ABOUT SOME NEW MODALITIES OF INDIVIDUALIZATION OF THE PUNISHMENTS ACCORDING WITH THE NEW PENAL CODE (LAW NO. 286/2009)

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Abstract

The individualization of the penal sanctions is a complex operation, and it is realized in three different phases: The phase of incrimination of the penal offences, the phase of precise determination of the punishment and the phase of the execution of the applied punishment. Starting from this reality, the theory of the penal law makes a distinction between the three phases of individualization that correspond with the three mention ones: the legal individualization, the juridical individualization and the administrative individualization. Within each phases, the penal law sanctions are individualized by the activity of particular authorities, within certain limits and with certain methods.The main goal of the study is to present the new modalities of the punishment individualization, adopted by assuming responsibility by the Romanian Government (Law nr. 286/2009). The study also presents other modalities of individualization of the punishment that exist in German Penal legislation, French Penal Code, Portuguese Penal Code, Model Penal Code, used as example by the Romanian Ministry of Justice, the initiator of the project. Along the study, there are presented some of the issues that could appear within the normal application of these new institutions.

Keywords: *individualization, personalization, punishment, postponing the pronouncing of the punishment, renunciation to pronounce a punishment, defendant's obligations*

Introduction

The new institutions that regulate the individualization of the punishment introduced by the Law nr. 286/2009 (the New Penal Code) raise some issues, both theoretical and practical.

The study widely analyzes each institution and the issues that will rise, in our opinion, during the application in practice of these institutions.

The Romanian legislator, having as inspiration other legislations, that contain these kinds of institutions, had introduced many provisions, sometimes excessively clearly stated, and guided towards a very dense regulations (for example: the institution of postponing the applying of the punishment is excessively regulated by the Romanian legislator in comparison with the legislations that have been a model of inspiration).

As we will show within the study, our concern is the necessity of these new institutions, regarding the fact of existence the institution of conditional suspension of the punishment, a similar regulation with the one analyzed by us, and also the acquittal, provision that already exist in the Criminal procedure Code.

In addition, we wanted to give a pertinent explanation of the expressions and the way the legislator expresses some terms, many times not very clear or precise, from the juridical point of

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view. We take here into consideration the differentiations that have to be made between the provided punishment, the applied punishment, and the executed punishment.

The study also contains explanations regarding the evolution of the individualization of the punishment, the way that it is reflected on the future behavior of the offender, and the effects that could result from a correct individualization of the punishment, regarding a certain type of individual.

1. The issue of the individualization of the criminal punishment, including the rules or legal criteria of the proceedings in this case, in order to obtain an efficient influence on the human behavior, presumes the observing those individualization rules that contributes, one way or the other, to an ordered development of the process, through which is getting to an adequate adaptation of the criminal punishment, regarding the offences and the offender's person, and by that, toward an exercising a benefic influence on the behavior of the offender.

In the doctrine[91] was underlined that the individualization of the punishment is that operation through which the criminal punishment is properly adequate and proportional for each offender, regarding the level of guilt and the real necessities for a just and useful repressive reaction.

After the introduction of the educative measures and safety measures within the Penal code, the expression "individualization of the punishment" wasn't considered proper anymore, in relation with a feasible possibility and realization meanings for a repressive reaction; thus, it was proposed that the expression "individualization of the punishment" to be widened[92]. The expression proposed by the Romanian professor Vintilă Dongoroz was the "adaptation of the penal sanctions", regarding their finality: reunifying the juridical order and the social defense. Before professor Dongoroz, Ion Tanoviceanu suggested the use of the expression "proportionalization of the punishment", considering that the expression of the "individualization" is improper. In his vision, the proportionalization of the punishment has to be made in such a way as to correspond to the seriousness of the committed deed and, in the same time, to be able to ensure the juridical order, to satisfy the disagreement sentiment of the collectivity and to protect the society; also, regarding the proportionalization of the penal sanction it would have to take into account the finality and the function of each repressive measure, and also, the offender's person[93]. The Italian doctrine is using the expression "*la commisurazione della pena*"[94] and Raymond Saleilles[95], who elaborated the well known monograph on the individualization of the punishment, asserted that the punishment must be adjustable to the nature of the one who is going to be applied to; if the offender doesn't have a completely perverted nature, the punishment mustn't contribute to pervert that nature; the punishment must help him to raise up; if the offender is beyond recuperation, morally, the punishment must be very severe, to benefit the society, representing a radical measure of protection an prevention.

