THE ASSESSMENT OF THE SOCIAL DANGER OF THE CONCRETE ACT. THE RENUNCIATION TO APPLY A PUNITIVE SANCTION

Doctor of Law Daniela Iuliana LĂMĂŞANU
Associate lecturer at the "Stefan cel Mare" University of Suceava, Romania
Prosecutor - Legal Department, Prosecutor of the Court of Appeal Suceava, Romania
lamasanud@yahoo.com

Abstract

The concept of renunciation to bring a punitive sanction is made to remove the art. 18^1 of the current Criminal Code dispositions and improves a no penalty cause with an optional character which can be applied only by the court of justice, but only after the dispositions from art. 80 of the new Criminal Code have been verified and executed. The court of justice will give a verdict that contains the renunciation to bring a punitive sanction and it will bring only a warning. These means that there were shown the facts that made possible the renunciation to bring a punitive sanction and the offender is warned to have an appropriate behaviour in the future and what are the consequences of committing another crime.

Keywords: the renunciation to bring a punitive sanction, warning, art. 80 from the new Criminal Code.

JEL Classification: K 14 – Criminal Law

INTRODUCTION

Each act under the rule of incrimination has a certain degree of social danger. This is the abstract social danger of that act and it is reflected in the limits of the punishment with which the legislator intended to sanction the perpetration of such deeds. The abstract social danger is different from the concrete social danger of the concrete act, and is reflected by the punishment imposed to the offender by the court. Thus, the application of the criminal sanction is in a necessary relationship with the determination of the degree of concrete social danger of the crime and the decision not to apply a criminal sanction requires a low degree of social danger of the act and of the perpetrator.

THE CONCEPT OF SPECIFIC SOCIAL DANGER OF THE ACT

The concept of socially dangerous act has been used in criminal law doctrine and in the law of East European countries and it is a requirement for the act under criminal law (an essential feature of the crime) (1) to provide such a degree of danger for the criminal law to be justified. Thus, the social danger refers to the harm brought to social values protected by criminal law and not to the legal order (2) as a whole, the social danger of the criminal acts being different from the social danger which is inherent in any illegal acts. The first category of facts presents a greater severity than those which consist in the violation of extra-criminal laws and the criminal social danger (the substantial illicit) may have some relative interdependence from the formal criminal illicit both in *bonam partem* (in the subject's favour), when the deed, although formally prescribed by law no longer provides the subsequent social danger, and in *malam partem* (against the subject) when the act would justify its penalizing by resemblance to an act punished by the law. Therefore, in the laws which lie on this concept, it would be permissible to introduce appropriate provisions to allow both the analogy of the incrimination and the removal of the criminal nature of concrete facts, which, until the solution of the cause, ceased to be a criminal social danger.(3) In this view (which was also adopted by the current Criminal Code), the socially dangerous nature of the act is a characteristic feature of the concept of infringement (4), a feature which must be included in each specific infringement. Thus, the judicial body must always establish not only the objective existence of the act, but also that it represents the social danger of an infringement, with a full match between the social risk assessed by the legislature at the time of incrimination and that of the considered facts. Therefore, the lack of social danger as an essential feature of the infringement

leads to the removal of the criminal nature of the act and it has a double consequence: firstly, the social danger of an action under the criminal law is removed, according to the law, when there are certain situations, states, cases or circumstances, explicitly or implicitly permitted by the law (5) or when the act is not an infringement if committed by fault or when attempting an infringement is not punishable. On the other hand, the lack of the concrete social danger of the act draws the absence of infringement. The absence of concrete social threat leads to the conclusion that the criminal punishment of the subject appears as unfounded and contrary to some fundamental principles of criminal law and criminal policy.

