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The decriminalization of low gravity criminal offenses: an unconstitutionality impediment

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Abstract
The need for a social reaction to the "small criminality" (*petite delinquance; leinkriminalität; Bagatellkriminalität*), meaning acts which formally meet the conditions of a crime, but by a minimum touch brought to the social values does not justify the imposition of a sentence, has prompted the search for alternative solutions to criminal sentencing.
A stream of decriminalization of such acts, supported by the International Association of Criminal Law and the Council of Europe has expressed in various legislative forms both within the criminal systems, in ways of sanctioning with alternative punishments and through extra criminal models as mediation or even the decriminalization of some acts.
The Criminal Code of 1968 regulated the institution of replacing criminal liability, following a broader European trend of decriminalization of acts of low social danger, even if the method of achieving this goal is specific to the Eastern European criminal laws.
The new Criminal Code has given up both the institution of replacing criminal liability in the way prescribed by Article 90 and the institution of lack of social danger of the crime provided by article 18 of the Criminal Code of 1968, in favor of penalty cancellation, as a new way of criminal liability replacement.
Alongside, the new Code of Criminal Procedure regulates the opportunity exercise of criminal proceedings principle and the institution of prosecution cancellation. Declaring the institution of prosecution cancellation unconstitutional calls into question the opportunity exercise of criminal action principle

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1. Decriminalization -concept and European

The need for an adequate social reaction to "**small crime**" (*petite delinquance; Kleinkriminalität; Bagatellkriminalität*), understanding here acts which formally qualify as a crime, but that through the minimum prejudice caused to social values do not justify the imposition of a sentence, prompted the search for alternative solutions to sentencing [1].

A trend of decriminalization of such acts, supported by the International Association of Criminal Law[1] and the Council of Europe[2] was expressed in various legislative forms, both within the penal systems, by means of alternative sanctioning and through extra-criminal models, such as mediation or the decriminalization of certain acts.

Although the concept of decriminalization can also be understood in the sense of desincrimination of the act [2], we understand to use this concept for the operation by which judicial authorities, in cases and under conditions provided by law, either waive prosecution or waive the penalty in favour of administrative measures (sanctions).

In this circumstance, the decriminalization of the act does not mean its desincrimination, the abstract act still being an offence under criminal law, but the actual deed, although meeting the constitutive elements of the offense, according to its consequences and the perpetrator's conduct, does not justify the imposition of a sentence.

The Committee of Ministers of the Council of Europe recommends that Member States (Recommendation no. (87)18/1987 on the simplification of criminal justice) take, with full respect for their constitutional principles and traditions, all necessary measures to implement, among other measures, the principle of opportunity of criminal prosecution (discretionary prosecution) if: the prosecuting authority has sufficient evidence of guilt, the measure is based on grounds of public interest, there is the consent of the suspect in all cases where it is possible and the victim is able to repair the prejudice.

2. Decriminalization of low gravity offences in the conception of the 1968 Criminal Code

Although neither the 1965 Constitution nor the Criminal Code or the Criminal Procedure Code of 1968 legislate the principle of opportunity of exercising criminal action, two institutions were regulated in the Criminal Code that allowed the prosecutor to decide on the opportunity of referral to the court or of imposing administrative sanctions.

The 1968 Criminal Code regulated the institution of replacing criminal liability, thus joining the European trend of decriminalization of acts of a low social gravity, even if the method of achieving this goal is specific to Eastern European criminal legislations.

Replacing criminal liability was a means of judicial individualization of criminal liability which allowed the prosecutor and the courts to assess the need and opportunity of applying criminal sanctions or simply administrative sanctions.

In order to reconcile the Criminal Code regulations with the 1991 Constitution which states that justice is done only through the courts, Law no. 104/1992 abolished the provisions of art. 96 and 97 of the Criminal Code on the replacement of criminal liability by public bodies with jurisdictional attributions, so the replacement of criminal liability became the exclusive competence of the court.

In an attempt to revitalize this legal institution that, due to the restrictive conditions under which such a measure could be taken (the maximum prison sentence of 6 months) seeing as in the special part of the

Criminal Code, the number of offenses punishable with imprisonment of up to six months was very low, replacing criminal liability could not achieve its intended purpose, basically being an institution born dead, Law no. 104/1992 increased the maximum sentence provided by law for acts where such a measure could be applied to 1 year and for acts expressly listed, punishable by imprisonment exceeding one year, it provided for a limit prejudice value of 3,000 old lei for intentional acts and 10,000 old lei for acts committed through negligence.

