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THE PRINCIPLE OF OPPORTUNITY IN THE FORTHCOMING CRIMINAL LEGISLATION

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Abstract:
The concept of giving up the idea of bringing a punitive sanction is made in order to remove the difficulties from art. 18[1] provisions of the Current Criminal Code and improves a no penalti cause with an optional character which can be applied only by the court of justice, but only under the regulations of art. 80 New Criminal Code which have been checked and executed. The court of justice will give a verdict that contains the surrender at sentencing and it will bring only a warning. These means that there were shown the facts that made possible the surrender at sentencing and the deninqent is warned to have an appropriate behaviour in the future and on the consequences of committing further crimes. The dismissal of the charges in a criminal prosecution is a new concept in the new criminal proceedings law in Romania. Regulated in Article 318 of the new Criminal procedure code, this concept refers to the principle of the opportunity of criminal charges. At the same time, the dismissal of the criminal charges is also a more expeditious way of solving the criminal cases being prosecuted. On the other hand, the prosecutor is proffered the competence to check if the case bears any public interest in the criminal charges brought against an individual.

Key words: *the surrender atsentencing , warning, art. 80 from The New Penal Code, criminal prosecution, dismissal of the criminal charges, opportunity of the criminal prosecution, public interest.*

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INTRODUCTION

Since its adoption in 1968, the present criminal code has emphasised the conception of of the Romanian legislator of the time regarding the concept of crime and of the strict legality of criminal law. In the article. 17 of the criminal code the crime is defined as a guity act, which represents a social danger, as provided by the criminal law. If concretely, a committed act interfears with the social values protected by criminal law, the judicial body (the prosecutor or the courts) can appreciate that the act lacks any degree of social danger, the imposed solution being different as the file is either in the phase of criminal prosecution or in that of being tried for a crime (non-initiation of criminal investigation, removal of criminal and acquittal, respectively). In all these cases the act lacks one essential feature of the crime, the social danger, respectively.

This solution is in reality a legal decriminalization of the fact which attracts the violation of the principle of separation of state powers since this is the exclusive duty of the legislator.

On the other hand, the finding of the judiciary that a concrete fact lacks the degree of social danger of a crime leads to a contradiction between the will of the legislator, expressed through the legal rule of incrimination which appreciates that an act is dangerous for the social values provided by law and the sanction imposed.

Under these circumstances, the contemporary legislator had in mind the fact that it is imposed both a reconsideration of the conception of crime and also a reassessment regarding the advisability of criminal action exercised on the wrongdoer of a low gravity act, introducing institutions that work in order to solve the old contradiction.

Further on, we will analyse the concept of social risk and as well as the solutions offered by the upcoming criminal legislation by the consideration of the principle of criminal cunvenience.

SOCIALLY DANGEROUS FACT

In the design of the current criminal legislation, the socially dangerous character of the fact represents a feature of the concept of crime (Antoniu, The Criminal Guilt, 2002, p. 65), a characteristic which must be found in every offence. Thus, the judicial body shall ensure every time not only the objective existence of the offence, but also the fact that it presents the social danger of a crime, and there should always be a balance between the social danger appreciated by the legislator at the time of the incrimination and the concrete fact which is analysed. Therefore, the lack of social danger as an essential feature of the offence, leads to the removal of the criminal nature of the offence and has a double consequence: first, the danger of a fact provided for in the criminal law is removed, according to the law, only under some circumstances, states or cases, explicitly or implicitly admitted by law (Dongoroz and the committee, ***Explanations***, vol. I, 1969, 342) or when the fact does not represent a criminal offence if it is committed with guilt or if the attempt of a crime is not punishable. On the other hand, the lack of the concrete social danger leads to no offence. An absence of the concrete social threat leads to the conclusion that the criminal punishment of the subject appears as a pointless theme and so, contrary to some of the fundamental principles of criminal law and criminal policy.

In the legal systems of law based on the respect for the principle of the legality of the incrimination an on the principle of separation of powers, the contradiction between the social danger generally presented by the fact provided by the criminal law and the absence, in the committed fact, of the degree of social danger of the crime, i.e. between the social danger of the fact considered criminal in its tipology, and the lack of social danger of the concrete fact, has been differntly resolved from one legislation to another. Whether the prosecutor has been granted the right not to start criminal proceedings when the committed fact does not represent a real social danger of a crime, being obviously devoid of criminal significance, whether it has been granted the freedom to the court in which such fact is tried to applly a minimal criminal punishment to the defendant or not to apply any punishment at all if it does not appear as beingnecessary. This solution has the advantage that it is perfectly accorded with the principle of the legality of the incrimination and the separation of powers in the state.

