CONSIDERATIONS ON THE CONCEPT OF PERSONALIZING THE PENALTIES

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Abstract

The adaptation of the constraint related to the committed offence is a mandatory request of equity, of principles deeply rooted in the individuals' conscience namely that no sanction must overcome the gravity of the committed offence (suim cuique tribuiere – giving to each person what he deserves), principle that, in the concept of the Roman lawyers, was part of the fundamental principles of law (jus praecepta), along with other two principles: honestere vivere (having a honest life) and alterum non laedere (not harming another human being).

Keywords: *offence, criminal liability, penalty, adaptation, individual reeducation.*

Introduction

Art. 1 of the Criminal Code which has as "*nomen juris*" the purpose of the criminal law states that "the criminal law protects, against all offences, Romania, the sovereignty, independence, unity and indivisibility of the state, the human rights and freedoms, property, and the entire state of law". This disposal represents the basic norm of the ensemble of regulations of the Criminal Code, "it contains a fundamental orientation in order to serve to the understanding, explanation and appliance of all the other norms provided by the Code".

But, social protection, as a fundament of the criminal law and penalty, has not the meaning given by the doctrine or by the positivist school, which, by its illustrious members, Cesare Lombroso, Enrico Ferri and Rafaelle Garofalo, sustained among others, the principle of the offender's liability on the base of the social protection; nor the meaning given by the doctrine of "the new social protection", which, by its representatives, Adolphe Pins and Filippo Gramatica, claimed to avoid, if possible, the deprivation of liberty and re-socialization of the offenders with the appropriate treatment measures.

The modern criminal law's theorists have unanimously established that the fundamental institutions of the criminal law are offence, criminal liability and penalty, because around these three notions revolve all the legal criminal provisions, creating the pillars of the law system[1].

Content of the paper

Offence has been defined as being "any action incriminated by law and sanctioned by penalty"[2] or "action or inaction, which is considered a fault, and the legislator punished it by the

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[1] Vintilă Dongoroz et al., *Explicaţii teoretice ale codului penal român, partea generală*, 1st Volume, Romanian Academy Publishing house, Bucharest, 1969, pag. 99; Costică Bulai, *Manual de drept penal. Partea generală*, All Educational Publishing house S.A. Bucharest, 1997, p 150.

[2] Vintilă Dongoroz – *Drept penal, Tratat*, Tempus Society & Romanian Criminal Sciences Association Publishing House, Bucharest, 2000, p 159.

criminal law"[3] or "material act stated and punished by law which can be imputed to its author"[4]. Reducing this legal category to its most simple and schematic form, Professor George Antoniu defined offence as being "a clash of wills, that of the offender and that of the legislator; as well as the result of this clash, the defeat (violation) of the legislator's will"[5].

Traditionally, the Occidental criminal codes do not state regarding the offence, justifying this omission by arguing that the elaboration of this notion does not belong to the law maker, but only to the science of the criminal law. Thus, considering the special importance of this institution, the Romanian criminal code in 1968 stated in its Art 17 the essential features if the offence: social danger, guilt and its statement in the criminal code. From these essential features it results the idea that the offence is a complex, material, human, social, moral, political and legal phenomena.

But of these three key features, there is now a tendency to remove the social danger from the definition of offence. The idea is very bold and it can be argued by various controversies concerning the definition of this reality that constitutes a substantial aspect of the offence and therefore the difficulty to introduce such a factor in characterizing the concept of offence. Moreover, the legislator takes care to criminalize only those conducts that affect or threaten the social values protected and as a consequence, it is argued that social danger is not required in the definition of the offence.

Criminal liability, as a form of the legal liability, has been defined as the criminal legal relationship of constraint between the state and the offender, on the other side, a comprehensive relation whose content is given by law as representative of society to hold responsible the offender and the obligation of the offender to be liable for his offence and to subject to the applied sanction[6].

The criminal liability is the judicial consequence of committing an offence, namely the immediate reaction of society against the offender.

Hence, the perpetration is the very cause of criminal liability and the resort to criminal law's penalties is the consequence of criminal liability[7].

The current criminal doctrine allegedly argued that criminal liability is only the logical consequence (not natural) of infringing the precept; criminal liability is not the product of the criminal offense in the meaning of a reality separated in time and space from the penalty, but a trial, a rational conclusion that the wrongdoer must suffer the consequences of his deed, to answer for it[8].

