

THE INFLUENCE OF ATTENUATING CIRCUMSTANCES ON THE PENAL LIABILITY OF THE DELIQUENT

Ph.D Lecturer **Laura-Roxana Popoviciu**
AGORA University, Oradea
Law and Economics Faculty
laura_popoviciu@univagora.ro
Police Inspector **Călin-Nicolae Popoviciu**

Abstract: *In art. 72 of Romanian Penal Code we encounter among general criteria of appropriation, circumstances that are attenuating or aggravating the penal liability, criteria that refers to the cluster of circumstances, situations, qualities or states that can influence the penal liability. These circumstances are placed outside the essential content of the offence, representing the so-called circumstantial content and only by chance they can accompany the preparation, the commitment or the consequences of the deed.*

These circumstances, if they exists, can sometimes determine a real change of the juridical treatment foresee by the law for the committed deed, according to the measurement and the conditions prefigured by the dispositions that regulates these modification reasons of the penalty.

Key words: *penal liability, attenuating circumstances*

In art. 72 of Romanian Penal Code we encounter among general criteria of appropriation, circumstances that are attenuating or aggravating the penal liability, criteria that refers to the cluster of circumstances, situations, qualities or states that can influence the penal liability. These circumstances are placed outside the essential content of the offence, representing the so-called circumstantial content and only by chance they can accompany the preparation, the commitment or the consequences of the deed.

These circumstances, if they exists, can sometimes determine a real change of the juridical treatment foresee by the law for the committed deed, according to the measurement and the conditions prefigured by the dispositions that regulates these modification reasons of the penalty.

Any human demeanour manifests itself in a extremely complex ambiance consisting on many conditionality's that can determine a person to take action in some ways, in which this person should abstain itself from committing a chain of infractions by controlling those tendencies that are pushing it to brake the law.

If a person breaks the law, it is important to apply a penalty to this person as a consequence of its aberrant option of that person, regarding who it bears the whole responsibility. For a penalty to be efficient it must be directly proportional to the gravity of the offence, not to clement, not to harsh, but just right.

Considering these aspects, the penal legislation developed the necessity of applying suitable penalties according the nature, the duration, the delinquent and the gravity of the offences committed. This is possible only by individualizing the penalty, an extremely complex operation.

According to the Penal Code, one of the criteria the court has to take into account regarding this appropriation of the penalty beside dispositions of the general part of the Penal Code, penalty limits provided in the special part or in special laws, gravity of the offence committed, delinquent's personality and the circumstances that aggravates the penal liability are the circumstances that are attenuating the penal liability.

Any offence can be committed in presence of these kind of circumstances, circumstances that have to be taken into account by the court as mandatory legal or judicial (permissive). In case these offences are ascertained, the court will have to attenuate the penal liability.

If these offences were missing, the penal liability would be less harsh.

Beside the fact that the attenuating circumstances contribute on applying some penalties that should reflect as real as possible the degree of social danger of the offence and of the delinquent, the influence indirectly through the quantum of the implemented penalty a series of other institutions stipulated in the Penal Code: relapse, release on parole, etc.

By "circumstances that attenuate or aggravate the liability", art. 72 of the Penal Code, we can understand that the Code is talking about different qualities, states, situations or other facts of the reality that, although are not part of the constituent content of the offence have bear upon the deed, the delinquent (influence the degree of concrete social danger of the fact and the dangerousness of the delinquent) and determines the diminution of the penalty under the special minimum or the aggravation of the penalty with possibility of exceeding the special maximum¹.

They have an important role in the individualisation of the liability and of the penalties, but the only ones that count are those that draw upon them a reduction or an enhancement of the degree of concrete danger².

The circumstances have a casual character because they doesn't accompany and doesn't characterize any concrete penal deed and are not bounded to the personality of any concrete delinquent, but, when they are retained, they determine a change of the penal liability and of the concrete juridical treatment of the perpetrator³.

