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Evolution of the Penal Legislation in Romania and Hungary, in the Post-Communist Era

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Evolution of the Law on the Execution of Criminal Penalties and Related Acts post 1989

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Abstract:

The continuous evolution of national legislation in the area of criminal law has triggered the shaping of different concepts as to the perception of the criminal law branches, thus emerging opinions or trends that are sometimes in diametrical opposition.

More precisely, while a part of the doctrine has firmly stated that the area of criminal law cannot be split up into several criminal domains, since it is an autonomous concept that sets out the norms that apply when holding an individual criminally liable, on the other hand, the majority is in favor of setting directions that could establish other branches of law, connected to that of criminal law.

In this sense, it becomes noticeable, more and more clearly, the distinct position of the law on the execution of criminal penalties, having a specific object, different from that of criminal law in general.

Keywords: *Romanian law on the execution of criminal penalties; custodial and non-custodial sentences; penitentiary law; new Penal Code and new Code of Criminal Procedure; Probation Services.*

Effectively speaking, the law on the execution of criminal penalties settles the special social relations governing the execution of criminal penalties, thus being created the legal framework that enables the performance of certain activities by the state authorities that are in charge of the execution of criminal penalties incurred by the persons convicted after a criminal trial.

Through this mechanism there are created the specific relations between the state coercive authorities and the convicted individual, a series of special criminal law norms being thus highlighted in order to establish the rules to be followed in the course of such proceedings.

Therefore, it is to be noticed that the different lawmaking process in case of norms that belong to a special area, that of the execution of criminal penalties, determines the emergence and self-governing existence of legal relations belonging to the law on the execution of criminal penalties. This set of norms highlights a well-structured pillar of criminal law, with specific rules and autonomous settlement.

Undoubtedly, the law on the execution of criminal penalties is extended on several levels, according to the concrete object it approaches and settles from a legal perspective.

Thus, in this area, there appears a wide range of aspects contained within the norms of the law on the execution of criminal penalties, referring mostly to the execution of principal punishments – custodial and non-custodial sanctions, to accessory punishments, but also to detention orders, as well as to guidance and supervision orders provided by penal legislation.

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For a clear understanding of the distinction between the law on the execution of criminal penalties and criminal law, we need to approach the core issue taken into account by the legislator upon settling the set of norms specific to each separate area. More precisely, while criminal law focuses on establishing the essential elements of an offense, the criminal liability and finally, the application of criminal sanctions, the law on the execution of criminal penalties centers on a moment subsequent to the aforementioned stages. It deals with the modalities of execution of penalties applied post-conviction, the established penalty being thus guided towards the realm of execution and assuming a material, concrete shape due to the effective application of norms of the law on the execution of criminal penalties.

In the legislative evolution of the law on the execution of criminal penalties, it is to be noticed a well-shaped system of norms, the foundation of this field being the adoption of Act no. 23 of 1969, as well as other special acts, which completed the general provisions of the former penal code. While the former penal code contained general norms in the area of execution of criminal penalties, governing institutions such as the parole, or the regimes of detention or work, the special legislation concretely provided the modality of applying criminal penalties, as well the stage of their execution.

The sources of the law mentioned above, the set of norms provided by certain special acts in force at that time, that completed the dispositions of Act no. 23 of 1969, created an autonomous, self-governing mechanism, shaping out the area of the law on the execution of criminal penalties.

The norms set out in the above-mentioned acts contained dispositions on the detention regimes, the modes of execution of custodial or non-custodial sanctions, or drew a division line between the execution of principal punishments and that of accessory punishments.

Consequently, from the manner the legislator settled this stage of execution of criminal penalties, it can be identified the autonomous character of the law on the execution of criminal penalties, with a particular object, specific to the coercive relations established between the state, through its specialized institutions, and the convicted individuals, following a definitive criminal sentence.

The set of provisions that govern this matter determine the existence of an autonomous branch of law, as a distinct stage in a criminal trial, namely that of effective application of the dispositions contained in the decisions passed by criminal courts.

Additionally, besides the autonomous nature of this branch of law, it is to be mentioned its public character, the legislation in this matter having an authoritative character. Thus, the convicted individual is subordinated to the state, which, by its specialized authorities, imposes on the convicted person the effective modality of executing the penalties established within the conviction decisions.

At the same time with the evolution of this legal system, the execution of penalties is not oriented only towards the punishment, at all costs, of the individual therefore, alongside with the punitive character of punishments, great attention is paid to the function of social reintegration of the individual. This special goal results inclusively from the special mode of settling the law on the execution of criminal penalties, the sources of this branch of law, which provide the legal framework destined to reach the outcome of rehabilitation and social reintegration, the beginnings of this conception being highlighted inclusively in Act no. 23 of 1969.