The measure was completely judicialized, the possibility of replacement of criminal liability being given exclusively to the courts, the Public Ministry bodies ceasing to have the possibility of such a measure and the legal limits of the prejudice caused by the acts for which such a measure could be decided were raised to 100,000 lei and respectively 500,000 lei, but due to inflation, they soon became insignificant too. This amendment also failed to lead to the reviving of the mentioned institution, to the contrary, due to inflation, the prejudice value limits have become derisory, the institution having limited applicability in the practice of the courts.

The failure of this criminal law institution in our legislation also lies in the existence of another parallel regulation, which had a fairly wide application, relieving the courts of minor criminal cases.

Law no. 6/1973 introduced art. 18^1 in the Criminal Code, which, if the act does not present the social threat of an offense, allows for the prosecutor or the court to order the waiver of charges or acquittal, as appropriate, and apply an administrative sanction, the judicial bodies giving prevalence to this institution, to the detriment of replacing criminal liability.

According to this article, the act provided under criminal law did not constitute an offence if, through the minimum prejudice brought to one of the values protected by law and through its specific content, clearly being devoid of importance, does not present the social danger of an offence.

An act of social threat under criminal law was any action or inaction which affects one of the values protected by criminal law and for who's sanctioning it is necessary to apply a penalty.

The following were taken into account in determining the actual degree of social threat: the manner and means of committing the offense, the purpose, the circumstances in which the offense was committed, the result or possible result, as well as the person and conduct of the perpetrator, if known.

If these cases, the prosecutor or the court could impose a sanction of an administrative nature such as reprimand, reprimand with notice or a fine from 10 lei to 1,000 lei.

The accused or the injured party could make a complaint to the court against the prosecutor's ordinance when they felt that their interests were harmed.

The prosecutor's opportunity to assess the degree of seriousness of the offense functioned even after the 1991 Constitution was adopted, until the entry into force of the new Criminal Code on 1.02.2014, without questioning the unconstitutionality of this measure.

3. The conception of the new criminal codes

The New Criminal Code has renounced both the institution of replacement of criminal liability as it was provided by art. 90, as well as the institution of lack of social danger of the offence provided by art. 18^1 of the 1968 Criminal Code, in favour of penalty waiver, as a new way of replacing criminal liability.

In parallel the new Code of Criminal Procedure regulates the opportunity in exercising criminal action principle and the waiver of criminal prosecution institution.

Both penalty waiver and waiver of prosecution have the effect of replacing criminal liability with administrative liability.

Being a public law action, criminal action shall be exercised by the Public Ministry, in principle, ex officio, the prosecutor being obliged to set in motion and exercise this action if there is evidence of the commission of an offense and there is no legal cause of hindering its exercise.

To avoid criminal trials in small cases, where no public interest exists, the mandatory exercise of criminal action was attenuated, by introducing the subsidiary principle of opportunity, under which, in such cases, the prosecutor can waive the exercise of criminal action, as provided by law[3].

Waiving criminal prosecution in the Romanian Criminal Procedure Code is the procedural way by which the prosecutor decides on the desirability of criminal prosecution. The prosecutor's possibilities to value the opportunity to exercise criminal action are circumscribed by law, by regulating conditions regarding the offence, the suspect or accused person and the public interest in the content Art.318 Criminal Procedure Code.

The conditions regarding the offense consider both its generic social danger and its concrete social threat.

The generic social danger of crimes is determined by the type of penalty or its legal maximum, criminal procedural law allowing for the waiver of criminal action only in offenses for which the law provides the penalty of fine or imprisonment up to 7 years.

The concrete social danger of the crime will be assessed by the prosecutor, on a case by case basis, in relation to: the *content of the act* (mitigated or aggravated content etc.); the *manner and means of committing* (breaking and entering, escalation, means that create public danger etc.); *actual circumstances* (place and time, occasional or repeated act etc.); *the consequences or possible consequences of the offense* (value of the prejudice, the extent of the exposure to danger etc.).

The opportunity to exercise criminal action will also be valued in relation to: *the person of the accused* (major, minor, health, level of education etc.); conduct previously to committing the offense (with or without criminal records, other data revealed by the evaluation report drafted by the probation service etc.); *purpose* (material profit, hunger etc.); *the defendant's efforts to eliminate or mitigate the consequences of the offense* (repairing prejudice or even willingness to recover it, helping the victim etc.)

There is no public interest in exercising criminal prosecution in the context where the objectives of criminal proceedings can be achieved without the application of any penalties and it would appear disproportionate to the seriousness of the offense and the defendant, the interests of the victim being protected without further pursuit of the trial, the costs of legal proceedings would be disproportionate to the consequences of the offense and not least, trying such acts of low gravity would put an unnecessary load on the role of the courts.

