VARIOUS TECHNIQUES OF INDIVIDUALISING PUNISHMENTS IN THE NEW CRIMINAL LAW

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Abstract
The author analyzes the new criminal code provisions in relation to criminal law in force, the new Penal Code has dropped explicit mention, as criteria of individualization of punishment, the general provisions of Part penalty and limits set out in the Special Part of Penal Code, as and causes that aggravate or mitigate criminal liability. Also, the new Penal Code was established several general criteria of individualization of punishment on which the judge can make a clearer assessment of the social significance of the individual offense and offender.

Keywords*: new criteria of individuation, penalty, mitigate or aggravate cases.*

Introduction

In order to understand the significance, the role and the place of punishment individualization in the system of the means of applying Penal Politics, it has to be viewed from the perspective of the purpose and from the light of the fundamental principles of Penal Politic, in comparison with the purpose of the Penal Law and the punishment in the Penal Code system, and most importantly, the harmonizing of material the Penal Code with the systems of other European Union countries.

The specific of Penal Politic, that regards the purpose[1], is the fact that it practically aims to gradually eliminate the crime phenomena from society. To this supreme purpose are consecrated the preventive[2] action as well as the reaction against crimes committed, reaction that also aims the causes of the same phenomena – the individual causes from the criminal's conscience. Or the repressive actions' efficiency to succeeding in this task depends, as it has been shown earlier, on the extent to which the means of this reaction and especially the punishment are adequate, on the extent to which the penal reaction is individualized.

In Penal Politics[3] and in the Romanian Criminal Law, individualizing the penalty isn't a mere principle of solid establishment of the penalty, but a condition *sine qua non* of the efficiency of the above mentioned hence of fulfilling the Law and Penal Politic's goal.

That is why, in Penal Politic and in the Criminal Law system *individualizing the penalty* has been elevated to the status of general principle and have found in this state an explicit consecration in all the European states' Criminal Laws[4]. Therefore the German Criminal Law regulates the principle of establishing the penalty[5]. In the 1st paragraph of art 46 of the Criminal Law it is mentioned that the accused blame is represents the very foundation of establishing the penalty, however when evaluating it, the effects on the future life of the doer must be considered. The French Criminal Law

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[1] George Antoniu, *Contribuţii la studiul esenţei, scopului şi funcţiilor pedepsei*, R.D.P., nr. 2/1998, Buucureşti, Edit. Monitorul Oficial, p. 9.

[2] Ibidem, p. 19-20.

[3] Costică Bulai, Bogdan N.Bulai, *Manual de drept penal, Partea generală,* Edit. Universul Juridic, Bucureşti, 2007, p. 56 şi urm.

[4] See Pen. C. of Iugoslavia art. 38 şi urm.; Pen. C. Of Hungary, art. 64 and next.; Pen. C. of Bulgary, art. 54 and next.; Pen. C. of Germany, p. 61 and next.; Pen. C. of Poland, art. 50–59.

[5] Hans Jescheck, *Lehbruch des Strafrechts,* Alemeiner Teil, Duncher und Humbolt, Berlin, 1988, p. 769; *Codul penal german* (Strafgesetzbuch, StGB) available on http://www.iuscomp.org/gla/statutes/StGH htm.

establishes in article 132-24 the general individualization criteria[6], mentioning that "in the limits imposed by the Law, the Court pronounces punishments and sets their conditions depending on the circumstances of the crime and on the author of the crime[7]. The Spanish Criminal Law[8] does not mention which are the general criteria for individualizing the penalty, but holds a very vast legal framework of penalties, in which the judge can establish the defined penalty in concordance with some characteristics.

This value of general principle that is owned by the individualization of the penalty is unanimously recognized in the Romanian juridical literature. [9]

Individualization of the penalty is consecrated and works, in the Criminal Law system, in perfect harmony with the basic principles of Politics and penal law.

In regulating the application of individualizing penalty in the Criminal Law system it is indeed assured that the fundamental principles of penal politics are respected. Therefore unity and the primary purpose of Criminal politics, for whose accomplishment works together the punisher as well as the judge summoned to apply the law, the juridical conscience that guides the judge's activity, all of these guarantee the harmonious accomplishment of the fundamental principles of Penal Politics in managing the making of penalty individualization .

Among the general principles enshrined in our criminal law a leading role for *the principle of individualization* of repressive reaction is reserved[10].