In the actual Criminal Code, the criminal liability concept is found in Art 17 Para 2, which states that "the offence is the only base of criminal liability".

Regulations regarding the criminal liability are found also in Title II, Chapter V, regarding the causes that removes the criminal character of the offence (Art 44-51) where the object of the regulation is the very existence of criminal liability, indissoluble related to the issue of criminal liability's existence.

Also, we find stipulations regarding criminal liability in Title VII regarding the causes that remove the criminal liability (Art 19, 121-124, 131-132), whose object are the situations in which an offence has been committed and therefore, exists criminal liability, but, subsequently,

[3] Ion Tanoviceanu, Vintilă Dongoroz, *Tratat de drept şi procedură penală*, 2nd Edition, Bucharest, p 151.

[4] Robert Vouin et Jacques Leante, *Droit penal et criminologie*, Paris P.U.F., 1956, p 147.

[5] George Antoniu, *Vinovăţia penală*, Romanian Academy Publishing house, Bucharest 1995, p 53.

[6] Costică Bulai, *Drept penal. Partea generală*, p 311.

[7] Vintilă Dongoroz et al., *quoted works*, 1st volume, p 19.

[8] George Antoniu, *Criminal Law Review*, No. 1/2004, p 30.

for certain considerations, is has been removed and the offender no longer bears the legal consequences.

Penalty, the third criminal law fundamental institution, is the legal sanction specific to criminal law, representing the consequence of non-complying with the criminal norms; in terms of the real content, penalty is harm, a sufferance to which the offender will be subjected to if he disobeys the criminal laws[9].

By its provision in the criminal norms, the penalty acts as a threat over the members of the collectivity for them to comply to the criminal law, thus as a mean of general prevention; by its effective appliance, the penalty acts a mean of the legal constraint; by its implementation, the penalty has a therapeutic character and function, of a severe, but necessary mean of redress[10].

The social, political and legal justification, namely the base of penalty, is confounded with the base of the criminal law, namely the protection of society against offences.

Social protection is a protection against offences, as socially dangerous acts, potentially repeatable and only against the offenders[11].

Art 52 of the actual Criminal Code states that penalty is a mean of constraint and reeducation of the convicted and has as purpose the prevention of committing new crimes.

From the analysis of this definition it results the features of penalty: penalty is a mean of constraint; penalty is a mean of reeducation; penalty is stated by the law; penalty is applicable only by the courts; penalty is personal and individual; penalty is applicable with the meaning of preventing new offences to be committed[12].

Regarding this last feature of penalty, we sustain that the prevention or forestall of new offences to be committed is made both as a special prevention (from the side of the penalty's subject), as well as a general prevention (from the side of other persons who have the intention of committing criminal acts).

Professor Vintila Dongoroz believes that the penalty exercises its general prevention action towards the persons who have a latent criminality, towards the victim and towards the entire collectivity[13].

It should be noted that penalty carries out the preventive purpose, the *antidelictum*. Before the crime to be committed, it is forestalled the committing of criminal acts by providing the penalty in the criminal law, warning over the consequences of breaking the law.

After the committing of the offence (*postdelictum*), the penalty exercises its preventive purpose on the one hand in the moment of its implementation by the court, and on the other hand, on the entire subsequent time of execution. In both cases, the penalty influences not just the behavior of the offenders, but also the behavior of those who, from the offender's sufferance, learn the necessary to their own behavior.

The penalty applied, directly, has the purpose of avoiding the relapse, and indirectly, by resonance and exemplarity can contribute to the correction of certain persons' behavior.

But regardless of the extent in which the appliance of penalty would increase the intimidation force of the penalty's threat over the public, the concrete punishment is meant, preponderant, to influence the offender and to modify his behavior[14].

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[9] Vintilă Dongoroz, *Drept penal, Tratat*, Tempus Society & Romanian Criminal Sciences Association Publishing House, Bucharest, 2000, p 465.

[10] Vintilă Dongoroz et al., *quoted work*, 1st Volume, p 22.

[11] Ştefan Daneş, Vasile Papadopol, Individualizarea judiciară a pedepselor, 2nd Edition, Judicial Publishing house, Bucharest, p 55.

[12] Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, 2nd Edition, Universul Juridic Publishing house, Bucharest, 2003, p 186-187.