The laws that have adopted such solutions do not include it as a separate, explicit requirement of the existence of the socially dangerous character of the crime, in addition to the need for its elements to overlap with the requirements of the legalpattern. If the actual fact would present a particularly low danger compared to the danger of the offence that was envisaged by the legislator at the time of the incrimination, this could be, as we have shown so far, one cause for the for the reduction of the sanction or even for not imposing a sanction of the fact, without having to make disappear the formal and the substantial illicit (Antoniu, The Criminal Guilt, 2002, 66).

A different solution was adopted in the criminal law of the former socialist countries, first in the Soviet Union and then in other former socialist countries in Europe. This solution is based on the so-called materialist conception about the crime that deems essential for the existence, the infringement of a socially dangerous nature and which has priority in relation to the criminalisation. Therefore, if the fact committed is found that it does not present the concrete social danger of an offence, it does not constitute a criminal offence, despite the provisions of the criminal law. That's why it was provided for in the law that, if the prosecutor or the court finds that the fact does not show the degree of social danger of an offence, these bodies have the right to establish the nonexistence of the offence, despite its provision in the criminal law, and eventually to notify other bodies to bring proceedings for administrative or disciplinary punishment of the wrongdoer (Bulai, ***Textbook***, 1997, 226).

It cannot be denied that the Romanian law generates a certain subjectivity, especially as regards the determination of the criteria that would assess the social danger, in order to specify at what point the fact reaches the danger justifying the existence of an offence or of a non-criminal violation. Even though in the art. 18st of the criminal code some criteria are shown after that one should follow in order to make this assessment, such provisions could only refer to the categories of

items that must be taken in situations, and not to the way in which within each category could be applied and assessed the quantitative differences of the social danger between different specific facts. Therefore, the jurisprudence has been given outstanding solutions that have proved themselves to be unable to eliminate the arbitrary character and the subjectivism of the judicial bodies (The Supreme Court, the criminal decision nr. 1134/1977, in Papadopol, Popovici, *The Repertoire*,1982, 162). Furthermore, it was appreciated (Antoniu, The Criminal Guilt, 2002, 67) that it would not be able to specify exactly in which limits the quantitative differences of the social danger are likely to be used only in the process of *the individualization of the sanction*, and when this distinction must result in the finding of *the lack* of criminal character of the fact.

Moreover, the settlement of the disagreement between the generic social danger of the offence and the social danger specifically by removing the criminal nature of the offence you places the legislator in a genuinely opposite position; either one can take for granted the assessment which is the basis for the legal description and therefore it must be respected, or it is not valid (as long as it may be subsequently amended in relation to the facts that will happen) and then the legal pattern must be removed (Antoniu, The Criminal Guilt, 2002, 66).

The doctrine has shown that the degree of the generic social danger reflected in the limits of the social punishment imposed by the legislator represents an assessment of the social danger of the latter, which, however, is not of an absolute objectivity, being influenced by the political opinion, the political conventions and the political programs of the party which forms the parliamentary majority or by the conclusions of its own doctrine, or from that of other countries (Avrigeanu, The generic social danger..., 1997, 36). The notion of ***the degree of social danger of the offence*** has a complex character that results from a dual perspective: the offencivity of the fact in relation to certain social values and the desirability of its incrimination (1).

This way of conceiving socially dangerous character of the fact is not without shortcomings. Firstly, the judicial body that examines the practical action, including its concrete social danger and it compares it with the legal description, cannot oppose *the generic social danger*, of the action or of the non-action (appreciated by the legislator when he described in the legal pattern) since he cannot substitute himself to the legislation, the legal pattern being imposed with all its features (including the overall assessment of the danger of the action or the omission) unconditionally, the judicial body, (Antoniu, The Criminal Guilt, 2002, 65). He can only respect the legal assessment, so that he could be included in its boundaries, but not to deny it , or to remove it (Antoniu, The Criminal Guilt, 2002, 65). The removal of the obstacle of legal assessment by the judicial body results primarily, from the fact that the legal pattern was established on the basis of the assessment of the danger of some past actions, in order to be taken into account in the assessment of the future facts so that, this pattern cannot be removed when assessing some facts which haven't been considered by the legislator.