THE CRIMINAL LEGALITY AND THE LACK OF SPECIFIC SOCIAL DANGER OF THE ACT

In law systems based on strict observance of the principle of legality of incrimination and of the principle of separation of state powers, the contradiction between the social danger generally posed by the act under the criminal law and the lack in the act committed, of the degree of social danger of an infringement, that is between the criminal social danger of the act considered in its specificity and the lack of the social danger of the fact has been resolved differently from one law to another. In some countries the prosecutor was granted the right not to start the criminal proceedings when the act committed does not actually have the social danger of an infringement, being clearly meaningless as regards the legal and criminal fields. In other legislations, the court was granted the freedom to apply to the subject a minimum criminal penalty or not to apply any punishment, if it does not appear as necessary (6). This solution has the benefit that it is perfectly consistent with the principle of the legality of incrimination and with the separation of state powers. Incriminating an action as an infringement is the work of the legislator who has in view not a specific fact, but a category of such facts in their specificity, present a criminal social danger, justifying the incrimination and the criminal punishment. In exceptional cases, when the material fact does not have this nature, the reaction of the judicial bodies must be different (the renunciation to the criminal prosecution or to the punishment), without questioning the criminal infringement as an infringement under its typical configuration.

THE LEGISLATIVE SOLUTION IN TERMS OF CRIMINAL LAW REFORM

By adopting the new Criminal Code, the Romanian legislator returned to the old concept of strict legality and the principle of separation of state powers, the social danger of the act not constituting anymore a feature of the infringement (7), but only a criterion of individualization of punishment. To solve the contradiction that can arise in case of having committed minor acts without infringing the penal legality and the separation of state powers, the new Criminal Code (8) regulates **the institution of renunciation to apply a punitive sanction** (9)**.**

Being the exclusive attribute of the court, the renunciation to apply a punishment may be granted on the one hand, only if some conditions are met regarding the act and the offender and on the other hand, only if we do not establish the accomplishment of the negative conditions expressly set by the legislator.

A. Conditions regarding the act

a. *The infringement has a reduced gravity, given the nature and extent of produced consequences, the means employed, the manner and circumstances in which it was committed, the reason and purpose.* To meet this requirement, the court must examine several criteria set by the legislator in the art. 80 paragraph 1 CN pen, namely:

- *The nature and extent of the consequences*. The verification has to note the existence of damages caused by committing the infringement and their scope. If the extent of the material or moral damage is relatively low this criterion is considered to be met.

- *The means used by the offender to commit the infringement*. The court must examine the tools that were used for committing the infringement, the dangerousness of the act being higher if

suitable instruments were used to produce serious consequences or which involve a certain "specialization" of the offender to commit a particular type of infringements - for example, applying a shot with a hard object even if a vital area was not targeted; using appropriate keys to open the locks on doors of injured parties.

- *The method and circumstances in which the infringement was committed*. By the way of committing the infringement we understand the process used by the offender to achieve its goal, that is the means in which he acted. The circumstances where the act was committed are the circumstances in which it was committed - for example, in a public place, at night, during a disaster, etc.

The court will verify if the method used by the offender to commit the infringement reflects or not a particular danger or if the act was committed in circumstances of time or place which render it a more serious nature.

- *The reason and purpose* reflect the subjective position of the offender in relation to the infringement and the effects produced. The reason represents the motive which led the perpetrator to commit the act and the goal is the finality sought by the offender when committing the infringement, his objective.

The verification of these criteria requires the court's consideration of the offender's motivation and the objective pursued by the commission of this infringement.

B. Conditions concerning the offender

- *The person of the offender* is a criterion which requires verification by the court of his degree of integration in society, in other words, whether he has or not a job, whether he is married, he has children or persons he maintains, his education level, etc.

- The criterion of *the previous behaviour* involves the analysis of the offender's behaviour before committing the infringement, if he has previously committed infringements or other antisocial acts.

- *The offender's attitude after committing the infringement* involves the court's verification of the efforts he has made to eliminate or reduce the consequences of his acts. For example, the recovery of the damage caused by committing the act, the transportation of the victim to hospital, the payment of the hospital expenses, etc.

- *The options for correction of the offender* are a criterion under which the court considers whether without the imposition of a punishment the offender will commit other acts in the future. In other words, the court must be convinced that the mere existence of criminal proceedings started against the offender is sufficient to induce him to refrain in future from committing further infringements.