These circumstances are situated outside the essential content of the offence, they compile the so-called circumstantial content of the offence. Those circumstances accompany the preparation, the perpetration or the consequences of the deed (for example circumstances regarding the place, time or the manner of committing the crime, extrinsic deed that prepared, facilitated or fulfilled the offence, the situation or victim's state) or connected with the delinquent (age, sex, his quality, premeditation, the reason, psycho-physic condition at that moment). These circumstances do not have the character of particular circumstances of a certain kind of offences because compared to the same type of law-breaking activity they can be present or absent sometimes⁴.

The attenuating circumstances are outside the content of the offence and have a random character, meaning that they do not accompany any offence and do not regard any criminal⁵.

The circumstances presented in art. 73 of the Penal Code are legal (mandatory) whereas the ones presented in art. 74 of the Penal Code are judicial (can be considered by the court as attenuating). Therefore, beside circumstances which the law consider as attenuating circumstances there are many circumstances that can constitute attenuating circumstances but were left uncharacterised by the legislator due either to their ambivalent character or the fact that their influence upon the degree of social danger of the deed isn't always decisive for the promulgation of the penalty, this influence being always conditioned by the concrete deed⁶. We can conclude that the aeffectual Penal Code prefigured only a few of the fact as attenuating circumstances leaving the court to characterize the facts as being attenuating, although these facts have not always this character.

The attenuating circumstances prefigured in the Penal Code have general application and are possible when any crime is committed therefore when the court ascertains their presence, must use them, their purpose being determining in a concrete manner the penalty applied for a certain offence and for a certain delinquent.

Unlike the legal attenuating circumstances enumerated by the law and detained by the courts of law, the judicial attenuating circumstances are covered by the rules of the legislator only as an

¹ A. Boroi, *Penal Law. General Part*, C.H. Beck Publishing House, Bucharest, 2006, p. 320

² M. Basarab, *Penal Law. General Part*, Vol. II, Lumina Lex Publishing House, 1999, p. 178

³ M. Basarab, V. Pasca, G. Mateut, C. Butiuc, *Commented Penal Code*, Vol. I, Hamangiu Publishing House, 2007, p. 406

⁴ V. Dongoroz, S. Kahana, I. Oancea, R. Stănoiu, I. Fodor, N. Iliescu, C. Bulai, V. Roșca, *Theoretical explanations of the Romanian Penal Code. Special Part*, Vol. III, Academia Romana Publishing House, ALL Beck Publishing House, Bucharest, 2003, P. 129

⁵ C. Mitrache, *Romanian Penal Law. General Part*, Juridical Universe Publishing House, Bucharest, 2006, p. 379

⁶ V. Dongoroz, S. Kahana, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, quote, p. 133

example, this time the court will decide if they are going to retain them or not when giving the verdict.

No matter what attenuating circumstances, it must be specified the fact that once retained by the court, these circumstances have a very important role in the appropriation of the penalty process, because can determine either the reduction or the substitution of the penalty. It must be taken into account a very important fact: if when we talked about the judicial attenuating circumstances mentioning that their cutting down is facultative, the court has only the obligation of minimizing the penalty, but in case of the legal attenuating circumstances, the court has two obligations: retaining them when they were ascertained and reducing the penalty according to legal provisions. In case the court breaks any of these liabilities, the penalty that will be applied wasn't going to be legal.

If an attenuating circumstance exists, it means that the crime and the criminal presents a minor degree of danger and his rehabilitation can be made by applying a rather small penalty or even replacing it totally⁷.

The attenuating circumstances, once they are ascertained, attract always the mandatory reduction of the main penalty under its minimum special limit or a replacement of the penalty, no matter if they are legal or judicial, reaching new special limits⁸, because they say that the existence of a new attenuating circumstance implies in any circumstances a less dangerous state of the criminal and the possibility of his rehabilitation by giving him a reduced penalty (time, quantum).

The existence of many more attenuating circumstances do not lead to so many Penalty reductions and can't justify the lowering of the penalty under the minimum limit prefigured by the law for the ipohesis of ascertaining attenuating circumstances; all the detained attenuating circumstances will determine only one reduction of the penalty, between the new special limits, but the presence of a multiplicity of such circumstances can attract a more accentuated relief of penal liability⁹.

