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**Judicial Individualization of Punishment in Special Situations.**

**Judge's Role in these Cases**

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**Abstract:** Punishment cannot fully implement its mission and cannot achieve its purpose unless it is perfectly molded to concrete individual case. To this end, the penalty should be appropriate to the degree of social danger of the crime and its perpetrator, and, equally, to be given by taking in consideration the real needs for straightening and rehabilitation of the perpetrator. The multitude situation encountered in practice, doubled by cultural and economic realities found in a never ending change, led to the introduction of additional provisions in the Criminal Code in order to achieve the best judicial individualization of punishment in some special situations. These additional provisions are designed to ensure the possibility to adapt the sanctioning treatment in a suitable manner to each offender brought to answer before the law. Therefore, only by promoting the principle *real punishments imposed to real criminals* will lead to an act of justice healthy, appropriate and equitable, based on promoting the key values of society among offenders and, equally, on protecting these values against criminal inclusions. This study aims both students and practitioners or academics and highlights on one hand, the legislative solutions of the new Criminal Code and on the other hand, the differences between the old and the new Criminal Code.

**Keywords:** criminal sanction; adaptation; personalization; efficiency; reeducation

## **1. Introduction**

In its proper meaning, *to individualize* means to highlight specific features of a person of a fact, of a situation etc. (Romanian Academy, 2009). From a legal perspective, the term of individualization expresses strictly the punishment adaptation in relation to individuality, personality of each offender (Daneș & Papadopol, 1985)

The individualization of criminal sanctions is one of the fundamental principles of criminal law who exercise its power both in the elaboration phase of criminal law provisions and in the application phase but also in the execution phase of punishment. This operation is achieved through three forms of individualization: *legal*, *judicial* and *administrative*. Legal individualization – the adaptation work made by the legislator -, and administrative – conducted by administrative authorities by adapting the execution of punishments regime - are forms without whom the operation of individualization of criminal sanctions does not make sense.

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Essence of the present study, the judicial individualization has a special place among the three forms of individualization and *represents the operation by help of which, ex lege, the judge effectively adapt the punishment applied to each individual, taking into account the case in its individuality, but also in social context, by reporting both the gravity of the committed offense and also the person of the offender, in order to achieve, in tandem, both the efficiency of its functions and the opportunity to achieve its goals.*

Therefore, the judge is the center of gravity for judicial individualization of punishments, center around which gravitates, on the one hand, various facts and circumstances involved in a case and, on the other hand, society's response to harmful action. Given that we have already realized the real importance of individualization work in order to achieve the purpose of punishment, judicial individualization of punishment is not made *arbitrarium iudicis* by the court, but must follow certain rules designed to guide the operation of individualization. Through the provisions of art. 74 of the Criminal Code the legislator has provided some general criteria that the court must take into account when carrying imposition of a sanction prescribed by law to a particular case.

Because the situations on which the judge is called upon to judge are among the most varied – practically, endless - the tools we have at hand must be equally able to provide a wide range of solutions from which to choose the best sanctioning treatment. However, in practice we encounter some "special" situations that require increased attention. Considering this special cases the general provisions set by art. 74 of the Criminal Code are no longer sufficient. For this purpose, the legislator filled the legislation with special prescriptions coming to complement the general framework created by art. 74 Criminal Code so that the judge will pronounce a solution as closely adapted as possible to the real needs of the offender rehabilitation.

These special situations are: the criminal fine penalty, additional penalties and ancillary penalties. We will treat the three cases identified above separately below.

## **2. Criminal Fine Penalty**

### **2.1. General frame. Fine-days System**

In the new Criminal Code, the fine penalty experience a new regulation, but also a wider scope compared to the Criminal Code from 1968, with an exponential growth of the number of offenses or variations of them for which a fine may be imposed as a unique punishment, but, especially, as alternative punishment to imprisonment (about 60 in the 1968 criminal legislation, more than 170 in the new Criminal Code).

The judicial individualization process of the criminal fine penalty requires some clarifications because of the new penal vision through which criminal punishment is determined by fine-days system, a system that operates in many European countries<sup>1</sup> and other continents<sup>2</sup>. According to this system, the fine is prescribed by law not as a standard grid of money, but as a number of fine-days, and the corresponding amount of a fine-day will be determined by the court within certain limits prescribed by law.

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<sup>1</sup> See, the *French Criminal Code* establishes nominally the criminal fine penalty in art. 131-3 (1<sup>st</sup> Book , Title III, Chapter I, Section I, Subsection 2) or the *German Criminal Code* which introduced the criminal fine penalty in Sections 40-43a (General Part, Title III, Chapter I, Criminal fine).

