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REGULATION OF PUNISHMENT IN CRIMINAL LAW OF FRANCE, GERMANY AND SPAIN

Vlad Nicolae NEDELCU¹

Abstract

We intend to undertake an incursion in the field of comparative criminal law in order to investigate and interpret the institution of criminal measures. In this regard, we will analyse the criminal sanction system in the following states: France, Germany and Spain, given the link between the states and, of course, the fact that they are based on the same system of law: Romanian-German.

Keywords

The criminal law of the French Republic; German criminal law; The Spanish criminal system.

1. The French criminal system

The criminal law of the French Republic combines several provisions of the Constitution and of the French Criminal Code from 1992, which, in fact, have replaced the "classical criminal law" inherited from Napoleon.

Other normative acts are also included in the sources of French criminal law, such as the Code of Criminal Procedure of 1958, the Code of Military Justice of 1966, as well as other non-codified norms of law. Characteristic of the law systems that rely on the Romanian-German law system, and in French law, the law has the greatest importance, while the court decisions have only an auxiliary character. The basic regulations regarding the application of the measures of criminal constraint are determined and regulated, for the most part, by the French Criminal Code.

In France, the definition of punishment and the establishment of the goals of punishment are based on two concepts: contemporary neoclassicism and the new social defence.

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The representatives of the first mentioned current insist on the necessity of achieving two primary purposes of the punishment: reward and intimidation. The severity of the sentence must correspond to the seriousness of the commission of crime. The very essential features of the punishment itself are the expression of its purposes. The punishment has a determined character, that is to say the French criminal law avoids the application of punishments for an indefinite term. Therefore, the need to serve the sentence corresponding to the sentence is found, without a possible change of a stricter detention regime with a lighter one, without the application of the conditional release, otherwise the punishment reducing its importance regarding intimidation and rewards.

Representatives of the second trend are opponents of such an approach to punishment. Correction and resocialization of the sentenced person are highlighted as punishment purposes (Dumneanu, 2014: 288).

The punishment system in the French Criminal Code includes coercive measures applied to both natural and legal persons. This category includes: detention, imprisonment, fine, fine-days, work in the interest of the society, deprivation of certain rights and also complementary penalties. In the conception of French criminal law, the security measures are coercive individual measures without moral significance on the dangerous offenders, for the social order, in order to prevent the crimes being committed; these are not remunerative, their purpose being exclusively preventive (Moraru, 2001: 30).

The French Criminal Code does not contain a definition of the notion of punishment or the statement of its purposes, but indirectly, the normative act regarding some concrete legal-criminal measures provides for some purposes of the punishment. Thus, for committing crimes, people are sentenced to serve their punishment in penitentiaries, which can ensure continuous medical and mental adjustment (Dumneanu, 2014: 288-289).

The French Criminal Code includes in a single sanctioning system both the punishments and the security measures; both categories of measures can be cumulatively applied to an offender. In relation to the penalties, the French criminal law assigns to the security measures an extremely modest role. Complementary penalties, such as the confiscation of illicit and dangerous things, are recognized as security measures. The same character is recognized by the case law and other complementary sanctions, such as the prohibition of being in certain

localities, the withdrawal of the driver's licence, the prohibition to practice certain professions (Moraru, 2001: 31-32).

The punishments, applied to the natural persons, depend on the character of the committed acts, which, according to S.111-1 of the French Criminal Code, are divided into three categories: crimes, offenses and misconduct. At the same time, it is necessary to take into account the fact that these deviations from the legal provisions may also have a criminal character and may also be recognized as contraventional deeds. For these reasons, the punishments are classified in criminal measures, corrective measures and sanctions attracted by the misconduct committed.

Criminal detention or imprisonment is included in the category of criminal penalties and can be applied for life or for a term of 10 to 30 years. According to S.131-2 of the French Criminal Code, the application of these penalties does not exclude the possibility of establishing complementary penalties, including the fine.

