„NICOLAE TITULESCU ” UNIVERSITY

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JUDICIAL INDIVIDUALISATION OF THE PUNISHMENT. ALTERNATIVES TO ENPRISONMENT

SUMMARY

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The judicial individualization of a sentence ,, is the work of the court and it consists into establishing and applying the punishment for the offense for which the punishment is provided, as well as stipulating the concrete manner of execution by adapting the penalty to the individual case, taking into account the degree of concrete social dangerousness of the offense and of the offender. The penalty thus established is the expression of justice in the resolution of the criminal act".

The manner of individualization of sentences and the concrete arrangements for their implementation has been a constant concern of the editors of the New Penal Code. In its explanatory memorandum it is stated that ,, in order to achieve the legal mechanisms to allow the court the choice of the right form of sentencing, the draft criminal code proposes a new regulation in this matter. This form of individualization;s main concern is determining how the convicted will bear coercion applied as a result of the crime committed, also a sensitive operation because it has the ability to directly influence in a significant proportion the social reintegration process of the offender".

The importance of the subject is resulting on the one hand from the important changes introduced by the new Penal Code in this area, and on the other hand from the different concepts adopted by the legislation with regards the way of social reintegration of persons who have committed offenses. Thus two new institutions were introduced, the waiving of the penalty and the conditional sentence; and the legal regime of e the suspended sentence under supervision has undergone important changes as well. The new legal changes have not taken into account anymore the conditional suspension of the sentence and the institution of the execution of the sentence at the working place.

The legislator intended, at least in theory, the creation of mechanisms that should allow straightenth and socialyl reintegratate the persons who have committed minor offenses and for which the execution of the sentence in detention would be contrary to the role and purpose of the punishment. Although such mechanisms existed in the old Penal Code as well, they were deeply broken. Thus the execution of the punishment at the working place in recent years has become an obsolete institution. Regarding the suspension of the sentence under supervision, even if there were provided some concrete

ways to prevent the offender in committing new offences and for this person to be socially reintegrated, these measures were inapplicable in practice, given the fact that probation services were active just on paper. The new introduced institutions - the waiving of the penalty and the conditional sentencing, and the changes to the suspended sentence under supervision (at least in terms of how they were designed), address part of the needs existing in the current social context. In order to attain the objectives pursued, together with the new codes that came into effect from 1 February 2014, there are two new legal provisions addressing these issues - Law no. 252/2013 on the organization and functioning of probationary system and Law. 254/2013 on the execution of sentences and the custodial measures ordered by the court during the criminal trial.

This paper is divided into ten chapters, of which the latter two containing conclusions and proposals og lgem ferenda and the bibliography.

Chapter I includes a series of general considerations. First it's analyzed the purpose of punishment and the penalty' functions such as ,, the concept of individualization of punishment ".

For the penalty to reach its goal it is necessary that it is adapted to the gravity of the offense and to the offender's degree of dangerousness. At this moment the punishment individualization operation kicks in, an operation of paramount importance.

As such, if the punishment is too mild than the offender will later on feel encouraged to commit new crimes. Also, the other members of the society, seeing the lack of reaction from the state's bodies, will be encouraged to commit such illegal acts themselves. On the other hand, applying a harsh punishment will lead to the isolation of the convict and shall invalidate any chance of reintegrating that person
into society. Once executed the penalty, chances are that person might feel stigmatized and commit new crimes (often more serious than the ones for which it was originally sentenced).

The judicial individualisation of a punishment involves three steps:

a) judicial individualization of the sentencing;

b) judicial individualization of applying the sentencing;

c) judicial individualization of executing the punishment.

By sentencing it shall be understood the operation through which the court determines the actual punishment that the defendant would need to execute. The court will choose the type of punishment (when the law provides alternative punishments or the possibility of joining the imprisonment with a fine) and its duration and cuantum. At this stage the court has the opportunity, if it considers that it is not necessary to impose a punisment, order a waiving of punishment (in reality a waiver in determining any punishment).

