

# WAIVER OF PENALTY IN THE NEW PENAL CODE

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## Abstract

*This paper is an attempt to expose the novelty brought by the new Penal Code in relation to both prior criminal law and also with the international law. Thus, one of the most debated articles of the new Penal Code is "giving up penalty" - art. 80-82, which has no counter part in our international law. In this context, the "gain" of this new provision is challenged / contract due to the possible subjective nature of the courts. Relevant in this regard is the fact that deprivation of liberty in the prison environment is a special situation, with strong resonances in the living environment of the defendant, both during detention and afterwards released. Moreover, giving up penalty, is one of the measures individualizing sentences and also a way to deplete its possible negative influences subsumed to the rehabilitation process held in prisons, even with the efforts made by the administration of the detention. Specifically, the "waiver of penalty" intends to alert the authors of criminal deeds with reduced gravity on their obligations regarding future conduct.*

**Keywords:** *waiver of penalty, international law, penalty, criminal deeds, Penal Code*

## Conceptual

Based on European and world trends in criminal law, the changes to the Criminal Code with focus both on penalty legislative measures and the integration of offenders should be carefully considered.

This paper aims an exposing of the effects of novelty items wanting to be applied in the Romanian penal law by revealing its positive and negative trends.

Thus, to achieve this purpose was used a brief presentation of the concept of "penalty waiver" thus presenting the advantages and disadvantages by studying the theory and practice of applying alternatives to prison detention in countries abroad and in Romania.

Legislative developments, especially the Penal Code in force and the new Criminal Code adopted by Law nr.286/2009 emerged behind the research on alternatives to detention legislation in Romania.

Imprisonment in the penitentiary environment is a special situation , with strong resonances in its life environment , both during detention and afterwards released. Emotional frustration and information , lack of communication , eternal interest in personal and material always leaves no moral solutions to everyday problems.

Despite efforts by the administration of the detention , assist reorganizations often negative personal values and decreased responsiveness to rehabilitation process carried out in prison , motivated by the fact that the rules by which prisoners conduct their activities and interpersonal relationships sometimes betrays system of " nerves " lower reporting for better or worse in terms of personal, low morality<sup>1</sup>.

In this context, a custodial sentence is a measure of state coercion - means the exclusive jurisdiction of the State to establish and enforce, through its competent organs, as guardian of the amounts recognized in the company , its reaction to the coercive committing the harmful act.

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<sup>1</sup> Mircea BORȘ, *Efecte ale pedepselor privative de libertate asupra coeziunii familiei*, www.edituratrinitas.ro.

Editing new European Prison Rules and requirements ever higher and burning of society have led to law 275 \ 2006 published in Official Gazette number 627 of July 20, 2006 and entered into force 90 days after publicatio .

We must not forget that deprivation of liberty , as a preventive measure or criminal penalty provided for by Law 275 of 2006 is a complex measure that raises a whole series of problems.

In addition to many personal issues of detainees extremely difficult, as are those of: isolation, waiving the normal way of life, temporary removal of the family and society, the reduction of certain rights, complying with a program of health problems , employment and other needs - the execution of the sentence and require considerable effort from the competent bodies of the state to provide observation, guidance and supervision throughout the period of detention.

### **Good to know**

Criminal penalty is a measure of restraint - which suggested that punishment is a reaction to the coercive and binding deed of crime affecting the amounts recognized or accepted in society.

It is also a means of correction and rehabilitation - to sentence the change offender behavior , his belief in the future not to commit such acts , and the cultivation of respect for the values it protected by law .

According to Penal Code punishment goals are to restore social justice , correction and prevention convict committed by convicted , but also by others , the new offenses.

However , the exercise of sentenced persons shall not be limited only within the limits and conditions established by law and the Constitution.

Fundamental rights and freedoms of man and citizen is not only a reality but also an objective of all human activities , that of course the democratic and progressive. Hence due attention is given almost everywhere in today's world , theoretical and practical issues concerning human rights , fundamental freedoms and respect the protection of the human person.

The issue of human rights and fundamental freedoms and constitutional rights of citizens is regulated internally and is also subject to the rules of public international law.

The main international instruments on human rights with a universal character were adopted after the Second World War under the United Nations. These acts must permeate the entire building international legal human rights .They influence national legislation of the Member in this area , their provisions being international standards of human rights.

