bound to regulate individualisation criteria and to adapt criminal sanctions to the particular case of criminal offenders respectively.

The principle of humanism of Criminal Law has another side, which involves, besides the protection of criminals’ rights, the safeguarding of victims of crimes who should not be ignored from the legal equation of the criminal conflict relationship, due to the concerns regarding the criminal offenders.

Throughout the resolution of the criminal conflict relationships, the victim must enjoy at least the same degree of attention and protection as the criminal offender, otherwise criminal law would be adrift and

<sup>6</sup> Thus, the preamble of the New York states:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights<sup>2</sup> and article 7 of the International Covenant on Civil and Political Rights, 3 both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975, desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world (...).”

<sup>7</sup> Ireland v. United Kingdom; Tyrer v. United Kingdom.

<sup>8</sup> Campbell and Cosans v. United Kingdom. The recitals of the Convention stipulate that the UK law (common law) allows the use of physical punishment on children by parents and educators, provided that they are not excessive and do not inflict mental or physical harm (humiliation, degradation). However, in our opinion, the Court’s solution (in the case X, Y v. the Netherlands), according to which forcing a minor over 16 years, with serious mental disorders, to have sexual relationships, does not represent inhuman treatment, is questionable. The Court has considered that the gaps of the Dutch laws in these cases, in the sense that the start of the criminal investigation is made subject to the preliminary complaint of the injured person, are not enough to entail the application of the Convention.

<sup>9</sup> Soering v. United Kingdom.

<sup>10</sup> Takin v. Turkey; Ribitsch v. Austria. If the wounds are attributable to the accused, who has opposed to the arrest, Art.3 of the Convention is not violated (Klas v. Germany).

failure would be implacable. The immediate beneficiary of the act of justice has to be the one who has become the victim of the illegal act, although on another, more abstract level, the effects of justice radiate more or less on all members of the society.

Criminal law and the other criminal sciences must also deal with the passive side of the crime, the *victimicity* respectively. If crime, in general, means all the criminal offences committed during a certain period in a defined territory, *victimicity* means all the persons who have become the victims of criminal offences during a certain period in a defined territory. In a wider sense, *victimicity* can mean both the completed side (the real *victimicity*), and the potential side (the virtual or the possible *victimicity*). The real *victimicity* or the actual *victimicity* is composed of the persons who have become the victims of criminal offences, and the virtual or potential *victimicity* is represented by all the persons who can become victims of criminal offences, as they have an increased victim risk<sup>11</sup>.

Like any other form of justice or maybe more than any other, the criminal justice involves, on the one hand, an increased attention to the person harmed by the criminal offence and, on the other hand, it involves, at the same time, the prominent contribution of state bodies. It is noted that, in comparison to the extra-criminal justice, mainly the one of private law, the criminal justice insists more on safeguarding, both as regards the private interest, and as regards the general interest, and it can be said that the act of criminal justice equally includes individual and public interests, but the state is bound to protect them both, even though the private ones are safeguarded only by taking into consideration the specificity of the injured party. Of course, that the private interest of the crime victim is included in the general one, as the safeguarding of crime victims exceeds the individual needs and interests, although it entails to take them into consideration<sup>12</sup>.

Like all the principles of criminal law, the principle of humanism of criminal law is applicable

both in the field of substantive criminal law, and in the field of criminal procedural law. Also, the humanism must also apply in the field of criminal enforcement law<sup>13</sup>.

The first decision of the Convention, in a case concerning the detention conditions, brought before Romania, was given in December 2007. It is the case *Bragadireanu v. Romania*.

Without insisting here on the detention conditions, as this is a notorious issue, the minimum European standards applicable to persons deprived of their liberty are far from being met in Romania.

Between 2007-2012, the Court has given several decisions against Romania for violations of Article 3 of the European Convention on Human Rights, and found prison overcrowding and inappropriate material detention conditions both in penitentiaries, and in the detention and provisional detention facilities<sup>14</sup>.

In July 2012, in the case *Iacov Stanciu v. Romania*, the Court has held that there was a structural problem in the field of material detention conditions.

In this decision, the Court has specified that it was necessary to create an internal appeal allowing the effective remediation of the damages suffered as a result of inappropriate detention conditions, including through compensation. After 2012, the number of cases pending before the Court has constantly increased<sup>15</sup>.

In 2016, in the case *Muršić v. Croatia*, the Court has stated that the deprivation of liberty for 27 days in a personal area of less than 3 m<sup>2</sup> is an inhuman and degrading treatment, being applicable the provisions of Art.3 of the European Convention on Human Rights<sup>16</sup>.

As regards the cases in which the minimum detention conditions are not provided, the President of the Strasbourg Court, Guido Raimondi, has recently declared that: „these are priority cases, because they fall under the scope of Article 3 of the Convention, but these are recurrent cases, which reflect systemic or structural difficulties and require internal solutions”<sup>17</sup>.

On 25 April 2017, the ECHR has given a pilot decision in the case *Rezmiveş and others v. Romania*<sup>18</sup>.

<sup>11</sup> The academic literature considers that the *victimicity* of a certain person is the “pre-disposition”, more specifically, the capacity to become, under certain circumstances, the victim of the crime committed through the criminal act or the inability to avoid the danger in the case where the latter could be prevented. The real *victimicity* cannot be clearly established, whereas its content includes not only the victims of known criminal offences (the revealed, discovered, apparent *victimicity*), but also the victims the unknown criminal offences (the black figures of *victimicity*).