In the following step - the individualization of applying the sentencing, the court examines if, considering all the circumstances related to the seriousness of the offense and to the defendant's degree of dangerousness, a conditional sentence is applicable, or is necessary to apply an effective punishment previously established.

In the last step, the court decides whether the sentence imposed is to be effectively executed, or if the execution will be suspended under supervision. Given that only the execution of a prison sentence may be suspended under supervision, we can not speak of an actual examination at this stage if the sentence imposed is just fine or life imprisonment. In these cases the court will be obliged to enforce the punisment established and applied previously.

The second chapter contains a summary of the main international regulations adopted in the field of alternatives to imprisonment. Even if at international level there were concerns about the need to reform the penal policy of states since the late nineteenth century, in the sense of rethinking the role of the punishment and creating new institutions in order to ensure the enforcement of the execution of a punishment both in the community and in the prison environment, with a view of a better social reintegration of offenders, the first important document (dealing in a multidisciplinary way with this) drafted within an international organization was only adopted in 1990.

In 1990 the United Nations General Assembly adopted at its 68th plenary session a set of minimum rules for developing non-custodial measures, the so-called Rules of Tokyo.

Throughout this chapter there is a summary presentation of the recommendations Nr. R (92) 16 on the European rules on punishment to be applied inside the community environment, Recommendation No. R (97) 12 on staff ensuring the enforcement of

measures and sanctions at Community level, Recommendation R (200) 22 on improving the implementation of European rules on Community sanctions and measures and Recommendation R (2010) 1 on European rules on the institution of probation.

The third chapter provides a brief history of the methods of non-custodial judicial individualization in Romanian legislation, starting with the Penal Code adopted during the period of Alexandru Ioan Cuza in 1864.

In Chapter IV there is a presentation of the institution of the waiver of punisment. The new Penal Code rethought the institution of crime/offence, the new reglementation of it being one of the major novelties brought by the new criminal legislation. Given the tradition instituted by the prior penal codes, namely to include a definition of the crime in a text of the code - although in most laws such definition does not exist, being considered that it falls within the jurisdiction of the doctrine - in the new legislative provisions it was decided to maintain this model of reglementation and to formulate the definition of the crime in art. 15.

The proposed definition, however, is substantially modified from that contained in art. 17 of the Penal Code of 1969. Article 15 of the current Penal Code stipulates that ,, an offense is an act considered by the criminal law provisions, committed with guilt, act which is unreasonable and attributable to the person who committed it ", while art. 17 of the Criminal Code 1969 defined the offense as "the endangering social act committed with guilt and considered under the criminal law provisions ". Waiving the part on social danger - and hence the category of offences that do not show the social danger of a crime - could not automatically lead to the application of a punisment to acts specifically devoid of significance. Often the detention environment turns people subjected to such a way of execution of the punishment in the most dangerous criminals, and in many cases the deprivation of liberty does not contribute to the social reintegration of offenders, on the contrary, it leads to their social isolation. Also from an economically point of view, imprisonment is expensive, involving important financial costs for the state. In specific cases, related to the gravity of the offence and to person which is the offender, the establishment of a sentence as such is not justified.

Same as in western legislations, also in the new Penal Code there is stipulated the opportunity principle, which allows judicial authorities to do just that, namely to decide

whether or not to establish an appropriate punishment. The institution of the waiver of punishment is a practical tool that will allow the court to assess whether the social reaction, in cases where the committed an act falls into the pattern provided by the incrimination norm, imposes or not the need to establish a punishment.

The waiver of punishment constitute a means of judicial individualization of the punishment, representing the prerogative conferred by the law to the court in order for it to waive the determination and sentencing of any punishment to the defendant, if it considers that the social reintegration of it and the restoring of the order disrupted due the offense can be achieved by jus giving a warning.