Secondly, it follows from the fact that the legislator does not criminalise an act randomly but only those facts which have reached the degree of social danger to justify the intervention of the criminal law. Therefore, the will of the legislator as expressed in the legal pattern is not only *a form* of expression (the legal pattern) but also *some substantial* justification which consists of the socially dangerous nature of the incriminated facts. Therefore, if the actual fact is done after the requirements of the legal pattern, thereby contradicting the will of the legislator as expressed in the norm of incrimination (the formal illicit), it also contradicts the substantial rationale for the will of the legislator (the substantial illicit), expressed in the norm of incrimination (Antoniu, The Criminal Guilt, 2002, 65). For these reasons, most laws do not include, as a special, explicit requirement, the existence of the socially dangerous character of the crime, in addition to the need for its elements to overlap on the requirements of the pattern.

Thirdly, with the adoption of the new criminal Code and the new code of criminal procedure, the Romanian legislator has returned to the old conception of legality and the strict strict principle of the separation of powers in the state, without the social danger of the fact to constitute a feature of the crime (2), but merely a principle of individualization of punishment. In order to resolve the contradiction which may appear in the case of minor offences without the ingringement

of the criminal legality and the separation of powers in the state, the upcoming criminal legislation has introduced two new institutions, namely **the prosecution and the surrender at sentencing.**

THE SURRENDER AT SENTENCING

In the design of the future legislation and criminal procedure law, the prosecution is the gathering of evidence which is required concerning the existence of the crimes, the identification of the persons who have committed an offence and the establishment of their criminal liability, in order to assess whether it is appropriate to provide for the sending to court or not.

The new code of criminal procedure amended the stages and the procedural acts which are carried out and shall be carried out in the course of the prosecution. Thus, if prosecutor is referred to in any of the ways set out by the legislator (formal manner, a complaint, an act concluded by finding another body provided for by law, the appeal of its own motion) and there is no obstacle for the implementation of the action or movement, it has, by order, a prosecution on the fact (in rem). From this point on, we use the evidence required in order to identify the wrongdoer. The person against whom there is reasonable suspicion that he has committed the offence in respect of which the prosecution has acquired a special quality, receives a special quality, that of **suspect**, respectively, which attracts a number of procedural rights similar to the status of the defendant listed in the article. 83.

The criminal proceedings is initiated, compulsorily, durind the prosecution by the public prosecutor, by order, unless there is evidence showing reasonable grounds to believe that a person has committed an offence, and, obviously, if there is no legal obstacle that would lead to a solution ofclassiffication. The criminal proceedings or the indictment represents the making of the procedural act provided for by law, which shall draw up the indictment (prosecution) against a person and afterwards it is initiated the action of the criminal responsibility (Mateut, ***Treaty***, vol. I, 2007, 684).

With regard to the implementation of the criminal action and the exercise thereof in the modern literature, there were two found two systems.

1. **The principle of the legality** of the criminal action is older and it has been spent since the beginning of the 19th century.Initially, the dominanat idea was that the legality as a principle obliges the prosecutor to put in motion and pursue criminal proceedings whenever it has been committed an offence, without the magistrate having the opportunity to opt in this respect.

It was appreciated in this conception that the Public Ministry cannot substitute itself to justice, the judge being the only one who has the right to assess, under the conditions of the offence committed, if the wrongdoer will be held criminal responsibility or not (A. Denauw, The decision of prosecution. Instrument and measure, The Magazine of Criminal Law, 1977, p. 449 as quoted by N. Volonciu, ***Treaty***, vol. II, 1993, 224).

The rigidity of these concepts and the cases of jurisprudence have determined the positions not only on the part of professionals but also on the public opinion and led to the emergence of the opposite system enshrining the principle of the advisability of initiating the criminal action.

2. **The opportunity of exercising the to criminal action** appeared more recently in criminal doctrine and tried to pick up the shortcomings of the principle of legality, especially with regard to the general and abstract overview in which the concrete assessment of the fact is not possible, the immerssion, in a transactional sense, being compulsory whenever the law was formally breached.