Imprisonment is a measure of corrective punishment and is applied for a term of up to 10 years. The term for which a preventive arrest can be applied is included in the term of punishment. Moreover, if the sentenced person is in the hospital or in a psychiatric institution in the process of serving the punishment measure, the period required for healing will also be included within the deadline set by the court.

In case of applying the prison sentence for more than one year, the court, pursuant to S.132-25 French Criminal Code, may order the serving of this punishment measure in semi-free regime. This fact implies the possibility of moving the convicted person outside the penitentiary institution in order to carry out studies, to acquire a job, to perform certain tasks or to participate in family life; it is in fact a reflection of the principle of humanism, manifested by the legislator with regard to the convicted person.

The fine is usually applied as an alternative to imprisonment or used as a measure of complementary punishment.

The punishment in the form of fine-days consists, as provided by S.131-5 of the French Criminal Code, in obliging the convicted person to transfer to the state budget a certain amount of money during a period of time determined by a court decision (but not more than 360 days).

According to S.131-6 and 131-7 of the Criminal Code of France, in addition to the prison sentence and the fine, for committing misconduct, the court can also order additional sanctioning measures, among which

we mention: cancellation of the driver's license, deprivation of the right to drive certain means of transport, confiscation of one or more means of transport belonging to the convicted person, the prohibition to keep and carry weapons for a period of up to 5 years.

The work in the interest of the company consists in the accomplishment by the convict of the unpaid work presenting general character, in favour of the public interest or of an organization, for a period from 40 to 240 hours. This punishment measure can also be applied as an alternative to the imprisonment sentence, if the convicted person expresses his will in this regard.

Along with the main sanctions, S.131-10 of the French Criminal Code (in the form of Law no. 98-468 of June 17, 1998) provides for the possibility of applying complementary punishments, which include: deprivation or limitation of a right, seizure of a certain asset, termination of the activity of a certain structure, etc.

According to the Ordinance of February 2, 1995, regarding the minor persons, the following measures of criminal constraint can be applied: establishing the semi-supervision or total supervision regime, compulsory work, deprivation of liberty with postponement of sentence serving, deprivation of liberty with postponement of sentence serving and with granting a probation period, imprisonment. Also, in the case of persons under the age of 18, coercive measures which are educational in nature may also be applied.

Legal entities may be subject to a fine, their amount being different. Moreover, regarding the legal persons the punishment measures provided in S.131-9 of the French Criminal Code may also be applied: cessation of activity of the legal person, prohibition to exercise a certain type of activity, placement under judicial supervision, prohibition to conclude contracts with state authorities for a period of 5 years or for an indefinite period, the prohibition to issue checks, the seizure of assets that were used to commit the criminal offense or which were obtained as a result of it.

The legal persons can be held liable in the same way as the sanctions are applied to the natural persons, as well as separately. The punishment in the form of placement under judicial supervision cannot be applied to legal persons under public law and also to political parties and trade unions.

In addition to the punishment system, the Criminal Code of France also provides for the possibility of applying a special measure of

constraint in the form of social-judicial control, the duration of which is up to 10 years in case of committing the offenses and up to 20 years in the situation of the commission of the offenses. Socio-judicial control generates, for the convicted person, the obligation to comply with the supervision and verification measures, designed to prevent recidivism.

Also, in the guilty person may be subject to certain restrictions, instituted in the context of the postponement of the enforcement of the punishment measure. Pursuant to S.132-29 of the French Criminal Code, when delivering the sentence, in the case of the convicted person the simple postponement of the serving of the sentence can be applied, and according to S.132-40 of the same Criminal Code, the possibility to postpone the serving of the sentence in probation period is regulated. In the first case, on the guilty person the obligation not to commit other acts that fall under the criminal law for a period of time is imposed. Arranging the postponement of the serving of the punishment measure under a probation period may have the effect of applying the social assistance, control measures, and of placing certain special obligations on the convicted person.

