THE INDIVIDUALIZATION OF PUNISHMENT ACCORDING TO THE NEW CRIMINAL CODE

Călin BERAR[*]

Abstract

The individualization of punishment implies finding the balance between the gravity of the crime and the personality of the criminal, on one hand, and the punishment that will be applied, on the other hand. The governing principle of this procedure is, undoubtedly, the principle of proportionality. Finding "the appropriate penalty" is a complex issue, in which each element can have an important role. Therefore, to ensure a proportion between the severity of the punishment and the seriousness of the offence it is imperative to determine those factors that support the proportionality test. So we must take into consideration the purpose of the punishment, the gravity of the offense, the offender's personality, the legislator's conception about the criminal sanctions and any other relevant element. The new penal code brought significant changes in the field, such as establishing lower sanctions for crimes than the previous criminal code but higher penalties for those who commit more crimes.

Keyword: balance, punishment, proportionality, crime.

I. Introduction

The individualization of punishment implies that judicial review carried out by the court when it is called to determine the sanction that will be applied concretely to the one who has committed an offense. It always involves a concrete and subjective analysis, which is different from the legal individualization (the one made by the legislator) which is also a general and abstract one.

The term "penaltie" comes from the Latin sentence "poena" and in the Roman law, in addition to the coercive role which he fulfilled it was also a way of repairing the

[*] *PhD Student, West University of Timişoara, Faculty of Law, Contract no. POSDRU/159/1.5/S/137926 of Romanian Academy:*

damage caused by a crime. In the Roman law, Papinian also defined it as "estimatio delicti" trying to synthesize the idea of retribution through punishment.[1]

The governing principle of this procedure is, undoubtedly, the principle of proportionality. In this sense, The Romanian Constitution, which was revised in 2003, states: "The exercise of certain rights or freedoms may only be restricted by law and only if it's necessary for: the defense of national security, public order, health or morals, rights and freedoms of citizens; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe. Restrictions may only be ordered if necessary in a democratic society. The measure must be proportionate to the situation that caused it, and applied without any discrimination or without any prejudice to the existence of the right or freedom."[2]

No doubt that this principle has the role to ensure the effectiveness of the punishment in relation to its purpose, but because not any effective punishment is always proportional[3], the proportionality principle applied in this matter requires considering at the same time, besides the gravity of the offense and the personality of the perpetrator, a series of other elements which are esential in order to prevent the ultimate sanction from being an abusive restriction of fundamental rights and freedoms.

This study focuses precisely on identifying these elements which support the proportionality test and how they can influence the final punishment. Their correct analysis is the guarantee respect for and protection of fundamental rights of citizens of both community and the offender against exaggerated repressive tendencies of governments.

2. The general criteria of individualisation

In the Romanian legal system, individualizing punishment is carried out by court according to the general criteria set out explicitly in the criminal code. This operation is performed by a judge, after the judicial inquiry and the debate.

The Romanian Criminal Code establishes the general criteria for the individualization of punishment that the court is obliged to take into account, both for the establishment of a punishment when the law provides alternative punishments and for its implementation. The article 74 of the New penal code states: "Determining the length times or the amount of the penalty is commensurate with the gravity of the offense committed and the dangerousness of the offender, which is assessed on the following criteria:

a) the circumstances and manner of committing the crime and the means used;

b) the state of peril for the protected value;

---

[1] *See V. Paşca,* Curs de drept penal. Partea generală, Ed. a II-a actualizată cu modificările noului Cod penal, *Universul Juridic Publishing House, Bucureşti, 2012, pp. 403.*

[2] *See Art. 53. par. 1 and 2 from The Romanian Constituition .*

[3] *For example a French law no. 2010- 242 of 10 March 2010 contained the possibility of chemical castration of the rapists .*

c) the nature and severity of outcome products or other consequences of the offense;
d) the reason for the offense and purpose;
e) the nature and frequency of offenses that constitute criminal history of the offender;
f) the conduct after committing the crime and during the criminal trial;
g) the level of education, age, state of health, family and social situation.

From these legal provisions it is clear that the judicial individualization process is not done in an arbitrary manner by the judge, but in compliance with the general criteria that must be taken into account.

Grouping these legal criteria listed in art. 74 we can note that there can be differentiated two categories: criteria relating to the act itself and the criteria on the person of the author. It should be noted that the legislation chose expressly to introduce in the new Criminal Code these criteria, which were previously made by the courts and legal doctrine.

