

COMPARATIVE ASPECTS REGARDING THE EXPULSION MEASURE IN THE PENAL CODE AND NEW PENAL CODE

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Abstract

With the aim of combating the delinquency phenomenon, by means of the provisions of art. 286/2009, regarding the Penal Code, it was diversified the general background of complementary punishments, which can be applied if the main punishment established is prison or fine payment. Therefore, is to be changed also the judicial nature of the expulsion measure, becoming complementary punishment by changing the rationality of applying this sanction.

Keywords: penal liability, sanctions, safety measure, main punishments, complementary punishments

Introduction

For the proper performance of the activities in human collectivities it is necessary to respect the general behavior rules. In general, the people's attitude towards the legislative imperatives it manifests on the line of respecting the judicial rules within a conformation judicial report. The efficiency of the penal judicial rules is assured by their application and by the way in which the persons, who committed infractions, by breaking the provisions of the judicial rules, are brought to book for the infractions committed¹.

Within the penal right judicial report, it is established the penal liability in the forms and modalities foreseen by law, in terms of the type of infraction committed, the level of social danger implied by the infraction and also by the particularities of the perpetrator².

With the aim of combating the delinquency phenomenon it is necessary, firstly, to combat the causes which generate the delinquency phenomenon and also the conditions which favor this phenomenon. This implies, of course, an effort from the company, so that the entire judicial-penal regulation to assure the prevention of committing dangerous deeds³, both by

¹ Gheorghe Nistoreanu, Vasile Dobrinouiu, Ilie Pascu, Alexandru Boroi, Ioan Molnar, Valerică Lazăr, *Drept penal. Partea generală*, Europa Nova Publishing house, Bucharest, 1997, pp. 84; Costică Bulai, Bogdan Bulai, *Drept penal. Partea generală*, Universul Juridic Publishing house, Bucharest, 2007, pp. 282; Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, Edition VIII reviewed and enlarged, Universul juridic Publishing house, Bucharest, 2010, pp. 181

² Gheorghe Nistoreanu, Vasile Dobrinouiu, Ilie Pascu, Alexandru Boroi, Ioan Molnar, Valerică Lazăr, *Drept penal. Partea generală*, Atlas Lex Publishing house, Bucharest, 1996, pp. 341

³ See Maria Zolyneac, *Drept penal. Partea generală*, Vol. III, “Chemarea” Foundation Publishing House, Iași, 1993, pp. 803

conformation and also by constraint for those who commit such deeds. On this line, the application of the judicial-penal regulations and penal policy of the state should contribute to the decrease of the delinquency at reasonable limits, protection of the social values, which fall under the incidence of penal law, to provide the filling of safety and social protection for all members of society⁴.

In the penal right, the sanctions are very important, being regulated in one of the three fundamental institutions of the penal right, with the infraction and penal liability, the doctrine in domain considering the sanctions as representing, evidentially, the effect of penal liability, and this, at its turn, is the judicial consequence of the infraction commission.⁵ These are essential means of achieving the goal of the penal law, contributing to the defense of the fundamental social values of the society against infractions⁶, representing also instruments for achieving and reestablishing the rule of law⁷. In terms of the persons who committed deeds foreseen by penal law, with all afferent threat, and accompanies the background of penal right sanctions, the sanctions represent inevitable consequences of their dangerous conduit and they aim to provide their constraint and decrease on the line of respecting the provisions of the penal right rules⁸.

In order to achieve the goal of the penal law, in the Penal Code are regulated several categories of sanctions. In terms of some variables specific to the delinquency phenomenon, namely the type of infraction committed, the level of social danger implied by the infraction, the person and perpetrator's conduit, the penal right sanctions, in the course of time, met a continuous diversification, so that in present it contains three categories of penal right sanctions: punishments, educational measures and safety measures⁹.