The current French criminal law tries to combine the ideas of neoclassicism, when it considers it necessary to apply serious penalties for committing certain crimes with a high degree of social danger, so that the purpose of re-socialising the convicted person seems to pass on the second plane. Other times, however, the main ideas of the school of social defence are the primary purpose of punishment. For example, in the field of crimes, long-term sentences have been reduced, considering that their application is not efficient, on the contrary, the convict being removed from the family, from the work process, and it was found that they hardly reintegrate into society (Dumneanu, 2014: 289).

2. The German criminal system

The basic source of German criminal law is the Criminal Code of the German Federal Republic, adopted in the initial drafting, in 1871, during the formation and consolidation of the German Empire. By 1975, substantial changes were made in the criminal law system of the RFG: the new general part of the Criminal Code was adopted, and in the content of the special part, essential changes were made. Currently, in Germany, the Criminal Code is applied in the form drafted in 1987. Based on the Declaration on the unification of RDG and RFG signed on

August 31, 1990, the criminal law of the latter applies to the entire territory of the unified federal state.

Germany's criminal law provides for the following coercive measures: the sentence of deprivation of liberty, additional sanctions, the obligation, as well as the application of corrective and security measures. The content of the system of criminal penalties includes deprivation of liberty, fine and deprivation of the right to drive means of transport.

Also, in the German criminal law the following safety measures are regulated: hospitalization in a psychiatric hospital, hospitalization in a re-education institution, admission in a social-therapeutic institution, admission in a supervisory and security institution, placement under supervision, the withdrawal of the driver's license, the prohibition of the right to practice. The first four security measures are depriving the person of liberty and the other three do not deprive the person from liberty. In addition to the provisions cited, the German criminal law provides in a separate title (Title VII), the institution of special confiscation (Verfall) and the taking over of certain things (Entziehung) (Moraru, 2001: 35).

Analysing the system of punishments provided in the Criminal Code of Germany, one can find the reprobative but human character of the punishment (Mariț, 2002: 197-198).

The deprivation of liberty, according to paragraph 38 of the Criminal Code, can be applied for life or for a determined period from 1 month to 15 years.

In case of the person sentenced to life imprisonment, he/she can be released conditionally before the term, provided that at least 15 years of the sentence are served and that the "special" danger of the guilt does not make it necessary to continue holding the one sentenced in the penitentiary institution.

The serving of the prison sentence is organized on the basis of a progressive system, which implies the gradual improvement of the conditions of detention of the convicted persons. Thus, for example, in Hamburg, correctional institutions have a semi-closed regime, and convicted persons are initially placed under closed regime conditions. During the course, the regime of enforcement of the punishments becomes lighter and, consequently, the prisoners are even offered the opportunity to benefit from short-term leave and travel outside the penitentiary. Moreover, in the process of serving the imprisonment sentences, conditions of social-therapeutic influence are created for the

particularly dangerous recidivist people with serious psychopathic disorders, on the criminals with advanced degree of dangerousness, who have committed crimes for sexual reasons or who acquired criminal skills at an age of up to 27 years.

In Germany there are two varieties of the imprisonment sentence. The first is applied to minors, who serve their sentences in separate prisons. The maximum term of the deprivation of liberty for persons under the age of majority cannot be more than 5 years, and in the case of the conviction for acts sanctioned, according to the general rule, with imprisonment for a term of more than 10 years, the maximum limit of this measure of punishment with reference to minors cannot exceed the term of 10 years. The second variety of deprivation of liberty is the placement of the person under arrest, based on the provisions of the Law on military offenses. It applies to the military within a period of 2 weeks to 6 months.

The monetary fine, according to paragraph 40 of the German Criminal Code, is applied in the following amount: from 5 to 360 daily wage rules (tariffs) (unless the law provides otherwise), taking into account the material situation of the person, from the average gross income for one day. In cases where the convicted person is not able to pay the fine in one instalment, he/she, according to paragraph 42 of the German Criminal Code, can be set a payment term or be allowed to pay the fine in instalments. In case of non-payment of the amount specified in the sentence, the fine can be replaced with deprivation of liberty. The imprisonment sentence cannot be applied, in such cases, with the conditional suspension.