<sup>2</sup> See, *Brazilian Criminal Code*, where the criminal fine penalty is regulated in art. 49-52 (General Part, Chapter V, Section III).

According to this system, establishing the fine is in relation with two factors: the number of days-fine, on the one hand, and the value of one fine-day, on the other hand; after knowing these two factors, the fine is determined by multiplying the number of fine-days with the corresponding amount of a fine-day. According to art. 61 para. (2) Thesis II of the Criminal Code „the appropriate amount of a fine-day is between 10 lei and 500 lei, is multiplied with the number of fine-days which is between 15 days and 400 days”, which means that, expressed in Romanian monetary system, the fine general limits are between 300 lei and 200.000 lei. For sanctioning a legal person it is used the same fine-day system. According to art. 137 para. (3) Criminal Code, Thesis II, the corresponding amount of a fine-day is between 100 and 5.000 lei. This is multiplied by the number of fine-days, which is between 30 days and 600 days. Thus, the minimum fine, with which a legal person may be sanctioned shall not be less than 3,000 lei and a maximum of 3,000,000 lei.

Immediately, we will notice a categorical toughness of punishments by increasing the general minimum three times and the maximum four times, for the individual person, and with a 1/6 of the minimum and half of the maximum, for the legal person. This is understandable, given that 170 offenses have as alternative, besides the imprisonment, the criminal fine penalty. In addition, we should not overlook taking into account the reduction, not at all insignificant in some cases, of the imprisonment penalty.

The fine punishment, in fine-days system, under the aspect of precise determination of the appropriate fine-day amount, is a define feature of this system. Through this, it is actually determined the content of a fine punishment and it ensures a appropriate application of it corresponding with the seriousness of the offense and with the offenders dangerousness, while being able to fulfill the coercion functions and, also, fulfill its purpose towards convicts with different financial statuses, thus respecting the principal of legality. Of course, fulfilling, under this aspect, the operation of judicial individualization of punishments, it requires a very good knowing of the convicts real financial status, both in terms of assets and legal obligations to the people under his care. Sending to these special criteria of individualization, that the law does, aims to ensure, as much as possible, the personal character of the punishment and, thus, stopping the fine punishment coercive effects reflecting on the people under convicts care (Antoniou, 2011).

## **2.2. Individualization of Criminal Fine Penalty for Individuals**

Being a financial penalty, also the offender patrimony may be different in scope and in social-human tasks, it is necessary that, in establishing the criminal fine penalty, to consider other criteria's than those used for general individualization of punishment.

1. From the art. 61 Criminal Code provisions, we should understand that the court must consider, when determining the criminal fine penalty, several criteria. According to this disposition, the criteria used for individualizing the criminal fine penalty, are of two kinds: *general criteria*, common to all punishments, found in art 74 Criminal Code, and *criteria specific to criminal fine penalty*, found in art. 61 para. (3) Criminal Code. Therefore, the judicial individualization of criminal fine penalty is done by the court based on the criteria showed in art 74 combined with special criteria shown in art.61, para. (3).

Practically, *first*, the judge will determine, the type of sentence applicable to the offense. If the fine is not viewed as a unique penalty, the judge will use, according to art. 74 para. 2 Criminal Code, the general criteria of individualization to choose if the criminal fine penalty is appropriate or not.

In a *second stage*, he will proceed to the actual individualization of criminal fine penalty. Thus, the court will use the general criteria of individualization common to all sentences, namely the seriousness of the offense and the threat posed by the convict, to establish the appropriate punishment. The special limits of the criminal fine punishment are established according to three steps, according to art 61 para 4 Criminal Code, by reporting to imprisonment punishment set for each felony. We should underline that, in this second stage, through the use of general criteria of individualization, the fine penalty will refer to a defined number of fine-days, and it will not have a certain amount of money.

Finally, in a *third step*, the judge will have to report to fine's special criteria of individualization in order to establish a fine-day value. These are two: *the convict's financial status* and *legal obligation of the convict towards the people in his care*<sup>1</sup>. By introducing these two criteria the legislator considered that courts should realize the best punishment individualization based on defender's personal situation. In this stage the judge establishes the actual fine (amount of money) that the defendant should pay. Criminal fine's specific criteria must be studied and treated carefully by the court, so they can adapt it better to a singular case, if not the convict will incur greater or smaller sufferance than necessary.