The appearance of safety measures in Romanian penal legislation is relatively recent¹⁰ and although it has a juridical feature that is different and controversial in the field of study, it had occupied an important and relevant role of prevention¹¹. As in the penal legislation of other countries, the safety measures didn't occur on a new field, also the older penal laws contained sanctions with a preponderant prevention role, although their existence in the Penal Code didn't represent safety measures, but they were considered either complementary punishments, or consequences of condemnation¹².

Being relatively recent, the first stipulations in the law text regarding safety measures can be found in Stirbey Penal Code, from 1850, where under the collocation "place under police supervision" it was regulated a safety measure¹³.

⁴ See Alexandru Boroi, *Drept penal. Partea generală*, C.H.Beck Publishing House, Bucharest, 2008, p.17

⁵ See Vintilă Dongoroz and collaborators, *Explicații teoretice ale Codului penal român*, vol. II, Academia Republicii Socialiste Romania Publishing House, Bucharest, 1970, pp. 19; Costică Bulai, Bogdan Bulai, *Manual de drept penal. Partea generală*, op.cit., pp. 284; Gheorghe Nistoreanu, Vasile Dobrinioiu, Alexandru Boroi, Ilie Pascu, Valerică Lazăr, Ioan Molnar, *Drept penal. Partea generală*, op.cit., p. 343

⁶ See Gheorghe Nistoreanu and collaborators, *Drept penal. Partea generală*, op.cit., p. 404

⁷ See Vintilă Dongoroz, *Drept penal* (republication of the edition from 1939), Romanian Association of Penal Sciences, Publishing House of Tempus Company, Bucharest, 2000, p.456; Alexandru Boroi, *Drept penal. Partea generală*, op.cit., pp. 329; Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, 8th Edition reviewed and enlarged, op.cit., p.182

⁸ Alexandru Boroi, *Drept penal. Partea generală*, op.cit., p.329; Constantin Mitrache, Cristian Mitrache, Romanian Penal law. General section, 8th Edition reviewed and enlarged, op.cit., p.181

⁹ See Alexandru Boroi, *Drept penal. Partea generală*, op.cit., p. 331; Mihai Adrian Hotca, *Codul penal – comentarii și explicații*, C.H.Beck Publishing House, Bucharest, 2007, pp. 616; Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, 8th Edition reviewed and enlarged, op.cit., p. 183

¹⁰ See Costică Bulai, *Manual de drept penal. Partea generală*, ALL Publishing House, Bucharest, 1997, pp. 585

¹¹ Laura-Roxana Popoviciu, *Drept penal. Partea generală*, Pro Universitaria Publishing House, Bucharest, 2011, p. 348.

¹² See Vintilă Dongoroz and collaborators, *Explicații teoretice ale Codului penal român*, vol. II, op.cit., p. 277; See Viorel Pașca, *Măsurile de siguranță -sanctiuni penale*, Lumina Lex Publishing House, Bucharest, 1998, pp.97

¹³ See Viorel Pașca, *Măsurile de siguranță -sanctiuni penale*, op.cit., p. 97

The safety measures were not regulated, even in the Penal Code from 1864¹⁴, but it was established, at the art. 37¹⁵, the special confiscation as complementary punishment. Also, by means of the provisions of art. 62, it was instituted also as complementary punishment, the action by which mentally incompetent persons who committed penal crimes were sent in a monastery, all these becoming afterwards safety measures.

If the Penal Code from 1864 do not contain in the law text provisions regarding safety measures, we can tell instead about the Penal Code from 1936 that is one of the first European penal codes which regulated the aspects related to safety measures, totally, as a result of the influences specific to the inter-war period¹⁶.

In the Penal Code from 1936¹⁷, the provisions regarding the safety measures are presented under Title IV „Safety measures”¹⁸. The principles according to which the safety measures were taken, contained aspects related to the identification of the existence of an infraction and concerning the danger status in regard to which it was established the application of a safety measure, confirmation that the concerned person committed the infraction and the real fear that new penal deeds will be committed¹⁹.