It was shown (Bouzat, Pinatel, ***Treaty of criminal law and criminology***, vol.II, ***Criminal Procedure***,749; Franchimont, Jacobs, Masset, ***Textbook of criminal procedure***, 52) that in the system of the opportunity the members of the court are the first magistrates of the case and therefore they should have the right to assess, in full knowledge, the consequences related to their attitude in connection with the implementation of the initiation of criminal proceedings. It has been also shown that in this system, the prosecutor has the discrete right to forgive that the judge has not

(Bouzat, Pinatel, ***Treaty of criminal law and criminology***, vol.II, ***Criminal Procedure***,749; Franchimont, Jacobs, Masset, ***Textbook of criminal procedure***, 52).

Essentially, the principle of the opportunity involves the freedom of assessment that the Public Ministry has in order to decide one way or another, by applying to both in respect to the implementation of the criminal action as well as to its exercise (Tarnoviceanu, ***Treaty***, vol IV, 1927, 209-210).

The most important criticism of denunciations was the one relating to the possibility of the arbitrary, which sometimes could be excessive and would blight the judicial act from its purposes. By taking into account these positions, the principle of opportunity does not manifest itself in any way in any legislation, being allowed the rule of the opportunity. If the opportunity would be complete, the prosecutor would assess not only the initiation of criminal proceedings, but after having notified the judge (even in the appeal), he could decide discretely the withdrawal of his action, thereby putting an end to the criminal liability of the accused (Volonciu, ***Treaty***, vol. II, 1993, 225).

In all the regulations allowing the principle of the opportunity, the legislation, the jurisprudence and the doctrine have highlighted a series of guarantees to shelter, as much as possible, the system of the exercise of the criminal action from the main criticisms.

In the contemporary legislations one can find the most different examples of the ways in which the system of initiating and of exercising the criminal action reveals itself (for example, in France and Italy the principle of opportunity is very well known).

The criminal procedure code since 1968 has enshrined the principle of the legality of the exercising the criminal action. When a crime was committed, no prosecutor was entitled to assess on the implementation of the opportunity of the initiation of the criminal action nor its exercise. The lack of the necessity to take compulsory intervention and ex officio of the judicial body whenever he has formally breached a criminal norm has been recognized by the Eastern European law, but the principled solving of the legal consequences was transferred from the criminal procedure in that of the criminal law potentially criminal. Thus, according to article. 18-1 criminal code, it does not constitute a crime the fact that, by offending the values protected by law and by its concrete contents, being obviously devoid of importance does not present the social danger of a crime.

Law No. 202/2010 concerning certain measures for accelerating the legal process introduced also in our laws the principle of opportunity. It is settled down in article 23. criminal proc. Code, according to which the prosecutor decides by enactment, as appropriate, the non-initiation of criminal proceedings or the removing from criminal proceedings when he is notified by the police bodies regarding the the existence of the cases stipulated by art. 10, let. b1 criminal proc.code.

In the new code of criminal procedure the mentioned principle is introduced under the shape of the abstemious opportunity, in article 318 governing institution of the surrenderat sentencing. In the recitals to the new code of criminal procedure, the legislator mentions that this institution represents a consequence of the principle of opportunity, being a regulation of the alternative solution to prosecution, this ability being given to the prosecutor.

I. **The conditions for applying the institution**

a) Regarding the *committed fact* it must be sanctioned by law with fine or by imprisonment of not more than 5 years (in the draft implementing law the prison sentence is 7 years). It also contains the contents of the fact, the way and the means of committing, the purpose, the real circumstances and the concequences produced or which could occur through the improvement of the crime option are criteria for assessment by the public prosecutor of the **existence or the absence of the public interest in the criminal prosecution**.

b) For the purpose of assessing the justified public interest for the criminal prosecution of a person, the prosecutor must also take into account **the person**, respectively the conduct of the person concerned prior to the committing of the the fact as well as the subsequent conduct represented by the efforts laid for the removal or mitigation of the consequences of the crime II. The procedural moment in which the institution operates

Under art. 318. align. 2 the surrender at sentencing can take **place only after the implementation of the criminal action and before the notification to the preliminary chamber.**

Thus the criminal investigation body after being notified in any of the manners provided by law (complaint, denouncing the facts concluded by other bodies of the finding as required by law, ex officio intimation) initiates the criminal prosecution with respect to the fact (in rem) by enactment.