After considering the criteria listed, the court considers whether *applying a penalty in charge of the offender, depending on the consequences that it would have on him.* Thus, we have in view the impact of penalty on the offender, either in socio-economic terms (risk of loss of employment generated by the conviction, the event of dissolution of marriage as a result of conviction, etc.) or in terms of his reputation or his health status.

C. Negative conditions of the renunciation to apply a punishment

Besides the positive conditions to be met by the offender and the infringement for the punishment to be renounced to, the legislator has also provided some negative conditions, which point out the impossibility of applying the institution examined by the court.

a. The offender has previously undergone a conviction, unless the situations in which the act was de-criminated or amnestied, the rehabilitation has undergone or the rehabilitation period has expired.

If the offender has been previously convicted, the court may not order the renunciation to apply a punitive sanction as long as he persisted in the criminal behaviour. It is not relevant whether the offender has previously been convicted to imprisonment or to fine penalty or whether the execution of the previous sentence was suspended. The nature of the infringement for which the previous conviction was pronounced - intentionally or by fault is also irrelevant.

In the changing realities of life it is possible for a given deed, which was at one time deemed as infringement, to cease to have a particular gravity for social relations and therefore to be no longer necessary to impose a punishment. Naturally, sooner or later, this act is to be de-criminated, removed from the sphere of the criminal illicit. The de-crimination is made either expressly, by a provision that abrogates the criminalization or the current law is replaced by another law which doesn't state anymore that act as an infringement. In the case of the passed convictions, the decriminalization removes all the criminal consequences of the committed act the penalties imposed were entirely executed until the entry into force of the exculpatory law. Thus, that conviction is not anymore a criminal antecedent which influences the subsequent criminal treatment of the convicted. In this regard, the decriminalization (*abolitio criminis*) is equivalent to a restoration of the ex-convicted, who has since the entry into force of the exculpatory law, all the rights, without any disability or forfeiture resulting from the conviction (10). Therefore, a previous conviction for an infringement that was later de-criminated may not be an impediment for the court to order the renunciation to apply a penalty for an infringement which followed after the de-criminated one.

As clemency of the legislative authority (Parliament), the amnesty removes the criminal liability for infringements committed until the date of emergence of the act of amnesty. The amnesty is dictated by reasons of penal policy, being correlated with certain socio-political situations that could influence the phenomenon of infringements in a period which marks important moments in the evolution of the society. Being a cause that removes the criminal consequences, the liability and punishment, the amnesty does not remove the infringement nature and it cannot be equated with the decriminalization of the act because it remains under investigation and the acts committed after the amnesty act constitute infringements and attract the criminal liability (11). As long as the legislator himself has "forgotten" the infringement, removing its criminal consequences, it cannot constitute a criminal antecedent to prevent the court to renounce to the imposition of a punishment for a subsequent infringement.

The rehabilitation intervention operates when there really is rehabilitation, that is in the case of imprisonment not exceeding 2 years or of imprisonment whose the execution was suspended under supervision if within 3 years the convicted has not committed any infringement (Art. 165 of the new Criminal Code). The expiry of the period of rehabilitation occurs after the interval of time provided by law in the case of the judicial rehabilitation (Art. 166 new Criminal Code). Being an extinctive cause of the consequences of conviction (12), with effects *in personam* and exclusively future consequences, the rehabilitation once occurred, it determines the cease of the nature of criminal antecedent of the conviction, the offender being regarded as such a primary offender, so that the court which judges a fact ulterior to the rehabilitation or to the of the period of judicial rehabilitation, may dispose the renunciation to apply the penalty.

b. *For the same offender has been disposed the renunciation to apply the punishment in the last two years preceding the date of the commission of the infringement.* If the offender has benefited from the removal of penalty 2 years before committing the infringement for which he is judged, the court may not order anymore the removal of penalty, because it proved to be ineffective in relation to the offender who persists in the criminal behaviour, being necessary to impose a punishment.

c. *The offender has evaded prosecution or judgement or attempted thwarting the finding of truth or identifying and criminally accounting the author or the participants.*

By avoiding the prosecution, the offender evades to appear before the judicial bodies.

