

# THE REAL SOCIAL THREAT AND THE CAUSES FOR REDUCING THE PUNISHMENT, ACCORDING TO THE CHANGES BROUGHT BY THE LAW NO. 202/2010, SMALL REFORM IN JUSTICE

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## Abstract

*The new substantial changes, though minor as concerns the content, if we relate to the intervention caused by the same legislative act in the procedure field, have generated serious difficulties in the interpretation and application in the legal criminal activity. This article aims at analysing and identifying the legal consequences caused at the level of the substantial norm for applying the mentioned legislative act. At the same time, the article offers efficient legal remedies for overcoming the procedure impediments generated by adopting the Law of Small Reform in Justice. The article has three parts, analysing the changes brought by the Criminal Law by the Law No. 202/2010 in different fields: art. 18<sup>1</sup> – the deed that is not a real social threat of a crime, art. 74<sup>1</sup> and art. 184 – accidental wounding.*

**Keywords:** *criminal law, real social threat, parties' reconciliation, grounds for reducing the punishment.*

## Introduction

As the Law No. 202/2010 itself, the article has a plural-disciplinary form, discussing aspects connected to adopting the Law of Small Reform in Justice, in the substantial, as well as in the procedure field.

Beyond the critical analysis, the article proposes efficient legal remedies, under the form of concrete, punctual and fundamental solutions, for the negative procedure consequences caused by applying this legislative act.

The work analyses, first of all, the way in which the legislator sets a legal preference for the material or legal criteria that have to be taken into account for determining concretely the degree of social threat of a crime, in the detriment of the personal criteria.

Secondly, one has to take into account the institution stipulated by art. 74<sup>1</sup>, that can be characterised with difficulty, as it contains elements that belong to the content of different legal categories, as a form for individualising the punishment with *sui generis* or hybrid character, made up of three distinct causes.

At the same time, there are analysed the changes brought to the way in which the criminal action can be ceased for all forms of the crimes of accidental wounding.

By offering proper procedure remedies, the work has the value of a guide destined first of all to the practitioners, but it can also be a source of inspiration for the legislator, as well, in case of future changes.

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The present form of art. 18<sup>1</sup> Criminal Code seems to be a compromise solution between the old regulation and the ones that propose completely eliminating this institution from the Criminal Code.

The changes brought give the judicial body the possibility to estimate concretely the degree of social threat of a deed stipulated by the criminal law only when considering the material or the real criteria stipulated by art. 18<sup>1</sup> paragraph 2, i.e. of those that concern all facts (conditions and the way for committing the deed, the consequences occurred or that might occur, etc.)

The personal criteria that concern the person and conduct of the offender have a subsidiary character, as they will be taken into account only if the offender is known.

The legislator's intention, by referring to the legislative act where this change was included – for accelerating the solutions of the trials, is obvious.

Thus, the judicial authorities have the possibility to conclude criminal files in the stage of criminal investigation, but with unknown author and for which there exists no other legal possibility, for interrupting the criminal investigation activity, or starting the trial, following the personal character of the criminal responsibility.

At the same time, the judicial authorities are admitted the legal possibility to refuse starting a useless procedure activity (by not starting the criminal investigation), if, although the offender is not known, the criminal activity is not dangerous.

This amendment of the substantial law causes certain procedure linked consequences, partly, by the changes brought by art. 228 and 230 of the Criminal Procedure Code.

At a substantial level, the constructions itself of art. 18<sup>1</sup> paragraph 2 contradicts, at least partly, the possibility of concretely estimating the degree of social threat, without knowing the identity of the offender. Thus, among the material criteria that have to be taken into account compulsorily for determining the real social threat, the legislator also stipulated the one concerning the purpose aimed at for committing the crime.

And the purpose is an element of the subjective side of a crime, a side that comprises all conditions concerning the psychical attitude of the offender towards the deed and its consequences.

The purpose is understood as the aim of committing the deed or the objective proposed and represented by the offender (C.Bulai, B.Bulai *Manual de Drept Penal („Handbook of Criminal Law”*, Universul Juridic Publishing House, Bucharest, 2007, page 195).

