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**The Postponement of Applying  
the Penalty in the New Criminal Code**

**Minodora Ioana Bălan-Rusu<sup>1</sup>**

**Abstract:** In this paper we examined briefly the postponement of applying the penalty institution, a new institution introduced into the Romanian legislation. The examination shall consider specifically the criteria considered by the court in order to take this measure, and some critical remarks on the current regulation. The innovations in criminal law matter consist of the achieved examination, onto the text of the law, and critical remarks aimed at contributing to the improvement of legislation. The paper can be helpful both to theorists and practitioners in the field, under the conditions of entering into force of the New Criminal Code.

**Keywords:** crime; surveillance measures; obligations imposed by the court

## **1. Introduction**

Referring directly to the nature of the punishments applied to those who committed crimes, Cesare Beccaria argued that *“we must therefore choose those penalties and the method to be implemented, which keeping the proportion will make an impression as strong and as durable on the souls of men and less painful on the body of the guilty person”* (Beccaria, 1764, p. 40). Continuing his examination, the same author states that *“for a penalty to have the desired content it is enough that the suffering caused by punishment to exceed the benefit that the offense brings, and in the midst of this process of suffering it must enter the inevitability of punishment and the loss of profits that it would bring the offense.”* (Beccaria, 1764, p. 40)

With the general development of the society, the penalty applied to the person who committed an offense under the criminal law has gained new guidelines, the principle of humanity having here a decisive role.

Starting from the criminological point of view from where it results the inefficiency of rehabilitation and re-socialization process of prisoners under the custodial regime, at the current moment most European laws impose sanctions oriented towards the implementation of the non-custodial regime. The studies conducted in this area have proven, with scientific arguments, that the rehabilitation process of a prisoner is properly carried out and with positive effects, especially through the enforcement of some penalties or other non-custodial measures.

In the current Romanian Criminal Code, there are provided as a means of individualization of punishment execution under the non-custodial regime, the conditional remission of executing the sentence, remission of executing the sentence under surveillance and the execution of punishment at the workplace.

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<sup>1</sup> Assistant Professor, PhD in progress, “Dimitrie Cantemir” Christian University, Bucharest, Address: 176 Splaiul Unirii, District 4, Bucharest, Romania. Tel.: +4021.330.79.00. Corresponding author: ionrusu@univ-danubius.ro.

In the New Criminal Code there were abandoned two of these methods, namely conditional remission of executing the sentence and execution of punishment at the workplace, remaining the remission of executing the sentence under surveillance.

Meanwhile, after the example of other European legislation, there were introduced two other ways of individualization of punishment, namely, the renunciation of applying the penalty and the postponement of applying the penalty.

In this paper we will proceed onto a brief examination on the postponement of applying the penalty institution, a new institution in the Romanian criminal law. Regarding the minors criminally liable, the new Criminal Code provides a special penalty system, consisting of non-custodial educational measures and custodial educational measures. Thus, it brings a radical change in the field, renouncing fully to penalties applicable to juveniles who are criminally liable in the favor of educational measures (Buzatu, 2012, p. 229). In this context, the renunciation of the Romanian legislator to applying the penalty for young offenders, the postponement of applying the penalty does not produce any effect in their case.

## 2. Content

### 2.1. The Legal Nature and Content of the Postponement of Penalty

The institution of the postponement of the penalty is provided for in the New Criminal Code in the Title III (Penalties), Chapter V (the individualization of sentences), Section 4. Mentioning the institution in Chapter V “The individualization of sentences”, leads to the conclusion that it represents in its essence a way of individualizing the penalty.

Given the above, it results that the postponing the penalty is a measure of individualizing the punishment which consists in the right of the court to determine a penalty by fine or imprisonment up to 2 years to the person who has committed one or more offenses, when there are fulfilled the positive conditions provided by law, and decide the postponement of applying the penalty, a period in which the convict will perform some measures and obligations imposed by the court.