After concluding the research on the reasonable suspicion which shows that a certain person has committed the fact, the suspect is notified, before his first hearing, this quality, the fact for which he is suspected, the legal framework and the rights listed in article 83.

As soon as it is observed that **there is evidence** which leads to compelling reasons to believe that the suspect is the one who has committed the crime, the prosecutor, by enactment, initiates the criminal action towards him, the procedural act being communicated to the defendant by the prosecutor who cites him to the hearing. Thus, only after the procedural momemt of the initiation of the criminal action the prosecutor, after checking the compliance with the criteria mentioned in article 318. align. 1, will be able to dispose the surender at sentencing towards the defendant.

At the same time if the prosecutor will issue the indictment ordering the judgment of the defendant, the preliminary chamber being called, he will no longer be able to order the surrender at sentencing towards the same defendant and regarding the same fact even though there are met the conditions listed by the legislator.

III. **The obligations imposed to the defendant**

The prosecutor orders that the defendant somply with one or more of the following obligations:

a). to remove the consequences of the criminal fact or to repair the damage produced or to agree to a civil way of repairing it;

b). a public apology to the person injured;

c). to fulfill the obligation of maintenance due;

d). to provide a service for the benefit of community, for a period ranging between 30 and 60 days, unless, due to health status the person cannot provide it;

e). to attend a counselling programme implemented or monitored by the probation service.

According to the enactment through which the prosecutor orders the surrender at sentencing, it is specified the term within which the obligations imposed must be compelled, without getting away from the **6 months**.

IV. **The procedural act ordering the non-initiation of criminal prosecution**

The prosecutor orders the non-initiation of criminal prosecution by ***enactment*** which, in addition to the mandatory actions provided for by art. 286. align.2 includes also the measures ordered under art. 318. align.3 as well as by article 315 align. 2-4, the deadline to be met for the sanctions imposed, the sanction for not .....the evidence to the prosecutor as well as the judicial expenses.

V. **The cancellation of the non-initiation the criminal prosecution**

The sanction of failure by the defendant to comply with the obligations imposed under art. 318. align. 3 is the reconsideration of the enactment of the non-initiation the criminal prosecution. This action occurs if the defendant does not prove the fulfillment of the obligations within 6 months from the notification of the enactment. A new non-initiation of the criminal prosecution is no longer possible in the cause.

VI. **The communication of the enactment of the non-initiation the criminal prosecution**

The enactment by which it was ordered the non-initiation the criminal prosecution is communicated to the defendant as well as to the other interested parties who have requested the communication of the solution.

VII. **The way to appeal**

Against the enactment by which it was ordered the non-initiation the criminal prosecution one may make a complaint to the Overall Prosecutor's Office-or, where appropriate, to the chief-prosecutor or to the Chief Prosecutor of the devision of the court.

The person whose complaint against the solution of the non-initiation of criminal prosecution ordered has been rejected, may make a complaint within 20 days of notification, to the judge of the preliminary court room to which it would belong, according to the law, the decision in the first instance.

The surrender at imposing the sentence

This institution is the exclusive of the judiciary and it may be conceded on the one hand, only if there are met some conditions regarding the offence committed and the offender on the other side, unless the non-fulfillment of the negative conditions accurately listed by the legislator is observed.

A. The Conditions relating to the fact

a. *the commited offence is of law gravity, due to the nature and the extent of the consequences produced, the means employed, the way and the circumstances in which it was committed, the reason and the purpose pursued.* In order to assess this condition as satisfied, the court must examine several criteria set out by the legislator in article. 80. align.1 New Criminal code., namely:

- *The nature and the extent of the consequences produced*. The checking has the purpose of finding the existence of any damage caused by committing the offence and the extent thereof. If the material or moral damage caused is comparatively law, one can appreciate as being fulfilled this criterion.

-*The means used by the wrongdoer to the commiting of the offence*. The court will have to examine the tools that were used to commit the offence, the offence being more dangerous if there were used the right instruments to produce bad consequences or the ones that involve a certain ”specialization” of the offender for committing certain crimes - for example, an application of a blow with a tough body even if it has not targeted a vital area; the use of appropriate keys for opening doorlocks of the injured parties.

-*The modality and the circumstances in which the crime was committed*. By the way in which the crime was committed one can understand the modality used by the wrongdoer in the purpose of reaching his goal, that is the way, the manner in which he has acted. The circumstances in which the crime was committed represent circumstances in which it was committed - for example, in public place, during the night, during calamities, etc.