Therefore, estimating this subjective criterion is always made considering the personal qualities of the offender, since representing the consequences of a concrete voluntary activity differs depending on the capacities of each individual.

Thus, if we take into account the nature of the logical-juridical reasoning that determining concretely the degree of social threat involves, the dimension of this condition, drafted without knowing the offender, is always inexact.

As different from the generic social threat of the crime, evaluated by the legislator *in abstracto*, within the punishment limits for each incriminated deed, the real social threat is evaluated *in concreto* by the judicial authorities, depending on the specific features of each case.

As there are provided at present the procedure consequences, art. 18<sup>1</sup> Criminal Code (regulated in the provisions of art. 228 and 230, Criminal Procedure Code), evaluating the degree of real social threat can be used in two ways.

First of all determining concretely the degree of social threat can be accomplished in a procedure framework, following the analysis of the evidentiary matters, after beginning the criminal investigation. If the judicial authorities estimate in this case that, by minimally affecting the protected value, the fact does not represent a crime, they order the solution of ceasing the criminal investigation (art. 11, item 1, letter b, as related to art. 10, lit. b<sup>1</sup>), if the offender is

known, or the solution of the docket solution (art. 11, item 1, letter a, as related to art. 10, lit. b<sup>1</sup>), if the offender is not known.

The novelty consists in the possibility of ordering the docket solution (solution conditioned upon the inexistence of the suspect in the case) but also in this situation, as opposed to the old regulation, where the solution was impossible.

In the second way, the real evaluation of the social threat would also be possible in an extra-trial context, when from the content of the act of apprehension or the acts proceeding the case, the fulfilment of the conditions stipulated by art. 18<sup>1</sup> would result.

In this case, the judicial authorities were recognised the possibility to order not starting the criminal investigation under conditions of art. 228, paragraph 3. Evaluating the real social threat in this case is not made by evidence, as the criminal trial has not started yet, but from the perspective of information elements, a fact that gives the estimation a strong random character.

What happens when, after the judicial authorities estimate, in lack of the offender, that the fact does not present the degree of threat of a crime, later, after discovering it, the personal criteria stipulated by art. 18<sup>1</sup> contradict the initial evaluation?

In the absence of an express interdiction, the provisions of art. 273, Criminal Procedure Code, concerning the reopening of the criminal investigation, should apply properly.

Thus, the initial solution for not starting the criminal investigation or for docketing, ordered without knowing the offender, has to be denied, being followed by the order of starting or, as applicable, reopening the criminal investigation.

This hypothesis illustrates the great degree of relativity of the institution in this form.

Moreover, even if the solutions for not starting the criminal investigation or the trial are not final and one cannot speak of the authority of the tried thing, when considering the European jurisprudence, in such a case the principle *non bis in idem* would be infringed, because of the identity of juridical procedures used (CJCE, February 11, 2003, Gozutok and Brugge, C-187/01 and C-385/01).

The important procedure consequences of the change of the substantial norm are found in the provisions of art. 230, Criminal Procedure Code. This article contains special character provisions, applicable if, from the content of the act or apprehension or of the acts performed before, there results the impediment stipulated by art. 10 lit. b<sup>1</sup> (lack of the real social threat).

As I have indicated, as different from the general provisions concerning the existence of the impediments stipulated by art. 10 in this procedure stage, that determine only one solution to be followed, i.e. the begin of the criminal investigation, in the case stipulated by art. 10, lit. b<sup>1</sup> the prosecutor has, according to the law, two possibilities: to order the begin of the criminal investigation or ceasing the criminal investigation.

The regulation is poor because of its incomplete character.

Because the two solutions belong to different juridical categories and have different consequences, the prosecutor's order has a too vast area and a cvasi-arbitrary form; its order should be circumscribed to certain situations stipulated by the law and not implicit, in order to avoid contradictory interpretation.

If we take into account the juridical nature and the general conditions of each of the two measures; the choice should be determined by the following reasons.

Not starting the criminal investigation in the case provided by art. 10 lit. b<sup>1</sup> should be ordered when there is noticed the lack of the degree of real social threat of the deed by reference only to the material or real criteria determined by art. 18<sup>1</sup> paragraph 2 Criminal Code, and the offender is not known.