The above-mentioned aspects, which point out an essential feature of the law on the execution of criminal penalties, namely that of preventing the commission of new

offenses, are particular to the law on the execution of criminal penalties, and by such feature this legal area differentiates itself from other branches of law in the criminal field.

Nonetheless, the law on the execution of criminal penalties is closer, from the point of view of its legal approach, to penitentiary law, but the latter contains a series of provisions strictly on custodial sentences for the convicted individuals that execute criminal penalties in a prison facility.

Therefore, penitentiary law separates itself from the law on the execution of criminal penalties, being just a part of it, the law on the execution of criminal penalties having a larger legal base, which allows for additional measures of social reintegration or execution of non-custodial sentences as well.

The first signals of the new approach to penitentiary activity and execution of penalties in criminal matters emerged upon the adoption of the Law Decree no. 6 of 7th January 1990, which abolished the death penalty and replaced it with life imprisonment.

Taking into account that the new post-communist vision was closer to a European punitive system, this measure was an essential one, also given the number of persons executed in Romania until the year 1989. Thus, in Romania, between 1965 and 1989, 104 persons had been convicted to death, only the Court Martial of Bucharest having convicted to the capital punishment a number of 47 individuals. The last persons convicted to the death penalty were the Ceausescu spouses on 25th December 1989.

The same year, still as a consequence of the evolution and the alignment of national penitentiary standards to European ones, there was enacted Act no. 21 of 15th November 1990, by which the National Penitentiary Network, as it was called at the time, passed from the jurisdiction of the Ministry of Internal Affairs to that of the Ministry of Justice.

Thus, a well-organized framework was created, which, in the future, was to generate an independent activity performed by the judges in charge of supervision within penitentiaries, appointed by the courts of law in the jurisdiction of which there were situated the detention facilities.

Later on, in the year 2004, another measure of great importance in the process of updating of the penitentiary system was represented by the adoption of Act no. 293/2004 on the Status of Public Officers within the National Administration of Penitentiaries, a law which brought about the demilitarization of the personnel working in penitentiaries. On that occasion the name of the institution was also modified, from the National Network of Penitentiaries into the National Administration of Penitentiaries, doubled by the administrative and logistic consequences entailed by the new structure.

This organizational change created optimal conditions for the adoption of a new act on the execution of criminal penalties and measures ordered by criminal courts of law, in accordance with the conceptions of European institutions in this field.

Alongside with the development of state coercion mechanisms, as well as the European exigencies on lawmaking and settlement of conditions that govern the execution of definitive criminal sentences, the national legislator had to resort to implementing a new conception in this area of law, in 2006 being enacted Act no. 275 on the execution of penalties and measures ordered by judicial authorities in the course of a criminal trial.

By the enactment of this act, subsequently amended several times, inclusively by Act no. 83/2010, the state imposed a new direction in the area of execution of penalties

or measures ordered in the course of a criminal trial, by respecting the fundamental human rights and the principles attached hereto, in accordance with the European law standards.

That is why, starting with the very first articles of Act no. 275/2006, the legislator paid great attention to the fundamental human rights that need to be respected by state authorities upon the effective execution of custodial or non-custodial sentences, a vital issue, especially if filtered through the rich case-law of the European Court of Human Rights containing convictions against Romania in this matter.

Therefore, Act no. 275/2006 contained provisions on the respect of human dignity in a prison facility. According to the dispositions of article 3 of said act, criminal penalties are executed in conditions that ensure the respect of human dignity. In what followed, article 4 settled the prohibition of torture, inhuman or degrading treatment or other ill treatment. Thus, it is to be noticed a focus of the legislator on a fundamental principle of a criminal trial and of the execution of penalties stage especially, namely the respect of human dignity.

As we have mentioned above, this aspect, as a standard imposed by European law, highlights also the social, human side of the end of a criminal trial, the judicial authorities and those who execute the former's orders being compelled to become aware of the aim of the procedure of holding a person criminally liable. More precisely, in order for the social reintegration to be effective, the state should come up with the right solutions, by enacting functional sets of laws, containing norms that take into account first and foremost the respect of the fundamental human rights.

At the same time with the enactment of the above-mentioned act, there was adopted the Government's Order no. 1897/2006, which ratified the rules governing the application of Act no. 275/2006 on the execution of penalties and measures ordered by judicial authorities in the course of a criminal trial. The set of rules comprised in the above-mentioned Order has actually applied the firm directions imposed by the European institutions in this field, the focus being the creation of an optimal framework that could allow for social reintegration.

