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**The Renunciation to Apply the  
Punishment in the New Criminal Code**

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**Abstract:** Representing an absolute novelty in the Romanian legislation within the paper it was examined the institution of renouncing to applying the penalty in the context of the provisions of the New Criminal Code, of implementing and changing the law. We are also presenting some critical comments and suggestions of *lege ferenda*, the work can be useful both for academic theorists and practitioners and also for the legislator with the entry into force of the New Criminal Code. The innovations presented in this study regard the legal text analysis and the critical remarks.

**Keywords:** offenses; perpetrator; renunciation; warning

## **1. Introduction**

In the second half of the XVIII<sup>th</sup> century Cesare Beccaria in a reference work, criticizing the cruelty of penalties and stressing on the need for “mild punishment” claimed that “the purpose of punishment is not to torture or to hit a sensitive human being, nor to abolish a committed crime (...). The goal is none other than to prevent the offender to bring to his countrymen further infringements and to divert others from committing similar acts.” (Beccaria, 1764, p. 40)

Continuing his analysis, the author quoted that “it must choose therefore those penalties and the method to be implemented, which keeping the proportion will make an impression as strong and as durable upon the souls of men and less painful on the body of the guilty one”. (Beccaria, 1764, p. 40)

Being released during the development of the Italian Enlightenment, the author's main work is heavily influenced by the Enlightenment ideas of that time.

We note that the author, criticizing the punishments characterized by excessive and unnecessary cruelty insists on the adoption of new, milder sanctions, their purpose being to prevent the offender to commit further crimes and preventively for the rest of the community members.

Unlike previous historical periods, in the modern era, a synthetic definition, the punishment was defined as a legal sanction, specific to the criminal law. (Dongoroz 1939, p. 582)

With the evolution of society as a whole, the penalty has adopted modern connotations, and nowadays it is defined as “the sanction of criminal law which consists of a measure of restraint and rehabilitation provided by law for committing an offense and it is applied by court to the offender in order to prevent committing new crimes”. (Bulai & Bulai, 2007, p. 291)

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The examination of the above definition, allows us to identify the essential features of the sentence, regarded as the main criminal law sanction that can be applied to a legal of physical entity, in whose account it was charged the committing of the offense, namely:

- it represents the main criminal law sanction under the Romanian law;
- it is a measure of restraint, which has as direct effect causing suffering to the offender;
- it is a means of the rehabilitation of the offender, being always provided by law;
- the penalty is applied in order to prevent the commission of new crimes, with a dual function, i.e. for the offender and thus to other community members.

Originally designed to be performed only under a closed regime, the penalty has known subsequently other ways of execution. Thus, both the Criminal Code in force and the New Criminal Code provide expressly two ways for penalty, that is in a closed regime (in penitentiary) and in a diversified, non-custodial system.

In fact, in the recent years, in Europe, there was a current with an increased influence, which insists on the execution of the majority of the non-custodial sanctions regime, the custodial regime being intended only for the offenders who have committed serious crimes.

We will not dwell on the arguments presented by many authors, retaining only that the rehabilitation of prisoners in penitentiary was often a phrase without direct consequences, in terms of rehabilitation and social reintegration of the offender.

In this context of transformation and reorientation of the sentence, as the main sanction of criminal law, the New Criminal Code proposes another institution of criminal law, the renunciation to penalty, an institution that is not found in the current Criminal Code.

Regarding minors that are criminally liable, the New Criminal Code provides a special sanction, consisting of non-custodial educational measures and educational measures involving deprivation of liberty. Thus, it brings a radical change of the optical field, giving up fully to penalties applicable to juveniles who are criminally liable in the favor of educational measures. (Buzatu, 2012, p. 228)

Under these circumstances, in the case of the juvenile offenders the renunciation institution of the penalty is unenforceable, the main reason being that the legislator has established a special punishment system for juvenile offender, a system which excludes the punishment.

## **2. The Content**

### **2.1. The Legal and Juridical Nature**

Renunciation to applying the penalty is set out in Chapter V (The individualization of sentences), Section 3 of Title III (Penalties), the general part of the New Criminal Code, articles 80-82.

Considering the way and the place of the rule in the structure of the New Criminal Code, the institution represents one of the measures of individualization of punishment.

Essentially the renunciation to penalty is in the right conferred by the law of the court to renounce at the establishment and enforcement of a sentence to the person guilty of a crime, in order to re-educate and re-socialize, given a number of conditions imposed by law.

Note that the conditions imposed by the law are not sufficient to renounce at the penalty, the court will appreciate the opportunity of applying this measure, namely the appliance of a sentence would be inappropriate because of the consequences that it would have on the person in question.

The texts referred to in articles 80-82 of the New Criminal Code governing the institution of renunciation to penalty represents an absolute novelty in the Romanian legislation.