Taking as model of inspiration the French Penal Code, the Romanian doctrine[96] suggested using the expression "personalization of the sanction", instead of individualization, in order to express not only the idea of adaptation of the punishment in relation with the individuality of each offender, but also, the adhesion of the offender to the punishment. The personalization of the penal

[91] Vintilă Dongoroz, *Drept penal (Tratat),* Bucureşti, 1939, p. 670

[92] Ibidem, p. 670-671

[93] I. Tanoviceanu, *Tratat de drept şi procedură penală*, comentat de Vintilă Dongoroz şi colab., ed. a II-a, vol. III, Tipografia Curierul Judiciar, Bucureşti, 1926, p. 99-105

[94] G. Fiandaca, E. Musco, *Diritto penale. Parte generale*, Bologna, 2001, p. 725

[95] Raymond Saleilles, L'individualisation de la peine, 2-me edition, Paris, 1909, p. 47

[96] O. Brezeanu, *De la individualizarea la personalizarea sancţiunilor*, în R.D.P. nr. 1/2000, p. 49

sanction would mean, in other authors[97] opinion, a shifting, a reorientation of the legal criteria of the sanction, from the seriousness of the offence to the person of the delinquent, the person deprived from his liberty but not his dignity.

Using the expression "personalization of the sanction" would be more correct if we take into account that the moral person, that can be sanctioned now, the adaptation of the sanction would never be individualized (regarding the moral person) because the moral person is not an individual.

The individualization of the penal sanctions is a complex operation, and it is realized in three different phases: The phase of incrimination of the penal offences, the phase of precise determination of the punishment and the phase of the execution of the applied punishment. Starting from this reality, the theory of the penal law makes a distinction between the three phases of individualization that correspond with the three mention ones: the legal individualization, the juridical individualization and the administrative individualization. Within each phases, the penal law sanctions are individualized by the activity of particular authorities, within certain limits and with certain methods. Regarding the legal force, the phases of individualization have a certain hierarchy: the legal individualization is mandatory and it is imposed to the juridical and administrative individualization; the juridical individualization is imposed to the administrative individualization. So, the legal force of the different types of individualization are structured by their mandatory force; first is the legal one, followed by the juridical one (that couldn't exist without a legal individualization), and the administrative individualization (that couldn't exist without a juridical individualization). The administrative individualization is realized by the administrative authorities, when the punishment (restrictive of liberty) is applied, by adapting the execution regime to each individual and his behavior in the imprisonment place. This type of adaptation is regulated presently by the Law no. 275/2006, regarding the execution of the punishments and the measures disposed by the juridical authorities, during the criminal trial, and it's a matter of execution Penal law branch.

2. The new recently adopted Penal Code, by assuming the Government responsibility (Law no. 286/2009) has an objective the creation of a coherent legislative frame in criminal law, avoiding the useless superposition of the in force existent regulations in the actual Penal Code and special laws that contain incriminations; simplifying the substantial regulations in order to maintain an Unitarian and a prompt application in the activity of the juridical authorities; assuring the respect of the exigencies imposed by the fundamental principles of the penal law assigned by the Constitution and the Treaties and Pacts regarding to fundamental human rights, signed by Romania.; the transposition of the regulations adopted by the European Union within our national legal frame; and, the most important, the harmonization of the Romanian material penal law with the other member states penal system, as a premises of juridical cooperation in criminal law matter, based on mutual trust and recognition,

Under the influence of this last orientation, the new Penal Code provides two new penal institutions, regarding the individualization of the punishment: renouncing to apply the punishment and postponing applying the punishment (Chapter V, section III and IV).

