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THEORETICAL AND PRACTICAL ASPECTS OF THE CRIMINAL SANCTIONING SYSTEM OF THE REPUBLIC OF MOLDOVA

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Abstract:

The criminal policy of the Republic of Moldova and the punishment system, the tendencies regarding the criminality and the sanction, the applications of the detention alternatives, as well as the international experience in the domain of criminal policies represent the basic topic of the criminal reform that the Republic of Moldova follows. Essentially, the criminal sanctions are considered to be the coercive consequences that the criminal law binds with the precepts of criminal law violations. The Penal Settlement is inconceivable outside criminal sanctions, that are regulated within one of the three fundamental institutions of criminal law, along with crime and criminal liability. Within the criminal constraint mechanism the sanction appears as an inevitable consequence of criminal liability and the criminal liability as a necessary consequence of the offense. The primary purpose of all criminal sanctions is to defend the society against criminals and to prevent the committment of new crimes, as by those who apply, as well as by the others.

Key words: *criminal liability, penal sanction, punishment, safety measures, educational measures, major punishments, complementary punishments, accessory punishments etc.*

The sanctions have been an especially important component in all legal systems throughout the history of law. The law would have no substance and finality without penalty. The penalty is a subject matter of legal relationship of constraint. Compliance with democratic laws is an objective necessity of consolidation of law-governed state. Therefore, it is true that the law becomes effective only to the extent that its provisions are met.[1] Gh. Bobos states that "penalty whether it refers to the offender's personality, his/her property or validity of some juridical acts, always represents performance of state coercion with all negative

[1] I. Santai. Introduction to the Law Study. Sibiu University, 1996, p. 125.

consequences which the state imposes on the punished person".[1] Another definition is given by V. Dongoroz, according to this definition, penalty is "any measure, which a legal rule establishes as a consequence for the case when its provisions are ignored", "it is a consequence of failure to comply with provisions because its reason to be arises from the assumption that any provision may be ignored".[2] In the light of the foregoing, it is possible to make a conclusion that penalty appears to be a legal category which is found in different branches of law. Despite the role and place assigned to sanctions in our legal system, this concept has not been yet developed or outlined sufficiently from the theoretical point of view, as it has been fairly noted.[3] The legal sanctions acquire specific meanings depending on the subject matter of violated rules of law. Hence there is a need for correlating the legal sanctions and different branches of law.

Penal sanctions represent a fundamental institution of criminal law, which forms the basis of any criminal justice system along with the institution of offence and institution of criminal liability. Regulation of penal sanctions is important for the whole penal sphere, it is viewed as an essential aspect of fundamental principle of legality and contributes to execution of legal rules both by compliance and by coercion exercised upon those who have failed to comply with the provisions of criminal standards. Penal sanctions represent consequences of violating the rules of criminal law.

We can find few definitions of penal sanctions in the national and international doctrines and legislation. However, the institution of penal sanction has always been in the focus of attention of scientists engaged in this sphere. As it was stated by N. D. Sergheievschii, a famous Russian scientist, there were about 24 philosophical currents at the beginning of the 20th century, which justified the right of state to punish offenders and there were about 100 individual theories cited by the experts in law.[4] According to I. Ia. Foinischii, "penal sanction consists in a restraint imposed on the individual who has committed a criminal deed ... constraint which consists in producing some suffering or at least in

[1] Gh. Bobos. General Theory of Law. Cluj Napoca: Ed. Dacia, 1994, p. 215.
[2] V. Dongoroz. Criminal Law. Bucharest,1939, p.571.
[3] C. Oprişan. Sanctions in the Romanian Civil Law – a Possible Synthesis, in R.R.D. no. 1/1982, p. 11.
[4] http://ru.wikipedia.org/wiki/ Criminal penalty (visited on 28.03.2014).

promising to cause a deprivation of something so that any sanction is directed against a property belonging to the law breaker: his/her property, freedom, dignity, physical and moral integrity and event against his/her life sometimes". Marcel Ioan Rusu defines penal sanctions as measures of constraint and reeducation stipulated by criminal law and imposed on individuals who have committed offences in order to prevent from re-offending by their reeducation.[1] The lack of definitions of penal sanctions is explained by the reason that the accent is always placed on highlighting the notion of punishment which is considered to be the only penal sanction meant for ensuring the restoration of rule of law infringed by committing an offence and especially when a sanction is generally regarded to be a punishment applied when an individual violates the provisions of a legal rule.[2] While punishment has been regarded to be the only means of social reaction against offenders in the concept of classical school of criminal law, further development of criminal law has led to assimilation of other means as well, which have acquired educational or preventive purposes along with their coercive content. Therefore, injunctions are included in the system of penal sanctions or legal institution of penal sanctions along with penalties.