Indeed even in the New Criminal Law[11] the principle of individualization has been explicitly enshrined by the position in art. 74. Cr. L from Section 1 entitled "General Dispositions", chapter V entitled "*Individualizing Penalties"* , Title III of the General Part which constricts the court to individualize the penalty, turning to some criteria.

In the disposition from paragraph 1 of art. 74 of the New Criminal Law it is provided that when establishing the length or quantum of the penalty it *is done* in accordance with some general individualization criteria, which means that the principle of individualization is consecrated through a mandatory disposition.

Under the new Criminal Law[12] the criteria applied to the individual also applies to the legal person. However, in the case of both individuals and businesses, among general criteria other special criteria becomes incident in some cases.

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[6] R. Saleilles, L*'individualisation de la peine,* Paris, Felix Alcan Editeur, 1909, p. 10-11;

[7] F. Desportes, F.Le Gunehec, *Le nouveau Droit penal,* Tome, I, Droit penal general, Septieme editition, Edit., Economica, Paris, 2000, p.820. A se vedea *Code pénal*, 2008, Dalloz, 105 édition, coordonată de Y. Mayaud, E.Allain, C.Gayet; www. legi-france fr.

[8] *Codigo penal.* Ley organica 10/1995, de 23 de novembre, edicion preparada por Enrique Gimbernat Ordeig con la colaboracion de Esteban Mestre Delgado, decimoquinta edicion, Tecnos., Madrid, 2009.

[9] Vintilă Dongoroz, *Sinteze asupra noului Cod penal al României*, Studii şi Cercetări Juridice, 1969, nr. 1, p. 7–35; Şt. Daneş, V. Papadopol, *Individualizarea judiciară a pedepselor*, ediția a II-a, Ed. Juridică, Bucureşti, 2003, p. 67, p. 91-150, p. 29-321; O. Brezeanu, *De la individualizarea la personalizarea sancțiunilor,* în R.D.P. nr. 1/2000. J. Grigoraş, *Individualizarea pedepsei*, Edit. Ştiințifică, Bucureşti, 1969, p. 91 – 110; Gh. Ivan, Individualizarea pedepsei, Edit. C.H. Beck, Bucureşti 2007, p. 105 – 167; J.Igor Andrejew, Lenouveau Code pénal polonais, *Revue de Science criminelle et de droit pénal comparé*, 1970, nr. 2, p. 309–317; Stefan Freier, *Les principes de l'infliction des peines aux termes du Code pénal tchécoslovaque* de 1961, Bulletin de droit tchécoslovaque, 1962, nr. 1–2, p. 31–35 etc.

[10] G.Antoniu – coordonator – *Noul Cod penal*, vol.II, Ed.C.H.Beck, Bucureşti, 2008, p.191-201.

[11] The New Criminal Law adopted trough the Law 286/2009 with assuming responsibility by the Government has permitted the lawmaker to be superior to the new criminal law adopted by the Law 301/2004 (subsequently repealed), as well as the current Criminal Law.

[12] Art.74. *General criteria for individualizing the penalty* (1) Establishing the duration or the amount of penalty is commensurate with the gravity of the crime committed and the dangerousness of the offender, which is assessed on the following criteria: a) Circumstances and manner of committing the crime and the means used; b) the state of peril created for the protected value; c) the nature and gravity of the result produced or of other consequences of the crime; d) reason and purpose of the crime; e) nature and prevalence of crime which constitute antecedents of the offender for which he is convicted; f) conduct after committing the crime and during trial; g) education level, age, health, family and

Regarding the general specific criteria of individualization it has been questioned whether they should be evaluated together or separately in a certain sequence.

In juridical literature the opinion that "the deed of the doer and all the circumstances in which the crime has been committed – regardless of the fact that through their weight they have the role of aggravating or minimizing circumstances – they must be thoroughly analyzed, as they condition each other and, therefore, increase or decrease the level of social peril" has been expressed. That is why the problem of putting first place investigating the person or the deed cannot be considered.

In another opinion it has been highlighted that the fact that at individualizing the punishment is undeniable the fact that all criteria must be considered and the sanction applied must represent the result of a multilateral examination.

