

SAFETY MEASURES IN THE NEW CRIMINAL CODE

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Abstract

Taking into consideration the judicial institution of the safety measures a key institution of the legislator's conception on the prevention and combat of criminality, the author examines the safety measures in the new Criminal Code.

Keywords: *safety measures, Criminal Law sanctions, sanctions.*

1. Preliminary considerations

The adoption of a new Criminal Law opens in front of the drafting committees many dilemmas, and one of the most important is the choice of the penalty system, the conception on the prevention and combat of criminality.

The place and role of the safety measures constitute an indication concerning the legislator's conception on the prevention and combat of criminality.

2. The origins of the safety measures

The new Code covers four safety measures in Title IV; art. 108 states that safety measures are:

- a) mandatory medical treatment;
- b) medical hospitalization;
- c) prohibition for occupation of a function or the exercise of a separate profession;
- d) special confiscation.

The other safety measures listed in art. 112 of the Criminal Code of 1968, prohibition to stay in certain localities, expelling of foreigners and the prohibition of returning to the family residence for a definite period, can be found in other forms, among alternative sanctions in art. 66 of the Criminal Code.

Are we assisting to a change of conception of the Romanian legislator?

Does he deny his position identical to the position of the International Criminal Law Association, to whom he expressed constant support to all international conferences attended?

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To answer this question we will give a brief overview of the evolution of the safety measures.

An essential role in the conceptualization of security measures and their spread in national legislation have had the work of the International Criminal Law Union, founded in 1889, whose dignified and respectable successor is the International Association of Criminal Law. Starting from the positivist School's ideas, the International Criminal Law Union proposed to admit that certain individuals, through their judicial history, the bad habits of life, physiological flaws or mental condition could be declared dangerous and therefore agree to take toward them, in addition to any penalties, a permanent safety measure meant to make them bear the appropriate treatment.¹⁾

This issue has been examined in numerous congresses where discussion was conducted almost exclusively on the reconciliation of individual liberties and guarantees and the notion of dangerous offender status.²⁾

The debates of the Brussels Congress in 1910 on a dangerous offender state have led to recognition of the need to create safety measures against dangerous individuals belonging to three categories:

a) recidivists; b) alcoholics and abnormal c) bums.

At the same time it was stated the post-criminal character of the safety measures.

The participants, among who were noted professors I. Rădulescu and G. Vrăbiescu on behalf of The Romanian Group, J.A. Roux on behalf of the French Group, E. Rubbens on behalf of The Belgian Group, Enrico Ferri on behalf of the Italian Group, have concluded that safety measures are sanctions to be provided by the Criminal Code, granting the judge the possibility to apply safety measures or penalties depending on the circumstances of the crime and personal conditions of the offender.³⁾

The International Conference for the codification of the Criminal Law held in Rome in 1928 finalized the proposed regulation for the safety measures.

The Conference resolution established that safety measures can be applied to socially dangerous persons who committed crimes punished by the Criminal Code, even if they are not criminally responsible.

Regarding the issue of whether the safety measure can replace or complete the punishment, it was subject to the Congress of the International Association of Criminal Law from Brussels in 1926 attended by, among others, the same Romanian teachers I. Rădulescu and G. Vrăbiescu and in their report they argued the thesis that the safety measure must not replace the punishment but complete it. To be more convincing, the Romanian rapporteurs presented the preliminary draft of the new Romanian Criminal Code in which there were eight safety measures.⁴⁾

The International Criminal Law Congress from Brussels in 1926 and the International Conference for the codification of Criminal Law held in Rome in 1928 established the dualistic conception of the safety measures, meaning that they can be used alternatively or concurrently with the punishment.

¹⁾ A. Prins, *La défense sociale et les transformations du droit pénal*, Paris, 1910, p. 35.

²⁾ G. Vidal, *Concepts de droit criminel et de science pénitentiaire*, Paris, Librairie Rousseau, 1928, p. 58.

³⁾ E. Ferri, *Rapport présente au nom de Groupe Italien*, R.I.D.P., 1926, p. 207.

⁴⁾ *La mesure de sûreté doit-elle être substituée à la peine au simplement la compléter? Rapport présenté au nom de Groupe Roumain par I. Rădulescu et G. Vrăbiescu*, R.I.D.P., 1926, p. 236..

3. Safety measures or punishment?

Although designed exclusively for the preventive purpose, safety measures follow the legal status of the punishment: are being applied only after perpetrating an offence, can be decided only by a judge, can not be taken but only by applying a normal criminal proceeding during which the defendant benefits from all the defense resources.

Even if accompanied by these guarantees, safety measures don't have "droit de cité", are not allowed on the front door in French Criminal Law but only as additional and secondary social protection measures specially reserved for certain categories of offenders for which conventional measures are proved inappropriate (minors, for example) or ineffective (for abnormal offenders). They continue to have an almost clandestine existence, when it uses them, the legislator does not name them as such. The naming is refused not only to the measures applicable to juveniles offenders, offenders included in the program of probation or conditional liberation that come to complete the penalty, but even to those replacing it.