In Chapter I, named “General provisions”, at art. 70²⁰, there were foreseen by the legislator the conditions of applying the safety measures, these were either coming with a punishment, or they were pronounced by themselves. These were pronounced only if the judge determined the danger status of the law-breaker.

In Chapter II, named “Different types of safety measures”, by means of the provisions of art. 71, from the Penal Code, it was described by the legislator the types of the safety measures, being regulated a number of 15 safety measures, of which we mention also the expulsion of foreign nationals, and within the Section VIII, at art. 79, it was regulated the safety measure afferent to the expulsion of foreign nationals, situation in which the court could forbid by conviction sentence the staying in Romanian territory, temporary or permanently, of the law-breaker with foreign nationality, guilty of a deed qualified as crime or delict, and after the expiration of the punishment, the convict was expelled.

In the Penal Code from 1968²¹, concerning the safety measures, in regard to the provisions of the Penal Code from 1936, about safety measures, the legislator’s intention was

¹⁴ Published in Official Journal (OJ) Part I, on October 30th 1864

¹⁵ Art. 37 of the Penal Code, from 1864 -, „Judges will be able to order the confiscation of: the things/elements produced by crime, delict or contravention; things/elements which were used or with which it was intended to commit an infraction, if these things/elements will belong to the infraction’s perpetrator, or to an accomplice; the descriptions, images and figures which would indicate the elements of a condemnable action: for this it will also order to destroy all samples/copies which are to be found, and also the packages, formats or prints which are aimed to reproduce them. The confiscation and destruction will be partial, when some excerpts or some parts of packages, formats or prints will be against the law”.

¹⁶ According to the resolution of the International Congress on Penal Law in Bruxelles, from 1926, under the title, „La mesure de surete doit-elle se substituer a la peine, ou simplement la completer?”, the attendant countries are asked to foreseen expressly the safety measures as complementary means to combat the delinquency - in Actes du Congres International de Droit Penal Bruxelles- 1926. Compterendu des discussions, cited by Viorel Pașca, *Măsurile de siguranță -sanctiuni penale*, op.cit., p. 98.

¹⁷ Published in OJ no. 65, on March 18th 1936.

¹⁸ The safety measures are regulated in the Penal Code from 1936, in Book I „General provisions”, at Title IV named „Safety measures”, in Chapter I, II and III.

¹⁹ C.I.Rătescu, I.Ionescu-Dolj, I.Gr. Periețeanu, Vintilă Dongoroz, H.Aznavocian, Traian Pop, Mihail Papadopolu, N.Pavelescu, *Codul penal Carol al II-lea*, annotated, vol. I, general section, Socec Publishing House, Bucharest, 1939, pp. 170-175.

²⁰ Art. 70 of the Penal Code from 1936 -, „Safety measures are applied only by court, coming with a punishment, except for the cases foreseen by law, when they are pronounced also by themselves. They can be pronounced only if the judge determines the danger status of the law-breaker”.

²¹ The Penal Code was adopted by means of Law no. 15/1968, published in OJ no. 79-79 bis, in June 21st 1969, it was subsequently republished in OJ no. 55-56, on April 23rd 1973 and once again republished, according to Law no. 140/1996, in OJ no. 65, on May 16th 1997.

to separate the educational measures applicable to minor law-breakers from the other safety measures²². Also, it was replaced the nationality criterion which enabled the action of taking measures in terms of the persons with no nationality, but who were staying in the country, harmonizing therefore the provision of the art. 117, regarding the extension of the principle of penal law personality foreseen in art. 4, from the Penal Code.

In present, the expulsion measure is regulated by means of the International Pact regarding the civil and political rights²³, the Additional Protocol to the European Convention concerning the transfer of convicted persons, adopted in Strasbourg, on October 18th 1997²⁴, the Protocols 4 and 7 to the European Convention concerning the human rights defense and the fundamental liberties²⁵.

