

## ALTERNATIVE DETENTION PUNISHMENTS IN ROMANIAN CRIMINAL LAW

Ioan GÂRBULEȚ\*

**ABSTRACT:** *At present, the alternative punishments to the jail punishment are extremely limited in options and they are inappropriate for the present social development, the new Criminal Code being very hesitant in this matter, and therefore, it is necessary to consider the introduction in our legislation of other alternative criminal sanctions to the jail punishment - electronic surveillance, partial imprisonment in its all various forms or work for community benefit, punishments successfully used in U.S.A. and other European countries.*

**KEYWORDS:** *alternative punishments, jail punishment, trial court, punishment individualization.*

**JEL CLASSIFICATION:** *K 14.*

Beginning as early as the antiquity, great thinkers have asked themselves questions regarding the right to punish, more specifically about the foundation of this right. What is it that gives the person that judges a crime, be that person a judge, a king, or a jury, the right to apply a punishment to his fellow creatures that commit harm to the society?

Over the passage of time a series of theories concerning the right to punish and its foundation have been formulated.

Therefore, some thinkers (Rousseau, Voltaire, Beccaria) have argued that the origin of the right to punish lies in the social contract. This theory, when applied to the criminal law, is based on the idea that society exercises the right to punish by dint of a mandate given by its members, presented under three aspects. According to the first point of view, the right to punish is a right to defense that belongs to the individuals and that they have given up at the moment of their entrance in the society; under the second aspect, the right to punish constitutes the natural right of the individuals to apply a punishment to the aggressors, a right that they, by agreeing to live in a society, have transmitted to the society itself; according to the third point of view, by becoming a part of the society the individuals not only have they yielded their natural right of defense and to apply a punishment to the society but, even more, they have given it the right to punish them in case they were to brake the laws of the association established through the social pact<sup>1</sup>.

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\* President of the Criminal Section – Court of Appeals Tîrgu-Mureş, Romania.

<sup>1</sup> N.T.Buzea, “Filosofia dreptului penal”, Iaşi, 1933, p. 330.

Regarding the foundation of the right to punish two fundamental conceptions exist. The first one argues that the right to punish is based on the expiation or absolute justice idea. A crime is a bad-doing that needs to be expiated for it is rightful, just that the one that has caused a harm to receive the deserved retribution. The punishment is applied in order to punish, therefore for the crime committed and not for the prevention of similar crimes from being perpetrated; even if this preventive result appears, it represents an indirect outcome of the punishment and beyond the scope of the criminal law. In other words, the punishment is a purpose in itself. Once applied and carried out its purpose is fulfilled: bad has been reattributed with bad and no other result is desired or pursued. Pitagora considered that due to the fact that the crime ravages social harmony a punishment that would equal the harm done must be opposed to it. Medieval canonic law considered the punishment as a sort of expiation – not only as a sacrifice, physical suffering but also as a salvation, a spiritual experience, a penance<sup>2</sup>.

According to the second theory, the right to punish is based on the concept of social utility. The punishment is applied not because a crime has been committed, so not for expiation, but to prevent further crimes in the future; thus, it represents a measure taken by the society for its own protection and it is justified by its utility and necessity. Platon argued that the punishment is not applied due to the common error committed, but to prevent, by power of example, future crimes from being committed. According to Aristotel, the foundation of the punishment lies in a unrelenting social necessity, due to the reality that the crowd abstains from braking the law only because of the threat created by the criminal law. Cicero expressly declared that the foundation of any punishment is the interest of the state, and Seneca recognized a single purpose to the punishment: the assurance of public security. The old French law thinkers – Beaumanoir, Pierre Ayrault, Jean Boutilier – considered that the main purpose of the punishment is the example, and Rousseau argued that the punishment is necessary for the conservation of the state against those that, by violating the social pact, take a place outside society and become their enemies, while Beccaria thought that the foundation of punishment is the common gain<sup>3</sup>.

