

THE POSTPONEMENT OF EXECUTION OF THE PUNISHMENT AND THE SUSPENSION OF SENTENCE UNDER SUPERVISION FOR THE CRIMES OF FAMILY ABANDONMENT AND THE PREVENTION OF THE ACCESS TO GENERAL COMPULSORY EDUCATION

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Abstract

In addition to the general conditions in which the court may order a judicial individualization measure without depriving a person of its freedom, the legislator created for certain criminal offenses, some regulations derogating from this regime. For these crimes, for reasons related to the protection of family life, if the defendant is aware of his crime, by fulfilling his obligations, the legislator presumed in an Absolut way that there is no requirement to effectively enforce the sentence and execute the punishment, in such cases the court being obliged to postpone the execution of the punishment or to order the suspension of sentence under supervision.

Keywords: *the postponing of the execution of the punishment, suspension under supervision of the sentence, abandonment of family, the prevention of the access to general compulsory education.*

1. Introduction

The imposition of a punishment and its effective enforcement are not likely to ensure that these measures will achieve the purpose of the punishment and the social reintegration of the person who has committed an offense in each case. Often the detention environment transforms the persons subject to such manner of punishment in more dangerous criminals, and in many cases imprisonment doesn't contribute to the social reintegration of offenders, but on the contrary, to their social isolation. Also in economic terms, imprisonment is expensive, involving significant financial costs for the state. In some specific cases, reported to the gravity

of the crime and to the person of the offender, enforcing a punishment is not justified.

In these circumstances, the legislator has created some mechanisms of judicial individualization of the punishment that allow this, if certain conditions set by law in a limitative manner, are met: the postponing of the execution of the punishment and the suspension of the execution of the punishment. In the event of committing certain offenses, the legislator went further on, practically imposing on the court to rule in the sense of applying an execution measure without depriving a person of its freedom, in the cases where the conditions provided for by law are met¹.

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¹ C. Bulai, B. Bulai, *Manual de Drept Penal. Partea Generală*, București, Ed. Universul Juridic, 2007, p.233.

2. Content

2.1. The legal provisions

According to Art. 378 of the Criminal Code, it constitutes the offense/crime of family abandonment the following actions: when the person who has the legal obligation of providing support to the person entitled to the support, commits one of the following actions:

- a) the departure, the banishment or letting unaided, and by these actions exposing him to physical or moral suffering;
- b) failure to fulfill the obligation of support as provided by law, with bad faith;
- c) failure to pay, for 3 months, the alimony established by a judicial way, with bad faith;

shall be punished with imprisonment from 6 months to 3 years or a fine.

With the same punishment is sanctioned the failure to execute, acting in bad faith, by the convicted person, the periodic obligations established through a court judgment, in favor of the persons entitled to receive support from the victim of the offense.

Criminal proceedings shall be initiated upon prior complaint of the injured party.

If, until the decision of conviction becomes definitive, the defendant fulfills its obligations, the court may rule, if appropriate, case by case, the postponing of the execution of the punishment or the suspension under supervision of the sentence, even if the conditions stipulated by law for this are not met.

Regarding the crime of preventing access to compulsory education, it is incriminated in Art. 380 of the Criminal Code as follows: the parent or person entrusted by law with the custody of a minor, that unduly withdraws or prevents by any means a minor to attend compulsory education, shall be punished with

imprisonment from 3 months to one year or a fine .

If, until the decision of conviction becomes definitive, the defendant ensures the resumption of class attendance by the minor, the court may rule, if appropriate, case by case, the postponing of the execution of the punishment or the suspension of the execution of the punishment, even if the conditions stipulated by law for this are not met.

The old legal regulation/legal provisions also stipulated the obligation of the court to order the conditional suspension of execution of the punishment for the crime of family abandonment (the crime of preventing access to compulsory education having no counterpart in the old Code). Thus according to Art. 305 para. (4) - (5) of the old Criminal Code (1969), if the parties haven't reconciled, but during the trial the defendant fulfills its obligations, the court, when determining the guilt of the defendant, rules in the sense of a suspended conditional sentence, even if the conditions laid down in Art. 81 are not met. The revocation of the conditional suspension occurs only if, during the probation period, the convicted person commits the crime of abandonment of the new family again.