We note that in order to have this measure of clemency towards a defendant, the court is required to conduct the proceedings in which it will be given all the necessary evidence, and the concerned person is found guilty of the offense or offenses for which he was sent to trial.

The institution of renunciation to penalty cannot be compared with any other institution from the current Criminal Code, as in this case, the court finds that the offense exists in its materiality and it was committed by the guilty defendant as provided by law.

Although in our doctrine there have been expressed some opinions according to which the institution itself replaces two institutions of criminal law set out in the current legislation i.e. “the act that does not present the degree of social danger of a crime” and “the criminal liability replacement,” (Gheorghe, 2011, p 120) we believe however that this new institution of criminal law is fundamentally different from the two mentioned, even if it can be said that the effects of the criminal liability present some elements of similarity.

## **2.2. The Conditions of Renunciation to Applying the Penalty**

The examination of the provisions of the text content of article 80 of the Criminal Code leads to the conclusion that the renunciation to applying the penalty is conditioned by the fulfillment of two categories of conditions that is positive conditions provided in paragraph (1) and negative conditions mentioned in paragraph (2).

The fulfillment of positive conditions under paragraph (1) letter a) and b) of the article 80 of the Criminal Code does presuppose the right of the offender to beneficiate from the renunciation of the penalty, this aspect being the only its vocation, its actual benefit being completed by the assessment of the court on whether the measure can be applied or not.

We realize therefore that there may be the case where although there are fulfilled the positive conditions required by law, the offender will not benefit from this feature, because the court did not consider it appropriate to take such a decision. In fact, the text itself is quite clear, in that the legislator used the phrase “the court may order”, which confers a right of disposal according to their own beliefs and not an obligation. Regarding negative conditions, we mention that in the case of finding a sole such condition [of the four listed in the text of paragraph (2)], the court is obliged to not decide on the renunciation of the penalty.

The examination of the conditions provided in the text of article 80 paragraph (1) of the New Criminal Code also supports another classification, namely:

- conditions relating to the committed offense;
- conditions on the person of the offender, and
- conviction of the court that the offender may rehabilitate without imposing a sentence, and therefore it is appropriate to renounce at the penalty.

a) *Conditions relating to the committed offense.* A first positive condition regarding the committed offense is referred to the content of article 80 paragraph (1), letter a) of the New Criminal Code, which

states that the offense must present a low gravity, which according to the law it must be assessed according to: the nature of the offense, the extent of the produced consequences, the used means, the manner and circumstances in which it was committed, motivated and purpose. In addition to these elements, according to which it is assessed the low gravity of the offense, expressly provided for in the law, the court must consider the other condition which it implicitly results from the content of paragraph (2) letter d) of the same article, namely that the punishment provided for the offense is up to 5 years. We mention that in our opinion, all these conditions on committed offense must be fulfilled cumulatively.

b) *Conditions on the person of the offender.* A second positive condition concerning the person of the offender is provided in the content of article 80 paragraph (1) letter b) of the New Criminal Code, and it has the following elements: the conduct before committing the crime, the efforts for removing or mitigating the consequences of the offense and the offender's referral opportunities, the opportunities being determined by the court.

If the first two elements of this positive condition, expressly set out by the legislator, namely, the conduct before committing the crime, the efforts for removing or mitigating the consequences of the offense present the minimum elements of difficulty to be ascertained by the court, the third item on the offender's referral opportunities requires some discussion as establishing its existence is an exclusive attribute of the court.

In the doctrine it was rightly expressed the view that by the possibility of reformation of the offender we "understand the intellectual opportunities, education and training, the education received until the commission of the offense, the financial situation that allows him to live without resorting to expedients necessary for himself and those that he has under care, so that there are specific prerequisites that the convicted person understands the constraint of the penalty even without its actual execution, so there is no need for the application and enforcement of the appropriate penalty of the committed offense." (Chiş, 2012, p. 507)

c) *Conviction of the court that the offender may rehabilitate without imposing a sentence.* From the assessment of the provisions of the law, it results that the renunciation to applying the penalty, in addition to meeting the two positive conditions to which we refer, it is necessary the conviction of the court that the offender may rehabilitate without the implementation and enforcement of a penalty for the committed offense. The court's conviction results explicitly from the content of article 80 line (1) of the New Criminal Code, on the renunciation to penalty as a choice of the court and not a right of the offender.

As mentioned above, even if two positive conditions are met cumulatively, the court in order to find the incidence of the institution it must be convinced that the renunciation to applying the penalty is necessary, and the event of applying a sentence, regardless of the individualization way of execution (custodial or non-custodial), it would be inappropriate because of the consequences that it would have on the offender. Under the provisions of article 80 paragraph (3) in case of several offenses, renunciation to penalty may be decided, if for each offense there are met the conditions in paragraph (1) and (2) of the same article.