The penal sanctions are distinguished from other legal sanctions and have specific features which make them unique in the complex of legal sanctions. The number of these features differs in various doctrines and ranges from three to seven in some doctrines.[3] However, these features can be summed up as follows:

- The penal sanctions have a public nature, they are provided for in the criminal law standards and are applied by competent criminal prosecution authorities on behalf of state. The vestiges of imposing private punishment for crimes are found only in the Muslim law today: up to 10% of homicides were committed in Yemen for reasons of revenge at the end of the 20th century;[4]

[1] Marcel Ioan Rusu. Criminal Law Institutions. General Part. Bucharest: Hamangiu Publishing House, 2007, p. 138.
[2] Ioan Chis. Non-imprisonable Penal Sanctions of the 21st Century. Bucharest:Wolters Kluwer, 2009, p. 43.
[3] Russian Criminal Law. Practical Course/ endorsed by I. Bastrykina; under the scientific editorship of A. V. Naumov. M., 2007. p. 189.
[4]Russian Criminal Law. General and Special Part/edited by A. I. Raroga. M., 2008. p. 185.

- The penal sanctions have a retributive, punitive nature, which implies a repression, a restraint; this restraint is designed so that not to lead to physical suffering, moral humiliation of the convict as well as to providing opportunities to reintegrate into society as soon as possible;[1]
- Another defining feature of penal sanction is its personality consisting in its application only to a guilty person;[2]
- The penal sanctions are aimed at preventing from committing another offence both by those who have committed an offence and by those who tend to commit one, etc.

Some researchers such as V.V. Esipov and K.A. Sîci unite and combine the features of penal sanction in the composition of sanction – structure resembling the corpus delicti which includes object of sanction – offender or his/her legal property; objective aspect – constraint for committed offence determined by a concrete sanction; subject – state represented by its authorities; subjective aspect – aim of punishment and attitude of offender towards the applied sanction.

As a conclusion, it is worth mentioning that the criminal law emphasizes the achievement of four goals as a result of imposing sanctions on the convict:

1. Restoration of social equity;
2. Correction of the convict;
3. Specific prevention or prevention from re-offending by the convicts;
4. General prevention or prevention from committing an offence by other individuals.[3]

If we perform a comparative analysis of these goals, we have to emphasize that the French criminal doctrine considers the goals of penal sanction, especially of punishment, to be retribution, intimidation, prevention and correction while the British doctrine focuses on repressive element, restoration of social equity and protection of society against criminal attacks.[4] The goals of punishment are formulated indirectly in the legislation of many countries. Thus, Part II, Sect. 18 of the US Code

[1] Marcel Ioan Rusu. Op. cit, p. 138.
[2] Naumov, A.V. Russian Criminal Law. Course of Lectures. Two volumes. V. 1. General Part. M., 2004. p. 339.
[3] Botnaru Alina, Vladimir Grosu, Mariana Grama. Criminal Law. General Part. Vol.I. Chisinău: Cartier juridic, 2007, p. 427.
[4] Valerii Bujor, Larisa Buga. Comparative Criminal Law. Course Notes. Chişinău: Cartier juridic, 2003, P. 71.

of Laws sets forth the following factors determining imposition of penalty: participation in law observance, abstaining from committing an offence.[1] The penal sanctions have been developing from one decade to another, from one period of historical development to another one so that the content, nature and duration of penal sanctions has changed based on the principles accepted generally in a democratic society, some penalties have disappeared completely (death penalty), others have changed their content (forced labor into community work). However, some new crimes, as for instance cybercrimes, crimes in the banking system, terrorism, arise together with these changes. These new crimes involve new types of penalties adopted even at the international level. According to these requirements, other penal sanctions have been introduced in the criminal laws along with the punishments which have been considered the only effective penal sanctions in the struggle against criminals for a long time. These new sanctions have primarily a preventive, educational role.

The Criminal Code of the Republic of Moldova provides for two categories of penal sanctions: punishments and injunctions.[2]

The punishment has been defined in many ways for a long period of time. Hugo Grotius defines punishment as follows: "*Poena est malum passionis quod infligitur propter malum actionis*" (An evil is to be inflicted because an evil has been committed). The Romanian doctrine defines punishment as a measure of constraint, measure of repression, deprivation for the offender, „this is an evil which is imposed to indemnify the evil produced by committing the offence."[3] The legal definition of punishment in the Republic of Moldova is found in article 61 of the Criminal Code of the Republic of Moldova, "Penal sanction is a measure of state constraint and means of correction and reeducation of the convict which is imposed by courts in the name of law on individuals who have committed offences causing certain lacks and restrictions of their rights."[4] If we make a comparison between the above definitions,