Chapter V aims at presenting the institution of the postponement of applying the punishment (conditional sentencing). Delaying the punishment is a means of judicial individualization of the punishment, located in the stage of applying a punishment. The court is called upon to dose e htsocial reaction that is required in proportion to the seriousness of the offense and to the person of the defendant. If the court considers that by simply setting a sentence, accompanied by a set of obligations and supervisory measures is sufficient to achieve the purpose of the punishment, than it is not necessary to convictict the offender or to effectivelly enforce the sentence.

The person against who the conditional sentence is applied, is subject to a strict supervision of a period of 2 years. During the period of supervision, the person against who the conditional sentencing was ordered must meet the following supervisory measures:

a) to report to the probation service, at certain t sedates/times;

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

c) to announce in advance, any change of address and any travel plans exceeding five days and with regards their return;

d) communicate any changes with regards jobs;

e) to provide information and documents as to enable the control of his how he/she provides for its livelihood.

The court may require a person against who conditional sentencing was ordered to also execute one or more of the following obligations:

a) to attend school 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 due to health reasons, the person can not perform such work. The daily number of working hours is established by the relevant law for enforcement of punisments;

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

d) to comply with control measures, treatment or medical care;

e) not to communicate with the victim or members of his family, with the people with who he/she committed the crime (accomplices) or with other persons as established by the court or not to approach them;

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

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

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

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

j) not to act or not to perform the function, profession or activity that has been used for committing the offense.

In Chapter VI the institution of the suspended sentence under supervision is further analysed. The suspension under supervision of the sentence is the instrument under which, if the court considers that the social reintegration of the person who committed a crime and in compliance with the purpose of the punishment, there is no need to impose an effective enforcement of the sentence, th e court shall suspend it for a specified period in which the conduct of the convicted person shall be considered and assessed. If the convicted person proves that at the end of this period that he/ she was fully reintegrated into society, the punishment will be considered as served. If the person fails to comply with the obligations set forth or commits a new offense, the suspension will be revoked and the punishment shall be effectivelly executed in custody.

As rightly pointed out in the doctrine ,, the suspended sentence under supervision is characterized by the establishment of a complex system of supervisory measures and obligations, allowing the supervision of the convict's conduct during the suspended sentence and that person's social reintegration in the community. "

If the conditions laid down by Art. 378 para. (5) of the Penal Code and art. 380 para. (3) of the Penal Code are fufilled, the court is required to defer sentence or to suspend the sentence under supervision for the offense of family abandonment and of preventing access to compulsory education.

According to art. 378 par. 5 Penal Code -,, if, until the final judgment (for the offense of family abandonment), the defendant fulfills its obligations, the court, as appropriate, shall grant a conditional sentence or a suspended sentence under supervision, even if not all the conditions provided by the law are fully met. "

With regards the other offense, art. 380 par. 3 Penal Code states that "if until a final judgment the defendant ensures resumption of school attendance by the minor, the court shall, where appropriate, grant conditional sentence or a suspended sentence under supervision, even if not all the conditions provided by law are fully met. "

Examination of these provisions is further elaborated in **Chapter VII**. We consider criticisable the legislator's option of taking in the new Penal Code the mandatory application of a method of non-custodial individualization in the case of the offense of family abandonment, and to extend it to another offense. This reglementation will lead in practice to paradoxical situations in which a person who has committed several offenses, will serve the sentence for some, and for others will benefit from conditional sentence or the suspension under supervision. It is also possible to be in such a case where the existence of supervisory term shall be flowing in parallel for concurrent offenses. Another criticism is the possibility that a person can commit the crime of family abandonment or of hindering access to general compulsory education if he/she wants, because if during trial he/she fulfills its family obligations or allows the minor to resume school attendance, he/she will not actually execute any punishment.

In **Chapter VIII**, the methods of judicial individualization for custodial arrangements in several countries such as the USA, UK, France, Italy, Spain, Portugal, Germany are presented.