At the same time, not starting the criminal investigation would be justified even in the situation when the lack of degree of real social threat of the deed, the offender is known, but the prosecutor estimates that the application of an administrative sanction is not proper.

In exchange, ceasing the criminal investigation in the case stipulated by art. 10 lit. b<sup>1</sup> has to be ordered if the lack of social threat is noticed, the offender is known and it is also necessary to apply an administrative sanction.

Knowing the identity of the offender is a *sine qua non* condition for ceasing the criminal investigation in this case, because of the legal nature and of the effects this solution involves (art. 249<sup>1</sup>), as well as because of the fact that, although they have an administrative character, the sanctions provided by art. 91, Criminal Code have a personal character.

Although the law does not stipulate expressly, when considering the normal succession of the procedure activities, the solution of ceasing the criminal investigation has to be preceded compulsorily by the measure of criminal investigation, under conditions of art. 228, paragraph 2.

The proposal of the criminal investigation authority addressed to the prosecutor, under conditions of art. 230, by which there is requested the cease of the criminal investigation for the case provided by art. 10 lit. b<sup>1</sup>, has to be preceded by the motivated solution for starting the criminal investigation belonging to the same authority.

After receiving the proposal, the prosecutor has to confirm, in max. 48 hours, the resolution for starting the criminal investigation, so that they order the cease of the criminal investigation.

This way to act is due to the fact that the criminal investigation authority is not competent to apply administrative sanctions, as per art. 91, Criminal Code, this right being recognised only to the prosecutor and to the court of law.

As per art. 230, in case of the criminal investigation, as well as in case of the cease of the criminal investigation, the procedure instrument is represented by an ordinance. The order contravenes to the general regulation, as provided by art. 228 that determines that, in all cases, not starting the criminal investigation is ordered by resolution.

The supplementary grounds for not starting the criminal investigation if the prosecutor takes the grounds included in the proposal of the criminal investigation authority if elective, this order is against the regulation stipulated by art. 203, paragraph 2 (*the ordinance has to be grounded*).

If this ordinance is not grounded, the persons interested have to be sent a copy of the ordinance, as well as one of the proposal of the criminal investigation authority, this comprising in reality the grounds that justified the measure.

The ordinance for ceasing the criminal investigation in the case stipulated by art. 10 lit b<sup>1</sup> has to be motivated in all cases, by referring to the general provisions stipulated by art. 203, paragraph 2, as well as by referring to the special provisions stipulated by art. 249-249<sup>1</sup>.

Because of the legal qualification that the instrument ordering not starting the criminal investigation, in the case stipulated by art. 10 lit. b<sup>1</sup>, there exists a nonconformity between the provisions of art. 230 and those of art. 278, paragraph 2 and 278<sup>1</sup> paragraph 1 that determine what instruments can form the object of the complaint addressed to the superior prosecutor and later on, to the judge.

If we take into account the express orders of the mentioned articles in the complaints, there results that only the resolutions for not starting the criminal investigation may form the object of this type of judicial control; as long as, in the case stipulated by art. 10, lit. b<sup>1</sup> not starting the criminal investigation is ordered only by ordinance, this instrument cannot be attacked by complaint under the special conditions mentioned.

The solution is excessive, but it is the only one that results from interpreting these non-correlated provisions.

According to the new amendments, art. 18<sup>1</sup> paragraph 3, no longer stipulates the necessity to enforce a punishment with administrative character when the prosecutor or court of law acknowledge the deed does not feature a felony's social threat degree.

The drafting of the text allows for double interpretation.

For a first one, the administrative character punishments do not apply under the situation when the concrete assessment of the social threat degree has been undergone without knowing the identity of the offender. *Per a contrario*, whenever law enforcement agencies determine his / her identity, even if they do not deem the deed to feature a felony's degree of threat, they must apply an administrative punishment following the antisocial behavior.

For the second version, regardless of determining the identity of the offender or not, where article 18<sup>1</sup> is concerned the application of an administrative sanction is left to the supreme evaluation of the magistrate.