United Nations Charter was adopted in order to create conditions necessary to maintain international peace and security, justice and respect obligations under international treaties. In achieving these goals, reaffirms faith in fundamental human rights, the dignity and worth of human person, in the equal rights of men and women and of nations large and small.

Noteworthy that the legal, defense and security system addressed by a national and also supranational perspective don't fit in the immutable, petrified and inflexible understanding paradigm. These values, denoted conceptual and in act, have an historic example, are undergoing processing, depending on the challenges which we must respond and expectations to be fulfilled.

Most research focused on the "penalty waiver" concept have addressed to it without analysing and presenting the need / opportunity for acquisition / integration in our legislation. Currently, the measure creates a series of disputes among the population, being interpreted as a "legal loophole" for a certain category of people. Against this background it is appropriate to provide a "full menu" of the new law.

Waiver of penalty is a measure of individualising the penalty as foreseen in art. 80-82, subsumed under section 3 of the new Criminal Code. Waiver of penalty represents the court's recognized right to permanently waive the establishment and enforcement of a sentence for a person found guilty of a crime, for pointing that, in view of the offense, the person and its conduct previously and after the commission of the offense, is sufficient to apply a warning because the establishment, implementation or enforcement of a sentence is likely to produce more harm than help

the recovery of the defendant. Meanwhile, judges may defer to a sentence of less than two years imprisonment, or a fine.

Thus, conditional sentence consists in determining a sentence for a person found guilty of an offense and temporary postponement of its implementation when the specific penalty is a set fine or imprisonment not exceeding two years.

The court also will consider the convicted person and his prior offense attitude. However, the Criminal Code draft hasn't kept criteria for granting release which created differences between men and women or between offenders convicted for crimes committed with intent or negligence. The new Penal Code keeps into account, however, the conduct of the convict, if he made progress towards reintegration into society and if the court is convinced that no longer represents a social danger.

Waiver of penalty may be considered a form of forgiveness. It exists in German, French, English, or Chinese law.<sup>2</sup>

The German law:

The mechanism to waive a penalty allows the Court to forgo the imposition when the consequences of action taken when the author are not so severe, and the applying of a penalty wouldn't be appropriate, provided that the penalty doesn't exceed one year (Article 60 of the Criminal Code).

The French law:

In correctional or contraventional manners (without exception), the court, after declaring the accused guilty, and, where appropriate, the confiscation of dangerous or harmful objects (Article 132-58 of the Criminal Code)<sup>3</sup>, may:

- Whether discharge penalty on the defendant
- Whether to postpone its decision

These measures (introduced in 1975) can be used regardless of the criminal record of the author and seriousness of the offense.

Exemption from punishment is granted where:

- It appears that defendant rehabilitation is underway
- The damage is repaired
- Problems resulting from the infringement ceased

Moreover, the penalty waive may be:

- Whether straightforward (in this case, we talk about a true "judicial pardon" there is no penalty but a simple declaration of guilt).
- Be subject ( the judge imposes a trial delay. If the conditions are met according to the deadline, the exemption is pure and simple).

The postponement of sentence consists to fixing a series of criteria by the judge which the offender is forced to perform in a certain period of time.

After this period (one year after the decision to postpone), where conditions have been met (offender reclassification, termination issues, compensation), the judge will decide exemption from punishment, and otherwise, will apply punishment of the offender (unless it prefers to postpone again the judgment). The accused should be present at the meeting to postpone the punishment.

Are distinguished as follows:

- Simple postponement
- Delay in implementing the test
- Postponement of notes

<sup>2</sup> <http://www.scj.ro/coduri.asp>.

<sup>3</sup> [http://www.legifrance.gouv.fr/affichCode.do;jsessionid=F7BB5224F210B3390CD7F35141F11A17.tpdjo16v\\_1?idSectionTA=LEGISCTA000006181749&cidTexte=LEGITEXT000006070719&dateTexte=20120130](http://www.legifrance.gouv.fr/affichCode.do;jsessionid=F7BB5224F210B3390CD7F35141F11A17.tpdjo16v_1?idSectionTA=LEGISCTA000006181749&cidTexte=LEGITEXT000006070719&dateTexte=20120130).

The court may defer the penalty, also by putting the defendant in a trial period not exceeding one year.

This is one of the innovations of the Criminal Code of 1992. His regime is determined by points 132-66 to 132-69. In cases provided by law (or regulations), the court seeking suspension of conviction may order the offender to comply with one or more requirements covered by these laws or regulations.