Although some authors have considered this as a setback[4], I appreciate that it was preferred this way, in order impose the judge a legal obligation to perform an accurate analysis in the light of all those criteria of art. 74 and not an abstract and general one as it often happened in the old regulation.

Besides, these general criteria applicable in all cases, the Criminal Code provides special individualization criteria, applicable only in certain cases, which the court is also obliged to take into account (for example, in the participation a special criterion for individualization is determined, namely the contribution of each participant in the offense).

The application of the general and special criteria of individuation by the court in each case may establish different concrete punishments ranging between specific minimum and maximum limits set by the criminal law, for offenses of the same kind, without that being consequently considered a different jurisprudence in the process of judicial individualisation of punishment, but a normal reaction of state when a crime is committed.

Also in the individualization process of penalties one can reach different concrete application of punishments for offenses of the same nature, even outside the special minimum and maximum limits set by the criminal law (for example, if the court finds that there are aggravating or mitigating circumstances). This does not mean that there is a non-unitary jurisprudence in matters of individualisation of penalties.

Moreover, because a penalty, of the same kind and amount, does not produce in all cases and to all the authors the same consequences, the personality analysis of the perpetrator becomes very important.

The full understanding of the personality of the offender helps to find the proper punishment which is able to determine the convicted person not to commit future

[4] *See G. Antoniu,* Observaţii cu privire la anteproiectul unui al doilea Cod penal, *Criminal Law Revue , nr.4/2007.*

antisocial acts, thus ensuring better performance of the educational role of the punishment. But things are not simple from this perspective because often the defendant during the process does not benefit of an effective defense and from this perspective.

Our legislation allows the judge to order, even in the case of major criminals, an evaluation report[5] made by a specialized service in order to reveal crucial data such as its psychophysical condition, living environment, opportunities for rehabilitation, etc. They are extremely important data that should not be neglected.

The two pillars of judicial individualization, the seriousness of the offense and the dangerousness of the offender, not prevail against each other. This is because the process of individualization is a complex process in which elements did not advance a preset value and in which any fact can receive a certain significance. In other words, evaluation is global.

3. The role of the individualisation circumstances

Beyond the criteria of individuation present in the art.74 of the new penal code, there are a number of other circumstances that may increase or decrease the quantum of penalty.

In this respect, art.77 of the Criminal Code provides that aggravating circumstances: the act of three or more persons together, the offense committed by cruelty or subjecting the victim to degrading treatment, the crime committed by means or methods likely to endanger other persons or property, the offense of by an adult offender, if it was committed with a minor offense, taking advantage of state of the victim particularly vulnerable, due to age, health, infirmity or other causes, offense committed in a state of voluntary intoxication with alcohol or other psychoactive substances when he was provoked to commit the offense, the offense by a person who has profited from the occasion of a disaster, the state of siege or state of emergency, offense for reasons of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, non-contagious disease or HIV / AIDS or other circumstances of the same considered by the perpetrator as a person causes of inferiority in relation to others.

Also, art.75 sets state mitigating circumstances such: legal challenge, exceeding the limits of self-defense, or of the state of emergency, payment injury during prosecution or trial before the first term.

The effects of mitigating circumstances rebound on legal limits of punishment which will be reduced by a third.[6] However, this produces also some concrete consequences on the sentence imposed by the judge who will default in lower limits. In the case of aggravating circumstances the judge has the opportunity to apply punishment to the

[5] *See art. 38 din L 252/2013 published in Official Journal nr. 514/14.08.2013.*

[6] *See art. 76 of the Criminal Code.*

special maximum and where it is estimated not to be enough he can add up to 2 years.[7]

But these are not limiting circumstances expressly provided, the judge being able to retain any fact concerning both how the person was committing the offense and the offender that may lead to reduction of sentence.

4. The purpose of punishment

In the process of the judicial individualization a special place has the identification of the purpose of punishment. The judge is called to appreciate which is the objective to be reached in the process of individualization. This requires both a general analysis and a particular one. In other words, it is necessary to determine the purpose of applying a sanction to the convicted of a particular case.

The penalty is in criminal law that fair "reward" applied to the perpetrator in order to restore the social order, being as an author has said the society's best defense against criminal conducts.[8]

Art.52 of the Criminal Code of 1968 contains a definition of the penalty: "The penalty is a coercive measure and a means of rehabilitation of the convict. The purpose of the punishment is to prevent the commission of further offenses ". It could be detached from it its main functions, namely the rehabilitation of the convicted and prevention of committing new antisocial crimes.