<sup>12</sup> M.A. Hotca, Victim protection. Victimology topics. C.H. Beck Publishing House, 2006, pp.1-2.

<sup>13</sup> Al. Boro, Gh. Nistoreanu, Criminal Law. General Part, 4<sup>th</sup> edition, All Beck Publishing House, 2004, p.14.

<sup>14</sup> The lack of hygiene, the insufficient airing and natural light, the inoperative sanitary facilities, the insufficient or inappropriate food, the limited access to showers, the presence of rats and insects in the prison cells. See R. Paşoi, D. Mihai, The pilot decision in the case *Rezmiveş and others v. Romania* in the field of detention conditions (available on [www.juridice.ro](http://www.juridice.ro)).

<sup>15</sup> For more data, see R. Paşoi, D. Mihai, op.cit.

<sup>16</sup> By the decision of the Great Chamber of ECHR in the case *Muršić v. Croatia* of 20 October 2016, the Strasbourg Court has confirmed that 3 m<sup>2</sup> of personal area for a prisoner in a collective cell is the minimum rule applicable in respect of compliance with Art. 3 of the Convention.

<sup>17</sup> According Mediafax, he said:” First of all, in the case of Hungary and Romania, where the number of cases has increased by 95%, 108% respectively, in 2016 (of the complaints brought before ECHR – the author’s note), this situation concerns cases related to the detention conditions. Undeniably, these are priority cases, because they fall under the scope of Article 3 of the Convention, but these are recurrent cases, which reflects systemic or structural difficulties and require internal solutions” (<http://www.mediafax.ro/externe/seful-cedo-guido-raimondi-numarul-cazurilor-legate-de-conditiile-de-detentie-din-romania-a-crescut-cu-108-in-anul-2016-16136759>).

<sup>18</sup> The pilot decision procedure is a form of cooperation between the ECHR and the defendant states, aimed at adopting general measures able to solve the systemic problem in question, acceptable instruments or means from the standpoint of the jurisprudence of the Strasbourg

The Court has reiterated the existence of structural problems in respect of the overcrowding of Romanian detention facilities and, although it has confirmed some progress, it has recommended additional measures from national authorities, concerning the logistics, the criminal policy, and the introduction the preventive and compensatory remedies for the persons in such situations.

The Court has granted the Romanian authorities a period of six months from the moment the decision has become final in order to present, in cooperation with the Committee of Ministers of the Council of Europe, an action plan identifying the additional measures and the timeline of their adoption<sup>19</sup>.

Disappointing and even indignant is the fact that this situation has not been solved by now (May 2021) by the Romanian authorities.

### 3. Conclusions

Humanism is both a principle of criminal Law, and a principle of the criminal policy, whereas the state is bound to find to instruments and means able to re-socialize those who commit crimes and to protect those who become victims of crimes.

From a different perspective, the state is bound to create the optimal legal framework for the successful reinsertion into the society of those who commit antisocial acts and for providing the necessary protection to the victims of crimes. In order to achieve

this policy, the state is bound to adopt assistance measures aimed at the detained persons and their victims.

The principle of humanism is enshrined in both internal sources and international treaties.

In comparison to the extra-criminal justice, mainly the one of private law, the criminal justice insists more on safeguarding, both as regards the private interest, and as regards the general interest, and it can be said that the act of criminal justice equally includes individual and public interests, but the state is bound to protect them both, even though the private ones are safeguarded only by taking into consideration the specificity of the injured party. Of course, the private interest of the crime victim is included in the general one, as the safeguarding of crime victims exceeds the individual needs and interests, although it entails to take them into consideration<sup>20</sup>.

Like all the principles of criminal law, the principle of humanism of criminal law is applicable both in the field of substantive criminal law, and in the field of criminal procedural law. Also, the humanism must also apply in the field of criminal enforcement law.

The hope to bring the crime between reasonable (controllable) limits for the society is a goal that can be reached within a relatively close time horizon, if the people are educated, the laws harmoniously cover all social interests, including the individual ones, and those contributing to their enforcement act professionally.

### References:

- M.A. Hotca, Victim protection. Victimology topics. C.H. Beck Publishing House, Bucharest, 2006;
- Al. Boroi, Gh. Nistoreanu, Criminal Law. General Part, 4<sup>th</sup> edition, All Beck Publishing House, 2004;
- C. Duvac, N. Neagu, N. Gament, V. Băiculescu, Criminal Law. General Part. Universul Juridic Publishing House, Bucharest, 2019
- M.A. Hotca, Criminal Law. General Part. Universul Juridic Publishing House, 2<sup>nd</sup> edition, Bucharest, 2020;
- R. Pașoi, D. Mihai, The pilot decision in the case Rezmiveș and others versus Romania in the field of detention conditions, available on [www.juridice.ro](http://www.juridice.ro).

---

Court. According to the ECHR jurisprudence, the states are free to choose the measures by which they understand to fulfil the obligation to comply with the pilot decision.

<sup>19</sup> Also, the Court has ordered the suspension of the review of the applications pending before it and not yet served on the Government for observations.

<sup>20</sup> M.A. Hotca, Victim protection. Victimology topics. C.H. Beck Publishing House, 2006, pp. 1-2.