Trying to thwart the truth is any action the offender does to prevent the truth from being found out - for example, influencing the witnesses or victims, destroying the evidences, the negative attitude in relation to the deed, its non-recognition even if there is obvious evidence of the guilt, the indication of variants of committing the crime to conduct the judicial organs on a wrong direction of investigation, etc.

In the case in which the deed is committed in participation, the condition is satisfied if one of the participants prevents the identification of the other participants or of the author or their criminal accountability.

d. *The penalty provided by law for the infringement committed is the imprisonment for more than 3 years*. This condition is met in the case of having committed serious infringements reflected in special limits of punishment, if the maximum penalty is imprisonment for 3 years or more or if the act is punishable by life imprisonment (eg, crimes against life, injuries, collisions or injuries causing death, trafficking of persons or minors, unlawful detention, infringements against sexual freedom and integrity, simple burglary and armed robbery, etc.).

The court must consider all the criteria listed by the legislator for the removal of the penalty to be possible. Meeting a single negative condition constitutes an absolute obstacle for the application of this institution.

If the court is informed with the judgement of various infringements committed by the same person in actual or formal (ideal) competition, for the renunciation to apply the punishment to be possible we must meet the conditions set by the legislator in relation to each concurrent infringement and the existence of a negative condition for an infringement (eg, influencing a witness) draws the inapplicability of the institution even if for the other facts the positive conditions for the allowance are met (Art. 80 paragraph 3 the new Criminal Code). This conclusion emerges from the whole regulation of the institution, the court conviction as regards the offender's dangerousness being the result of the analysis of his all criminal activities included in the act of intimation.

CONCLUSIONS

The renunciation to apply the penalty is a ***faculty*** for the court and even if we would check the compliance with the criteria set by the legislator for passing this solution, however, if they deem it necessary to impose a penalty on the offender, the court will dispose his conviction.

The renunciation to apply the penalty only requires the court to renounce to impose a principal, accessory or complementary penalty on the offender. The court will apply on the offender a warning that consists in actually presenting the reasons that led to renounce to the penalty and warning the offender on his future conduct and on the consequences he risks if he will commit more infringements. A single warning will be applied even if the court was informed the offender committed various infringements.

If there is a state of danger the removal of which is necessary to prevent the perpetration of other criminal acts provided by the criminal law, the court will also be able, by the same decision, to dispose the application of safeguards to the offender. However, the court may also order him to pay civil damages as the renunciation to apply the penalty has no effect on the performance of safety measures and the civil obligations imposed by the sentence (Article 82 the new Criminal Code).

Therefore, by the decision it will pass, the court finds the existence of the infringement and the culpability of the offender but will apply to the subject a warning and, if necessary, a safety measure, and may require the defendant to pay civil damages. The fact that the court does not impose a sanction is without prejudice to the criminal nature of the act. It is an infringement, it is referred to by the criminal law, it has been committed with guilt in the form required by the incriminating rule, it is not justified and it is attributable to the person who committed it. From this perspective, the institution of renunciation to apply the penalty appears as a question of un-punishment, with general nature and whose implementation is left by the legislator to the discretion of the court informed with the judgement of the deed.

The person for whom was ordered the renunciation to apply the penalty is not subject to any forfeiture, ban or disability that might result from the infringement (Art. 82 paragraph 1 the new Criminal Code), these being perpetual or long-term criminal or extra-criminal legal consequences, arising from the very fact of conviction.

Therefore, it can be concluded that, by setting the renunciation to apply the penalty a progress was made towards reforming the system of individualization of criminal responsibility but also a crystallization of the legal-criminal concept regarding both the concept of infringement and the reduced dangerousness of the fact itself and the person who committed it.