3. Renouncing to apply the punishment represent the right of the Court to definitively renounce to establish and apply a punishment for a guilty person, regarding the offence, the offender's character and his previous and after the offence behavior. By applying an advertisement, the Court avoid the harm that would be done in case of pronouncing a punishment; in this case, would do more harm than good to the offender's reeducation and social reintegration. This institution

[97] Th. Papatheodoru, *De l'individualisation des peines et la personalisation de sanctions*, în Revue internationale de criminologie et de police technique, nr. 1/1993, p. 109

is also regulated in German penal law (section 60 Penal Code), Portuguese Penal Code (article 60 and 74), French Penal Code (article 132-58), Switzerland Penal Code (article 53 and 54).

The conditions of renouncing to apply a punishment are provided by the article 80:

a) the seriousness of the offence must be very reduced, regarding the nature and the extension of the consequences produced, the used means, the way and circumstances the offence was committed, the motive and the purpose had in mind by the offender;

b) the Court must consider that regarding the offender person, his behavior previously committing the offence, the efforts made to diminishing or eliminate the consequences of the offence, and also his real possibility to straighten up, an application of a punishment would be inopportune and could determine unwanted consequences regarding the offender person;

At letter a), the legislator considered both the objective conditions of the offence, but also some subjective conditions, such as the motive and the purpose pursued by the offender in committing the offence; the legal provision is granting the judge the possibility to easily decide, taking into consideration the two categories of conditions, if it is the case or not to apply this provision.

At letter b) the legislator was guided more toward some subjective conditions that have bearing on the offender personality giving the judge the possibility to evaluate better the nature and the quantum of the applied punishment, taking into consideration the mentioned conditions.

Within the cited section two, there are shown the conditions that must be respected in case the Court decides to renounce pronouncing the punishment. So, the Court cannot pronounce the renunciation to the punishment if:

a) the offender was previously convicted for an offence, excepting the cases provided by the article 42, letter a) and b) or for which (offence) had intervened the rehabilitation or the period provided for rehabilitation was fulfilled;

b) the offender beneficiated of this kind of individualization of the punishment within the last two years, previously the date of committing the actual judged offence;

c) the offender had been avoiding criminal prosecution or the criminal trial, or tried to shatter learning the truth or identifying and criminal prosecution of the participants;

d) the punishment provided by the law for the committed offence is the imprisonment larger than 5 years.

In case of concurrence offences, the renouncing to apply a punishment may be pronounced for each concurrent offence, if there are fulfilled the provisions stipulated by the law.

The Court, in applying this disposition, that has the character of an advertisement, stipulates within the grounds that sustained the judgment, what determined the Court to renounce to apply a punishment and compel the offender attention regarding his future behavior and the consequences if he will commit another offence. In case of concurrent offences, a single advertisement is applied. The effects of the renunciation to apply a punishment consists in non existing, in the future, for the offender, of any interdictions, incapacities or decays from any legal rights that could result from the offence committed. The offender is not absolved of the civil obligations provided by the judgment and neither from the execution of the safety measures (measures that have another juridical nature than the punishment; they are pronounced in order to eliminate a dangerous situation, produced by the offender).

4. Another modality of individualization of the punishment provided by the new Penal Code is postponing the application of the punishment (section 4).

The Court could pronounce the postponing and establish a probation period if there are fulfilled the following conditions:

a) the established punishment, including the case of concurrence offences, is a fine or, at most, two years of imprisonment;

b) the offender was never previously convicted to imprisonment, excepting the situations provided by the article 42, letter a) and b), or for the offence committed intervened the rehabilitation, or the period established for rehabilitation was fulfilled;

c) the offender asked to do work for the benefit of society, unpaid;

d) regarding the offender person, his previous behavior committing the offence, the efforts made by the offender to diminish or eliminate the consequences of the offence, and also his possibilities to straighten up himself, the Court appreciate that the immediately apply a punishment is not necessary; it is however necessary for the offender to have a supervised conduit for a determined period of time;