Also, on internal background, the expulsion measure is regulated by means of the provisions of the Government Emergency Ordinance (GEO) no. 194/2002, regarding the regime of foreign nationals in Romania, in Section 4 of Chapter 5, concerning the “Regime of removing the foreign nationals from Romanian territory”, and as a measure of constitutional order, the expulsion is foreseen in the provisions of art. 19.

The safety measure of expulsion, according to the provisions of art. 117, from the Penal Code, stipulates the interdiction of staying in the country of the law-breakers, foreign citizens or stateless persons, with no residence in Romania, in case they represent a danger for society.

The danger status which imposes the application of this safety measure results from the connection of two factors: deed (infraction) committed by the foreign citizen and the personal status, socially dangerous of the law-breaker²⁶.

The incrimination character of this measure is implied by the obligatory removal of the foreign citizen from the Romanian territory and the interdiction to return in our country’s territory²⁷. This measure applies only in relation with the law-breaker person foreign citizen, the family members of the law-breaker couldn’t be expelled following the application this safety measure, but as a result of the expulsion measure on administrative way, when this measure imposes²⁸; the administrative expulsion can be applied by the administrative organs in regard to foreign citizens considered undesirable on our country’s territory, according to the provisions of art. 19, align. 3, from the Romanian Constitution, although they committed no deeds foreseen by the penal law²⁹.

Instead, when the convict has strong relations with Romanian state, the expulsion safety measure cannot be applied. However, in the situation when the convict has the entire family, property and affairs in Romania, the measure can applied, the jurisprudence being able to go over the reality of some strong family connections³⁰.

²²Constantin Bulai, *Drept penal român. Partea generală*, vol. II, „Șansa”-S.R.L. Publishing House and Press, Bucharest, 1992, pp. 154; Viorel Pașca, *Măsurile de siguranță -sancțiuni penale*, op.cit., p. 99

²³ Adopted by the United Nations General Assembly on December 16th 1966 and which became effective on March 23rd 1976. Romania ratified the Pact by means of the Decree no. 212/1974, published in OJ no. 146/20.11.1974.

²⁴ Ratified by Romania by means of OJ no. 92/1999, published in OJ no. 425/31.08.1999.

²⁵ Ratified by Romania by means of Law no. 30/1994, published in OJ no. 135/31.05.1994.

²⁶ See Î.C.C.J., S. pen., dec. n

r. 1843/1999, Bulletin Jurisprudence from 1999; Î.C.C.J., s. pen., dec. no. 112/2004, on www.scj.ro

²⁷ See Vintilă Dongoroz and collaborators, *Explicații teoretice ale Codului penal român*, vol. II, op. cit, p.312; Maria Zolyneac, *Drept penal. Partea generală*, vol. III, op.cit., pp. 882

²⁸ See Vintilă Dongoroz and collaborators, *Explicații teoretice ale Codului penal român*, vol. II, op. cit, p.312; Alexandru Boroi, *Drept penal. Partea generală*, op. cit., pp. 376.

²⁹ Constantin Bulai, *Drept penal român. Partea generală*, vol.II, op.cit., p. 161

³⁰ See C.S.J., s.pen., dec. nr.1162/2001; Benrachid Cause c. France; Moustaquim Cause c. Belgium on www.coe.int

It is admitted in literature³¹, the fact that the danger implied by the commission of some infractions regards the foreign law-breaker, as a passive subject and not active of an infraction, in the sense that not the fear that this foreign national will commit another infraction concretizes the danger but the fear that other persons, displeased by the presence on the country's territory, after executing the punishment, of the foreign law-breaker, could react against him, committing infractions and disturbing the public order.³² The expulsion measure can be applied following the achievement of the following conditions: the deed committed (in country or abroad) to be an infraction; the law-breaker to be foreign citizen or to be stateless person with residence abroad, in the moment of pronouncing the conviction; the case in which the law-breaker continues to stay in the country imply a dangerous state of things for the society³³.