Along time, according to the level of society development, the punishment system has developed and evolved. Until the XVIII<sup>th</sup> century bodily punishments prevailed. The death punishment, under its diversity of shapes – hanging, beheading, wheel hauling, impaling, whip slapping in public – was often applied in a totally discretionary manner and according to the social class of origin of the offender.

Towards the end of the XVIII<sup>th</sup> century and the beginning of the XIX<sup>th</sup> century criminal law goes through a process of humanization under the influence of the Enlightenment thinkers (Montesquieu, J.J. Rousseau, C. Beccaria), and thus the bodily punishments are replaced with liberty depriving punishments and prison begins to be considered as a standard of punishment and will therefore represent, with its different means of execution, the institution around which the entire criminal punishing system in that century will centre<sup>4</sup>.

At the end of the XIX<sup>th</sup> century and the beginning of the XX<sup>th</sup> century positive criminology comes into being (Cesare Lombroso, Enrico Ferri, Raffaele Garofalo) and the

<sup>2</sup> V. Papadopol "Studiul introductiv la C. Beccaria. Despre infracțiuni și pedepse", Editura Științifică, București, 1965, p. XLI.

<sup>3</sup> Ibidem, p. XLII – XLVIII.

<sup>4</sup> L. Coraș, "Sancțiuni penale alternative la pedeapsa închisorii", Editura C.H.Beck, București, 2009, p.35.

representatives of this new ideology plead for the replacement of punishments with criminal substitutes, measures deprived of any moral tint and unconnected with the guilt notion of the offender<sup>5</sup>.

Under the influence of these ideas in a part of the European states as well as in the U.S.A. new types of punishments were introduced, punishments alternative to the prison punishment: probation (suspension of punishment passing) in the Anglo-Saxon system of law and the suspension of punishment execution in the rest of the European states.

In the middle of the XX<sup>th</sup> century, under the influence of new criminological and legal-criminal ideologies, in particular the theory of social defense (F. Gramatica, Marc Ancel), together with some of the punishment execution judicial individualization institutions (conditioned suspension of the punishment, suspension of sentence passing, punishment exemption, punishment execution at the working place) a series of alternatives to the imprisonment punishment were regulated – real mechanisms able to lead to the perfecting of the punishment individualization process.

Due to the over-population of prisons, starting with the 1980's – 1990's new solutions with respect to the application of liberty privative punishment were looked for and thus intermediate sanctions between supervision and punishment emerged, for which the main instruments are intensive supervision, house arrest, community service, night or day time detention, incarceration for short periods of time<sup>6</sup>.

In our country, the Criminal Code presently in force regulates only two main criminal sanctions: liberty privation under two possibilities (life detention and imprisonment from 15 days to 30 years) and fine, alternative criminal sanctions being related only to the punishment individualization (conditioned suspension of punishment execution, suspension of punishment execution under supervision and punishment execution at the working place).

In our opinion, these criminal sanctions do not answer to the contemporary society's needs, being obsolete and in most of the cases inefficient. In most cases, the judge can apply only an imprisonment punishment and does not have at his disposal any other sanctions from which to choose the one that is most appropriate in accordance with the gravity of the crime committed and with the offender's personality.

Enforcing a jail sentence with imprisonment does not solve almost at all the reeducation problems claimed by the law, for it is well known that the penitentiary regime is not even close to representing a reeducation factor for the inmates, being more of a criminal skills development school.

On the other hand, we must take in consideration the failure to properly regulate punishment individualization, for the judge has at his disposal a wide range of sanctions, and more so because there has not been a success in unifying the judiciary practice in this matter, and, not rarely, trial courts apply completely disproportionate punishments for the same type of felony act with the same personal circumstances of the offender. For example, recently a recidivist accused was sentenced by the Reghin trial court to 5 years imprisonment for a bicycle theft, the damage being covered by returning the bicycle, while in another case a similar recidivist accused was sentenced by Miercurea Niraj trial court to 1 year and 6 months imprisonment for a number of 30 thefts of vehicles, the caused damage being just

<sup>5</sup> V. Pașcu, "Măsurile de siguranță. Sancțiuni penale", p. 18.