The new criminal code does not contain such provisions, but this does not mean that the legislation has abandoned the old conceptions about punishment. Therefore, legal doctrine and jurisprudence task lies in theorizing its goals.

One writer said "the purpose of punishment is none other than to bring the guilty prevent further infringement of his fellow citizens and to deter others from committing antisocial facts.[9]

It is made the distinction between immediate purpose of punishment, namely to prevent the perpetrator from committing crimes, and the mediated purpose, which is to warn other people that if they commit such acts are liable for penalties which involves restriction of the fundamental rights.

Over time, there was always a tendency to legitimate punishment established and applied when a crime was committed. This justification is made either on the concepts of religion, morality, or even on a need to restore the social order violated after committing the crime. All these led to the emergence of some types of justice which were based on different beliefs of that community. They are the retributive justice, the distributive justice and the restorative justice.[10]

---

[7] *See art. 78 of the Criminal Code.*

[8] *See G. Antoniu*, Contribuții la studiul esenței, scopului și funcțiilor pedepsei, *Criminal law revue nr. 2/1998, Bucureşti, pp. 17.*

[9] *See C. Beccaria,* Despre infracţiuni şi pedepse, *Scientific Publishing House, Bucureşti, 1965, pp. 51 .*

[10] See R. Cario, *Justice Restaurative, Principes et promesses*, second edition, L'Harmattan, Paris, 2010, pp. 42

Explained in a simple form, the retributive justice is that form that focuses only on punishing the offender. The real purpose is to deter the commission of future antisocial acts.[11] How can this be done? Through a system of exemplary punishment in accordance to the gravity of the act committed.

It should not be regarded as a pure satisfaction of the victim by imposing to the perpetrator a sentence like the evil he committed it, but rather as the only way to maintain some order in the absence of strong state structures to ensure the rule of law. The simple explanation would be: the offender deserves it.

One way of defining it is by reference to the Talion's law, summarized in the phrase "eye for an eye and a tooth for a tooth". Through the sentence, it is given an example to society and at the same time a warning that anyone committing such an offense will suffer similar consequences. And just this warning produces an intimidating effect so to prevent the commission from similar crimes.

In other words, the amount of penalty imposed should reflect the degree of anger felt by the community as a result of committing an offense, and, thus, should be respected a proportion.[12]

The notion of proportion in this system is rather that of equivalence between the evil committed and the punishment received. The greater the penalty is, the better the need for justice of the community is satisfied. Therefore, within it, the interference in the fundamental rights and freedoms is more important. So it is not a model for nowadays.

However, in this context, it should not be taking into account the idea that in the retributive justice system a harsh punishment must be applied in all circumstances. Therefore, the penalty will be applied only if that person is really worth it and not on a mere satisfaction of a community.[13]

In other words, the only test for assessing proportionality comes here in reference to the fair correspondence between the deed and the punishment established, being of no importance the necessity for such punishments, suitability or effectiveness of its application.

Unlike the first, the distributive justice is emphasized mainly on the rehabilitation of the offender, so that it tends to layout a sentence that will ensure him awareness of the evil committed and subsequent social reintegration. Prevention is achieved here not by revenge of society but by educating the offender not to commit such acts any more.

The idea of proportional justice first appears in Aristotle, who stated it as his vision, involving the idea of distributive justice. He speaks in his work about the need for a fair

---

[11] *See W.R.P. Kaufman,* Honor and Revenge : A Theory of Punishement, *Springer, London, 2013, pp. 49.*

[12] See A. von Hirsch, *Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and thei rrationale, , în* Journal of Criminal law and criminology, nr. 1/1983, pag. 209-248 http://scolarlycommons.law.northwester.edu .

[13] *Kant,* The Metaphysical Elements of Justice*, cited by A.E. Bottoms and R.H. Preston (eds),* The Coming of the Penal Crisis: a criminological and theological exploration , *Scottish Academic Press, Edinburgh , 1980 pp. 62 .*

relationship between the state and the citizen, assessed through the rule of law.[14] In other words, such interaction should occur only within the limits permitted by law, any deviation from this implying the idea of social disorder.