2. As a novelty, and a very important one in judicial individualization of criminal fine penalty for individuals, are the provisions of art. 62 which do not provide the opportunity, but the obligation to apply a fine accompanying imprisonment as an additional main punishment when the committed offense was intended to provide a material gain.

As exception to art 61 para (6), when the main imprisonment punishment is accompanied by a fine, the special limits of fine-day are determined in relation with the court's imprisonment punishment, not in relation with imprisonment limits set within the criminal law provisions. Also, they will be reduced or increased as an effect of aggravation or mitigation's criminal liability set into the incrimination texts. In this case, the court will establish the number of a fine-day according to general criteria of individualization applicable to all punishments, by taking in consideration the main imprisonment penalty. In establishing the amount of one fine-day, consideration shall be given to the amount of material gain that was obtained or desired [art. 62 para. (3)]. Therefore the specific criteria of a fine will not correspond with the ones in para. (3) art. 61 Criminal Code – the convict's financial status and legal obligation of the convict towards the people in his care – instead, they will be ignored based on the higher threat posed by the offender, and that because he aims to obtain economic benefits by committing crimes.

### **2.3. Individualization of Criminal Fine Penalty for Legal Persons**

According to art. 187 Civil Code „Any legal person must have a self-sustained organization and an own patrimony, affected to achieve a certain moral and licit purpose, according to general interest”. Being the only main punishment that can be applied to a legal offender, the individualization of criminal fine penalty must be made by keeping into account of the legal person specific.

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<sup>1</sup> The maintenance obligation is regulated the new Civil Code, II<sup>nd</sup> Book – “About Family”, Title V – entitled “The maintenance obligation”, but also in Title IV – “Parental authority”, Chapter II – entitled “Parental rights and responsibilities”. The maintenance obligation exists between husband and wife, parents and children, who adopts and the adopted, grandparents and grandchildren, great-grandparents and great-grandchildren, brothers and sisters, as well as between other persons specifically provided by law (see, art. 516 Civil Code). It shall be entitled to maintenance only the one who is in need, because of not having a gain from work, or because of same inability to work. When we refer to “he convicts legal obligations towards persons they are supporting”, we should also take into considerations the obligations contained in art. 487 and 488 Civil Code from II<sup>nd</sup> Book – “About Family”, Title IV – “Parental authority”, Chapter II – entitled “Parental rights and responsibilities”.

Similar to individuals, the individualization criteria of criminal fine penalty for legal persons are of two kinds: *general criteria*, common to all punishments (art. 74 Criminal Code) and specific *criteria* [art. 137 para. (3) Criminal Code],

Because this is the only main punishment applicable to legal persons, the judge will go straight to establishing the number of fine-days based on general criteria, applicable to individualization of all punishments. The sentence's special limits are established according to 5 levels [art. 137 para. (4)] by reporting to the main imprisonment penalty limits for individuals.

In a *second stage*, the judge will have to report to criminal fine's specific individualization criteria for a fine-day value. These are, as for the individuals case, in two: *the turnover* (in case of for-profit legal entities), and *the value of assets* (in case of the other legal entities), as well as *other obligations of the legal entity*. By introducing these two criteria, the legislator, considered that the courts should realize a better punishment individualization, reported both at the legal person financial power and other obligations (for example, a bigger or smaller number of employees).

Common to individuals and legal entities is the provision from art. 61 and art. 137 para. (5) Criminal Code, that indicates a cause for increasing with a third the special limits stated by para (4) from both articles, in case that the committed offense was intended to provide a material gain. To apply this aggravating cause it is not necessary the effective obtaining of the benefit, individual/legal entities must only intend to obtain a material gain thought the offence.

### 3. Ancillary Penalties

The ancillary penalty consists in applying a coercive measure additional to *in concreto* established punishment if the court finds that this type of punishment is required, by taking in to consideration the nature and gravity of the offense committed, the offender's person or circumstances of the case.

According to art. 55 Criminal code, para. a) -c), ancillary penalties for individuals are:

- ban on the exercise of certain rights [see, Art. 66 para. (1)];
- military demotion (see, art. 69);
- publication of judgment to convict (see, art. 70).

Ancillary penalties for legal persons [art. 136 para. (3)] are:

- winding-up of legal entities;
- suspension of the activity or of one of the activities performed by the legal entity, for a term between three months and three years;
- closure of working points of the legal entity for a term between three months and three years;
- prohibition to participate in public procurement procedures for a term between one and three years;
- placement under judicial supervision;
- display or publication of the conviction sentence.