5. We observe the presence of both objective criteria (those referring to the offence, punishment established by the Court), but also subjective criteria, more numerous in this case[98]. The subjective criteria are more numerous in this case of individualization because the person of the offender is to be supervised on a period of time (two years), period within he must respect the supervise measures and to execute the obligations imposed by the Court. We mention that the Probation Service is in charge with the offender supervision within the period of 2 years (period that starts from the date of the conviction became definitively). The Probation service has the obligation to seizure the Court in both cases that the offender is not respecting the obligations imposed, or, in contrary, he is respecting the obligations imposed by the Court. The obligations that must be respected may suffer modifications during the execution. So, if during the probation period have intervened new grounds that justify either the imposing of new obligations, increasing them, or otherwise diminishing the existent execution conditions, the Court will pronounce the modification of the obligations accordingly, in order to assure the supervised person increased chances of rehabilitation. Therefore, the Court, when is ascertain of this facts, is obligated to modify the offender's obligations. The compulsoriness of the Court is the result of using the expression "**the Court decides**" instead of "**the Court may decide**", by the legislator.

The Court decides the discontinuing of the execution of some of the imposed obligations, when it's appreciated that the maintaining of these obligations is no longer necessary.

Also the Court may revoke the postponing of the application of the punishment if during the probation period, the offender, with bad faith, doesn't respect the supervision measures or he is not

[98] a) to present himself to the Probation Service, at certain fixated dates;

b) to receive visits of the probation officer assigned to his supervision;

c) to announce, beforehand, if he is changing the place of living, any travel that exceeds five days and his return;

d) to communicate changing the working place;

e) to communicate information and documents that permit the control of his meaning of existence;

2) The Court may impose to the offender to execute one or more of the following obligations:

a) to take a training course, a professional qualification course;

b) to work unpaid, for the benefit of the community, on a period of 30 to 60 days, respecting the conditions imposed by the Court, except the case his health doesn't permit that. The number of daily work hours are established by the Law of punishment execution;

c) to attend to one ore more social reintegration programs, developed by the probation service, or organized in collaboration with the communitarian institutions;

d) to submit himself to the control measures, treatment or health care;

e) not to communicate with the victim or its member family, with the persons who participated with him in committing the offence, or other persons named by the Court, or not to be in the proximity of those persons;

f) not to be in certain places or at certain sports, cultural meetings, or other public meetings, established by the Court;

g) not to drive certain vehicles established by the Court;

h) not to detain nor use or wear any kind of weapons;

i) not to leave the territory of Romania without the approve of the Court;

j) not to occupy or exercise the profession, activity or the position that he used in committing the offence;

executing the imposed obligations. In this case, the Court revokes the measure and decides the application and execution of the punishment. In case when, until the expiring the period of supervision, the offender is not fulfilling totally the civil obligations established in the judgment, the Court revokes the postponing and decides the application and execution of the punishment, excepting the case when the offender proves that he had no possibility to fulfill those obligations. If after the postponing the application of the punishment, the supervised person commits a new offence, intentionally or with praeter-intention, discovered by the authorities within the probation period, and for which a Court pronounced a conviction, even after the expiration of the probation period, the Court revokes the postponing and decides the execution of the punishment. The applied punishment as a result of the revoking the postponing and the punishment applied for the new offence is calculated in accordance with the dispositions regarding the concurrent offences. If the subsequent offence is committed without intention, the Court **may maintain** the disposition regarding the postponing of the application of the punishment.

In this case we observe that the Court has the **faculty** and not the **obligation** to maintain the disposition of postponing the application of the punishment. The Court can repeal the postponing of the punishment if during the probation period it is discovered that the person under probation had committed a new offence, until the judgment that disposed the postponing remained definitive, even after the expiration of this period, offence punished by prison, the postponing is repealed. In this case it will be applicable the dispositions regarding the concurrent offences, recurrence offences or intermediary plurality. In case of concurrent offences the Court can dispose the postponing of the application of the resulted punishments, if there are fulfilled the conditions provided by the article 83 of Penal Code. If the postponing will be pronounced, the probation period is calculated from the date that the previously judgment remained definitive.