2.2 Conditions

In case the conditions laid down in Art. 378 para. (5) and Art. 380 para. (3) of the Criminal Code are met, the court is obliged to rule in the sense of postponing of the execution of the punishment or suspension under supervision of the sentence. Unlike the general background of these measures, the legal texts mentioned above do not establish a facultative choice for the court, but an obligation. The court nevertheless retains the possibility to determine which of the two institutions best fits the crime and the defendant's degree of dangerousness. Although the legal text does not provide for,

we consider that nothing prohibits the court to rule in the sense of waiving the application of a punishment if it considers that it wouldn't be appropriate to set such a penalty and the other conditions laid down in Art. 80 of the Criminal Code are met.

Therefore, in order to rule in the sense of the postponing of the execution of the punishment or the suspension under supervision of the sentence for the two types of criminal offences, the following conditions have to be met:

- to have committed in the consumed form a crime of abandonment of family or the crime to prevent access to general compulsory education.

The offense must be typical, attributable and unjustified. For example if the person liable for providing the legal support is acting in good faith and doesn't have the objective possibility to actually pay the support alimony, the solution required is acquittal. Likewise, a parent cannot be convicted for the crime of preventing the child to attend school, if that parent is abroad and the actual care and support of that child is performed entirely by the other parent.

Also, for the offense/crime of family abandonment, the court cannot rule in the sense of postponing of the execution of the punishment or the suspension under supervision of the sentence, if the person entitled to support/alimony support withdraws his/her complaint. In this case the court shall rule cessation of the criminal trial.

The legal provisions regarding the postponement of the execution of the punishment and the suspension of sentence under supervision are applicable only when the crime/offense is in a consumed form, the only attempt for any of the two offenses not being incriminated by law.

- the defendant has to have fulfilled its legal obligations, in the crime of family abandonment, and for the crime of

preventing access to compulsory education – to have provided that the minor had resumed attendance of classes, between the time calculated from the preparation of the indictment, until the judgment becomes final.

If the defendant meets its obligations, or ensures the resumption of school attendance during the criminal investigation, before the preparation of the indictment, the prosecutor will proceed to the dismissal of the case, the defendant's conduct having the value of a non-punishment clause. In the old regulation there was no provision of such a cause for non-punishment. Therefore, if the defendant performed his duties during the criminal investigation, the prosecutor should have notified the court, which will have ruled in the sense of conditional suspension (of course if the court didn't assessed that the offense doesn't have the concrete degree of social danger of an offense, in which case it would dropped the charges against that person).

Also we consider that if the defendant meets its obligations, or ensures the resumption of school attendance during the investigation, but the prosecutor still pursues a criminal trial, the court will be obliged to pronounce the termination of criminal proceedings under Art. 16 lit. h of the Criminal Procedure Code. The court is obliged to ascertain the incidence of a cause that removes the functional ability of the criminal action (the existence of a cause of non-punishment in this case), even if this cause wasn't found by the prosecutor, in these conditions the court not being able to rule in the sense of postponing the execution of the punishment or the suspension of sentence under supervision.

-the defendant is of full age.

According to Art. 114 of the Criminal Code, towards the minor who, at the time of the offense, is aged between 14 and 18, and non-custodial or custodial educational

measure shall be taken. Since the legislator has ruled against the possibility of juvenile sentencing, the court obviously could not postpone or suspend the execution of punishment under supervision.

Regarding the two offenses covered by this study, we consider excluded the possibility that a minor would commit the crime of preventing access to compulsory education. But we do not exclude the possibility that a minor is liable to pay alimony support to his minor child, thus committing the crime of family abandonment if he does not pay acting in bad faith.

If the above conditions are satisfied the court will be obliged to rule in the sense of postponing the execution of the punishment or the suspension of sentence under supervision (as shown above court may also rule in the sense of waiver of penalty) even if the conditions provided for in Art. 83 or Art. 91 of the Criminal Code are not met.

Therefore nothing will prevent the court to postpone the application of the punishment if it establishes for the crime of family abandon a sentence of 3 years, even if according to Art. 83 para. (1) of the Criminal Code, the fixed penalty ought to be of 2 years at most. Also the postponement or suspension under supervision is mandatory, even if the defendant was previously convicted, regardless of the nature of the offense committed, the form of guilt or the penalty sentence imposed.