As part of ensuring the rule of law it will always be proportional a punishment that is provided in the standard of criminality and is able to determine the offender not to commit such antisocial acts. Also, the way to reach that sentence is relevant in terms of respecting proportionality. Abuse, regardless of when that occurs, even if it is subsequently removed, deprives from the beginning the person of a fair trial, while opening the doors for disposition of a disproportionate sentence.

Unlike those two, the restorative justice is based on the idea of repairing the damage caused to the victim.[15] Basically, what matters in this context is that any person who has suffered some damage as a result of a crime should receive fair compensation, in nature, if it is possible, or in equivalent.

This kind of justice was born from the desire to give the victim a role in the process of accountability of the perpetrator. In most cases of the above systems, the liability is more a matter settled between the community and the offender. Unfortunately, in the analysis of proportionality in such systems, the condition of the victim is not too emphasized.[16]

But the restorative justice is not only designed to provide compensation for the damage but the condition of the offender's itself in order to return to the society.[17] The first step in achieving these goals is to be aware of the evil you did and repair the damages. Following this behavior shows that it is not necessary to apply a punishment toward the maximum.

From this perspective, proportionality is analyzed in terms of victim's interest, but not in the sense that it should be avenged by the community but as its damage must be repaired. Basically, the parties involved in a crime are outlining the further course of the process, largely determining the future consequences and can even influence the final penalty. In this way, a measure will be proportional if it is capable of producing the purpose of punishment, considering it as less restriction of the fundamental rights.

I think these different meanings of the concept of proportionality can be explained the best through the following example. A person is attacked in the street by another one on religious reasons, and because of this aggression he broke his hand. Surely, if we are dealing with a system of retributive justice there would not appear disproportionate a punishment according to talion's law, or many years in prison. At the same time, if we want the rehabilitating of the offender, it may be considered sufficient a punishment directed to the minimum, as well as within the restorative justice that person could remain even unpunished if he repairs the damage caused to the victim and it does not require pulling it accountable.

---

[14] *Aristotel*, Etica Nicomahică, *V, I, 1129b; 1130a; Editura Ştiinţifică şi Enciclopedică, Bucureşti, 1988, pp. 106 – 107* .

[15] *See J. Dignan,* Understanding victims and restorative justice, *Open University Press, 2005, pp. 94* .

[16] *See P. Hulsroj,* The principle of proportionality, *Springer Publishing House, Hornbaek, 2013., pag. XI*

[17] *R. Cario,* op.cit., *pag. 53* .

Eventually, this kind of justice is nothing else but a reflection of ideologies and beliefs of a society, and, to assess what is just, we can not dissociate from it. Social reaction against crime must adapt in a way that can lead to these goals of the community.[18]

These different ways of perception of the role of punishment has no doubt influenced the judicial individualization. Our penal system, introduced with the entry into force of the new Criminal Code has produced important changes on the concept of punishment. For this reason we draw closer to a type of restorative justice. This is because limits have been significantly reduced sentences for all offenses and also given the opportunity in the criminal case to reconciliation of the parties to a much larger number of facts. For example, in the case of theft, which was sanctioned drastically, new penalties established by the legislation were significantly reduced, even allowed a reconciliation that will be barring further prosecution.

These changes are not isolated, and reveal the legislator's general conception about the role of punishment in our criminal law system. By virtue of this fact in the process of individualization it is required to take into account, on the one hand, the abstract danger reflected in the standard of criminality, as well as the author's attitude to resolve the consequences of his actions, repairing the damage caused.

5. The judge's subjectivity

The criminal process is characterized by the judge's impartiality which involves making a physical exam on situations in order to establish the appropriate punishment that can lead to achieve its purpose.

As shown above, law provides sufficient assessment criteria and benchmarks in order to establish the main directions in achieving judicial individualization. At the same time, the limits of punishment that can be found in the text of the indictment of an offense involving the possibility to apply a penalty towards the minimum or maximum, depending on the particularities of each case.

From this equation the usual assessment of the individualisation can not totally exclude the person called to assess the correctness and necessity of concrete measures. This is because the very notion of proportionality concerns an assessment from someone, to be made exclusively in consideration of the need for balance.

The court is not an abstract institution but it is composed of human beings, characterized by their own subjectivity. However impartial a judge is, in a way, the final punishment will be to some extent the reflection of his own conscience.