According to our recent doctrine the characteristics of the postponement of executing the sentence are:

- *“it is a measure of individualization of the penalty available to the court;*
- *the postponement of applying the sentence can be decided for the imprisonment penalty without exceeding two years or in case of conviction with fine penalty;*
- *the offender must meet cumulatively the legal conditions, of not being previously convicted with imprisonment, to perform community service work without payment and his conduct to create the conviction of the court that it is no need for applying the penalty;*
- *there are no negative situations provided by law, in the presence of which the court cannot apply the measure of penalty postponement”*. (Chiş, 2012, p. 516)

The institution of penalty postponement is a novelty in the Romanian legislation and also another way of individualizing the penalty. This institution differs fundamentally from the renunciation to applying the penalty primarily because in the case of renunciation the court does not establish any penalty, while in the case of postponement the court establishes a penalty, the application of which is postponed, under the conditions expressly provided by the law. What is characteristic to both institutions of criminal law is that the renunciation and the postponement of applying the sentence represent a right, a choice of a court and not an obligation.

In our recent doctrine it was argued that the institution of postponing the appliance of the penalty “differs from the remission of executing the sentence under surveillance in the latter case the court, setting the penalty, decides the suspension of its execution for a period prescribed by law, after which the penalty is considered executed, if the convict did not commit a new offense, and the suspension has not been revoked or canceled. Postponing the application has as effect, if the convict meets the legal requirements, the non-appliance of the penalty, and not considering it as being executed”. (Sima, 2011, p. 169)

## **2.2. The Conditions of Postponing the Execution of the Penalty (Positive Conditions)**

According to the provisions contained in article 83 paragraph (1) of the New Criminal Code, the court may order the postponing of applying the penalty, establishing a surveillance term, if some conditions are met, positive ones, namely:

- the established punishment, including in the event of multiple offenses is a fine or imprisonment without exceeding two years;
- the offender has previously been convicted to imprisonment, except the cases provided in article 42 letter a) and b) or for which it intervened the rehabilitation or it expired the rehabilitation term;
- the offender has expressed the agreement to perform community service work without payment;
- in relation to the person of the offender, his previous conduct before the offense, the efforts to remove or mitigate the consequences of the offense and its means of correction, the court considers that the immediate application of a penalty is not necessary, but it needs surveillance of its behavior for a specified period.

Although it is not mentioned by the legislator as a positive condition, another condition resulting explicitly from the content of negative conditions is that the maximum of the sentence provided by law for the committed offense of not being smaller than 7 years.

Regarding the condition laid down in article 83 paragraph (1), letter d) of the New Criminal Code, that is the conduct before the offense, the efforts of the offender after committing the offense for removing or reducing its consequences and possibilities of correction, we mention that it must express a regret attitude, awareness of the seriousness of the offense and the cause harm, thus there is the premise of his reintegration and re-socialization. The examination by the court of the behavior and attitude before and after the crime should establish the belief that the immediate application of a penalty is not necessary, but still it requires surveillance for some time.

Please note that in order to decide the postponement of applying the penalty, the court must determine the cumulative performance of the four positive conditions without being incident any negative condition.

## **2.3. Negative Conditions that require the Non-applying of the Institution**

Under the provisions of the law [article 83, paragraph (2) of the New Criminal Code], the court may not order the postponement of the appliance of the penalty if the penalty provided by the law is of 7 years or more or if 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.

From the examination of the above provisions it shows that these negative conditions, in addition to the maximum sentence provided by the law for the committed offense, regard exclusively the attitude

and behavior of the offender during the criminal trial in its first two phases, namely prosecution and judgment.

It is worth mentioning that the finding of the legal provisions' incidence which was mentioned above, the court must establish the existence of such situation, without being necessary their cumulative performance as in the case of positive conditions examined above. In the case where, according to article 62 of the New Criminal Code against the accused it was ordered also the appliance of the penalty of the fine accompanying imprisonment, its application is postponed.

Under procedural aspect it is worth mentioning that according to article 83 paragraph (4) it is mandatory to submit the reasons that lead to postponing the appliance of the penalty and warning the offender on its future behavior and the consequences to which it exposes if it will commit crimes or it will fail to comply the surveillance measures or it will not perform his obligations during surveillance period.