The last chapter is dedicated to conclusions and *legem ferenda* proposals. It aims to create a complete picture of the reality of the probationary system in Romania. As such, in the last years, unfortunately, it has been a real crisis of the probationary system. Basically, in the past six years the number of people under the supervision of the

probation services increased almost fourfold. If in 2010 under the supervision of the Probation Department there were 9628 persons, in 2015 the number reached 42 034 persons. The number progressively increased from 12 857 in 2011 to 16 383 in 2012 and 20 446 persons in 2013 (thus an increase of 3-4000 persons per year), after the entry into force of the new codes exploding in every sense the word. In 2014 the number of persons under supervision has increased by over 6000 and in 2015 this number increased to 16 000 persons. The authorities' reaction to this growth of the number of persons against who non-custodial measures were ordered was non-existent. A simple requirement, that would have been clearly required in this case, was to increase the number of probation officers, commensurate with those they should supervise. That was not the case. In 2010, at national level, there were 288 probation officers, in 2011 the number dropped to 286, in 2012 to 283 and in 2013 to 280. In 2014 this number increased to 360, but in 2015 but fell back to 352.

Basically, if a probation officer in 2010 was working a total of 33.4 cases in 2014 this number increased to 74 cases, and in 2015 it exploded to 119 cases.

Unlike the number of persons under supervision, which has alarmingly grew; the number of people incarcerated has remained constant. With regards the costs of detention, statistics show that in 2010 an inmate cost the Romanian state 26 590 lei (amount obtained by dividing the budget of the National Administration of Prisons to the total number of inmates - namely 73 lei per day); in 2011 the costs for a single detained person amounted to 30 580 lei (83 lei per day); in 2012 - costs amounted to 28 679 lei (78 lei per day); in 2013 - costs amounted to 30 081 lei (82 lei per day); in 2014 - costs amounted to 34 312 lei (94 lei per day) and in 2015 - same costs amounted to 39 325 lei (107 lei per day).

Summarizing, it appears that in 2015 a prisoner cost the state 39 325 lei per year, while for a person under surveillance the state offered 592 lei (representing annual amount, less than the amount spent weekly with an inmate).

This reality should give serious thought to legislative and executive authorities. For every person who is imprisoned, the state should pay several hundred times more. Thus, the government must realize that it is more convenient to prevent, because incarceration is much more expensive and often the effects are harmful.

In these conditions the allocation of important financial resources to the probation activity is required. The state currently allocates 1.1 billion lei to 28 000 inmates and 25 million lei for 42 000 persons under surveillance. Only by increasing the number of probation officers (so that a probation officer may manage at the most 30 cases), by allocating the necessary money for training them and by organizing vocational training courses anchored in the realities of everyday reality and programs for professional reintegration able to ensure the proper social reintegration for the supervised persons, the state may prevent that further offenses are committed by these persons.

The proposals of legem ferenda focuses on the one hand on the changes in existing legal provisions and on the other hand over the introduction of new ways of judicial individualization alternative to imprisonment.

The prevention of new offenses/crimes and the social reintegration of offenders require the legislator to introduce new measures to individualize alternatives to imprisonment in the criminal law of our country. First it should be considered that waiving the institution of conditional suspension of the sentence could be a fundamental error. It is wrong in my opinion the view expressed by the legislator that any person who has committed an offense should be subject to supervision. For some persons, given the nature and the gravity of the offense and given the personal circumstances of the offender (age, the existence of an occupation, a job, a family, if this person is integrated into society), such surveillance is not justified because the offense in question might be a simple accident. For these persons the existence of a conviction and the risk that by committing a new offense/crime they might end up in prison executing two cumulative punishments constitutes a sufficient warning.