The court will check whether the process used by the wrongdoer to commit the offence represents or not a special injuriousness or if the crime was committed in the circumstances of time or place which give it a more serious character.

- *The reason and the purpose pursued* reflects the subjective position of the wrongdoer in relation to the commitment of the crime and the consequences produced. The reason represents the goal which determined the wrongdoer to commit the crime and the purpose is the purpose which he pursued by committing the offence, that is the objective followed. The checking of these criteria requires the consideration by the court of both the rationale of the wrongdoer as well as of his final purpose by committing thecrime.

B. Conditions relating to the person of the wrongdoer

- *The person of the wrongdoer* represents one criterion which requires the checking by the court as to the degree of its integration in society, in other words, whether or not he has a job, is married, has children or dependents, the studies he attended etc.

- The criterion of *the previous conduct to the commitment of the crime* involves the analysis of the behaviour of the wrongdoer before he committed the crime or other antisocial facts.

- The attitude of the wrongdoer after committing the crime requires the checking by the court of the efforts he has made in order to diminish the consequences of the crime. For example, recovering from injury caused by committing the crime, the transport of the victim to the hospital, the payment of his hospitalization expenses etc.

- The possibilities of rehabilitating the wrongdoer represents a criterion on the basis of which the court assesses if without the application of a criminal punishment, the wrongdoer will commit other facts in the future. In other words, the court must be satisfied that the mere existence of criminal

trial started against the wrongdoer is enough to determine him to abstain from committing other crimes in the future.

After analysing the criteria listed, the court assesses *the opportunity of carrying out a sentence* on the burden of the wrongdoer, *depending on the consequences that they would have on him*. Thus, it is taken into account the impact of the application of the penalty upon the person of the wrongdoer, either from the socio-economic perspective (the risk of job loss as a result of the sentencing, the contingency of marriage dissolution as a result of the sentencing, etc.) or in terms of his reputation or of his health.

C. The negative conditions of waiving the application of punishment

In addition to the positive conditions to be met by the wrongdoer and the fact in order to be able to have the penalty waiver, the legislator has also foreseen some negative terms, the completion of which attracts the impossibility of the application by the court of the analysed institutions

a. *The offender has previously received a conviction, except for the situations in which the fact was decriminalised or amnestised, or when there has been rehabilitation or the term of rehabilitation was fulfilled.*

If the wrongdoer has been previously convicted, the court can not order the suspending of the application of the punishment as long as he has persisted in his criminal behaviour. No matter if the wrongdoer has previously been convicted for jail or fine or if the previous execution of punishment has been suspended. At the same time, it lacks the relevant nature of the offence for which the previous sentence was pronounced - intentional or guilty.

In the ever-changing realities of life, it is possible that a certain fact, which was at one point deemed as a crime, to desist to have this special gravity for the social relationships and consequently the application of a punishment not to be necessary. Naturally, sooner or later, this fact is to be decriminalised, that is removed from the sphere of the criminal illicit. The decriminalisation is either expressly, by a disposal that nullifies, the respective accusation, or replace it with another law that does not stipulate the fact as a crime. In the case of the sentences given, the decriminalisation removes all the criminal consequences of the committed fact if the punishments applied were executed entirely up to the date of coming into force of the decriminalising law. Thus, the respective conviction does no longer constitute a criminal precedent that can influence the previous criminal treatment of the detainee. In this respect, the decriminalisation (*abolitio criminis*) equates a rehabilitation of the ex-convict, who enjoys, from the moment of the entry into force of the decriminalising law, all the rights, without any kind of inability or decline arising from the conviction (Bulai, ***Textbook***, 1997, 130). Therefore, a previous conviction for an offence which was later decriminalised cannot be an obstacle for the court to order the application of a waiver of punishment for an offence which is subsequent to the decriminalised one.

As an act of forgiveness of the legislative authority (the Parliament), the amnesty, removes the criminal liability for the crimes committed until the issue of the amnesty act. The amnesty is dictated by reasons of criminal policy, being in close relation with the specific socio-political circumstances that could influence the criminal phenomenon in a period marking important moments in the evolution of the society. Being a cause which removes the criminal consequences, the criminal liability and the punishment, the amnesty does not remove the criminal character and may not be equaled with the decriminalisation of the fact because it remains incriminated and the facts committed subsequent to the amnesty act represent offences and lead to criminal liability (Bulai, ***Textbook***, 1997, 328). As long as the legislator himself ”forgot” about the commitment of the crime, removing its criminal consequences, naturally it cannot represent a criminal precedent that can prevent the criminal court to give up the implementation of a punishment for a crime previously committed.