#### **2.4. The Surveillance Period**

The surveillance period provided by the law [art. 84 paragraph (1) of the New Criminal Code] is of 2 years and it is calculated from the date of the final judgment ordering the postponement of applying the penalty. Throughout the monitoring period, the person to whom it was ordered this measure must comply with the surveillance measures and carry out its obligations under the conditions set by the court.

#### **2.5. Surveillance Measures and Obligations**

In accordance with article 85 paragraph (1) and (2) of the New Criminal Code, during the period of surveillance, the person who has received the postponement of applying the penalty must comply with a number of surveillance measures and obligations imposed by the court.

The surveillance measures provided by the law are:

- to report to the probation service, at the set date;
- to receive visits from the probation officer assigned to his surveillance;
- to notify in advance any change of residence and any journey exceeding five days, and also the return;
- Communicate changing jobs;
- Communicate information and documents in order to enable the control of his livelihood.

At the same time, the court may require the person concerned to carry out one or more of the following obligations:

- to follow a training course or vocational training;
- to perform community service work without payment for a period between 30 and 60 days, as determined by the court, unless the state of health the person cannot perform the work. The daily number of hours is established by the law of executing the penalties;
- to attend one or more social reintegration programs run by the probation service or organized in collaboration with the community institutions;
- to comply with control measures, treatment or medical care;
- not to communicate with the victim or members of his family, with the people who committed the crime or other person determined by the court, or to stay away from them;

- not to be in certain places or at certain sporting events, cultural or other public gatherings, determined by the court;
- not to drive certain vehicles established by the court;
- not to have, use and carry any type of weapon;
- not to leave the Romanian territory without the consent of the court;
- not to handle or perform the task, occupation, profession or activity that has been used for committing the offense.

After examining the above provisions it shows that the surveillance measures are required in all cases, while one or more obligations may be imposed by the court or not. In other words, once the court enforces the judgment it may impose the execution of one or more obligations or only the performance of the surveillance measures, which are required at all times.

Regarding the surveillance measures, “they are intended to establish a direct contact throughout the surveillance period between the person against whom the postponement was imposed and the probation service, to verify its behavior, and the compliance of the obligations and the prohibitions imposed by the court”. (Sima, 2011, p. 172)

Regarding the obligations imposed by the court we state that “a group of obligations having formative feature, in the sense of requiring the convicted to follow a course of professional training, to perform community service work without being paid, for a period between 30 and 60 days, as determined by the court, other obligations include attending to social integration programs, the medical inspection or treatment specified by the court, obligations that aim at rehabilitating the concerned person, to social and professional reintegration, removing the conditions that favored crime, preventing the commission of new crimes.

A second group of requirements have prohibitive feature for the defendant: in the sense of not communicating with the victim or relatives, not to attend to some social events, not drive certain vehicles, not having guns, not leaving the Romanian territory, not occupying professional positions as the one that it used to commit the offense. Their role is to prevent the commission of offenses against the person ordering the postponing of applying the penalty.” (Sima, 2011, pp. 172-173)

To establish the obligation on the community service, the court shall consult the periodical information provided by the probation service on the existing concrete possibilities of execution at the level of the probation service and at the level of the community institutions. When determining other types of obligations such as: not to communicate with certain people, not to be in certain places or social events or not driving certain vehicles, the court will individualize concretely the content of the obligation, taking into account the circumstances of the cause. Regarding the civil obligations, the person must comply in full no later than three months before the expiry of surveillance period.

## **2.6. Surveillance**

During the period of surveillance, the probation service must notify the court in the following circumstances:

- having intervened reasons justifying either the modification of the obligations imposed by the court or the termination of executing some of them;
- the supervised person did not comply with the surveillance measures or it did perform its obligations under the established conditions;

- the supervised person did not fulfill its civil obligations established by the decision, no later than three months before the expiry period of surveillance.

Please note that some requirements set by the court will be monitored by other state institutions, according to the law, and the supervised person must send some data to the probation service.