To this end, it is important to mention the Recommendation No. R (87) 3 of the Council of Europe's Committee of Ministers to Member States on the European Prison Rules, adopted on 12 February 1987, which sets out, as a basic principle, that deprivation of liberty shall be effected in material and moral conditions that ensure respect for human dignity and are in conformity with these rules. The same recommendation states, from the very Preamble, that all persons deprived of liberty shall be treated with the respect of fundamental human rights.

Given the broad range of European recommendations and directives in this field, the Romanian state was obviously confronted with a series of issues related to the assurance of material conditions of detention that should be in accordance with European requirements.

This aspect added to the overcrowding of prison inmates, thus forcing the state to adopt methods of implementation, both legislative and material, from a logistic point of view, by which detention conditions should not lead to a violation of the articles in the European Convention.

In order to complete the general provisions in the field of execution of penalties and other measures ordered in the course of a criminal trial, ever since 1998 there was enacted the Government's Order no. 487/1998 amending and completing the

Government's Order no. 65/1997 on the organization and functioning of the Ministry of Justice, thus being established the Probation Service within this ministry.

Subsequently, by Order of the Minister of Justice no. 2626/C/2000, said service was reorganized under the name of the Department of Supervision and Social Reintegration, still subordinated to the Ministry of Justice, and later on, there were established the services of social reintegration of offenders and of supervision of execution of non-custodial sentences, as special agencies, attached to each court house (tribunal), under the coordination of the Department of Supervision and Social Reintegration.

In 2006, the name of the services was modified, by Act no. 23/2006, thus becoming the Probation Service.

Once enacted the new Penal Code and the new Code of Criminal Procedure, a re-shaping of the probation system was imminent, taking into consideration the significant amendments brought to the regime of non-custodial sentences.

Therefore, alongside with the adoption of the new codes in criminal matters, in force since the 1st of February 2014, new laws became necessary in order to create a legal framework that would lead to increased efficiency of the measures to be ordered by judicial authorities.

Thus, there were enacted Act no. 254/2013 on the execution of penalties and custodial measures ordered by judicial authorities in the course of a criminal trial, Act no. 253/2013 on the execution of penalties, guidance and supervision orders and other non-custodial measures ordered by judicial authorities in the course of a criminal trial, as well as Act no. 252/2013 on the organization and functioning of the Probation Service.

Once this set of laws entered into force, they aimed at setting out a modern way of executing criminal penalties, and as a result, Act no. 275/2006 was repealed, thus two distinct laws remaining valid, depending on the regime of the measures ordered in the course of a criminal trial, namely custodial and non-custodial ones.

As regards Act no. 254/2013, it is destined to complete the serious reform in criminal matters signaled by the adoption of the two new codes, but also to improve the institutions created by the former Act no. 275/2006. If the latter law was meant to open up a new horizon in the matter, by respecting the standards imposed by the European Court, as a result of the multiple convictions of Romania in the field of detention, Act no. 254/2013 shapes out, in a particularly European manner, institutions that complete and harmonize the provisions of the new Penal Code and the new Code of Criminal Procedure.

Said act actually details the elements of some new institutions approached by the legislator, such as home arrest, as well as the way in which different substantial or procedural provisions are applied in practice, aiming at the social reintegration of the convicted individuals, their reeducation or the physical and psychical development of the former in order to dissuade them from committing further offenses.

At the same time there has been settled the judge in charge with the supervision of deprivation of liberty, who carries out his activity within penitentiaries, custody and arrest centers, as well as within educational and detention centers, whose main duty is to supervise and control the lawful character of the execution of penalties and custodial measures.

Therefore, the new act contains a series of guarantees in determining strictly whether the state respects or not the fundamental human rights in the course of imprisonment, taking into account the multiple international and European regulations

in the field, both those preceding Act no. 275/2006 and the more recent ones of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as well as the current case-law of the European Court of Human Rights. (the affair of *Petra vs Romania.*)

In order to shape out more clearly a positive result of the new regulations in the field, it should be mentioned that by the enactment of the new set of laws, the legislator took into consideration the firm position of the European Court of Human Rights which, in the area of political rights, stated that the global prohibition of the right to vote to all convicted individuals who execute a custodial sentence, a measure that was inherently applicable in the former legislation, regardless of the length of the sentence and irrespective of the nature and gravity of the offense, exceeds the acceptable margin of appreciation, being incompatible with article 3 of Protocol I (the affair of *Calmanovici vs Romania*).

As regards the enactment of Act no. 253/2013, it brings about a new vision in the field, setting out a series of non-custodial institutions, such as the suspended sentence with probation, supervised freedom (probation), as well as certain obligations imposed on minor offenders, suspended sentence with probation applicable to minor offenders, temporary release under judicial control. Also, there have been inserted new institutions, destined to represent an efficient alternative to deprivation of liberty, such as the deferred imposition of a sentence or community work.