The rehabilitation of the intervention operates when there is rehabilitation of rights, i.e. if the prison sentence not exceeds 2 years or in the case of prison sentence whose enforcement was suspended under surveillance if within 3 years the sentenced person has not committed any other

offence (article 165 of the new Criminal Code). The expiry of the rehabilitation takes place after the period of time provided by law for judicial rehabilitation (art. 166 new Criminal Code). Being an extinctive cause of the consequences of the sentencing, with *in personam* effects and with exclusive future consequences, the rehabilitation once occurred, leads to the ceasing of the character of criminal precedent of the sentence, the wrongdoer being considered as being a primary criminal, so that the notified court, with a prosecution subsequent to the right rehabilitation or the expiry of the rehabilitation period, can order the waiver of the application of the penalty.

b. *Towards the same wrongdoerb it was ordered the waiver of the application of the penalty in the last two years prior to the date of committing the crime for which he is on trial*. If the wrongdoer has benefited from the waiver of the application of penalty 2 years before the date of committing the crime for which he is on trial, a court can no longer order the waiver of the application of the penalty because it was found to be ineffective against the person of the wrongdoer which persists in the criminal behaviour, in this case being necessary the application of the punishment.

c. *The wrongdoer ran away from criminal prosecution or trial, or tried to thwart the finding of truth or the identification and punishment for the criminal liability of the author or participants.*

Through the evasion from criminal prosecution or trial, one can understand the refusal of the wrongdoer to appear before the judicial bodies. ..

By trying to baffle the findind of truth one can understand any workmanship of the wrongdoer performed for the purpose of jeopardizing the finding of the truth - for example, the influencing of the witnesses or of the injured, the destroying of some sample materials, the negative attitude in relation to the crime committed, its nonacceptance although there is obvious evidence of guilt, the indication of some variants of committing a crime in order to lead the judicial authorities on a wrong direction of investigation, etc.

In the case of participation in the commitment of the fact, the condition is satisfied if one of the participants prevents the identification of others or of the author or their criminal liability.

d. *Punishment provided by law for the committed crime is imprisonment for more than three years.* This condition is fulfilled in the case of committing some crimes, of high gravity, reflected within the particular limits of the punishment, if the maximum limit of the prison sentence is 3 years or more or if the fact is punished with life imprisonment (for example, the criminal offences against life, body injury, blows or injuries causing death, traffick in minors, or persons, offences of unlawfully depriving of freedom, offences against freedom and sexual integrity, the simple and the qualified robbery etc.).

The court must consider all the criteria set out by the legislator in order to have the possibility of waiving the application of the penalty. The performance of a single negative condition represents an absolute obstacle to the implementation of this institution.

If the court is called with prosecuting several crimes committed by the same the person in actual or formal competition (the ideal), in order to be able to have waiver of sentencing, there must be satisfied the conditions set out by the legislator in relation to each competing crime and the existence of one negative condition for one of the offences (for example, influencing a witness) draws the enforceability of the institution even if for the other facts the positive conditions for granting are fulfilled (article 80 para. 3 new Criminal Code). This conclusion emerges from the entire regulation of the institution, the instance's belief about dangerousness of the criminal being the result of the analysis of his entire criminal activity covered by the act of notification.

The waiver of the application of the penalty represents ***an aptitude*** for the court and even if the fullfilment of the criteria set out by the legislator would be checked, in order to give the solution, still if it is assessed as necessary the application of a punishment for the wrongdoer, the court will order his conviction.

The waiver of the application of the penalty assumes a waiver to a court to apply in the burden of the wrongdoer a main penalty, accessorial or complementary. The court will apply to the wrongdoer *a warning* that consists in presenting the real reasons that led to the waiver for applying the sentence and the warning of the wrongdoer upon his future conduct and the consequences to

which he is exposed if he commits further crimes. He will be applied a single warning even if the court was called with the commitment by the wrongdoer of a series of crimes. If there is a state of danger whose removal is needed in order to prevent the commitment of other facts provided by the criminal law, the court may, by the same decision, order the application of some safety measures against the defendant. At the same time, the court will be able to order his binding to pay civilian damages since the waiver of the application of the punishment does not produce effects of exercising the safety measures and civil liabilities imposed by the decision (art. 82 new Criminal Code).