Deferred at order can only occur once and can be ordered even in absentia (132-68). During the suspension meeting, if the requirements were met within the time (one year after the decision to postpone), the court may relieve guilt or punishment, or impose the penalties provided by law or regulation. If the requirements have been implemented with delay, the judge disposes of penalty (if any) and decides penalties provided by law or regulation.

The British law:

Exemption from penalty may be granted:

- If the sentence is not fixed by law,
- and if the judge believes that a penalty would be inappropriate in terms of:
  - Circumstances
  - The nature of the offense
  - Personality of the perpetrator

Sentencing judge may adjourn the proceedings to enable it to assess the behavior of the offender, whose guilt has been declared to determine punishment (ie, compensation for damages). Postponement may not exceed 6 months.

The soviet law

The "social danger" element played a key role in defining the offense. If it does not exist or have disappeared between the time of the offense and the trial date, an exemption from punishment is possible.

The Chinese Law

Exemption may be granted only for minor offenses, provided the offender to demonstrate laudable behavior.

In case of exemption from punishment, the offender:

- may be penalized,
- may be required to make a statement of repentance,
- may be required to repair the damage.

It is also subject to administrative sanctions.

The Belgian law

Waiver of penalty was introduced in 2000 in the Belgian law by Article 21b of the Code of Criminal Procedure. However, it is not possible if reasonable time is exceeded when sentencing offenders. The judge may convict an offender with a minimum legal sentence or settle with a declaration of guilt.

#### **How was the new article seen by the Romanians?**

In Romania "Members of the Criminal Code Commission have failed, neither in the second day of debate, to decide about the article that allows the court to waive the penalty, some believing that in the originator's version, almost every criminal can escape."<sup>4</sup>

In this regard, on the individualization of punishment, the court establishes the right to discharge, which consists in decisive renunciation to establish and implement a punishment for the offender, to the extent that it represents an offense with reduced seriousness, and in relation to an individual offender, the conduct previously to the offense, the efforts to eliminate or mitigate the

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<sup>4</sup> <http://www.mondonews.ro/Comisia-de-Cod-Penal-in-dezacord-fata-de-renuntarea-la-aplicarea-pedepsei+id-8295.html>.

consequences of crime, and his chances of referral, it is considered that the penalty would be inappropriate because of the consequences that would have on his person.

If a discharge of penalty is decided, the court will apply the offender a warning stating that it will not attract any disqualification, prohibition or incapacity for the offender. Waiver of penalty will not be operable if the deed is the legal punishment of imprisonment exceeding three years or if the offender was more willing to waive the penalty in the last two years preceding the date of the offense for which is judged.

#### **How does the penalty discharge work?**

Simply, by manifestating a judicial clemency. It can also sometimes speak about a judicial penalty discharge, but sanctions exceptions may apply in respect of a person only after the declaration of guilt.

Regarding the introduction of several new Criminal Code penalties alternative to imprisonment, this represents a new vision as a result of European regulatory sources, affirmation and implementation of these types of sentences in the Community measures have social and economic benefits resulting their strong application, but also because they meet the need of diversification penalties, enforcement and their individualized and more effective defense of society.

Waiver of penalty is one of the measures of individualization of punishment and is a court recognized the right to permanently abandon the establishment and enforcement of a sentence for a person found guilty of a crime, for resocialization that, given the gravity of the offense, the individual offender and conduct before and after consideration by the commission of the offense, is sufficient to apply a warning, because the establishment, implementation or enforcement of a sentence is considered inappropriate because of the consequences that would have on his person.

Giving reason to punishment in modern society is the existence of criminal acts that have a reduced gravity, which may be exempt from imposition of a sentence, is sufficient finding their offender warning about future conduct.

Waiver of penalty is only an expression of will of the court, the law setting conditions on the individual offender or the maximum penalty for that special can apply to art. 181 Penal Code. before taking into account only the actual degree of social danger, demonstrated by the manner and means of committing the offense, the purpose, the circumstances surrounding the crime committed, the result produced or which could have produced. We note that these criteria related to the seriousness of the offense were assessed by the court, to the concrete conditions established by law text, the art. 80 para. (2) Penal Code.

On the other hand the relationship between international and domestic law of a country of importance both theoretically and practically. Over time various theories have been developed on the relationship between international law and internal law of States.

