THE PRINCIPLE OF HUMANISM AND THE PRINCIPLE OF OPPORTUNENESS OF PUNISHMENT – NEW CONCEPTS IN REALIZING THE PURPOSE OF THE CRIMINAL LAW

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Logos Universality Mentality Education Novelty, Section: LAW, 2014, Year III, Issue 1, pp: 47-53

Published by:
Lumen Publishing House
On behalf of:
Lumen Research Center in Social and Humanistic Sciences
The Principle of Humanism and the Principle of Opportuneness of Punishment – New Concepts in Realizing the Purpose of the Criminal Law

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Abstract
As stated in doctrine, criminal law has been used for centuries in a purely punitive, deterrent manner, and exclusively for the benefit of the state. However, criminal law currently reflects the liberal efforts of mankind to humanize it, to take into consideration not only the apparently vital interest of the society to protect itself from the ones that commit crimes, but it also considers the characteristics, the rights and the human condition of the offenders.

The new Romanian Criminal code reflects a new conception of the criminal legislator, concerning the ways to fulfil the purpose of the criminal punishment. According to this new and modern conception, the establishment and disposing the sentence application, meaning the penalty application of the delinquent, are not the only ways to realize the role of the criminal law to defend the social values. The proof of this new conception is offered by regulating, in the new Criminal code - two new institutions of judiciary individualization of the punishment, namely the renunciation to the penalty enforcement and the delay in the penalty enforcement, New Criminal Code.

Keywords: principle of humanism of criminal law, legal individualization of penalty, the opportuneness of penalty, renunciation to the penalty, deferment of penalty.

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1. The principle of individualization of the penalty and *the humanism of the criminal law – fundamental principles of the criminal law.*

The principle of individualization of the criminal penalties and the principle of humanism of criminal law are fundamental principles of criminal law aiming not only at a fair application of criminal provisions or at respecting the rights of the person subject to criminal liability, but also at preventing the commission of acts punishable under criminal law, a goal that was in itself raised to the rank of fundamental principle of criminal law.

Deriving from the principle of criminal liability, *the principle of individualization of punishment* dictates that the imposition and the enforcement of criminal law sanctions should be implemented by actually determining the gravity of the offense with regard to the person of the offender, so that the applied sanction should be efficient in performing its functions and achieving its purpose (Bulai, 2011). In establishing this principle, the legislator started from the premises that the criminal law sanctions cannot achieve their goal of preventing the perpetration of new crimes, from the point of view of both the perpetrator as well as of other persons, unless they are perfectly adapted to each individual case, to the particularities of the offender, to the necessity of correction and re-education of each offender (Bulai, 2011). Therefore, the individualization of punishment requires that it should be in compliance with the crime committed and the dangerousness of the offender, thus attempting to create a balance between the punitive, repressive role of the punishment and its purpose of correcting criminal behaviour and of preventing new crimes. (Bulai, 2011)

As stated in doctrine, criminal law has been used for centuries in a purely punitive, deterrent manner, and exclusively for the benefit of the state. However, criminal law currently reflects the liberal efforts of mankind to humanize it, to take into consideration not only the apparently vital interest of the society to protect itself from the ones that commit crimes, but it also considers the characteristics, the rights and the human condition of the offenders. (Borlan, 2013)

*The principle of humanism of criminal law* emerged and was established in this context. This principle requires that "the entire criminal regulation should take into account the fundamental interest of the individual, should consider the fact that the offender is a human being, who has his rights, and should also consider the necessity of ensuring the conditions for the accomplishment of each one’s personality” (Bulai, 2011).
2. The principle of humanism reflected in consecrating alternative legal ways of punishment without execution

One of the expressions of the humanism principles of criminal law and of the individualization of punishment consists in the attempt to find alternative modalities to execution of imprisonment in the penitentiary environment. Imprisonment produces only apparent advantages, the disadvantages and drawbacks being numerous, affecting not only the condemned person, but the society as well; sometimes, this punishment has long-term negative consequences that are difficultly evaluated and even harder to remedy.

The most obvious drawbacks, on the one hand, for the state and the society undoubtedly, consist in considerable quantum of expenditure for the organization and function of the penitentiary system, along with everything this system involves, expenditure whose only certain finality consists in nothing but the isolation of the offender for a specific period of time. The correction of the offender’s behaviour, the example it may provide for others represent the preventive role of the punishment, since these are only desiderata, being outside any certainties or guarantees.