I believe that the only tenability for failing to apply an administrative sanction should the social threat be absent would be the fact the offender is unknown.

The fact that these do not represent a form of criminal liability, that they are not recorded in the criminal record and vary from reprehension to a fine in the amount of lei 1.000 are grounds in favor of the necessity to apply an administrative sanction should the offender be known.

Nonetheless, both interpretations are tolerated by law.

Referring to article 74<sup>1</sup> of the Criminal Code, we must first of all emphasize that, by Resolution no. 573 / 2011 of the Constitutional Court (published in the Official Gazette no. 573 / 2011) the high unconstitutional exception has been accepted and these article's provisions were deemed unconstitutional.

Although it is not a legislative body, the Constitutional Court, by its final and generally mandatory decision, thus determines the impossibility to apply the provisions comprised by article 74<sup>1</sup> of the Criminal Code, even if the text was formally ruled out by another legislative intervention.

Nevertheless, analysis of the specified provisions is of interest from the perspective of the legal effects that the existence (between November 25th, 2010 and May 25th, 2011) of this substantial norm used to and still generates, if we at least consider the possibility of reviewing final criminal decrees in case of Constitutional Court's decrees, an exceptional possibility provisioned by article 408<sup>2</sup> of the Criminal Code.

The legislator's intervention, although minor in volume, brings forward serious negative consequences concerning its enforcement. The institution contradicts the very finality of the law as instead of simplifying and accelerating the completion of criminal trials, it shall instead generate controversial practice and trial hindering.

The regulation is incomplete both from the form (drafting technique) and contents point of view.

We firstly deal with the absence of a marginal name that seems to suggest the legislator's difficulty to classify his own creation.

What is the legal nature of the institution provisioned by article 74<sup>1</sup>?

The classification is rendered difficult by the fact that the institution is composed of elements comprised by distinct legal categories.

Although the article is included in the section regarding general mitigating circumstances, nevertheless the contained clauses are particularly applied to certain types of crimes. At the same time, even if not included in the detailed range of legal mitigating circumstances, the institution is similarly enforced, as it features imperative character, and its enforcement cannot be denied should the premise be met.

The *sui generis* character of the institution provisioned by article 74<sup>1</sup> is pictured in its tripartite content, as it comprises three distinct causes.

Consequently, the institution can be classified as a form of individualizing the *sui generis* or hybrid charge, made up of a cause of punishment reduction (article 74<sup>1</sup> paragraph 1), a cause of replacing the prison charge by a fine (article 74<sup>1</sup> paragraph 2, first hypothesis) and by a cause of

replacing criminal liability with administrative liability (article 74<sup>1</sup> paragraph 2, second hypothesis).

Another shortcoming considers the hardly identifiable scope of this institution.

If the concrete determination, by listing, of the crimes provisioned by the Special Part of the Code does not raise issues or maybe solely the criteria determining the selection, the generic determination, by indication of the group of crimes, raises serious interpretation issues as the category „economic crimes” does not feature a specific legal cover.

Thus, a crime can be classified as economic either by reporting to the premise, when it implies the preexistence of economic or commercial rapports, or by referring to the material item, when the action or non – action aims an economic activity, even by referring to the subjective element, should the pursued target be economic.

Consequently, the norm fails to meet the predictability requirement, as the semantic area of the term „economic crime” is hard to be concretely defined, due to absence of legal classifications.

The regulation itself is mixed up because, on the one side, there is no equivalence between the expressly specified crimes and the ones determined abstractly, by pointing out the type, the first 6 crimes not being economic by their nature, and on the other side, there is no justification for ruling out from the crime category for which the cause can apply, the ones legally classified as economic, and yet provisioned by the Special Part of the Criminal Code (articles 295 – 302 – crimes to the regime determined for certain economic crimes).

The sole condition these crimes must meet in order to be inscribed in the decrease grounds provisioned by article 74<sup>1</sup> is the one concerning the form.

Thus, crimes, regardless of the fact they are concretely individualized or generically determined, must take the form of done deed crime, and be either material or of outcome; furthermore, the immediate consequence must always result in indubitable damage.