Finally, other authors share the opinion that in accomplishing "the operation of legal individualization of the penalty the starting point is represented by the penal deed in comparison with the data complex that indicates its level of social peril (gravity, frequency, prevention possibility, means of committing, consequences) and as final point the personal situation of the criminal regarding the social peril represented by itself (the role he/she had in committing the crime, the guilt's form and gravity, psycho – physical state, previous history, etc)". This order might have its legal basis in the provisions in art. 74, enumerating the individualization criteria, indicating primarily aspects regarding the severity of the deed and afterwards the personality of the doer.

Punishment individualization, on behalf of its proper determination, isn't a mere recommendation which the lawmaker brings forward to the court but an obligation from which he cannot abscond.

Regarding individualizing punishments, the New Penal Code, even if it maintains many of the previous dispositions, introduces new ones as well, highly important, such as renouncing on applying the penalty and delaying it[13] (chapter V, section III and section IV)

Waiver of penalty consist in the court's recognized right of judgment to forgive permanently the establishment and application of a penalty for a person who is guilty of committing a crime, for the fulfilling of which, taking into count the committed crime (art.80 paragraph 1 letter a.); of the personality of the criminal and he's behavior that he has had before and after committing the deed, would be sufficient applying a warning, while establishing, applying and executing a penalty would risk producing more harm than to help the recovery of the accused. (art. 80 paragraph 1. letter b.)

In art. 80 paragraph 1. letter b. from the New Criminal Law are mentioned the conditions for waiver of penalty. In paragraph 2 of the text mentioned above are showed the conditions in which the court cannot dispose waiver of penalty[14]. Waiver of penalty in case of infringements of competition (art. 80 para. 3) may be ordered if concurrent conditions for each offense are set out in paragraphs. 1 and 2 of the article cited. Waiver of penalty law is regulated in other countries as well (Germany, France, Switzerland, Italy etc.).

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social situation. (2) When the law provides alternative penalties for the crime committed, the criteria set out in para. (A) are taken into account and choosing one of them.

[13] Versavia Brutaru, *About some new modalities of individualiyation of the punishments according with the new Code penal*, Studii si Cercetari Juridice, vol.II, Drept Public, Timisoara, Conferința internațională a doctoranzilor în drept, 2010, p. 90-97.

[14] Article 80 para. 2 of the new Criminal Code so provides, that it may not be given waive of penalty if:

a) The offender has previously suffered a conviction, except as provided in subparagraph 42.let. a) and b) or that has been rehabilitation or rehabilitation period has been fulfilled;

b) against the same offender was more willing to waive the penalty in the last two years preceding the date of the offense for which trial;

c) the offender has evaded prosecution of law or truth or attempted thwarting the identification of his whereabouts and his charging or criminal liability or the participants'.

d) penalty provided by law for the offense is imprisonment for more than three years.

It was also envisaged the postponement of the sentence in Article 83 of the new penal code for crimes for which the law provides established punishment, including in the event of multiple offenses, is a fine or imprisonment not exceeding two years; if the defendant had no criminal record, except as provided in Article 42 letter a and b) or for which has been reached term rehabilitation or to rehabilitation, and after committing the crime has given solid evidence that may point the defendant had a good attitude court may not apply to any punishment and if he had an improper conduct may be to postpone them again, for the same period of surveillance (surveillance period is 2 years in Article 84), penalty, or penalty provided by law within.

The Romanian criminal law the principle of individualization of punishment was the first time explicitly enshrined in the Criminal Code of 1936, in the provision of art. 21, stated that "punishment applied by a judge applies the statutory limits, taking into account the reasons and seriousness of the offender and the degree of perversity."

In the literature this provision has been interpreted as meaning that it contained "a recommendation and a criterion for judicial individualization of punishment"[15]. The structural changes in social and political ordering of our country, led to a reformulation of the provision of art. 21 Penal Code. which should correspond better promoted criminal policy of consistently increasing in our state.

Thus, by Decree no. 187 of 30 April 1949 to amend the Criminal Code provision in art. 21 was modified in the sense that the court "shall" take into account when determining the sentence of the Criminal Code general dispositions, the special limits of punishment for each crime, the seriousness that it shows the offender and the circumstances of the offense and the offense was committed. Through this change not only have been scientifically formulated general criteria of individuation, in a manner very close to that of the provision in art. 72 of the Criminal Code was given a very explicit mandatory provision, stating that the court must determine the actual sentence based on criteria listed in the text.