ENDNOTES:

(1) George Antoniu in Codul penal comentat şi adnotat. Partea generală , Ed. Ştiinţifică, Bucharest, 1972, p. 91; Costică Bulai, Manual de drept penal, Ed. All, Bucharest, 1996, p. 152; Constantin Mitrache, Cristian Mitrache, Drept penal român. Partea generală, Ed. Casa de editură şi presă „Şansa", Bucharest, 2002, p.86

(2)Vintila Dongoroz, Drept penal, Bucharest, 1939, p. 8 - the author defines the judicial order as the regulation of the relationship life with the legal rules.

(3) George Antoniu, Vinovăţia penală, the second edition, Ed. Academiei Române, Bucharest, 2002, p. 65

(4) Ibidem

(5) Vintila Dongoroz and the collective, Explicaţii teoretice ale Codului penal român. Partea generală, vol I, Ed RSR Academy, 1969, p. 342 - the author shows that fall into this category the cases in which the law provides for both the infringement the threat of which is removed and the reason of removal of this threat (eg, the preventive arrest, the house search or the implied restriction of rights by inherent acts of certain activities) or occupations recognized by law, acts which by their nature present a social danger and are prescribed by law - such as: personal injury caused by engaging in sports, surgical operations etc.).

(6) For example, Art. 2.12 of the American Model Penal Code devotes a good solution in this respect, in the case of infringements of minimum importance. According to the text, the court may renounce to the judgement depending on the type of behaviour complained and on the circumstances of the case, considers the offender's manifestation was in the traditionally accepted boundaries of tolerance and is not contrary to the aim pursued by the legislator, it does not gravely violate the interests of victims, and whether the fact has not caused an actual harm that the law sought to prevent or caused it to an insignificant level or whether it has been committed under such circumstances that it is not reasonable to believe that the legislator considered to prohibit such acts. (Model Penal Code and Commentaries, Part I / 1, Philadelphia, P.A. The American Law Institute, 1985, p. 399-400). The new French Penal Code provides in Art. 132-58, 132-59 the possibility for the court to exempt the offender of any punishment, with a correctional aim, if it is clear that he was re-educated, that the caused damage was repaired and the disturbance resulting from the infringement stopped; paragraph 60 of the German Criminal Code gives the court the possibility to renounce to apply a punishment if it is not more than 1 year of imprisonment, when the consequences of the fact affected the offender to a large extent, so that applying a punishment would appear unnecessary.

(7) According to art. 15 of the new Criminal Code, the infringement is the act under criminal law, committed with guilt, unjustified and attributed to the person who committed it.

(8) Adopted by Law. 286/2009, published in the Official Gazette. no. from 24.07.2009

(9) In the project of the new Criminal Procedure Code has been provided for the prosecutor to be able to renounce to the criminal prosecution. Article 318 of the new Criminal Procedure Code states the applicability of this institution in the case of infringements for which the law provides the fine penalty or imprisonment not exceeding 5 years, the prosecutor being able to renounce to the criminal prosecution when, depending on the offender, on the behaviour he had before committing the infringement, on the factual content, on the manner of committing the infringement, on the purpose of committing it, on the concrete circumstances of the infringement, on the efforts made by the offender to remove or mitigate the consequences of the crime, finds that there is not a public interest in his prosecution.

The renunciation to prosecution can take place only after moving the criminal proceedings and before the notification of the preliminary board.

The prosecutor may order the offender to satisfy one or more of the following requirements:

a) to eliminate the consequences of the criminal act or to repair the damage caused, or to establish with the civil party a way to repair it,

b) to publicly seek apology to the injured party,

c) to perform his maintenance obligations,

d) to perform unpaid community service work, with the consent of the offender, over a period between 30 and 60 days, unless, by reason of health, that person cannot perform the work;

e) to attend a counselling program conducted or supervised by the probation service.

4) If the prosecutor disposes that the defendant has to fulfil the obligations set out in paragraph 3), by order he fixes the time limit by which they are to be met, which can not be longer than 6 months.

(10) [1] C. Bulai, quoted work, p. 131

(11) Idem, p. 328

(12) Viorel Paşca, Ramiro Mancaş, Drept penal. Parte generală, Ed. Universitas Timisiensis, Timişoara, 2002, p. 754

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