Such legislative necessity, translated into the enactment of laws which create the general framework of coercion aiming at social reintegration by non-custodial measures, is in relation with the state penal policy, since the legislator understood that the application of measures in criminal matters is to be done effectively, depending on each particular case, and that many times a non-custodial measure proves more efficient than custodial ones.

The new provisions identify the institutions in charge of executing or supervising the fulfillment of obligations imposed on the convicted individual, as well as the cases of breach of preventive measures ordered by judicial authorities.

Concerning Act no. 252/2013 on the organization and functioning of the probation system, it settles the legal framework for the application of the values on which a modern system of probation is based, according to the European Convention on Human Rights and the international and European conventions and recommendations.

These provisions pay special attention to the professional training of the personnel acting within the probation system, as well as to the research and study activities within the Probation Department at the Ministry of Justice.

The problem of a well-shaped probation system that can be inferred from these legal provisions, derives from the manner in which the state settles, through the law, aspects related to the social reintegration of individuals who commit criminal acts and is reflected in the finality of such methods, by a thorough analysis of the efficiency of the laws in the field of probation.

Concretely speaking, the problem raised is that of establishing, at a governmental level, the most efficient supervision instrument aimed at the social reintegration of those who committed offenses acknowledged and sanctioned by criminal courts. This aspect derives from the nature of penalties inflicted by the judge, taking into account that criminal sanctions applied in a criminal trial have not only a punitive side, meant to punish beyond any other reason, but also an educational side, destined to reeducate offenders.

The above-mentioned issue is related, to a considerable extent, to the penal policy adopted by each state, while, at a global level, there have been attempts to find methods more or less different by which specialized institutions may create the framework necessary to reach the objectives of social reintegration.

Following the legislative evolution in the field of probation, having regard to the general penal norms and the special provisions of Act no. 252/2013, it is to be remarked that the state puts greater focus on the last stage of a criminal trial, namely that of execution of criminal sentences.

Therefore, it is deemed as extremely important the fact that both the legislative and the judicial authorities treat with great attention both the rules on finding the truth or establishing the guilt during the stages of pre-trial investigation and the judgment, but also subsequent to the establishment of guilt, with an aim to supervising the conduct of convicted individuals.

This fact derives, as we have mentioned previously, from that the role of a criminal penalty does not consist only of punishing, as we might infer from the very name of the legal institution, but also of succeeding to reeducate the individuals targeted by these sanctions.

It is true though that, by rendering efficient the methods of coherent transposition of probation rules, by enacting special laws and institutions in the field of probation, such as the new provisions that have entered in force at the same time with the new codes in criminal matters, the state has only gains and benefits, both socially and economically.

From a social point of view, the reintegration into the community of those who committed criminal acts, manages to create a social stability of the environment in which they are integrated, leading to a feeling of security of the citizens with whom the convicts come into contact following their penal sanctioning.

On the other hand, from an economic point of view, an efficient reintegration of these individuals into the society means that they have to respect the working rules within different companies or institutions which carry out their activity with the aim to obtaining profit.

By designating probation officers – or "case managers" as they are called in the internal penal legislation, the state succeeds in doing an analysis of each individual taken separately, the probation services appointing well trained persons, with proper education, in order to permanently supervise the process of the individuals' reintegration into the community. This goal can be achieved only through a distinct and detailed analysis of each person, as well as through a very complex knowledge of each individual's psychology. Only this way can we talk about an efficient approach of the state, by its specialized agencies, destined to contribute substantially to the reeducation of offenders.

However, many times there are references to the inefficiency of such a system, based firstly on the idea that the persons who commit offenses and prove to be perseverant in the criminal career, are "built" in such a way that any attempt of the state to improve their deviant behavior leads to no result, thus recidivism being born.

Undoubtedly we agree that in certain situations, the perseverance in committing offenses, caused by different internal or external factors, succeeds in overcoming any proceeding meant to correct criminal behavior, but it is true as well that if the state manages to exactly discover the causes behind the commission of such acts, the fight for achieving the goal of social reintegration is considerably facilitated.

Concretely, it is highly unlikely that the state may aim at socially reintegrating all the persons convicted for having committed offenses, since this phenomenon would be an utopia, instead the state, by implementing institutions in the probation field, by creating a coherent and efficient system, well organized at the level of probation services, aims to create the chance for each individual to be reeducated.

Therefore, no matter how efficient the contribution of state agencies to the achieving of the above-mentioned goals may be, they ultimately create an opportunity for the criminally sanctioned individuals to be socially reintegrated, by implementing a set of rules contained in the special acts in the field of the law on the execution of criminal penalties, while leaving room for their own persuasion and choices in order to reach the positive goal of reeducation.