Regarding measures to be added to the punishment for the sole purpose of preventing a future crime, they are hidden under the semblance of a punishment and are generally called as "additional punishments".

Under no circumstance it is a matter of terminology, but the intention of the Legislative to insert as much as possible these means of action in a safe, familiar and pre-constituted framework, because safety measures still inspire only a relative confidence.⁵⁾

The legislator's trend to include the safety measure in the legal framework of the punishment has been enhanced by the jurisprudence.

Thus, the Court of Cassation, in the context of decisions taken a long time ago, did not recognize the character of safety measure nor the relegation or prohibition of stay.⁶⁾

Moreover, three of the additional punishments, in which the doctrine discerns safety measures, are taken out of the field of Criminal Law: special confiscation, closure of establishment, the withdrawal of the driving license.

Granting these measures the character of "measures of police and public security" removes the application of some rules such as the personality of the punishment, non-cumulating or territorial application of the punishment.

We can say that in France there is a clear trend of the Legislative and the jurisprudence to submit safety measures to the same legal rules as the repressive measures.

Currently, it is assumed that there is no criminal legislation based only on punishment or only on safety measures, because a system of criminal sanctions must have both a retributive character and a preventive one.⁷⁾

However, contemporary doctrine⁸⁾ finds the existence of a current of thinking in favor of merging between the punishment and safety measures. This thesis is based on the difficulty of organizing a sensitively differentiated deprivation of liberty regime for punishment towards safety measures, showing at the same time the difficulties of cumulative applying of punishments and safety measures.

This is why it was used in the draft of the French Criminal Code in 1978 only the expression of sanction, to include both the penalties and safety measures, but in the new French Criminal Code the expression of safety measures is no longer listed.

⁵⁾M. Patin, *La place des mesures de droit dans le dispositif moderne* (R.S.C., 1948, p. 415).

⁶⁾ For details see R. Schmelck, G. Picca, *Pénologie et droit pénitentiaire*, Editions Cujas, Paris, p. 80.

⁷⁾ C. Sima, *Safety measures in the contemporary Criminal Law*, All Beck, București, 1999, p. 39.

⁸⁾ G. Stefani, G. Levasseur, B. Bouloc, *Droit pénal général*, Dalloz, 2005, p. 417.

The International Criminal and Penitentiary Commission noticed in 1951 that the dualism between punishment and safety measure, which is softened more and more, will have to be avoided as much as possible⁹⁾.

At the 6th Congress of the International Association of Criminal Law, held in Rome in 1953 on the Grispigni report which presented a more nuanced position, professor Jimenez of Assua remained a firm dualist, arguing that the unitary doctrine, although consecrates the expression of "punishment" is emptying it of any retributive character and moral coloring, thus coming back little by little at the unitary positivist regime and the denial of any guilt originating in the human behavior.

Although the current French Criminal Code does not establish any express safety measure, the doctrine divides safety measures into three categories:

- a) Safety measures officially recognized and enforced as such;
- b) Safety measures operating as punishment;
- c) Safety measures operating under administrative regime.

Regarding the new Romanian Criminal Code, it, in regulating safety measures, stood firmly on the positions of the International Association of Criminal Law.

a) Safety measures can be taken only by the court ensuring the legal control in the procedure of taking such measures;

b) Thus, the safety measures are lacking any moral coloring, being taken in consideration of a dangerous state of a person, without being connected to its guilt, only for preventive purpose. The only basis of safety measures is the state of danger;

In order to avoid the afflictive character, safety measures must not assume, as much as possible, any suffering.

c) Safety measures aren't taken for a definite period of time. Neither the legislator nor the judge can determine in advance the length of a safety measure;

However, some measures that can be treated as additional punishments, such as professional incapacities are taken for a definite or relatively definite period of time.

d) Safety measures are essentially revisable in the event that the state of danger leading to their taking, disappears. Revocation of safety measures may be ordered by the Court, both at the request of the person against whom the measure was taken against, and at the request of the Prosecutor;

e) Security measures can only be taken after perpetrating a crime. As shown at the International Association of Criminal Law Conference from Brussels in 1926, the state of danger, whatever its nature, must be highlighted by perpetrating a crime provided in the Criminal Law;

f) Safety measures may be taken without the application of a punishment, or in conjunction with the punishment, depending on the circumstances of the offence and on the offender's personal situation.

⁹⁾ *Ibidem*, p. 418.

4. Conclusions

Thus, the Romanian regulation fully complies with the general principles of safety measures established in time at the International Association of Criminal Law Conferences and Congresses.

Even if it restricts the number of safety measures and introduces additional punishments which include the old safety measures, the Romanian legislator retains the traditional concept of safety measures as a means of removing the state of danger, to prevent perpetrating of the crimes in the Criminal Law.

The new Criminal Code appears as a continuation of the Romanian Criminal Law School, anchored in the neoclassical concept of preventing and combating criminality that is also open to some elements promoted by the new currents of thinking and trends in contemporary Criminal Law.

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