The direct and logical consequence of this condition would be that article 74<sup>1</sup> would not apply to the attempted crimes. Whether we speak of the legislator’s intention or omission, the regulation is profoundly inequitable and absurd from the legal point of view as it punishes more seriously this atypical form of crime (always less dangerous) than the done deed crime.

As legal benefits are solely admitted for done deed crime, the regulation equals to encouraging the offender on the crime path all the way through. The prompt intervention of the legislator is required in order to remove this inequity.

Concerning the legal effects of the institution regulated by article 74<sup>1</sup> we would like to point out that it gathers several grounds under the same content, some of charge decrease and others of replacing either the penalty or the criminal liability.

What implies the enforcement of one of these different grounds is the amount of the inflicted and remedied damage.

Should the entire inflicted and remedied damage exceed Euro 100,000, in the equivalent value of the national currency, the limits of the penalty as provisioned by law are cut to half. This provision undoubtedly represents a cause of charge decrease, but as it features specialized character, it should have been regulated within the content of each crime considered by the legislator and not in the general part of the Code.

Should the prejudice be between Euro 50,000 and 100,000 on the other hand, in the equivalent value of national currency, the fine penalty may be applied. The unclear drafting of the text implies the idea that the fine penalty enforcement under these conditions would solely be a possibility, the court being entitled to choose between either decrease of charge limits to half or replacement of prison charge with the fine penalty.

The replacement is possible even if the fine penalty is not alternatively provisioned with prison in the incriminatory text.

Finally, should the inflicted and remedied damage be up to Euro 50,000, in national currency equivalent value, the administrative sanction is applied.

Unlike the prior situation, the application of the administrative sanction is compulsory should the legal condition be met, so that this hypothesis may be classified as a replacement ground for criminal liability.

This criminal liability replacement cause features nevertheless a special character as it supposes meeting of certain different conditions from those of common law provisioned by article 90 of the Criminal Code.

The sole legal solution to substantiate this special form of criminal liability replacement is the cease of the criminal trial pursuant to article 11, paragraph 2, letter 2 reported to article 10 letter i of the Criminal Code.

The cause is comprised by the hindrance stipulated by article 10, letter i, because one cannot identify in its content show replacement of criminal liability came about in compliance with the common law provisions (article 90) or according to the special provisions (art. 74<sup>1</sup> paragraph 2).

Should replacement of criminal liability occur subject to the conditions of article 74<sup>1</sup> paragraph 2, this cause not only ceases the criminal action but also its possible performed civil action, as it involves an entirely inflicted and remedied damage.

Even if the enforcement of an administrative sanction can still happen, on proceeding area, and following ruling of acquittal pursuant to article 11, point 2 letter reported to article 10 letter b<sup>1</sup>, by application of article 18<sup>1</sup> of the Criminal Code, I believe that this kind of settlement is not possible for the hypothesis provisioned by article 74<sup>1</sup> paragraph 2 of the Criminal Code.

First of all, if we consider the legal structure of the new institution, it unequivocally results it acts as a hindrance deriving from the lack of object of the criminal action (namely criminal liability), the deed continuing to be deemed as a crime.

On the other hand, the case provisioned by article 18<sup>1</sup> of the Criminal Code no longer deems the deed as a crime due to lack of an essential feature (lack of social threat), so that it acts as hindrance due to lack of criminal action (namely the crime).

Secondly, the absence of real social threat cannot be determined with apriority for any economic crime, regardless of the way it is committed, solely through whole damage reparation.

Last but not least, as we pointed out, the enforcement of administrative punishment is compulsory in the case stipulated by article 74<sup>1</sup> paragraph 2 while the case provisioned by article 18<sup>1</sup> is left to the consideration of the legal authority, thus featuring an optional character.

Although it implies a special character, the grounds for the replacement of criminal liability regulated by article 74<sup>1</sup> paragraph 2 must be enforced, due to its incomplete regulation, by reporting to the general conditions of the institution for criminal liability replacement.

Thus, although not specifically provisioned by law, one may conclude by analogy that replacement of criminal liability can solely be ordered by the court of law and the administrative punishment can solely be part of the ones stipulated by article 19 of the Criminal Code: rebuke, warning rebuke, fine from lei 10 to 1,000.