The expulsion is performed with precise destination and with the agreement of the state to which the national, namely the convict, belongs, not being possible to perform the expulsion of a person in a state where the convict might risk to receive the death punishment or to be tortured or to endure severe sanctions, inhuman or degrading, interdiction which results from the New York Convention, to which our state adhered in 1990.³⁴

The measure can be applied on long term, and in case the danger state of things stops or in case the person would obtain, subsequently, the Romanian nationality, the measure, where applicable, to be removed or to be replaced with another safety measure.³⁵ The expulsion comes, as a general rule, with prison punishment and it is performed after the execution of this punishment.

Also in Law no. 301, from 2004³⁶, regarding the Penal Code, the safety measures were regulated within the Title V from the general section of the Penal Code, by means of the provisions of art.128-136. As regards the content, the types of safety measures were not different from those foreseen in the Penal Code from 1968. By means of the provisions of art. 128, from the Penal Code, there were stipulated the following safety measures: obligation to receive medical treatment, medical admission, interdiction to take a position or exercise a profession, a handicraft or another occupation, interdiction to be in some localities, interdiction to return to the family home for a limited time, expulsion of foreign nationals and special confiscation.

Concerning the Law no. 286/2009, regarding the Penal Code³⁷, we mention that some safety measures were eliminated from the content of the provisions of art. 112, from the actual Penal Code, being kept in the provisions of art. 108, from Law no. 286/2009, only: the obligation to receive medical treatment, medical admission, interdiction to take a position or exercise a profession, special confiscation and extended confiscation, measure which was

³¹ See Alexandru Boroi, *Drept penal. Partea generală*, op.cit., pp.376

³² C.S.J., penal section, decision no. 1008/2001, in Bulletin Jurisprudence from 2001, p. 179.

³³ See Bucharest Court of Law, s. pen., sent. pen. no.219, dated on October 3rd 1987, unpublished, C.S.J., s.pen., dec. no. 1843/1999, unpublished, in Alexandru Boroi, Sorin Corlățeanu, *Drept penal. Partea generală*, Selection of test cases for students use, C.H.Beck Publishing House, Bucharest, 2003, pp.280

³⁴ The measure was inserted in Romanian legislation by means of Law no. 20, dated on October 20th 1990, published in OJ no. 112, on October 20th 1990; Mihai Adrian Hotca, *Codul penal – comentarii și explicații*, op. cit., pp. 790; See Bucharest Court of Law, Section I pen., dec. no. 1044/A, dated on September 28th 2004, in Bucharest Court of Law. Selection of judicial practice in penal domain 2000-2004, op. cit., p. 213

³⁵ See Vintilă Dongoroz and collaborators, *Explicații teoretice ale Codului penal român*, vol. II, op. cit., pp. 314; See Bucharest Court of Law, Section I penal, sentence no. 1481/F, dated on November 16th 2004, in Bucharest Court of Law. Selection of judicial practice in penal domain 2000-2004, Wolters Kluwer Publishing House, Bucharest, 2007, p. 208

³⁶ Law no. 301/2004, regarding the Penal Code, which followed to enter in force, according to the provisions of art. 512, from Law no. 301/2004, on September 1st 2008, as it was reviewed by means of the provisions of GEO no. 50/2006 (published in OJ no. 566/ on June 30th 2006). Law no. 301/2004 was published in OJ no. 575, on June 29th 2004 and abrogated by means of the provisions of Law no. 286/2009, regarding Penal Code.

³⁷ Published in OJ no. 510, on April 24th 2009

inserted subsequently in the content of art. 108, by means of the provisions of art. II, pct.2, from Law no. 63, from 2012.

By diversifying the content of the complementary punishment the legislator intended to provide a better harmonization of the sanction in regard to the concrete circumstances of the clause, by increasing its efficiency. Also, a part of the sanctions were inserted in the content of the complementary punishment, which in present can be found in the content of the safety measures, namely the interdiction to be in certain localities, expulsion of foreign nationals and the interdiction to return to the family home for a limited time, since by their nature these have a pronounced punitive character, and by their application it aims especially the restriction of the movement liberty of the convict, and as a result of this effect, it is performed the removal of the danger status and the prevention of committing new infractions.