The Criminal Code, through its provisions, offers increased opportunities for judicial individualization of punishments. Compared to the 1969 Criminal Code, the Criminal Code in force allows the courts possibility to apply, besides the main penalty, ancillary punishments in cases where the main penalty is only the criminal fine penalty. In addition, the condition of existence of a minimum prison sentence of two years is removed, the courts can apply ancillary punishments regardless of the duration of imprisonment and even if its execution was suspended under supervision.

Also, the possibility for ancillary penalties application is not conditioned by preexistence of imprisonment penalty, thus the ancillary penalties can be imposed, either when the court has given a sentencing judgment (with imprisonment service or suspension of service of a sentence under supervision), either a sentence consisting in criminal fine penalty.

Establishing one/several ancillary penalties is closely linked with the process of the judicial individualization of punishment. Moreover, even in par. (1) art. 67 of the Criminal Code the legislator imposes to the judge to take into consideration the nature and gravity of the offense, the circumstances of the case and the offender person – basically, to the general criteria of the punishment individualization – if he considers that imposing of such penalty is needed. Furthermore, we believe that the judge mission is very important because the law leaves to his wisdom to appreciate it is necessary or not to impose such penalties. *In concreto*, the judge will have to weigh the nature and gravity of the offense, the circumstances of the case and the offender person, to pinpoint which are the needs for rehabilitation and which are the areas that must be protected from the dangerous actions of the offender, needs and areas requiring further attention.

In criminal law we find situations where the application of ancillary penalties is mandatory. We encounter such situations when the law expressly states in the incrimination text of the crime the express prohibition on the exercise of certain rights. *Exempli gratia*, we mention the *crime of bribery*, provided by art. 289 para. (1) – shall be banned the right to practice the profession or the activity that was used by the defendant to commit the crime; the *crime of armed robbery*, provided by art. 234 para. (1) – the defendant shall be prohibited from exercising certain rights (any of those listed in Art. 66 and which are applicable); *abusive investigation*, provided by art. 280 – the defendant shall be prevented from exercising the right to hold public office, etc. In these cases the judge must take into account the order of law, failure to apply these specific ancillary penalties is unlawful.

Imposition of a sentence with ancillary penalties consisting in ban on the exercise of one or more rights from art. 66 par. (1) of the Criminal Code, requires the imposition of the correlative additional penalty/penalties, solution given by law in art. 65 para. (1) Criminal Code. In fact, the contrary view would be unnatural because it denies the idea of continuity that is envisaged by law. Thus, for example, to a convict the given judgment of the court imposes, besides the main penalty of imprisonment, the ancillary penalty consisting in prohibition to hold public office. After executing the required fraction in detention, he is conditionally released and, according to art. 68 para. (3), final thesis, the execution of ancillary penalties begins after the period of supervision. If he is not subject to ancillary penalty, the convict, between release date and last date of surveillance term is not subject to any prohibition, which would give him the right to stand for public office. Therefore, the lack of continuity leads to abnormalities, a convict cannot be considered a time – ironically, nearest temporally to the offense – worthy to exercise his rights and, in a subsequent period, unworthy. However, the application of additional penalties besides ancillary penalties is viable only in case of conviction to imprisonment; if the defendant is sentenced only to a criminal fine penalty, the execution of the ancillary penalty starts from the moment when the given sentence becomes final.

#### **4. Additional Penalties**

In accordance with art. 54 of the Criminal Code „an additional penalty consists of a ban on the exercise of certain rights, as of the moment a conviction remains final and until the date the sentence of imprisonment has been fully served or deemed as served”.

Therefore, additional penalty is complementary in nature, with the designed role to complement the main penalty. More specifically, the court applies, through its given judgment, in addition to the main penalty, ban on the exercise of certain rights from the moment when the given judgment became final until full execution of punishment or, until when the punishment is considered as served.

Unlike ancillary penalties, in order to apply the additional penalty of ban on the exercise of certain rights, it is necessary to establish a main punishment and, also, the ancillary penalty consisting in ban on the exercise of certain rights. If both conditions are satisfied, the court shall apply only the additional penalty correlative to the rights that have been banned as ancillary penalty. This interpretation emerges from the provisions of art. 65 para. (1) of the Criminal Code. Taking in consideration the interpretation of these provisions, we believe that the court must apply additional penalties in absolutely all cases when it had considered necessary to apply ancillary penalties or when the law imposes the mandatory application of ancillary penalties.