Being a compulsory measure, the court shall order the postponement or suspension, even if reported to the person of the defendant, his previous conduct before committing this crime, his efforts to

eliminate or mitigate the consequences of his offense/crime and his means of correcting, the court would appreciate it necessary to enforce the sentence.

At the same time the court will choose a non-custodial way of judicial individualization, even if the defendant has evaded prosecution or trial, or tried thwarting finding the truth or the identification and criminal accountability of the author or participants.

Regarding the condition on the agreement to perform unpaid community work we consider that we must make a distinction between the methods of individualization that the court will take.

If the court decides upon the postponement of execution of the punishment, the legislator leaves it to the judge of the case the choice of imposing the obligation on community work. If the court considers that the reintegration of the accused can be made only by applying this obligation, his consent is necessary. Otherwise, we believe that the court shall decide upon postponement, with or without the consent of the defendant in this respect, because Art. 378 para. (5) and Art. 380 para. (3) of the Criminal Code have priority towards Art. 83 par. (1) c².

If the court considers it necessary to decide suspension of sentence under supervision, then it is compulsory to oblige the defendant to perform community work for a period between 60 and 120 days. In this case, the condition of the agreement to provide unpaid community work must be fulfilled, because otherwise there would be a violation of the Constitution and the European Convention on Human Rights³.

² A. Risnita, I.Curt, *Renuntarea la aplicarea pedepsei. Amanarea aplicarii pedepsei*, Ed.Universul Juridic, Bucharest, 2014, p.170. On the contrary, M. Udriou, *Drept Penal. Partea Generală. Noul Cod Penal*, Bucharest, Ed, CH Beck, Bucharest, 2014, p.255.

³ A. Vlăsceanu, in G. Antoniu (coordinator), *Explicații Preliminare ale Noului Cod Penal*, Bucharest, Bucharest, Ed.Universul Juridic 2011, p.192.

As emphasized in the legal literature, ignoring the conditions laid down in the general part of the Criminal Code shall not cause the creation of new institutions. Therefore if in the case of a penalty fine the only solution is postponement of application of punishment, because suspension under supervision for a fine would be a hybrid institution that borrows the subject from postponement institution and the procedure from the suspension institution⁴.

However, if the defendant fails to fulfill his legal obligations required for the offense of family abandonment, or doesn't provide for the resumption of school attendance, for the offense of preventing access to compulsory education, until the final judgment, the court will be able to rule in the sense of postponement of application of the punishment or suspension of sentence under supervision, but only if the conditions laid down in the general part of the Criminal Code are met. The provisions of Art. 378 par. (5) and Art. 380 par. (2) of the Criminal Code are derogatory in favor of the defendant, and do not allow to reach the conclusion that, if the obligations are not fulfilled the defendant could not benefit of a non-custodial modality of judicial individualization⁵.

Problems may arise if besides the crime of family abandonment or preventing access to general compulsory education, the defendant has committed other competing crimes.

In this regard we consider that the distinctions made under the old legislation should remain valid. The court shall order, as a mandatory rule, postponement of application of the punishment or suspension under supervision of the sentence if the

conditions prescribed by the Art. 378 par. (5) or Art. 380 par. (3) of the Criminal Code are met. With regards to the competing offense/crime the court may order postponement of application of the punishment or suspension under supervision of the sentence if the conditions of the general part of the Criminal Code, namely Art. 83 and 91 of the Criminal Code are met. The court cannot rule on postponement or suspension with regards to all offenses/crimes under Art. 378 par. (5) or Art. 380 par. (3) of the Criminal Code, because the exceptional conditions laid down in these legal texts with regards to all offenses/crimes are not met. Therefore for each offense/crime, the court will rule by a separate non-custodial modality of judicial individualization, and the probation periods will run in parallel. Merging of the punishments and the imposition of an increase of penalty will be made only if the two measures will be revoked.