The notion of proportional punishment itself also bears a moral dimension, which focuses mainly on the right balance between the end and the means. Finding of fairness and moral perspective often leads to different views of the same situation. The analysis of this perspective should not be removed but I would say it is even useful in conditions in which any social value is given a specific meaning and moral duty.

[18] *R. Cario*, op.cit., *pag. 53* .

In this context it was said that the judge is always dominated by a certain dilemma, namely whether the judgment will decide what will satisfy equally the public good and the individual good.[19] In this way we have to recognize the possibility of the two errors: to convict an innocent person and therefore to acquit a guilty person.

But only the analysis of the general conditions of individuation reminds us about the subjectivity of the judge. Thus, if we go in depth the general criteria of individuation we see that some of them require an evaluation according to the perceptions of one called to give a solution.

For example art. 74 par. b of the Criminal Code provides, among other conditions, the status of the danger created for the protected social value. Obviously, this state of danger will always be assessed through his own convictions of the judge, with no definite objective assessment in this regard. Therefore, for example in the case of rape, a female judge will apply a greater penalty than a male judge.

Thus, it is obvious that the judge's subjectivity plays an important role in the process of individuation. It is not clear however that this undermines the judicial system and would constitute a violation of the legal norms. Subjective does not mean arbitrary or discretionary.

6. Conclusions

The judicial individualization of the sentences is a very important stage in criminal proceedings because its main objective is to establish the effective sanction, after deciding the guilt of the perpetrator.

The principle of proportionality helps concretely in the process of the individualization of the punishment, which is why it was called the principle of individualization. Applying the principle of proportionality in this matter entails defending principles as that of legality that of the right to a fair trial or the defendant's rights of defense. Its operation can be fully understood only in relation to them.

The system proposed by our legislature is a fairly open system that provides the legal framework for judicial individualization and the criteria proposed to consider are not the only ones exhaustively listed in various provisions. The body in charge of their application can refer to any element that could be related to the defendant or the person on how to commit the crime.

However, the main pillars of the proportionality test in this matter are: analysis of the gravity of the offense, the offender's individual analysis system mitigating and aggravating circumstances and assess in terms of the possibility to achieve the purpose of punishment.

This work was supported by the project "Excellence academic routes in doctoral and postdoctoral research - READ" co-funded from the European

[19] *See V. Pasca,* op.cit. *pp. 521 .*

Social Fund through the Development of Human Resources Operational Programme 2007-2013, contract no. POSDRU/159/1.5/S/137926.

References

Antoniu George, Contribuții la studiul esenței, scopului și funcțiilor pedepsei, *Criminal law revue* nr. 2/1998, București

Antoniu George, Observaţii cu privire la anteproiectul unui al doilea Cod penal, *Criminal Law Revue*, nr.4/2007 .

Aristotel, *Etica Nicomahică*, V, I, 1129b; 1130a; Publishing House Ştiinţifică şi Enciclopedică, Bucureşti, 1988 .

Beccaria Cesare, *Despre infracţiuni şi pedepse*, Scientific Publishing House, Bucureşti, 1965 .

Ciopec Flavius, *Individualizarea judiciară a pedepselor. Reglementare. Doctrină. Jurisprudenţă.*, C.H.Beck Publishing House, Bucharest, 2011.

Dignan James, *Understanding victims and restorative justice*, Open University Press, 2005 .

Dobrinescu Liviu, Principiul proporţionalităţii în dreptul European. Exemple de neproporţionalitate din legislaţia şi practica românească, in *Curierul fiscal*, nr.1/2013 .

Emiliou Nicholas, *The Principle of Proportionality in European Law. A comparative study*. Kluwer Law Inetrnational, London, 1996 .

Hulsroj Peter, *The principle of proportionality*, Springer Publishing House, Hornbaek, 2013.

Kaufman Whitley.R.P., *Honor and Revenge: A Theory of Punishement*, Springer Publishing House, London, 2013,

Melander Sakari, Ultima ratio in european criminal law, *European Criminal law Review*, nr. 1/2013.

Paşca Viorel, *Curs de drept penal. Partea generală, ediţia a II-a actualizată cu modificările noului Cod Penal*, Universul Juridic Publishing House , Bucharest, 2012.

Rivers Julian, The presumption of proportionality, *The Modern Law Review*, nr. 3/2014

Streteanu Florin,*Tratat de drept penal.Partea generală*, vol.I, C.H.Beck Publishing House, Bucharest, 2008.