Therefore, by the decision it will give, the court assesses the existence of the fact and the guilt of the wrongdoer but it will charge him with a warning and, if necessary, a security measure, being able to oblige the defendant to pay the civil damages as well. The fact that the court does not apply a penalty, doesnt't bring any prejudice to the character of the committed fact. It represents a crime, that is stipulated by the criminal law, it was committed with guilt in the form required by the incriminating rule, it is not justified and is imputable to the person who committed it.

The person to which it was ordered the waiver of the application of the penalty is not subject to any debasement, prohibitions or inabilities, that could result from the committed fact (art. 82, para. 1 of the New Criminal Code), being the legal consequences of criminal, extra penal, or long-lasting reference rules arising out of the conviction itself.

CONCLUSIONS

The surrender at sentencing and the waiver of the application of the penalty represents an important step in the evolution of our criminal- procedural legislation with a view to harmonizing it with the laws of the member states of the European Union. The local institutions are designed to act on the application of the principle of the abstemious opportunity in carrying out the criminal action for committing crimes of a law gravity. If we consider the fact that in the new Criminal Code the limits of punishment have been reduced for some crimes, their scope of application is extremely wide.

From the conceptual perspective, the institutions analysed are designed to replace the current assessment of the real degree of social danger of the committed fact, with the consequence to order according to the regulations of the current criminal procedure code, the non-initiation of criminal proceedings, the removal from the criminal prosecution pursuant to article 18-1 criminal Code and art. 91 criminal Code or the payment pursuant to article 10 let. b1 criminal procedure Code (the committed fact does not present the degree of danger of a crime), in this way being eliminated the contradictions generated by these institutions.

Still, the legislator has not given effeciency to the principle of legal symmetry which should be applied with regard to the conditions of the application of those two. If the prosecutor can cancel the criminal prosecution in the case of crime punishable by law with imprisonment up to 5 years (in the draft law on the implementation of the new criminal code, the penalty is a maximum of 7 years), the judge may cancel the application of a punishment only if the committed crime is punishable by law to no more than 3 years in prison. Under these circumstances, we can assess that *the increasing of the limits of punishment in the case of the application of the institution of the waiver of the application of the penalty is really necessary, in the areas of sentencing to 3 years in prison to 5 years in prison; in any case, the limits of the punishment should be similar.*

The possibility of the prosecutor to compel the defendant, by enactment, to perform a service work for the benefit of the community is debatable as long as the procedural act whereby this obligation is established does not have the character of a legal decision which decides whether or not the defendant has committed the fact with guilt. The defendant, in reality is charged by the prosecutor, obliging him to provide community service work, although he is presumably innocent until the ordering of a legal definitive decision of conviction.

On the other hand, the court may order the compelling of the defendant to perform service work on behalf of the community, if it accomplishes the application of the institution of ***postponing***

the carrying out the penalty (when it orders a penalty on the burden of the defendant but whose execution is delayed, and during the surveillance period, the defendant may be required to provide service work for the benefit of community).

In the case of the waiver to the application of the penalty (80 N.Criminal Code) even though it is assessed that the defendant is the one who has committed the crime, the court does not have the possibility to compel him at providing community service work because, in the absence of on application of punishment, a surveillance term is not estsblished and the only applied sanction is the warning.

Therefore, the legislator should *review the limits of the penalty for the application of the institution of the surrender from the criminal prosecution and the waiver of the application of the penalty*. Nevertheless, in consideration of the fact that the prosecutor cannot order the defendant to have the provision of unpaid work for the community legislator we suggest the legislator *to reconsider the obligations that may be ordered by the public prosecutor in charge of the defendant in the case of the surrender from the criminal prosecution.*

ENDNOTES

(1) In the activity of analising the opportunity of the incrimination of the fact, the legislator must take into account whether or not the solution of fighting that fact, by its deeming as crime, does not imply a higher social cost in balance with the desired positive result.
(2) According to art. 15 of the New Criminal Code, the offence is the fact provided for by the criminal law, committed with guilt, unsustified and charged on the person who committed it

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