If for the second offense/crime the court considers that the conditions with regards the postponement of application of the punishment or suspension of sentence under supervision are not met, the court shall order its effective execution, without this influencing in any way on the solution given with regards the crime of family abandonment or preventing access to general compulsory education. In this regard, the application of the punishment will be postponed, or execution of sentence will be suspended. Of course the requirements and the supervision measures will remain without object and cannot be executed. Merging these punishments and applying an increase of penalty can be achieved only in the event of revocation of

⁴ A. Rîșniță, I.Curt, *read*, p.168.

⁵ To the same effect, according to the old legislation, solution which is maintained in present times as well, the Court of Appeal decision 512/1998, in I.C.Morar, *Suspendarea condiționată a executării pedepsei. Culegere de practică judiciară*, Bucharest, Ed. CH Beck, 2007, p.176-177.

the postponement or suspension of the execution⁶.

2.3. The term of surveillance

According to art. 2 of Law no. 253/2013, the term of surveillance or the supervision period designates the time frame in which the person towards which one of the following measures has been taken: the postponement of application of the punishment, the suspension of sentence under supervision, the release on parole or a non-custodial educational measure (in the case of minors), must comply with the obligations or surveillance measures ordered by the court in its task.

In case of postponement the surveillance term is 2 years, while in the case of suspension under supervision the surveillance period is between 2 to 4 years without being shorter than the length of sentence given.

The surveillance term begins to run from the date of the final judgment of the court, and being a substantial term, the period shall be calculated on full days.

Regarding the crimes of family abandonment or preventing access to general compulsory education there are no derogations with regards the term of supervision.

2.4. Surveillance measures and obligations

Art. 85 of the Criminal Code states that during the term of supervision, the person towards which the postponement of execution was ordered, must meet the following supervisory measures:

a) to report to the probation service, at the dates set by it;

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

c) to notify in advance, when moving to another address and any travel periods of over 5 days;

d) to communicate when changing jobs;

e) to communicate any information and documents, in order to enable control of his sources of livelihood.

The court may require that the person towards which the postponement of execution was ordered to carry out one or more of the following obligations:

a) to attend a school/training course or vocational training;

b) to perform unpaid community work for a period between 30 and 60 days under the conditions set by the court, unless that, due to health reasons, the person cannot perform the work;

c) to attend one or more social reintegration programs run by the probation service or organized in collaboration with institutions from the community;

d) to accept control measures, treatment or medical care;

e) not to communicate with the victim or members of his/her family, with the people with who he/she committed the crime or with other persons, determined by the court not to be approached;

f) not to be in certain places or at certain sports events, cultural or other public gatherings, determined by the court;

g) not to drive certain vehicles determined by the court;

h) not to hold, to use and to carry any type of weapons;

i) not to leave Romania without the court's consent;

j) not to occupy or to perform public functions, his/her profession or the activity that has been used for committing the offense.

⁶ G. Antoniu, in G. Antoniu and C. Bulai (coordinators), *Practica judiciară penală*, vol. II, Bucharest, Ed. Academiei Române, 1990, p.76.

Regarding the suspension of sentence under supervision, according to Art. 93 of the Criminal Code, during the surveillance period, the convicted person must respect the following supervisory measures:

a) to report to the probation service, at the dates set by it;

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

c) to notify in advance, when moving to another address and any travel periods of over 5 days;

d) to communicate when changing jobs;

e) to communicate any information and documents, in order to enable control of his sources of livelihood.

The court imposes that the convicted person has to execute one or more of the following obligations:

a) to attend a school/training course or vocational training;

b) to attend one or more social reintegration programs run by the probation service or organized in collaboration with institutions in the community;

c) to obey the control measures, treatment or medical care;

d) not to leave Romania without the court's consent.

During the surveillance period, the convict will perform unpaid community work for a period between 60 and 120 days, under the conditions set by the court, unless because of health reasons, he/she cannot perform the work.

The new Criminal Code has regulated the possibility to modify or terminate the obligations and supervisory measures if during the period of supervision, some changes that require such measures occur.