On the other hand, regarding the person of the offender, the major drawback consists in the violation of one of the fundamental rights, the right to freedom, thus damaging one of the essential attributes of the human condition, that of self-determination, of expressions of free will, and implicitly diminishing the human potential. Furthermore, the statistics regarding this area highlight the fact that only a low percentage of those that have been sentenced to imprisonment actually correct their behaviour; on the contrary, sometimes, staying in the prison environment together with other convicts induces even an aggravation of criminal tendencies and it increases the risk of repetition of criminal behaviour after release from prison.

In Romanian criminal law, the first institution of individualization which involved non-fulfilment of punishment was provided in art. 65 of the Criminal Code of 1936 under the heading “Suspension of Punishment”. Therefore, the suspended sentence institution has been recognized and established in the Romanian criminal law for almost a century, with subsequent modifications and amendments, being widely applied in legal practice.

3. The renunciation to the penalty enforcement and the deferment of penalty – new forms of judicial individualization

The two new institutions, currently consecrated by the New Criminal Code (Law no. 286/2009), are renunciation to the penalty enforcement, regulated by art. 80-82, or delay in the penalty enforcement, regulated by art. 83-90 of the New
Criminal Code, institutions having French-German origin, designed to replace the application of art. 18\(^1\) of the previous Criminal Code – the first, and the conditional delaying of the penalty enforcement provided by art. 81 of the same previous criminal code - the second institution.

**Renunciation to the penalty enforcement** means that the Court should not even proceed in establishing a penalty for the committed offence brought to justice, if this offence is considered less severe by the Court, taking into account the nature and the gravity of the consequences, as well as if the Court specifies that “according to the delinquent’s nature, his behavior prior to the committing of the crime, his efforts in the removal or mitigation of crime’s consequences, as well as according to his rehabilitation possibilities, a penalty application would be inappropriate because of the consequences it might have upon this person”.

**Delaying the penalty enforcement** - the second newly introduced institution - gives the court the freedom to set a penalty for the person accused of committing a crime and sent to trial, but to delay its application for a surveillance term of 2 years, during which it is examined the re-socialization capacity of the offender, by implementing measures of surveillance and obligations whose monitoring is entrusted to the probation service.

So, delaying the penalty enforcement supposes the setting of a penalty for the person found guilty of a felony, but without disposing the sanction application, in this case the Court postponing the penalty enforcement and thus giving the offender the chance to prove his understanding the educational role of the criminal process even in the absence of a conviction. (Borlan, 2014)

In consideration of these effects, the delaying the penalty enforcement was characterized as "the antechamber of renouncing the enforcement of the penalty" (Rasnita, 2014), or as a real sword of Damocles hanging over the offender during the surveillance period. (Rasnita, 2014).

The introduction of the institution in the French Criminal Code by Law no. 75-624 of 11 July 1975 was followed by a Resolution adopted in 1976 by the Committee of Ministers of the Council of Europe, through which the governments of Member States were invited to consider the opportunity of implementing similar measures in national legislation. In this context, it is to be noted that the newly introduced institution of delaying the penalty enforcement complies with the requirements of the Council of Europe Recommendation (92) 16 on the European rules on community sanctions and measures. (Rasnita, 2014)

**II. Conditions under which the two new judicial institutions of individualization of penalties can be disposed**

The conditions under which the two new judicial institutions of individualization of penalties can be disposed concern, on the one hand, the gravity of the offense committed by the accused person, gravity made obvious
both by the general limits of the penalty provided by the law for the offense in question and by the actual amount of the penalty set by the court.

On the other hand, the conditions of application of the two institutions have also taken into account the offender, the person, on issues such as his/her lack of grave criminal history or his/her willingness to provide free community service – in the case of delaying penalty enforcement.

One of the most important conditions for the application of the two new institutions, regarding the offender, and that extensively reflect the application of the principle of judicial individualization of penalty and the principle of humanism of criminal law is the condition that the court is to appreciate if the enforcement of a penalty, the immediate enforcement of a penalty, respectively, is unnecessary.

This appreciation is made, as required by the criminal law, according to a number of landmarks, such as: the person of the offender, the conduct prior to committing the offense, his/her efforts to remove or mitigate the consequences of the offense and his/her possibilities for redress.