They have adapted or changed policy and legislation based on the theory that they considered it as having won. All development doctrine is meant to answer some practical questions, indicating the behavior to be followed by state internally, the legal system and especially in the field of justice, and domestic, international relations changing<sup>5</sup>.

#### **How does it work?**

As the name suggests, the penalty discharge consists in giving a person's permission not to serve his sentence. But to do this, a number of conditions must be met. First, one must be guilty.

Then, exemption from punishment may be imposed only for crimes or misdemeanors. It will be granted if three conditions are met. First, it is necessary to be granted the reclassification of the convicted person.

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<sup>5</sup> Thomas Buergenthal și Renate Weber, *Dreptul internațional al drepturilor omului*, Editura ALL, 1996, pag.216.

It also requires that the damage is fully repaired and then, the disruption resulting from the offense to be stopped. Exemption from punishment will prevent the imposition of additional or complementary penalty. But is likely to be security measures.

Although these conditions are fulfilled, penalty waiver is not granted automatically. This measure favorable particularly to the convicted person it is not possible, however, than in correctional or administrative cases. Therefore it is not applicable in criminal cases.

This measure is more favorable because the judge can decide whether that sentence will not be mentioned in the criminal record. So, with maximum leniency from the judge, the defendant won't serve his sentence, nor have recorded convictions.

Being recognized as responsible, the offender that was discharged of punishment shall bear court costs. And this exemption of judicial punishment is, of course, different from the exemption from punishment, which is legal in nature. So, not created confusion: Waiving penalty is a judicial act, while the exemption from punishment is prescribed by law.

### **Three examples of application of the statutory provision in question even in the realm of France:**

#### Case Study 1

Michaël Youn (French comedian) was sentenced by the Paris court for insulting and assaulting two police officers, but was not disciplined. A decision "satisfactory" in accordance with the words of his lawyer, Marc-Henri Debusschere<sup>6</sup>. The prosecutor requested a suspended sentence of imprisonment for six months and fined 2,000 euros against the actor.

Alliance (the second union of peacekeeping forces), said in a statement that it "can not be stunned by this decision." "Regarding the attacks against police officers, there is only one answer: the application of the law," he adds. "Every citizen should be subject to the same rules and it seems unbearable to see there are different rules depending on social status," said the union.

#### Case Study 2

A man of 31 years suffering from multiple sclerosis, which cultivated cannabis at home to relieve pain, was sentenced, but released from punishment by the criminal court in Strasbourg, urging prosecution itself "kind law enforcement." "In this case, we need to show the humanity, "even if the offense is serious, said the criminal investigation, Gilles Delorme<sup>7</sup>.

The young man, who moves with difficulty due to illness, said that he was surprised by the "unexpected". decision. "I thought I would be given a suspended sentence, or at least a fine, although I have no money," he told AFP. The accused was arrested in June 2011 and placed for 24 hours in police custody after being terminated because of cannabis leaves, from his personal plantation, were visible from the street.

He explained so it cultivated inside his home since 2004, forty plants whose flowers are consumed in the form of cakes. "If I could, I would miss it: it is necessary to hide the taste of cannabis to be better Honey" "I tried to limit intake, otherwise my body gets used and reduce the analgesic effect," said him.

During the meeting, he presented a certificate issued by a Swiss physician attesting to consumption of cannabis to alleviate pain and improve motility. For his lawyer, Francis Trapp, "The therapeutic aspect was clear," which led the court to take "an exceptional decision."

#### Case Study 3

Magistrates Court in Charleville-Mezieres took recently a decision noticed to press due to the unusual. A man aged 45 years was arrested for DWI (EAEC), characterized by the presence in

<sup>6</sup> <http://next.liberation.fr/cinema/01012327043-michael-youn-coupable-mais-dispense-de-peine>.

<sup>7</sup> <http://www.leparisien.fr/strasbourg-67000/il-cultivait-du-cannabis-therapeutique-dispense-de-peine-03-10-2011-1637764.php>.

exhaled air of about 1 mg of alcohol per liter.<sup>8</sup> Prosecuted for driving under the influence of alcohol and abuse of police agent (acts punishable by imprisonment even without the existence of injury), he faces up to three years in prison, three years license suspension and a fine of € 45,000.