2.5. The revocation of the postponement of execution and of the suspension under supervision of the sentence, for the crimes of family

abandonment or preventing access to general compulsory education

According to Art. 88 of the Criminal Code (and Art. 96 Criminal Code) the postponement of execution and of the suspension under supervision of the sentence is revoked in the following three cases:

a) If during the supervision term the supervised individual, acting in bad faith, does not comply with or does not perform the supervisory measures or obligations established by law.

b) If until the expiration of the supervision term the supervised person does not fully meet the civil obligations established by the court's decision.

c) If during the supervision term the supervised person has committed a new offense/crime, intentionally or with exceeded intention, discovered within the period of supervision, for which a conviction was ordered even after this period (if the court ruled on suspension under supervision of the sentence, the revocation will only intervene if in the case of the new offense/crime the court sentenced imprisonment, while in the case of postponement the revocation will occur even if the penalty applied is a criminal fine). If the subsequent offense is committed by negligence, the court may revoke or maintain the postponement of execution, or the suspension under supervision of the sentence.

In the case of suspension of sentence under supervision, the legislator provided in Art. 96 par. (3) a particular cause for revocation, namely if the penalty fine that accompanied the imprisonment penalty under Art. 62 was not enforced and was replaced by imprisonment under Art. 63 par. (2) or art. 64 par. (5) and par. (6), the court shall revoke the suspension and enforce the sentence, to which it will add the

imprisonment penalty with which the criminal fine was replaced.

Regarding the two offenses covered by this study, it should be noted that there is a legal provision such as that provided by Art. 305 par. 5, which stated that revocation of conditional suspension, occurs only if, during the probation period, the convicted person commits again the crime of family abandonment. Therefore, now if the court rules on suspension under supervision for any of the two offenses/crimes mentioned above, this suspension will necessarily be revoked if the convicted person intentionally or with mixed guilt (both intentionally and by negligence) commits a crime (in the case of a crime of negligence a suspension of the sentence can be imposed under Art. 96 par. 6) during the period of supervision, regardless of the nature of the offense/crime.

However, according to the majority opinion prevailing in the legal doctrine and in legal practice, we consider that the revocation will not operate if the new offense/crime is still a crime of family abandonment, or of preventing access to compulsory education and the court deferred or suspended under supervision the sentence for this new crime. Therefore, as shown in the legal doctrine, otherwise this would dispossess of content the measure of suspension imposed for the second penalty, despite the fact that the defendant has fulfilled its legal obligations and would have deserved to benefit from an actual suspension of execution of the sentence. The intention of the legislator was to exert some pressure on the defendant to determine him/her to fulfill his/her legal obligations, and once this goal achieved, the interest and justification of the penalty imposed disappears; whether this method to compel the defendant has been used once or several times, granting him/her actual freedom

becomes even necessary in order for him/her to be able to fulfill its duty/legal obligations towards his/her family⁷.

An argument in this regard is the fact that in the project for the new Criminal Code adopted by Law no. 301/2004, which however never came into force, it is expressly stated that special conditional suspension for the offense/crime of family abandonment shall be applicable only for the first conviction of the offender for this kind of offense/crime (Art. 228 par 5 of the Criminal Code). If the legislator wanted this provision to take effect, it would have been included in the new Criminal Code, applicable at this time.

Maintaining the postponement of execution or the suspension of sentence under supervision will be ordered regardless whether the offense/crime committed during the term of surveillance is different from the one for which the postponement or suspension was ordered (originally the defendant committed a family abandonment and afterwards he/she commits a crime in order to prevent access to compulsory education or vice versa) and regardless whether for the new offense the court rules on postponing the execution of punishment or suspension under surveillance.

The revocation of the suspension under supervision may be ordered in case of failure to execute, acting in bad faith, the penalty fine accompanying the imprisonment penalty. Exceptionally, one might imagine some situations when the defendant through the crime committed pursues a material benefit, for example a parent that withdraws his child from school in order for both of them to work (paid work) at building a house. In these cases the court could sentence the convicted person to pay a criminal fine and in case of failure, acting in

⁷ G. Antoniu, note II to criminal decision no. 896/1971 of the Gorj County Court in the Romanian Journal of Law (decizia penală nr. 896/1971 a Tribunalului Județean Gorj în Revista Română de Drept), nr.2/1974, p.145-147.

bad faith, this measure could be replaced with imprisonment.

Failure to respect, acting in bad faith, the measures or obligations imposed by the court (including the ones regarding community work), require the revocation of the postponement or of the suspension under supervision of the sentence, for these crimes, as well.