The effects of the postponing of the applying of the judgment are: the punishment is not applied and the offender is not submitted to any interdiction, declined from any civil rights or incapacities that could be a result of committing the offence, with the condition that the person doesn't commit again another offence until the expiration of the probation period, or it wasn't pronounced the revoking of the postponing or it wasn't discovered a cause for annulations. The postponing of the application of the punishment doesn't produce any effects on the safety measures and the civil obligations established by the judgment. We observe that the effects of this type of individualization are identical with the ones provided by the article 80-82 (renouncing to the punishment) with the mention that, speaking about a postponing the punishment is no longer applied.

6. In relation with the issue mentioned above, there are more problems that must be debated. The jurisprudence, so far, never pointed out the necessity of introducing of these new institutions. We ask ourselves, what real problems would resolve these dispositions. The acquittal (discharging the trial) could resolve the problem of renunciation to pronounce a punishment. The provisions regarding the institution of the postponing the application of the punishment, could be satisfied by the institution of the conditioned suspension of the execution of the punishment. It is true, that are different expressions; regarding the postponing we use the expression "**established punishment**" and regarding to conditioned suspension we use "**applied punishment**", but, the question that is rising is when the individualization of the punishment is happening? When it is established, when it is applied or when it is executed? In the case of postponing, the legislator uses the expression "applied", but for the Court to be able to renounce or postpone the application of the punishment, it is necessary that the punishment to be already established. Maybe the following expression was more accurate "**postponing the execution of the punishment**" because the punishment is already established, in conformity with the provisions pointed out at letter a) where the expression used is "**the established punishment".**

The French authors[99] make a more accurate distinction regarding the renouncing and postponing the pronunciation of the punishment, using the effects of these institutions; the **postponing** presumes the **pronunciation** of the punishment; **the execution of the pronounced punishment is renounced to**; the postponing of the pronunciation has an effect only on the individualization of the punishment, this individualization could be followed by a pronunciation, if the offender doesn't respect the conditions imposed by the Court.

7. **Comparative law**. According to the German Penal Code, (Title V, section 59, 60, Absehen von Strafe), The Court renounce to the punishment when the consequences of the offence are so serious for the offender, that a sentence to prison would be a disaster. This disposition is not applicable if the offender was previous convicted for an offence to prison for more than a year. The criteria for the renunciation of the punishment could be: the seriousness of the offence is much reduced, the level of guilt is very low, or, other reasons[100].

According to the French Penal Code, In the case of a misdemeanor or, except in relation to the matters considered under articles 132-63 to 132-65, and in the case of a petty offence, the court, after finding the defendant guilty and ordering, if need be, the confiscation of dangerous or noxious objects, may either exempt the defendant from any other sentence, or defer sentence in the cases and pursuant to the conditions set out in the following articles. At the same time as it decides on the defendant's guilt, the court rules, if necessary, on any civil claim for damages. An exemption from penalty may be granted where it appears that the reintegration of the guilty party has been achieved, that the damage caused has been made good and that the public disturbance generated by the offence has ceased. A court granting an exemption from penalty may rule that its decision shall not be registered in the criminal records. Exemption from penalty does not extend to payment of the costs of the proceedings. A court may defer sentence where it appears that the reintegration of the guilty party is in the process of being achieved, that the damage caused is in the process of being repaired, and where the public disturbance generated by the offence will cease. In this case, it determines in its decision the date when it will pronounce sentence.

A deferment may only be ordered where the defendant, in the case of a natural person, or his representative, in the case of a legal person, is present at the hearing. At a reconvened hearing, the court may either exempt the defendant from penalty, or impose the penalty set out by law, or further defer pronouncement of sentence pursuant to the conditions and according to the terms set out under article 132-60. The decision with respect to the penalty must be made no later than a year after the first deferment decision.

At the reconvened hearing the court may, taking into account the offender's behavior, either exempt him from penalty, or pass sentence as set out by law, or further defer sentence pursuant to the conditions and according to the terms of article 132-63.

The decision regarding the penalty must be made no later than a year after the first deferment decision.

According to the Portuguese Penal Code (articles 60 and 74), an **admonition**, is pronounced by the Court if: the agent ought to be sentenced to a fine of a measure not superior to 120 days, the court may limit itself to pronounce an admonition.