The patrimonial fine is expressed in an amount of money that cannot exceed the amount of the assets of the person who committed the crime. This measure of punishment can be applied in conjunction with the sentence of life imprisonment or the deprivation of liberty for a term of up to 2 years.

The next measure of criminal restraint, provided in paragraph 44 of the German Criminal Code, is the measure of the prohibition to drive means of transport for a period of 1 to 3 months. This punishment can only be applied in cases of committing criminal offenses related to the driving of the means of transport. It is necessary to specify that the term of the prohibition does not include the period of serving of the imprisonment sentence, as well as the detention of the person in certain

institutions, where he/she was placed under the order of the judicial bodies.

Examining the issues related to the application of punishment measures under German criminal law, we emphasize that, in certain cases, in case of economic and financial crimes, the law provides for the possibility of applying alternative sanctions, being allowed both the use of measures of criminal constraint and the contravention punishment.

Along with punishments, the Criminal Code of Germany also stipulates the possibility of applying security measures. In this category we can include the deprivation of the right to hold certain offices, the lack of the possibility to benefit from the rights obtained as a result of the public elections and the lack of the right to elect and to be elected.

As a criminal means of special influence, according to the German criminal law, we can mention the corrective and safety measures which, according to the provisions of paragraph 61 of the Criminal Code of Germany, include: admission to a psychiatric hospital, placement in a curative medical institution for alcoholics and drug addicts, preventive detention, establishment of supervision, suspension of driver's license, deprivation of the right to exercise a certain activity. The basic criterion of the application of the safety measures is the danger of the subject, whose removal from the society is intended by means of the measures in question. The corrective and safety measures, acting in parallel with the system of punishment measures, are oriented, first and foremost, towards the implementation of a special prevention. These measures are taken both in case of the convicted persons and of the irresponsible or partially responsible persons, but who are in "danger".

The admission to the psychiatric medical institutions is applied to the persons who have committed crimes in a state of irresponsibility or partial responsibility, if as a result of the assessment of their general state it appears that they could commit new dangerous acts for the society.

Regarding the persons who committed the crime in a state of reduced responsibility, the measure of admission in a psychiatric hospital is prior to the serving of the punishment.

Placement in a medical institution for alcoholics and drug addicts is taken in relation to persons who have committed criminal acts in a state of intoxication or as a result of the attachment to drugs, thus presenting a danger to society. The duration of the hospitalization in the medical institution cannot exceed, according to paragraph 67 d of the German Criminal Code, a period of 2 years.

The preventive deprivation of liberty is applied to the subjects, considered as "criminals by their nature", such as, for example, the recidivists, if the appreciation of their personal characteristics and the character of the crimes committed speak show an advanced danger to society. The duration of this measure of criminal restraint cannot exceed the term of 10 years. After its serving, regarding the released person, according to the provisions of paragraph 67 of the Criminal Code of Germany, certain supervisory measures may be implemented.

3. The Spanish criminal system

The normative regulation of the content of the measures of criminal constraint is achieved, in Spain, on the basis of the Criminal Code, adopted on November 8, 1995. This category includes the punishment measures and the security measures.

The criminal sanctions (penalties) are divided, according to S.33 of the Spanish Criminal Code, in serious, average and light, depending on the danger of the criminal acts committed and, respectively, the rigor and harshness of the measures applied. Serious penalties involve deprivation of liberty for a term of more than 3 years and also the complete or partial deprivation of certain rights. The death penalty is not provided, but S.15 of the Constitution of Spain sets the possibility of its introduction in the cases provided by the military criminal law during war time.