[1] Nikiforov, B.S., Reshetnikov, F. M. Modern American Criminal Law. Moscow, 1990, p. 71.
[2] Criminal Code of the Republic of Moldova no.985 as of 18.04.2002. Published:14.04.2009 in the Monitorul Oficial no. 72-74.
[3] C. Bulai. Criminal Law – General Part. Bucharest: All Beck Publishing House, 1997, p. 283.
[4] Criminal Code of the Republic of Moldova no.985 as of 18.04.2002. Published:14.04.2009 in the Monitorul Oficial no. 72-74, art. 61.

we can evidently observe that the main character of punishments in the first definitions is profoundly retributive, the offender's punishment is aimed only at offender's exclusion from society and causing some suffering for the committed offence. The character of punishment is diversified in the legal definition so that the main features of punishment are not constraint and exclusion from society anymore, a very important aspect of reeducation is introduced. In the light of amendments to the Criminal Code, the major distinction of punishments is made according to the nature of person that is imposed the punishment: thus, we have punishments which are imposed on individuals and those which are imposed to legal entities. The new law sought to introduce criminal liability for legal entities as well, while they were not criminally liable under the old Code.

The doctrine classifies the penalties taking into consideration the following criteria:

- *according to the object which is their goal* – custodial penalties or penalties restricting liberty, pecuniary penalties, penalties depriving or restricting the moral rights;
- *according to their duration* – lifetime or unlimited penalties (for instance, for an individual – withdrawal of military rank, and for legal entity – its liquidation) and temporary punishments (the majority of punishments are temporary);
- *depending on the degree of their autonomy* – basic penalties, supplementary and mixed penalties.

Injunctions are penal sanctions aimed at extending the range of sanctions necessary for preventing the criminal phenomenon. The notion of injunctions has a common, general meaning and a technical meaning belonging to the legal language. Generally, injunctions are regarded to be measures taken to create a risk-free environment, measures of protection, preventive measures. Technically and legally, injunctions are meant to be a category of penalties with a purely preventive purpose imposed on persons that have committed offences provided for by criminal law and constitute a social danger.[1] The exponents of positivist and neo-positivist currents understand injunctions as measures of social protection meant to replace the obsolete concept of punishment, while the exponents of classical school of criminal law dispute the penal character of injunctions as they take place only in the sphere of administrative law. The character

[1] Viorel Pasca. Injunctions. Penal Sanctions. Lumina Lex, 1998, p. 27.

of penal sanction of injunctions is commonly acknowledged in the criminal doctrine at present. The legal definition of injunctions is found in article 98 of the Criminal Code of the Republic of Moldova, which stipulates that "the injunctions are aimed at eliminating a danger and preventing from committing offences stipulated by criminal law". When compared with other punishments, the injunctions are not consequences of criminal liability and do not depend on the gravity of offence committed, they can be imposed even when the offender is not imposed a punishment because application of injunctions is justified by existence of state of danger which represents the offender's personality. While being designed for preventing the state of danger revealed by committing an offence stipulated by criminal law and for preventing from committing new crimes, the injunctions are as a rule imposed for an indefinite period (for the period of duration of state of danger) and regardless imposition of a punishment on the offender.

According to article 98 of Criminal Code, the following measures are included in the category of injunctions:

a) medical measures of constraint;
b) educational measures of constraint;
c) expulsion;
d) special confiscation;
e) extended confiscation.

The special literature classifies the injunctions depending on their nature as follows:

- medical measures (compulsory medical treatment and hospitalization);
- measures restricting the rights (prohibition to hold certain positions or perform certain jobs, prohibition to stay in certain places, prohibition to come back to the family dwelling for a definite period and expulsion);
- restrictive working measures (special confiscation). Thorough knowledge of injunctions, their content and conditions of their imposition involves consideration of provisions which regulate them separately.

When viewing this subject as a whole, it is possible to make a conclusion that the penal sanctions have generally a punitive or retributive character implying certain deprivations or restrictions. Punishments have mainly this character while other penal sanctions, such as injunctions, have mainly preventive character. At the same time, penal sanctions have a necessary and inevitable nature. Moreover, they are

characterized by their *post delictum* action, having its cause in committing an offence provided for by criminal law.

The evolution of criminal law is marked by a continuous attempt to control the human aggression of criminal character and to legalize, control and humanize the aggressive response to it, including sanction. The scale of penalties, which is an angular scale of penal sanctions, has undergone major transformation lately both by extending the limits of punishments and by introducing new major punishments and elimination of others. In such a prospect, the legislator should put himself a question if the system of penal sanctions and all punitive measures, in the way they are regulated at present, are satisfactory to the full extent in correlation with the social requirements. In the light of these requirements, it is possible to make a conclusion that some measures of penal repression have become inefficient and other measures do not comply with the finality and functions of penal sanctions.

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