Admonition only takes place if the damage has been repaired and the court concludes that, doing so, the aims of punishment will be accomplished in an appropriate and sufficient way;

As a rule, admonition will not be used if the agent, during the 3 years prior to the act, has been sentenced to whatever penalty, including admonition.

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[99] F. Desportes, F. Le Gunehec, *Le nouveau Droit penal*, tome 1, Droit penal general, Septieme editition, Ed. Economica, Paris, 2000, p. 820-823

[100] Hans Jescheck, *Lehbruch des Strafrechts*, Alemeiner Teil, Duncher und Humbolt, Berlin, 1988, p. 769-773

Admonition consists of a solemn oral censure made in session by the court to the agent.

Article 74 provides the **Dispensation of penalty;** When the crime is punishable with imprisonment not superior to 6 months, or only with a fine not superior to 120 days, the court may declare the defendant guilty **without applying penalty** if:

a) The unlawfulness of the act and the guilt of the agent are minute;

b) The damages have been repaired;

c) Reasons of prevention do not oppose to the dispensation of penalty.

If the judge has reasons to believe that the damage reparation is about to happen, he may adjourn the decision for a reconsideration of the case within 1 year, on a day which will be immediately fixed.

When another rule allows the dispensation of penalty on a facultative nature, this will only take place if the case fulfils the pre-requisites stated in the sub-headings of number one above.

According to the Model Penal Code[101] (U.S.A), the Court can withhold the sentence of imprisonment and placing the defendant on probation. Subsection two sets forth eleven factors that should be accorded weight in favor of withholding a sentence of imprisonment. The list is not exclusive and the presence or absence of any of the factors is not meant to conclude the matter. The Court is directed not to impose imprisonment unless the circumstances of the case support an opinion that an imprisonment is necessary to protect the public because at least one of the three specified criteria is satisfied[102]. Since these three criteria are exhaustive of the factors that may justify imprisonment, a Court may not rely on some independent consideration for sending an offender to prison. In deciding whether to sentence an offender to prison, the Court, is required by subsection (2) to take account of the enumerated grounds that favor an alternative disposition. Subsection (2) does not, however, preclude the court from considering other reasons against an imprisonment sentence. A major purpose of this is to ensure that imprisonment sentence is not routinely imposed. The Subsection 3 is designed to suggest that is an additional judgment called for in those cases where a decision in favor of withholding a sentence of imprisonment is made, namely whether the supervisory regime of probation should be invoked or whether some other form of disposition is more appropriate. The other sanction to be considered includes a fine and suspension of imposition of sentence. The Model Penal Code moves within the older tradition in providing for a suspension of the imposition of sentence rather than for a conditional discharge.

Conclusions

The new Penal code, adopted in 2009, contains many new substantial penal law regulations. The aim of the study was only to clarify some of the issues that could rise up, for now, only theoretically.

It remains to be seen what other problems will be raised by the practitioners, after the new penal code will be enforced. This study refers to only a part of the vast institution of individualization of the punishment, with a special view on the new institutions.

The opinions expressed in the Romanian doctrine regarding the problems that may be solved by these new regulations are different; the regulation regarding the renunciation to apply a

[101] *Model Penal Code and Commentaries, part I, general provisions,* The American Law Institute, Philadelphia, Pa, 1985

[102] Under the introductory part of subsection (1), the Court may not sentence an offender to prison unless "it is of the opinion that his imprisonment is necessary for the protection of the public". If the finding or one or three specified factors does lead the Court to have that opinion, it would, of course, impose a sentence of imprisonment. But it is possible that the court will find one of the three specified factors and yet not conclude that imprisonment is necessary to protect the public. Then it is not authorized to impose that sentence.

punishment may be considered, by some authors, as an unpunishable cause with general application; after other authors, a modality of replacing the penal responsibility, because the renunciation to apply a punishment does not affect the character of the offence, the deed is still a crime, whether it is applied a punishment or not.

The legislator preferred to let the Court to decide if a punishment will be applied or just a warning.

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