In the current Criminal Procedure Code system, waiving prosecution can only be conditional.

The prosecutor rules, after consultation with the suspect or defendant, that he meet one or more of the following obligations:

a) remove the consequences of the criminal offense or to repair the damage caused, or to agree with the civil part on a way of repairing it;

b) publicly apologize to the injured party;

c) to fulfil his outstanding obligations;

d) to perform unpaid community work for a period between 30 and 60 days, except where, because of his health, the person cannot perform the work;
e) to attend a counselling program run or supervised by the probation service.

If the prosecutor orders the accused to fulfil the obligations mentioned, by ordinance, he also stipulates the term by which they are to be met, which may not be longer than 6 months, or 9 months for obligations assumed by the mediation agreement concluded with the civil party.

If the defendant does not prove fulfilment of these obligations within 6 months from the communication of the ordinance, the prosecutor revokes the ordinance and orders the criminal prosecution of the defendant.

A new waiver of criminal prosecution is not possible in the same case.

The defendant and all other persons who have requested the communication of the solution shall receive a copy of the ordinance by which the prosecutor ordered the waiver of prosecution and are entitled to file a complaint against it.

If the prosecutor's ordinance is not refuted and the defendant has met the established obligations, his criminal liability has been virtually replaced by the said measures, which are not of criminal nature.

If the prosecutor waivers criminal prosecution, within 20 days of receipt of the copy of the ordinance to solution the case, the defendant can ask for a continuation of criminal prosecution in order to appear before the court and prove his or her innocence.

Through Decision no. 23/2016 [6] the Constitutional Court admitted the exception of unconstitutionality of the provisions of art. 318 of the Criminal Procedure Code finding that they are contrary to art. 126 par. (1) of the Constitution, according to which justice is achieved through the High Court of Cassation and Justice and the other courts established by law.

It is argued that by regulating the institution of waiving criminal prosecution in the manner provided for in art. 318 of the Criminal Procedure Code, the lawmaker has not achieved an appropriate balance between the principle of legality, specific to the continental law system, also existing in Romania, and applying the principle of opportunity, specific to the Anglo-Saxon law system, giving prevalence to the latter, to the detriment of the first, by regulating among the prosecutor's attributions acts specific to the judiciary.

Thus, according to the provisions of art. 318 of the Criminal Procedure Code, the prosecutor has the option to waive prosecution and therefore to replace the court in the administration of justice, in approximately three-fourths of all the offenses contained in the Criminal Code and special laws in force, the solution thus given by the prosecutor not being subject to review by the court.

The decision was adopted with the separate opinion of three judges which, in addition to the compared law arguments on the existence of similar regulations in other legislations, have argued that the large number of offenses for which the institution of waiver of prosecution can be incident did not constitute a genuine unconstitutionality argument because the verifying and establishing of the unconstitutionality of legal provisions by the contencious constitutional court cannot be made on the basis of quantitative criteria, but by qualitative assessment. Waiving criminal prosecution does not violate the principle of separation of judicial functions because the control of the justice courts on solutions of waiving prosecution is already regulated in the Code of Criminal Procedure. For all cases where one of the parties in criminal proceedings is unhappy with the solution of waiver of prosecution stated by the prosecutor, the Criminal Procedure Code provides for specific remedies that consist of formulating complaints addressed to the hierarchically superior prosecutor and, finally, to the justice court with the power to resolve the case in first instance.

Declaring as unconstitutional the provisions of art.318 of the Criminal Procedure Code resulted in their abrogation and implicitly in the voiding of content of the principle of opportunity of criminal prosecution, a

principle that has not been declared unconstitutional.

Waiving criminal prosecution was introduced by the lawmaker in the architecture of Romanian procedural law for the purpose of relieving the courts of the task of resolving criminal cases relating to offenses under criminal law that do not present high social risk.

An effect of waiving criminal prosecution can be the increase in the number of people sent to trial, where the courts will either waive punishment, means by which acts are decriminalized by the courts of justice, or they will enforce noncustodial sentences (delaying punishment enforcement or a suspended sentence of imprisonment under supervision), putting an extra load on probation services.

The solution opted for by the Constitutional Court is not one of those contributing to the harmonization of the Romanian criminal law with European law and the lawmaker will have to revise the regulation of waiver of prosecution in a context where the drafting of a new constitution is already a necessity.

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TAG: *criminalità organizzata, Incostituzionalità, mediazione, sanzioni amministrative, Decriminalizzazione, Diritto dell'Unione Europea, penale, Diritto penale internazionale, Procedura penale, procedura penale europea ed internazionale*