<sup>6</sup> L. Coraș, op. cit., p.40-41.

partially recovered. Overlooking to challenge the sentence in the legal period of time, in the first case, and the sentence being challenged only by the accused and the attorney remaining passive, in the second case, those sentences lost the possibility to be rectified.

When inmates with previous similar experiences meet each other in the jail premises, it is not a surprise that they are seeking state institutions or media attention to express their injustice and to gain reparation.

Therefore, to avoid eventually absurd situations in legal practice, we consider that it is absolutely necessary to diversify the applicable punishments and to regulate more strictly the judiciary individualization of punishments. For instance, it is unacceptable that in cases of heavy drugs, an accused who commercialized 4 doses of heroin to be sentenced to 10 years imprisonment while another accused that has basically the same personal circumstances, commercializing 4000 ecstasy pills get a 3 years jail sentence suspended on probation.

The new Criminal Code makes an important step regarding the enforcement of alternative punishments instead of jail punishments, but however not sufficient, the punishments to be enforced being too much diversified, searching in the mean time solutions to replace the imprisonment when it is not required.

Therefore, the main imprisonment punishments remain the same but are more accurately regulated according to the new Criminal Code, and regarding the fine punishment, its value is established based on the fine days system, and the Court will pronounce the number of fine days according to the general individualization criterias; when the convict maliciously doesn't fulfill, either completely or partially, the fine punishment the number of fine days will be replaced in accordance with a number of imprisonment days.

The new Criminal Code brings two new important institutions to help punishment individualization: renunciation to enforce the punishment and punishment adjournment.

Thus, when the committed felony has a reduced sternness, taking into consideration the perpetrators' person and his behavior prior to the felony, his efforts made in order to cover or diminish the prejudice caused, as well as the personal possibilities to straighten, the Court according to art. 80 of the new Criminal Code can decide to renounce to enforce a punishment, considering its influences over the offenders' person.

The punishment adjournment can be ordered when the established punishment for the felony is fine or a maximum of two years imprisonment, or in case of multiple felonies, when the perpetrator has not been previously convicted to jail punishment and he agrees to do work for the community benefit, situation when, after taking into consideration his behavior prior to the felony, the efforts made to cover or diminish the prejudice caused as well as the personal possibilities to straighten, the Court can decide that it is not necessary to enforce a punishment but rather to monitor his behavior for a specific period of time.

However, despite the obvious progresses made in this field, we estimate the alternative criminal punishments instead of jail punishments provided by the new Criminal Code as being insufficient and not proven to be a remedy, on a large scale, to the negative consequences of imprisonment.

We consider to be more appropriate, especially when a new Criminal Code and Criminal Procedure Code are issued, having a more diversified area of sanctions and to offering the judge the possibility to choose a right punishment according to the sternness of the felony,

perpetrator, his behavior prior to the felony, the efforts made to cover or to diminish the prejudice caused, chances to straighten, the environment from where he emerges, etc.

Therefore, we believe that *the punishment execution under electronic surveillance* would have been suitable for introduction in our legislation, which is a way to serve the imprisonment punishment outside the penitentiary premises, a measure successfully applied in U.S.A, England and France.

Also, it could have been appropriate to regulate the *partial imprisonment* institution, in which the inmates' obligation is to spend a specific number of hours in the penitentiary premises and the rest of the time to be free, as it is regulated by the Spanish, Belgian, Italian, French and Portuguese legislation.

Another way of serving a punishment could have been *work for the community benefit*, present from the early 90's in the northern countries subsequently spreading later towards other European countries.

In conclusion, we estimate that when taking into consideration the magnitude of social development, the present alternative criminal sanctions to jail punishment are significantly reduced as options and are completely inappropriate, the steps made by the new Criminal Code in this matter being rather hesitating, therefore, it is of the outmost importance to introduce in our legislation those alternative criminal sanctions that have been successfully used in the U.S.A. and western Europe.