From what was stated above results that this language is no longer used in the new penal code as "must take into account" but as the phrase "take account". This wording is correct because the standard regards the operation of individuation, and not the court. As for the mandatory nature of the provision in force, it can not be, we believe, to doubt.

This norm with amount of general principle will be applied in relation to all special part of criminal law rules, whether contained in the Penal Code or in special laws for non-criminal. Enshrining the principle of individualization explicit highlights its position in relation to other principles of our penal policy and criminal law. If in the scope of application and its content is derived from the principle of determining the penalty policy and the fundamental principles of our criminal law (principles of legality, humanism and democracy)[16] and is subordinate to these principles, it is nevertheless true that the fundamental principles can not be met without observance of the principle of individualization of punishment. It is a consistent position which lies both the theory[17] and our judicial practice[18].

Consecration default principle is important in determining the penalty from a bent perspective.

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[15] V. Dongoroz, în C. Rătescu, I. Ionescu-Dolj, I. Gr. Perieţeanu, Vintilă Dongoroz şi alţii, *Codul penal adnotat, vol. I, Partea generală*, Comentarii la art. 21, p. 68.

[16] Vintilă Dongoroz, *Drept penal*, (Tratat),1939, p.82.

[17] In our literature of criminal law the principle of determining the penalty has particular importance and is widely recognized and affirmed.

[18] In the legal practice is sufficient, we believe, to refer to the decision of the Plenum of the Supreme Court no guidance. 12 of 10 November 1966 on the *individualization of punishment*. George Antoniu, Vasile Papadopol, Mihai Popovici, Bogdan Ştefănescu. *Îndrumările date de Plenul Tribunalului Suprem şi noua legislaţie penală,* Edit. Ştiinţifică, Bucureşti, 1971, p. 72 and following.

Firstly, this consecration actually increases the explicit consecration's authority on the one hand because it proves that the lawmaker has complied with this principle, he himself making an it a work of individualization, as far as he could and on the other hand because it ensures the implementation of the individualization principle via the conditions created for this purpose. Determining the legal frame for punishment individualization for each crime and providing the court with the means to apply individualization, the laws explicit provision of the individualization principle not to remain a formal proclamation, but to be actually achieved.

Second, enshrining the principle of individualization implicit control law ensures the work of individuation because individualization made in concrete determining of the sentence or during execution must take place within the framework established by law, this legal framework is itself implicit expression of the principle of individualization of consecration. The provision of art. 72 Penal Code., which enshrines the principle of individualization, refers to the individualization of punishment, namely on the occasion of its concrete determination by the court. This direct reference to the punishment could be explained if we consider that the sentence is typical of criminal sanction, the main sanction without which the system of criminal law could be conceived; is the main instrument of achieving the policy and criminal law and therefore applied the principle of individualization have reported primarily on the sentence. But punishment is not the only criminal sanction.

Alongside it in the system of enforcement of our criminal law, it measures to provide safety and educational measures that are also criminal sanctions, means of reaction to committing an offense under the criminal law, although other measures are taken on other grounds and pursue other immediate purposes. These criminal penalties can not perform any other functions (removal of a state of danger from which a person who has committed an offense under the criminal law, is exposed again to commit such an act, if not safety measures, education and juvenile offender rehabilitation, if not educational measures) if they are not individualized and do not correspond to the state of real danger and prevention needed of the facts provided by the criminal law in each case.

In other words, safety measures and educational measures are subject, as well, like any other criminal penalties, to the general principle of individualization[19], in that it must correspond to the seriousness of the crime committed, that the danger that prevents state and the individual offender, this adaptation of the penalty depending on its functional efficiency.

It is reminded that the principle of individualization of criminal sanctions not only operate at their specific determination by the courts but its presence and influence is still known at the time of the criminal law as regards the limits of punishment for each crime and the conditions under which these limits can be overcome and the regime of imprisonment during the execution.

Of course individualization principle finds its full application in the penalty execution phase, in the process of continuous adjustment of these sanctions to the actual needs of the convict rehabilitation referral and using effective means of individualizing made available to law enforcement bodies responsible for overseeing prison sentence.

One may conclude that the principle of individualization by means of criminal law is organically integrated in our criminal law system and has a general application.

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[19] Vintilă Dongoroz, in *Explicaţii teoretice ale codului penal român*, vol. II, Bucureşti, Edit. Academiei Române, 1970, p. 243.

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