At trial, the defense raised that argument in defense that the defendant was held the degrading detention conditions, calling on the court, because it has the necessary powers (under Article 456 of the Criminal Procedure Code), to go and see what occurs.

And the court has not questioned the words. It estimated that the defendant suffered a "traumatic experience" and "has already paid dearly (...) crimes are not at a level of serious crime." "If cells are kept in custody where the poor are outrageous, if those indicted are retained here for long periods without being provided with minimal personal hygiene (...), it clearly and objectively, and unworthy degrading treatment ". Accordingly, the court issued an exemption from punishment.

Material conditions of detention, as terrible, were included. They can not serve as legal basis for waiving the penalty.

Consequences to be drawn from this is more radical: inhuman, degrading and unworthy are forbidden in France and throughout Europe (section 3 of the European Convention on Human Rights). This prohibition applies primarily by the state: the sovereignty and dignity.

But in this case, the court requires that the person in breach to be harmed regarding freedom (jail), rights (prohibition of driving), assets (fine and costs), for violations. But for this, the state itself violated the law that it also approved. He promised in November 1950 that no person shall be subject to inhuman and degrading treatment, and 60 years later, continues to do so yet. It requires that any violators are punished, and requires that it be applied that maxim to himself.

In our case, the legal punishment of offenders is illegal. So, the criminal convictions would be illegal. The judge must refuse. Specifically through a cancellation procedure. The difference is real: no declaration of guilt, free of charge (€ 90), no mention of criminal record, and in particular no loss of penalty points (6 points in this case).

## Conclusions

Detention means the loss of many basic human rights, including the loss of free movement, loss of right to enjoy family, social relationships limit the disqualification to work for themselves or run a business.

We can also mention limiting personal privacy, passing through many humiliating experiences such as intimate body search and imposing other people urinating in front of the test drugs, violence and loss of self respect. And many years before the effects of detention will be felt by social stigma that will limit access in many areas of labor market and will create difficulties in obtaining credit or insurance.

Detention is a serious punishment by social exclusion and clearly marks the distinction between those convicted and others. Inmates often feel offended that they were imprisoned or feel they have been treated too harshly than others. And they spend all day accompanying other condemned colleagues who have similar feelings. They begin to believe they were wronged and tend to forget those who suffered because of their criminal acts.

The relationship between victim and criminal justice underlying concept of reintegration , but unfortunately prisons creates an environment where victims tend to be forgotten .The third factor underlying the RPP suggests that the prison should promote a policy that would contribute to the awareness of crime is criminals effects on those involved.

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<sup>8</sup> <http://www.maitre-eolas.fr/post/2010/02/18/Un-homme-dispens%C3%A9-de-peine-en-raison-des-conditions-indignes-de-sa-garde-%C3%A0-vue>.

However, conditions of detention that violate human rights can not be justified by lack of resources. This lack of resources was and remains the biggest problem facing the whole of Romania, not only the prison system struggling with a lack of material resources. Lack of resources is the main reason that invokes when authorities asked the weaknesses in the system. Thus such a provision would be completely incompatible with the reality of prisons.

It can be said that the law 275/2006 contains provisions that are found in most European prison systems of industrialized countries, having many things to complain, there will be no need for urgent proposals.

The notion of right and wrong, virtue and vice, command and permission, merit and guilt, praise and reproach, remorse and moral satisfaction and assume responsibility proportions require action or free will. If man is not free laws and regulations, advice, prayers and supplications, rewards and punishments have no purpose. These terms do not necessarily imply freedom as check and certainly where there is no freedom as we throw in jail the prisoner.

Freedom is constrained by concession fight for freedom. Not restrict freedom but amplification is the most direct route to solving human problems.

Basic issues of deprivation of liberty and freedom as a human condition which provokes strictly necessary other issues of punishment, intimidation, rehabilitation, factors facilitated the emergence of all of detention. Prison itself is the biggest issue basically whereas there was a lot of problems.

It is not known whether imprisonment is an effective remedy in the treatment of crime. Support and pressure for performance and change comes from many directions: from the government which must meet international standards, from the public wanting information on the safety of prison and quality of recovery activities to be performed with detainees from some stakeholders in collaboration with prisons that human rights non-governmental organizations, with universities and scientific research, with all those interested in the issue of prison global social, psychological, educational, moral and legal.

**Finally, why should the court defer pronouncement of the sentence after the other organs of state have documented the defendant or the offense?**

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