When the law prefigures alternative penalties for the crime, the court must focus first on one of these penalties and only after will establish the effects of the attenuating circumstances comparing them to the penalty set, abstractedly from the existence of the others.

The measure in which the penalty can be reduced and the cases in which the penalty can be replaced are established by disposals of art. 76 of the Penal Code.

Therefore, according to disposals from art. 76, the attenuating circumstances are efficient mainly on main penalties (custody and fine).

- The custody

By disposals of art. 76, character a-d is regulated the measure in which the custody penalty can be obsolete without replacing it with a fine:

- when the special minimum of the custody penalty is 10 years or more, the penalty drops under the special minimum, but not less than 3 years;

- when the special minimum of the custody penalty is 5 years or more, the penalty drops under the special minimum, but not less than 1 year;

- when the special minimum of the custody penalty is 3 years or more, the penalty drops under the special minimum, but not less than 3 months;

- when the special minimum of the custody penalty is an year or more, the penalty drops under this special minimum, until the general minimum¹⁰

By the disposals of art. 76, character e, is regulated the measure which can reduce the custody penalty or can replace it with a fine:

⁷ E. Crisan, *Attenuating Circumstances*, Sfera Juridica Publishing House, Cluj-Napoca, 2008, p.144

⁸ M. Basarab, quote, p. 203

⁹ S. Danes, V. Papadopol, *The juridical appropriation of the penalties*, Scientific and Encyclopedic Publishing House, Bucharest, p. 173

¹⁰ Art. 76 of the Romanian Penal Code

- when the special minimum of custody penalty is 3 months or more, the penalty drops under this minimum, until the general minimum, or is applied a fine that can not be under 250 lei, and when the special minimum is under 3 months is applied a penalty that can not be under 200 lei.

The substitution of the custody penalty with a fine is facultative for the court if the special minimum of the custody penalty is 3 months or more and the substitution of the custody with a fine is mandatory for the court when the special minimum of the penalty is under 3 months, situation when the criminal is liable for a fine that can't be less than 200 lei. In this case, the court can not pick between custody and fine, but will apply mandatory, the fine.

At paragraph 2, art. 76 we encounter some cases in which the effects of the attenuating circumstances are more limited: „in case of crimes against the state, against peace and humanity, homicide, crimes that has as a result the killing of a persona, or crimes with extremely grave consequences, the custody penalty can be reduced to let's say a third of the special minimum”. In these cases the penalty will be reduced to a third of the special minimum.

- The fine

In case which the penalty is the fine and attenuating circumstances are abstained, the procedure is as follows:

- when the penalty is the fine, this can be lowered under its special minimum, up to 150 lei when its special minimum is 500 lei or more, or until the general minimum when its special minimum is under 500 lei.

The attenuating circumstances have repercussions even in the case of penalties implemented on legal person.

According to article 76, paragraph 4 of the Penal Code, when exists attenuating circumstances the fine for a juridical person is set as it follows:

- when the special minimum of the fine is 10.000 lei or more, the fine drops under this minimum, but not less then a fourth;

- when the special minimum of the fine is 5.000 lei or more, the fine drops under this minimum limit, but not less then a third.

The technique used by the legislator is different of that used in case of private individual. If in case of a private individual the legislator indicated the maximum limit by which can drop under the special minimum, in case of juridical persona the legislator indicates how much one can lower the limit under the special minimum, the maximum limit by which the fine can be reduced being deduced by reporting the fine's special minimum limit to the quotation of a fourth or a third by which a limit can be dropped under that minimum¹¹.

- The penalty of life imprisonment

According to art. 77 of the Penal Code, „for that kind of crime the law prefigures the penalty of life imprisonment; if there are any attenuating circumstances is applied a sentence of imprisonment of 10 to 25 years”.

- The complementary penalties

According to art. 76 paragraph 3 of the Penal Code, when there are attenuating circumstances, the complementary penalty of abridgement of rights for the offence committed can be averted.

¹¹ M. Basarab, V. Pasca, G. Mateut, G. Butiuc, quote, p. 438