### **2.7. Modification or Termination of Obligations**

Under the provisions of the law [article 87 paragraph (1) of the New Criminal Code], if during the surveillance period there have intervened reasons justifying the imposing of new obligations or increase or decrease the existing executing conditions, the court will decide properly the modification of the obligations in order to ensure to the supervised person increased chances of rehabilitation. If the court finds that maintaining some obligations is no longer required, it shall order the termination of their execution.

### **2.8. The Revocation of the Postponement of Penalty Execution**

When the court finds that within the period of supervision the person in bad faith did not comply with the surveillance measures or perform its obligations, the court will revoke the postponement and it shall decide the implementation and execution of the penalty. When by the expiry of the surveillance deadline the supervised person does not fully meet the civil obligations established by the decision, the court shall revoke the postponement and it shall decide on the implementation and execution of the sentence, unless the person proves that it had no possibility to fulfill them.

If after the postponement of applying the penalty the supervised person has committed a new offense, intentionally or non-intentionally, being discovered during the surveillance period, for which a conviction was decided, even after the expiry of that period, the court shall revoke the postponement and decides the implementation and execution of the penalty. The sentence imposed following the revocation of the postponement and the penalty for the new offense is calculated according to the provisions on the competition of crimes.

In the case where the previous offense was committed by fault, the court may retain or revoke the postponement of the appliance of the penalty.

### **2.9. The Cancellation of the Postponement of Applying the Penalty**

Under the provisions of the law [article 89 paragraph (1) of the New Criminal Code], if during the period of surveillance the supervised person is found to have committed an offense by the final judgment of ordering the postponement, for which it was applied even imprisonment after the expiry of this period, the postponement is canceled, applying, where appropriate, the provisions on competition of offenses, relapse or the intermediary plurality.

Within paragraph (2) of the same article it provides that in case of completion on offenses, the court may order to postpone the appliance of the penalty if the conditions set by article 83 are met. If you have the postponement of applying the penalty, the surveillance period is calculated from the date of the final judgment by which it was previously ruled the postponement of applying the penalty.

### **2.10. The Effects of the Postponement of Applying the Penalty**

The person to whom it was decided the postponement of applying the penalty is no longer applicable the penalty and is not subject to any disqualification, prohibition or incapacity that could result from

the offense, if it has not committed a new crime by the expiry of the surveillance measure, it was not ordered the revocation of the postponement and did not reveal a cause for cancellation. The postponement of applying the penalty has no effect on the execution of safety measures and civil obligations set out in the judgment.

### **3. Critical Reviews**

As mentioned previously, the institution of postponement of applying the penalty is an absolute novelty for the Romanian legislation. In this context, in our opinion, the achieved examination highlights also some legislative imperfections, which we will formulate below. A first critical remark concerns the surveillance period of two years. We appreciate that this period is too small, given the gravity of the committed offense. We believe that the seriousness of the committed crime, as well as other elements pertaining to the offender this period should have a maximum and a minimum limit, the court being able to appreciate the period of surveillance. We propose limits between two and four years.

Another critical remark refers to the punishment provided by the law for the offense which, according to the current regulations is up to 7 years. We believe that this limit is high, which is why we believe that a maximum of five years would be more realistic. We argue this proposal by the fact that within the new Criminal Code there are many offenses, some with increased seriousness that can be included in these provisions.

### **4. Conclusions**

The postponement of applying the penalty institution is introduced in the Romanian legislation, in the context of new European guidelines in executing penalties matters. This institution of criminal law is provided in the laws of several European countries, such as German Criminal Code, the English Criminal Code, the French Criminal Code, the Italian Criminal Code, etc. No doubt that the institution's regulations vary from one state to another, depending on their criminal policy objectives.

The institution itself has become in time inefficient in the rehabilitation and re-socialization process of convicts in prisons, often having contradictory effects. Regarded by some with doubts, and by others with confidence, the institution of the postponement of applying the penalty will prove its effectiveness over time after the entry into force of the New Criminal Code and its application by the courts.

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\*\*\* Noul Cod Penal. Art. 83-90/ The New Criminal Code, Article 83-90.