If the court decides to renounce to the penalty, it shall apply to the offender a warning consisting of presenting the reasons which led to the renunciation of the penalty and warning the offender on its future conduct and the consequences to which it exposes if he shall commit further crimes. In case of several offenses it shall be applied a single warning (article 81 of the New Criminal Code).

No doubt that the warning applied by the court in these circumstances is an extra-criminal sanction, with administrative feature, having no effect on the criminal history of the offender. However, as other authors (Gheorghe, 2011, p. 131) and we appreciate that the warning should be sent and recorded in the criminal record of the offender, this aspect offering the possibility of applying the provisions of article 82 paragraph (2), letter b) of the New Criminal Code.

In the absence of such evidence (registering the warning in the criminal record), the judicial authorities will not be able to make incident the provisions of the mentioned above text, making it inapplicable against the will of the legislator.

### **2.3. Cases Where the Renunciation to Penalty Cannot Be Applied**

According to the provisions of article 80 paragraph (2) of the New Criminal Code, renunciation to applying the penalty may not be granted if:

- a) the offender has previously had a conviction, except the cases provided in article 42 letter a) and b) or for which the rehabilitation intervened or the rehabilitation time limit expired;
- b) to the same offender it was applied he renunciation to the penalty in the last 2 years preceding the date of the offense for which he was trialed;
- c) the offender has evaded prosecution or trial or attempted the thwarting of finding the truth or identifying and finding criminally liable the author or the participants;
- d) the punishment provided for the committed offense is imprisonment exceeding five years.

Note that these negative conditions concern the existence of a past criminal history of the offender, the possibility of applying in the last two years the provisions relating to the renunciation of penalty, the offender's behavior during trial and the seriousness of the crime, this time resulting from the maximum penalty provided by law for the committed offense.

We will not insist on examining the four cases in which there are not applicable the provisions for the renunciation to penalty, stating only that it is not required finding to find them all, but only one.

In other words, even if they are fulfilled cumulatively all the positive conditions provided by the law in article 80 paragraph (1) of the New Criminal Code, the finding of a single case mentioned in paragraph (2) of the same article, will be lead implicitly to the impossibility of applying the renunciation of the penalty.

### **2.4. Effects and Cancellation of the Renunciation to Applying the Penalty**

In accordance with article 82 paragraph (1) of the New Criminal Code, the person who received the renunciation of the penalty is not subject to any disqualification, prohibition or incapacity that could result from the committed offense. However, renouncing at the appliance of the punishment has no effect on the execution of safety measures and the civil obligations provided in the decision [article 82 paragraph (2) of the New Criminal Code].

If within two years of the final judgment ordering on the renunciation of penalty it is discovered that the person to whom this measure was taken committed previously another offense, for which it was imposed a penalty even after this period, the renunciation to the penalty is canceled and it is established punishment for the offense which led initially to the renunciation of the penalty, then applying, where appropriate, the provisions on the several offenses, intermediary recidivism or plurality. [article 82, paragraph (3) of the New Criminal Code].

### 3. Critical Comments and Suggestions of *Lege Ferenda*

The examination of the provisions of article 80-82 of the New Criminal Code allows us to formulate some critical comments and suggestions of *lege ferenda*.

A first critical remark concerns the need for a written warning and its signature by the offender before the court who decides the renunciation to the penalty. Of course this measure could be taken by the court even if the law does not expressly provide, but it would be preferable that such a procedure is provided for in the wording of texts governing the institution of renunciation to the penalty.

The second observation, which in our opinion requires legislative addition, addresses the need of sending the conceived warning in written form, with the criminal court's decision, where it will be recorded, in order to enable the judiciary bodies to ascertain previous application of the renunciation to penalty, in case of committing a new crime or an offense committed previously.

### 4. Conclusions

As mentioned previously, the institution of renunciation to penalty is an absolute novelty in the Romanian legislation. Note that the EU institution of renunciation to penalty is provided, among other states, the German Criminal Code, the Italian Criminal Code and the French Criminal Code, of course with the fulfillment of various conditions resulting from the criminal policy of each state.

In its essence, we believe that the institution is found to be necessary, given the tendency of some European countries to reorient mainly the application of penalties with non-imprisonment, on the other hand the inefficient process of rehabilitation and re-socialization of offenders under the regime of deprivation of freedom. The renunciation of penalty is an institution exclusively available to the court, which, however, is a choice and not an obligation, even when the conditions set by the law on the offense and the person of the offender are fulfilled.

As a general conclusion we believe that the institution on the renunciation of punishment was necessary the Romanian Criminal Law, its practical usefulness will be proved in the near future, with the application by the courts.

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