The Spanish Criminal Code, which entered into force in 1996, provides, in the General Part, a separate chapter, entitled "Security measures" (de las medias de seguridad). Some safety measures are depriving the person of liberty (admission in a psychiatric centre, admission in a detoxification centre, admission in a special educational centre).

Other security measures are not deprived of liberty (the prohibition of being in certain localities, the loss of the right to drive vehicles, the cancellation of the license or permits to use a weapon, the prohibition of a profession, the expulsion from the national territory of foreigners who do not legally reside in Spain (S.96 Criminal Code) (Moraru, 2001: 37).

As subjects of criminal liability and punishment, only the natural persons can be included in the Spanish Criminal Code. The deprivation of liberty, pursuant to S.36 Spanish Criminal Code, can be applied for a term from 6 months to 20 years, and in case of cumulation of crimes,

according to S.30 Spanish Criminal Code - up to 30 years. This variety of criminal punishment is served in prisons and consists in the strict isolation of the one convicted by the society. The court has the right to postpone the serving of the sentence which deprives a person of liberty. In the aforementioned case, the prohibition on frequenting certain places, of leaving the place of living without proper permission, the obligation to participate in work, cultural, educational and even studies programs can be applied to the convicted person.

The deprivation of certain rights can be expressed in the absolute limitation of rights, in the prohibition to practice a certain kind of activity, in the absence of parental rights, the right to guardianship and trusteeship, in the release from office, in the withdrawal of the right to conduct means of transport, to keep and carry armament, to be in certain places or to visit them. The category of average penalties includes the lack of the right to drive means of transport for a certain period of time, the lack of the right to carry and keep weapons, the fine, the arrest and also the public works.

The fine is calculated in fine-days, respectively in the equivalent of 5 days up to 2 years. The amount of the fine is set accordingly with the amount of the damage caused by the crime and with the taking into account of the material state of the guilty person. In case of avoidance of the convicted person from serving this punishment, according to the provisions of S.53 of the Spanish Criminal Code, it can be replaced with deprivation of liberty.

The arrest can be applied for a period of 1 to 24 days and is enforced at the nearest institution for the deprivation of liberty from the place of living of the convicted person. A peculiarity of this measure of punishment is the regularity of its enforcement: in the days of rest and not more than 36 hours per week. In addition, S.37 of the Spanish Criminal Code admits the possibility of serving the measure of arrest in the municipal institutions and within the police centres.

The works for the benefit of the community are arranged with the consent of the convicted person, as these substitute the arrest or the fine. In this case, the physical condition and the skills of the convicted person are compulsorily taken into account. According to S.49 of the Criminal Code of Spain, the duration of this punishment measure may not exceed 8 hours daily.

The security measures are applied in the case of establishing the "criminal danger" of the person, that is to say, in the cases of his/her

committing the facts that fall under the criminal law. They represent separate means of legal influence which have their own legal nature. The premise of their application lies in committing the acts prohibited by the criminal law, which predetermines the advanced danger of the person in relation with whom they are taken.

The Spanish Criminal Code regulates a wide spectrum of security measures, which are divided into two categories. The first one includes the means of influence in the field of deprivation of liberty: placement in a psychiatric centre or in a re-education centre, as well as placement in a special study centre. The second category includes security measures that have nothing in common with limiting freedom: the prohibition of being or residing in certain places, the withdrawal of the driver's license, the deprivation of the right to carry weapons, the expulsion from the country of persons who are residing illegally in the country, the obligation to reside in certain places and so on.

Conclusions

In France, the definition of punishment and the establishment of the goals of punishment are based on two concepts: contemporary neoclassicism, which focuses on the idea of reward and intimidation, and the new social defence, which aims to correct and re-socialize the convicted person.

Analysing the system of punishments provided in the Criminal Code of Germany, one can find the reprobative but human character of the punishment.

The death penalty is not provided for in the Spanish law, but S.15 of the Constitution of Spain established the possibility of its introduction in the cases provided by the military criminal law during war time.

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