As an additional penalty, which accompanies the imprisonment one, it can be banned the same rights as in the case of ancillary penalties [see, art. 66 para. (1)], except for the right of a foreign citizen to reside on Romanian territory [art. 66 para. (1) letter c)], right that can be prohibited as an additional penalty only if the main imposed punishment is life imprisonment.

Establishing one/several additional punishments is closely linked to the judicial individualization of punishments process. The court, when seeking to determine the duration of the sentence, will assess the seriousness of the offense, and the threat posed by the offender. Depending on the specific situation of each case, it can establish into convict charge certain disqualifications, prohibitions or incapacities [listed in art. 66 para. (1) of the Criminal Code.], which are designed to alert the convict on its negative behavior. These disqualifications, prohibitions or incapacities have a dual role: first, they should compel the convict that he can no longer take actions in ways that are harmful to society (for example, prohibition of driving certain categories of motor vehicles leads, implicitly, also to the impossibility of jeopardizing traffic public roads); secondly, they have a rehabilitation role because they force the convict to correct his behavior and to understand the value of the lost right.

Not the least, we must mention that in the new Criminal Code the application of additional penalties became optional; the courts are not forced to order this type of punishment even when the defendant was sentenced to imprisonment, or if the main penalty is life imprisonment. This choice has influence on the individualization of punishment work because it allows judges to better adapt the punishment to each individual case, applying an additional penalty is not justified in all cases. However, we must not lose sight of the fact that additional penalty is mandatory when the court found necessary to apply one or more ancillary penalties.

## 5. Conclusions

The institution of individualization of criminal sanctions is large and complex and it has been the source of different visions over the last 150 years, starting with the marking of the concept, as a response to the emphasized character of *retribution*, but also to the total absence of adaptation of sanctions from XIX century. Nowadays, the concept has evolved and it appears as a *sine qua non* condition, regarding to the institution of criminal liability, although the opinions are still divided. Nevertheless, leaving aside and not taking into consideration the different views, the individualization remains an important instrument of criminal law.

Through this mechanism, it takes place the operation of adapting all the measurements of criminal coercion to the legal level, judicial and administrative level, as an expression to the reaction of the society regarding the antisocial behavior of people. The reporting to an individual case, by taking into consideration the offender, the danger of the offender and his chances of straightening, is the result of fulfillment with maximum efficiency of the functions and purpose of criminal law sanctions.

In this context, the judge's role is extremely important: firstly, because he represents the instrument by through the legislator applies the right penal treatment and secondly, because he is the one to whose intuition, life experience and wisdom, turns to dose the society's intervention, according to the seriousness of the criminal act and to the danger posed by the offender.

The judge doesn't have to see the sanction just as a retribution from the society, correlative to committing the criminal act, because in this way, he would be just an instrument to the society's revenge for the damage made by the offender. „*Retaliation is related to nature and instinct, not to law. Law, by definition, cannot obey the same rules as nature*”. (Albert Camus). Furthermore, Friedrich Wilhelm Nietzsche once said „*distrust all in whom the impulse to punish is powerful*”.

The legislator of criminal law who recently came into force, may have understood the need to create new institutions who will not emphasize the wish of retribution, but the desire of adapting the sanction by taking into consideration the offender. Leaving aside the legal and the administrative individualization, which are not the object of our study, although the changes are visible<sup>1</sup> and it influence the judicial individualization work, the judicial individualization of the criminal sanctions is way better established, by creating a legal framework where the judge has the possibility of adapting the sanction to each individual case. As example, the general provisions (art. 74 Criminal Code), the mitigating or aggravating circumstances (art. 75-79 Criminal Code.), and more, the judicial individualization of execution of punishment (art. 80-106 Criminal Code).

Also, regarding to the judicial individualization of the sanctions in special cases, new modifications are to be considered - taking into consideration the offender: for example, the clear defining of criteria of individualization specific to criminal fine penalty, the introduction of the fine along the imprisonment as an additional main penalty, optional to the situation when the criminal act was committed with the purpose of obtaining financial benefits, the elimination of the conditions which restrained the application of additional penalties, etc.

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<sup>1</sup> The decreased limits, with some exceptions, to most offenses incriminated by criminal laws; the increasing number of offenses which are punishable without deprivation of liberty; exponential growth of offenses punishable with non-custodial sentences as an alternative to the deprivation of liberty ones, etc.

These changes have reconciled the criminal law to fundamental rights of man, and also created new institutions inclined to humanize the criminal law.

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