Regarding the revocation of postponement or of the suspension of sentence under supervision given due to failure to execute the civil obligations established by the court, there are some remarks to be made. As emphasized in the legal literature, this case of revocation is inapplicable for the offense of family abandonment in the version of unpaid alimony, because the civil action in this case is devoid of purpose given that the injured party is already in possession of an enforceable title⁸. Whereas for the other normative ways of committing the offense of family abandonment, the injured party may still pursue civil action, in case there are moral damages suffered. By fulfilling the obligations imposed for the offense of family abandonment done by leaving, it is considered that the person that is required to provide the support has fulfilled the obligations if he/she resumes providing support and care, and not if it pays any potential moral damages, because these can be determined only by court order, until then not being certain nor legally demandable. While it would be hard to imagine a practical example, at least theoretically a civil action covering moral damages, could be initiated also when the offense was done by failure to pay alimony.

We consider that for the offense/crime of prevention of access to compulsory

education, civil action is always admissible, this kind of offense being likely to cause material or moral damages. In all these cases, if the court ordered the postponement of application of punishment or the suspension of sentence under supervision, and admitted the civil action, failure to execute the civil obligations will attract revocation of the suspension⁹.

2.6. The cancellation of the postponement of application of the punishment and of the suspension of sentence under supervision for the crimes of family abandonment or preventing access to general compulsory education.

The cancellation of the postponement of application of the punishment and of the suspension of sentence under supervision consists in abolishing the court's order of imposing a non-custodial individualization modality, when this modality was struck from the beginning by a critical irregularity, because at the time of delivery of the final solution the court had no knowledge, due to circumstances that are not attributable to it, of the existence of a criminal record of the defendant, information that, if it had been known, it would have excluded the incidence of this modality of judicial individualization.

Seeing that the postponement of application of the punishment and of the suspension of sentence under supervision for the crimes of family abandonment or preventing access to general compulsory education enjoy a derogation, being disposed independently of the criminal record of the defendant, we consider that the institution of cancellation is not incidental for these two offenses.

By exception, if the court ordered the postponement of application of the

⁸ I.C. Morar, *Suspendarea condiționată a executării pedepsei, sansă sau capcană ?*, Ed. Lumina Lex, Bucharest, 2002, p.255-256.

⁹ A. V. Iugan, *Revocarea suspendării executării pedepsei sub supraveghere în lumina noului Cod Penal*, in Criminal Law Writings, nr. 2/2014, p.68-69.

punishment or the suspension of sentence under supervision, without the conditions laid down in Art. 378 par. (5) or Art. 380 par. (3) of the Criminal Code being met, it does it under the legal provisions of the general part of the Criminal Code (Art. 83 and 91 of the Criminal Code).

2.7. The effects of the postponement of application of the punishment and of the suspension of sentence under supervision for the crimes of family abandonment or preventing access to general compulsory education.

There are no derogating provisions with regards the effects of postponement of application of the punishment and of the suspension of sentence under supervision for the two offenses covered by this study.

Regarding the postponement of application of the punishment, Art. 90 of the Criminal Code determines that for the person against whom a postponement of the punishment has been ordered, the actual punishment will no longer be enforced, and that person will not be subject to any revocation of rights, prohibitions or incapacities that could result from the offense, if until the end of the surveillance period, that person has not committed a new offense, and the postponement was not revoked.

If for any of the two offenses, the court ordered the suspension of sentence under supervision, the punishment is considered as executed if the convicted person has not

committed a new crime discovered by the end of the supervision period and revocation of suspended sentence under supervision was not ordered. From the end of surveillance period starts to run the terms prescribed by law for the rehabilitation of the convicted person.

3. Conclusions

We consider objectionable the option of the legislator to incorporate in the new Criminal Code the mandatory application of non-custodial individualization modalities for the offense of family abandonment, and to extend it to another offense. This legal provision can lead to paradoxical situations in practice, situations in which a person who committed more crimes to serve the sentence for some, and for others to benefit from postponement of application of punishment or suspension under surveillance. Also, it made possible the existence of supervisory terms that run in parallel for concurrent offenses. Another criticism is the possibility for a person to commit how many crimes of family abandonment or of preventing access to general compulsory education he wants, because if during the trial he fulfill its legal obligations or assures the resumption of class attendance, he will not actually execute the punishment.

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