[13] Ion Tanoviceanu, *Tratat de drept şi procedură penală*, 3rd Volume, Bucharest, 1926, p 203.

To achieve its purpose, the penalty must perform the following functions:

- The constraint function, results from the nature of the penalty as a mean of constraint;
- The function of reeducation, consists of the influence over the offender's mentality and skills;
- The exemplarity function has an adjoining feature and consists of the influence which the penalty applied to an offender has over other persons;
- The elimination function, which assumes, is achieving its purpose, the temporary or definitive elimination of the convicted one from society[15].

Art 53 of the Criminal Code, with its subsequent modifications and completions, establishes the frame of the actual penalties, referring to the main, complementary and accessory penalties.

Noteworthy is the fact that by Law no. 278/2006 inserted in the Criminal Code a new chapter regarding the penalties applicable to the juridical person, containing rules regarding the fine (as main penalty), and rules regarding complementary penalties applicable to the juridical person.

One of the fundamental principles of the criminal law that is placed at the base of criminal sanctions is their adaptability[16].

The principle contains the rule that the criminal law sanction must have the quality of being individualized, namely to be able to be proportioned qualitative and quantitative in relation to the nature and gravity of the act and according to the concrete circumstances of the cause.

A penalty is adaptable when it can be graded quantitative, namely divisible.

Also, a penalty is adaptable when it can be shaped qualitative, namely elastic.

Usually, are adaptable long-times penalties (imprisonment) and the amount ones (fine)[17].

The penalty is susceptible of a higher dosage, the more it will be proper to answer to a just repercussion[18].

From here results the idea that the adaptable punishment leads to the accomplishment of the penalty's purpose, desiderate which can only be achieved by the complete and efficient realization of the functions of the penalty and listed above.

But the main functions of penalty, i.e. the constraint and the reeducation functions lead to the accomplishment of its purpose only if are considered some basic elements of the offence.

The offences have a different degree of social danger and the offenders are by their nature, morally and physically very different. The psycho-physical capacity, age, occupation, cultural level, behavior are features that individualizes each offender. A penalty which would not have in count these realities would not be able to exercise an efficiently preventive influence – educative and would represent more a revenge of society against criminal offenders.

The ability to be or not be punished, the higher or lower degree of guilt and the nature more or less dangerous of the offender depends on his status.

Raymond Saleills argued that the penalty must be adaptable to the nature of the person is addressed to. If the guilty one does not have a completely perverted base, the penalty itself must not contribute to its perversion; it must help him to rise. If the offender is irrecoverable, the

[14] George Antoniu, *Sancţiunea penală,Concept şi orientări*, in the Romanian Law Review, nr.10/1981, p 7.
[15] Costică Bulai, *quoted work*, p 286-288.
[16] Costică Bulai, *quoted work*, p 282.
[17] Vintilă Dongoroz, *quoted work*, p 468.
[18] Ion Tanoviceanu, *quoted work*, 3rd volume, p 110.

penalty will be against him in the status of society and will represent a radical measure of defense and prevention[19].

The committed criminal act is an important element in establishing and measuring the penalty for several grounds: it indicates to which extent has the legal order been violated and to which extent must be acted (legal value); it indicates the intensity of the dissatisfaction created in the collectivity and thus the extent to which the social group waits for a satisfaction (social value); it indicates the presence of a person more or less dangerous (symptomatic value)[20].

Another argument regarding the necessity of individualizing the penalty is the fact that the social values susceptible of being harmed by antisocial facts do not have an equal value. One cannot state that the protection of the state is equal with the protection of the patrimony assets or with the protection of life and body integrity.

The objective existence of such differences between the social values protected by the criminal law colors differently also the abstract general danger of the social manifestations against these values, fact reflected in the way of punishing these facts.

Also, the actions and inactions that harm the same social values do not have the same gravity. Some are simple, some are more direct, some are insidious, more complex; some assume more conditions of achievement, some fewer conditions, some have a larger echo in the public opinion, some a limited one etc. These aspects too justify a certain difference in sanctioning each offence[21].

These aspects were taken into account when it was settled in the Criminal Code a more shaped system of measures that can be taken against offenders by the different degrees of social danger presented by their actions and their person. This system of measures contains: penalties, safety measures, educative measures.