Although of administrative nature, the charge is recorded in the criminal record, in order to check the incidence of article 74<sup>1</sup> paragraph 3. The text hinders the application of decrease or replacement grounds for the offender who, although having initially benefited from such grounds, commits all over again the same type of crime during a time period of 5 years from having committed the deed.

The term runs between the time of committing of the two crimes and not between the times of rulings by which these grounds are enforced.

At the same time, according to the legislator's express will, the term runs solely for the future, as it addresses special reduction or replacement grounds provisioned by article 74<sup>1</sup>.

Consequently, if a person committed tax evasion and benefited from reduction grounds (identical in content) stipulated by article 10 of Law 241 / 2005, even if that person commits a new economic crime in a time period less than 5 years, that person has the right to enjoy the grounds for charge reduction stipulated by article 74<sup>1</sup> paragraphs 1 and 2, as the identity required by law is not met.

In order for the provisions of article 74<sup>1</sup> paragraphs 1 and 2 to come into effect it is required the damage coverage happen *post delictum* obviously but necessarily *ante iudicium*, namely until the case settlement in the court of first instance.

In absence of a contrary provision, the reduction or replacement grounds can also apply when the case is submitted to retrial following abolition or invalidation, to the extent to which retrial shall be performed by the court of the first instance.

In all cases, reparation must be whole; in case of partial remedy of the damage, the grounds stipulated by article 74<sup>1</sup> cannot be enforced but the incomplete reparation can be deemed as legal mitigating circumstance.

Another major shortcoming refers to the lack of correlation between the general provisions concerning the extremely serious consequences with the ones of newly introduced provisions. Thus, replacement of criminal liability, subject to conditions of article 74<sup>1</sup> paragraph 2 is involved in case the inflicted and remedied damage goes up to Euro 50,000, in the equivalent value of national currency when already due to exchange fluctuations, crimes come under the form of aggravating circumstances because the inflicted material damage can be larger than lei 200,000.

At the same time there is enormous discrepancy between the general conditions concerning the damage and replacement of criminal liability in the common law conditions, when the amount of the damage should not exceed lei 10 or 50 and the ones provisioned by article 74<sup>1</sup> paragraph 2 where the amount of the prejudice must not exceed Euro 50,000 (approximately lei 210,000).

Last but not least the drafting is short as it does not rule out the possibility of gathering legal benefits that can come about either under the form of additional mitigating circumstances or under the form of punishment reduction grounds with special character (for instance article 320<sup>1</sup> Criminal Code – admitting of guilt)

To conclude, the institution, structured in default brings more controversies than benefits.

Concerning the newly introduced provisions in article 184 of the Criminal Code, the possibility of removing criminal liability through reconciliation of the parties takes shape for two other forms of the crime of the crime of injury, namely the ones provisioned by article 184, paragraphs 2 and 4.

Although the way to remove criminal liability is identical for article 184, paragraphs 5 and 6, the legal structure and proceeding consequences are different.

Thus, for the deeds provisioned by article 184, paragraphs 1 and 3, the criminal trial can solely start following a complaint of the injured party, while for the deeds provisioned by article 184, paragraphs 2 and 4 the trial always starts officially.

At the same time, in the first situation, criminal liability can be removed either by reconciliation of the parties or by withdrawal of the prior complaint, while the newly regulated hypothesis stipulates that liability can solely be removed by reconciliation.

Following the pater of possession disorder (article 220) and seduction (article 199) crimes, the legislator's intervention is welcome because it gives the parties the opportunity to settle the criminal dispute by mutual consent.

## Conclusions

In substantial and especially proceeding filed, where the legal norms are promptly applied, any legislative intervention gives rise, through its nature to controversies and disputes.



Nonetheless when the contents of the amending law contradicts the finality itself, the emergence of not unitary practices and proceeding impediments is unavoidable, as the law is at the same time the premise and the condition of the procedure.

The legislator's intervention, reported to the normative instrument this amendment has been included in – of accelerating trial settlement- is obvious.

Nevertheless, sometimes the regulation has flaws both concerning the form (drafting technique) and the contents.

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