By reintroducing the institution of suspended sentence, this would relieve the activity of the probation services. It must be said that in France, a country that inspired our country's legislation, up to 2004 in the regulation of measures of custodial individualization, there are three types of suspension: simple suspension, testing suspension (or supervised/ under supervision) and suspension under surveillance accompanied by the obligation to perform a work of general interest (or community service). We believe this is the solution that our legislator should also embrace, such solution giving a margin of appreciation sufficient for a court, that would remove the

inconvenience of existing legislative provisions at this time and that would create the necessary levers for the social reintegration of those who have committed offenses/ crimes.

The American model of "split sentences" should also be adopted. Namely, through the same sentence the judge could establish that the defendant shall spend a fixed period (usually several months) in custody and later on the execution of the remaining punishment shall be suspended under supervision. There are many cases where the legal situation of the accused is at the limit between incarceration and suspension under supervision. If in the case of these punishments the court could "dispose a split sentence", this would appear to be the best way of individualization.

Although it would imply a huge expenditure, the necessary legislative changes should be introduced and (again after the American model) the ,,so-called transit centers" should be created. The status of the persons who are placed in these units is an intermediate between incarceration and effective probation. Therefore these persons are imprisoned for some time, but not in an actual prison, but in an institution specialized in social reintegration, and at this end of this period they are placed under the supervision of the probation service. Their purpose is to ensure offenders, on a temporary basis (egg 6 months), strictly scheduled living conditions and support. In this regard most programs put a strong emphasis on addressing the educational and professional deficiencies of the offenders.

Another method of the judicial individualization of the punishment that we appreciate it should be introduced in our legislation is the semi - detention (regulated by the French, Italian and Portuguese legislation). The convicted person can leave the detention center every day for a few hours to work, and at the end of the working day return to prison. A university professor, a famous doctor, a scientist are more useful to society if left to carry out their professional activities (which have no connection with the punishment they are executing) unless they are permanently imprisoned. The aim of the repressive punishment is achieved because these persons don't have the right to leave the detention center outside working hours. Such a measure would be more likely to facilitate the social reintegration of the convicted person. This is not torn total living environment continues to have a job, which will facilitate them the opportunity to have a normal life

after serving their sentences. On the contrary, the lack of a stable job would encourage that person to continue committing offenses/ crimes in order to ensure their livelihood.

We believe that in the Romanian legislation also house arrest should be introduced as a means of judicial individualization of the execution of the punishment (possibility existing under American, British, French and Italian legislation). For certain categories of persons, the purpose of the punishment can be achieved by this method of imprisonment, incarceration in an actual prison being unnecessary. Also, through this measure, the state would save significant amounts of money, money that could be further invested in financing the probationary services or in social services for the assistance and reintegration when out of prison. For the effective functioning of the judicial individualization of these two methods, some electronic monitoring arrangements should also be introduced.

We also consider beneficial if our legislation would take over from the Portuguese legislation the measure of weekend's arrest. In this latter situation, for a punishment not exceeding three months, the convicted person is imprisoned only on Saturdays and Sundays, the rest of the week being left free in the community to which he/ she belongs. Such a measure would be beneficial in our opinion for persons who have committed minor offenses, are well integrated into society, have a job, have a family and more dependents.

Insuring the preventive goal of the punishment and the social reintegration of the persons who committed the offenses through alternative ways to imprisonment are aspects on which our country still has to undertake serious efforts. As noted throughout this paper, the Romanian legislation has serious deficiencies in this regard. But above all, it requires a social and economic reform of the entire governing system. Even if there is a legal framework close to perfection in this area, it is devoid of any effect without creating jobs for the persons who committed offenses/ crimes, without allocating sufficient funding to implement all methods of individualization provided by law, for the recruitment and training of a sufficient number of probation officers who can provide further support and advice to persons who have previously committed offenses/ crimes.

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Codul Penal al Franței

Codul Penal al Italiei

Codul Penal al Spaniei

Codul Penal al Portugaliei

Codul Penal al Germaniei

Codul Penal al Finlandei

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