Also in the purpose of the different implementation of penalty, the criminal code provided for a minimal and a maximal duration of the penalties susceptible of being applied, adopting the system of the relatively determined sanctions, which allows for a better individualization related to the concrete circumstances of each cause.

Hence, for every guilty person, the penalty must be adapted to its purpose, thus it will give the maximum possible output. The penalty must not be fixed before, rigidly, nor regulated by the law, so that it will be invariable, since its purpose is individual and must be achieved by using a special strategy adapted to each case[22].

In the legal literature, the individualization of penalty was defined as being the operation of adapting the penalty and its execution to the individual case and the offender, so as to ensure the functional ability and the achievement of its purpose[23].

The definition emphasizes the fact that the individualization of penalty is, firstly, a mean by which the penalty is concrete determined.

Secondly, the definitions points out the fact that the individualization of penalty is a mean of adapting its nature and its quantum or duration to the individual case, to the committed offence and especially to the offender's person, to his danger and his aptitudes to correct himself under the influence of the penalty.

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[19] Raymond Saleills, *L'individualisation de la peine*, Paris, Felix Alcon Publishing house, 1909, p 10-11.

[20] Vintilă Dongoroz, *quoted work*, p 233.

[21] George Antoniu, *Cu privire la reglementarea cauzelor de agravare şi atenuare a pedepselor,* Romanian Law Review, no. 4/1970, p 47.

[22] Raymond Saleills, *quoted work*, p 11.

[23] Vintilă Dongoroz et al., 2nd volume, p 119.

In the criminal doctrine there are opinions regarding the necessity of reconsidering the principle of individualizing the penalty, sustaining the necessity of replacing this concept with the one of personalizing the penalties.

The most important argument refers to the fact that the sanction should materialize around the accused, the equivalent of a man deprived of his freedom, not his dignity[24].

In other words, the respect of the human dignity becomes one of the key factors of the criminal intervention, giving the possibility for some alternative solutions in the implementation of the criminal policy. To the same effect, Raymond Saleilles argued that the penalty, to achieve its purpose, must not lead to the loss of honor, but, on the contrary, must help to its regain, thus the dignity can retake its place inside the conscience[25].

Moreover, the respect for human dignity is mentioned also in the Universal Declaration of Human Rights and subsequently recognized by numerous international documents; is has an absolute feature, promoting the idea of the necessity to protect against treatments that will harm his health, body integrity and dignity of the persons detained.

The protection of the human dignity which involves the personalization of penalties is an imperative that aims the ensemble of the criminal and execution process, but does not mean that from respect to human dignity, the offenders must not be punished. On the contrary, undertakes us to elaborate norms and structures to recognize and ensure this major goal, with the prospect that the human dignity gains a decisive place inside person's own conscience[26].

Another important argument lies in the changing of the regulatory framework. Law No. 278/2006 inserted in the Criminal Code regulations relating to penalties for the legal person. In this situation, no longer about an individual as such, the penalty applying to natural and legal persons, taking into count its specific features, it is natural that this concept be called or possibly even replaced with the personalizing the penalties.

Thus, French criminal law prefers the term of personalizing the penalty instead of individualizing it, on the ground that the latter term, valid for individuals, is no longer adequate for moral persons who, in the vision of the French criminal law, can also be criminally punished[27].

Conclusions

Any transformation of the principle of individualization of penalty into the principle of personalizing the penalty assumes a new way of approaching institutionally or doctrinaire the adaptation of penalty.

We believe that, though there are reasons to replace the expression of individualizing the penalty with another one able to accurately express the idea of adequacy of penalty in relation to all criteria used for this purpose, and compared both with the individual and the legal persons with the legal person, *the term of individualization should not be abandoned*, because on the one hand, the individualization is achieved not only in terms of the offender's persons, but also by his deed, and on the other hand, has a long tradition and entered into the criminal legal terminology.

[24] Theodore Papatheadoru, *De l´individualisation, des peines et la personalisation des sanctions*, Revue internationale de criminologie ed de police technique, No 1/1993, p 109.

[25] Raymond Salleilles, *quoted work*, p 243-245.

[26] Ortansa Brezeanu, *De la individualizarea la personalizarea sancţiunilor*, Romanian Criminal Law Review, no.1/2000, p 47-50.

[27] Philippe Salvage, *Droit penal general*, Grenoble, 1994.

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