In the Romanian doctrine it is believed that the express establishment in the legal text of the landmarks depending on which one appreciates the opportunity to apply these measures of judicial individualization of penalty is auspicious, and that this does not represent in any way a restriction of the freedom of the court to form its own conviction on the possibility of the offender to right his/her conduct without the effective execution of the penalty. The express provision of these milestones however binds the court to motivate its decisions of enforcing the measures of individualization of penalty, by precisely indicating those circumstances which its conviction was based upon. (Rasnita, 2014)

We believe that the appreciation of the court on the person of the offender, that can be achieved based on the elements set forth in art. 74 para. (1) letter g), namely: education, age, health, family and social situation, represents the actual application of the principle of humanism, which requires, as stated in the introduction, taking into consideration the human condition to the offender.

The fact that the offender is employed and the sole provider of the family can be a sufficient basis for assessing the appropriateness of applying such a measure of judicial individualization of penalty.

Regarding the conduct prior to committing the offense, although apparently this refers primarily to the criminal record, it has been showed in the doctrine that it should also be taken into consideration the misdemeanors or the civil offenses committed in the past, as well as, as shown in the case law, the offender’s attitude in human relationships, and other elements that can help better outline his/her personality considering his/her conduct in society, the
correct attitude towards his/her family, the labour relations, and the entire context of the social relations in general. (Rasnita, 2014).

4. The reason for introducing these new institutions of legal individualization of the penalties

We assess that the reason for introducing the two new institutions is the considerably increased negative effect of sentence ruling over some of the offenders’ conscience, so that the intimidating and reparatory effect upon the behaviour can be obtained without the sentencing of a conviction, i.e. without setting and enforcing the penalty, even when the execution of the sentence might be suspended.

Therefore, both in the case of renunciation to the penalty enforcement and the delaying of the penalty enforcement, it is the opportuneness principle that operates, in the sense that the Court takes into consideration the possible negative effects of a conviction sentence – fact that always implies the convict's subjection to the social opprobrium. This situation might have a negative impact on the convict's personality and behaviour, an impact that could result more visible and stronger than the possible positive effects obtained through conviction. (Borlan, 2014)

In other words, the Court will use the two instruments of penalty judicial individualization when it assesses that the non-conviction of the offender might have more beneficial effects on him/her as well as on the society, than it would the application of the “convict” stigma. (Borlan, 2014)

Likewise, one must also take into account the fact that the aim of these institutions of penalty judicial individualization, which provide alternatives to the restriction of personal freedom, is not other than the general scope of the penalty, supporting the achievement of this very scope. (Rasnita, 2014)

Since nowadays the scope of the penalty has ceased to be that of “destroying” the offender, the restriction of personal freedom is not, in its turn, considered anymore the only way to correct a person’s behaviour and make him/her aware of the seriousness of the committed offense and its consequences, as well as of the benefits of lawful conduct. (Borlan, 2014)

5. Conclusions

Since statistics show that most offenders appreciate the vote of confidence given to them by the court and comply with the conditions of the delaying of penalty enforcement, so that only a small part of the decisions to delay get revoked, doctrine appreciates that “the application of two new institutions of judicial individualization of penalty - renunciation to the penalty enforcement and delaying penalty enforcement - will be more favourable to the
process of reintegration and re-socialization of the offender, than the conditional suspension of the penalty, which involves the condemning of the offender.” (Rasnita, 2014)

In our opinion, the enforcement of these instruments of judicial individualization of the criminal sanction, that signifies in fact granting „a second chance” helps the offender to be aware of the risks of offence, to value such chance by the Court and implicitly to become more responsible for his future behaviour, by refraining himself from committing other offences and, thus, to fulfill the preventive purpose of the criminal trial.

Consecrating these two new institutions of judiciary individualization signifies a real evolution in understanding and fulfilling the principle of humanism of criminal law and that of the opportuneness of punishment, because it reflects in fact the acception of the revolutionary idea that applying a punishment and, consequently the qualification of “convicted person” is not always necessary, and that the purpose of penalty to obtain the repairing of the behaviour of the delinquent and to prevent committing other offences in the future can also be met without the convict’s sentencing.

Acknowledgment

"This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013”.

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