Therefore, as regards the complementary punishments, the Romanian legislator extended the area of the main punishments with which can be applied complementary punishments, interdiction to exercise some rights being possible both with the prison punishment, irrespective of its duration, and with fine payment punishment. The conception of the old penal code, which conditions the possibility of applying the complementary punishment and the interdiction of exercising some rights of committing an infraction of a certain severity level expressed by the application of the prison punishment for at least 2 years, was abandoned in the favor of a more flexible regulation, which allows the evaluation of the necessity to apply the complementary punishment, considering also the nature and severity of the infraction, circumstances of the cause and law-breaker person, ignoring the nature and duration of the main punishment applied, a similar regulation containing also the art 113-7, from the French Penal Code.

As regards the expulsion, this is contained by the provisions of the New Penal Code, as complementary punishment, being foreseen at the art. 66, lit. c, from the New Penal Code, and which stipulates the interdiction of exercising for a period between one and five years of “the right of the foreign national who stays on Romania territory”. The legislator considered that the reason for expelling the foreign national³⁸ from the Romanian territory is to apply a complementary punishment to the main punishment, to which the foreign national was convicted, instead of a safety measure, as a result of the fact that not the danger status and the prevention of committing some infractions is the reason of the sanction, but the necessity to apply a sanction in addition to the main punishment, to which the foreign national was convicted³⁹. By means of this modification it is changed the judicial nature of this penal law institution, which imply the modification of the conditions in which can be applied and which are not commune to all categories of rights that are interdicted as complementary punishments according to the New Penal Code.

The actual regulation is in accordance with European law systems, these sanctions being contained also by French Penal Code, at art. 131-30, by Spanish Penal Code at art. 39, and also by Polish Penal Code, at art. 39.

Also, there were absorbed in the content of art. 66, regarding the content of the complementary punishment to interdict the exercise of some rights, at align. 4, the provisions concerning the person protection, which follows to leave, constringed, the Romanian territory, provisions inserted in the Penal Code as a result of the ratification by means of Law no.

³⁸ In the New Penal Code is not defined the term “foreign national”, but according to art. 2, lit.a, from GEO no. 194/2002 (published in OJ no. 955, on December 27th 2002) regarding the regime of foreign national in Romania, the foreign national is a person who don't has Romanian nationality but of another state member of EU, or of the European Economic Area. Also, according to art.2, align.1, lit.c, from Law no. 122/2006 (published in OJ no. 428, on May 10th 2006), regarding the asylum in Romania, the foreign national is the foreign citizen or the stateless person.

³⁹ See George Antoniu and collaborators, *Explicații preliminare ale noului Cod penal*, vol. II, Universul Juridic Publishing House, Bucharest, 2011, pg.56

19/1990⁴⁰, of the Convention against torture and other punishments or inhuman or degrading treatments, and in the aspect of executing this punishment, the interdiction of the foreign national right to stay on Romanian territory don not apply in case it was applied the suspension of the punishment under supervision.

Conclusions

Although, changed in regard to the judicial nature in the provisions of the New Penal Code, the expulsion, as complementary punishment, will be applied after the execution of the main punishment, indeed this change determines the modification of the conditions in which it can be applied this punishment since, in this case, not the danger status and the prevention of committing some infractions will represent the reason of applying it, but the necessity to apply a sanction as a result of committing an infraction. Concerning the term “foreign national” we can ask ourselves if the person with no Romanian nationality, which has the nationality of a state member of EU, can be considered a foreign national or not, since this person can be considered foreign national only in the context in which this person would formulate an asylum application in Romania, because in this moment Romania is also a EU member.

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⁴⁰ Published in OJ no. 112, on October 12th 1990

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