CONVICTION INDIVIDUALISATION

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Abstract

The up to date legislations has gone that far, as they foresee the type and the length of conviction regarding each penal charge.

However, this stage presents a specific development of public reaction against criminality, and its essence consists of a theoretical and practical engagement that individual conviction should be adjusted to the subjective attributes and qualities of the author who has committed the penal act. Analysing the background of this individualism, it was concluded that the aim of this engagement initially has been to avoid arbitraries and misuse, especially the violence of citizen's equality.

Over the years and with the evolution of judicial-penal system through this individualisation, the misinterpretation expectation in determining the way of importance of the subjective -objective circumstances regarding the authors of the penal acts, in the completion of this misinterpreted element that legal individualisation contained was considered. Hence, the penal judicial science processed a formal -procedural theory which was known as judicial individualisation.

This theory comprises of various laws which defines the basic criteria of the conviction terms; while the court based on each individual case as well as based on the mitigating and aggravating circumstances defines the type and the length of conviction even though this individualisation has as a main criteria, the penal culpability and responsibility of the author. Thus, this type of individualisation is not majorly supported.

Such result probably has come as a consequence of the necessity of deep recognition of the author's personality who has committed the penal act by the side of the respective penal preceding authority based on the studied circumstances.

Over time and actions, the basic conditions to issue a conviction, definitively in order to grant it the case evolution is that it will be laid in the execution space of the penal conviction. Precisely, for this execution to be in the spirit of the above mentioned individualisations, the practice had the need for the relative rationalisation in the framework of sentence suffering. This necessity has led to what is called the "administrative individualisation".

This presents a sort of sentence individualisation by which the viewpoints in the penology literature is applied by the organs and the personnel of the entities, and the improving punishment institutions. This individualisation is narrower and has to do with the suitability of one's convicted personality during the time that he is suffering the sentence in such institutions. According to the criteria of penology science, this individualisation is being made on the basis of knowing the personality of the convicted person, on the observation basis and on the analytical study of the respective experts.

Keywords: Sentence, conviction, circumstances, court, penal, individualisation, author, court

1.0. The Notion and the Importance of Individualisation of Conviction

Conviction individualisation implies the adoption of conviction for the penal act and its author. The aim of individualisation shows that conviction in an efficient way will impact the re-education of the author. Although, the old penal rights did not recognise the institution of conviction individualisation, the individualisation of the conviction of the penal right for the first time was presented in the Penal Code of France in 1810. Respectively according to previous French Penal Code of the year 1790, the convictions have been determined in an absolute way, according to the absolute legal system of conviction.

As we have seen, even the school did not recognise the institution of conviction individualisation. According to the viewpoint of this school, the level of conviction depends only on the weight of the offense.

Such measurement of the conviction has aimed to punish in the same way all the author’s offenses and in this way has claimed to be fair. But in practice, this way of conviction measurement has not been fair and as unequal punishment even in cases when the weight of the concrete penal actions has been the same since they have been committed by various people based on various motives and circumstances. These facts have constrained the lawmakers to abandon the absolute system of conviction and to embrace the relative system of convictions, which will enable the courts within the limits allowed by the law to adjust the conviction to the weight of the offense and that of its author. However, special credit for the launch of the conviction individualisation in the penal right goes to the positivist and sociological school.

1.1 Individualisation of Conviction According to the Italian Positivist School

This school is represented by some distinguished thinkers such as Cesar Lombroso, Enrique Ferry and R. Garafalo. These philosophers

criticize the methodology of penal-classic right, especially their rigorous rules which are not based on everyday life, and notably in the personality of the delinquent which is the central axle of the penal right, criminology and penology.

They openly oppose the viewpoint that the author commits the offense with his free will, and the so called "moral accountability" of the author and the retributive aim of the conviction were protected by the penal classical school. Firstly, the Italian positivists noted that man does not commit a crime due to his free will. In contrary, the man's actions and behaviors are determined by a range of causes which stands the subjective individual nature in the first place.

So the principle of the so called moral responsibility was hold forth by the judicial classical school. Since the crime is committed due to some causes and circumstances in which the author has no influence, it cannot be decided and judged. This school insists in the study and the cognition of the delinquent's personality in the subjective elements of the penal act. In this regard, the defence from criminality to the school in question is against repression, and demands that criminality should be prevented by curing and improving the delinquents instead of convictions, by using the positivists to apply austerity and defence measures.

The author of the offense is not free to commit any penal act, since he/she is driven by internal bio-psychic factors. Being in such state, the positivists think that the author is not capable of accepting penalty for his/her own actions and behaviour.

So they reason that by not being penalised by the society, they are obliged to undertake healing measures towards these people.

It is worth emphasising that between the authors of this school, divergences exists regarding the personality of the criminal. Cesar Lombroso, an Italian criminologists and founder of the Italian School of Positivist Criminology concluded that man is born as a criminal and that he is distinguished from normal people with his own biological signs, with his own habits of anatomic physiological and psychological nature. According to him, the individual factor is the main cause of criminality in the society. Therefore, the conviction in such cases has no impact. Lombroso also stated that the criminal man is sick, abnormal, and as such he is born. Being in such situation through the repression and punishment measures he cannot be improved. The state of the born criminal is dangerous to the society; therefore he/she should be healed.

Ferry and Garafalo emphasized that it is indispensible to know the personality of the delinquent, and to know the reasons and circumstances that have driven them into delinquent and criminal behaviours. The representatives of the Italian positivist school besides the individual factor

which they qualify as central factor in the fight and prevention of criminality mentioned the importance of preventive measures.

These measures cannot be convictions or even any type of measure with repressive character, but rather, it should be measures that alleviate the social difficulties of the delinquent person.

Under the progressive spirit of this school, the penal world legislation has acknowledged big achievements with regards to necessary measures taken to fight and prevent criminality as well as the upgrading and strengthening of penitential system based on categorisation and the social healing of the delinquents.

1.2 Individualisation according to the sociological school

According to this scale, the presentation of criminality in every society is influenced by internal and external factors. But the external factors usually play a determinant role. The representatives of this school are Van Hamel, Franc List and A. Prens. The authors of this school do not deny the role of bio-psychic factor. However, according to them, these factors are of the second hand because the economical-social, social-cultural and the other external factors are the major determinant regarding the behaviours and the actions of the delinquents. Even according to the members, their free will is not important for penal responsibility, since the penal right considers practical cases of criminal impediments and the protection of society from him; and not with treatment and philosophical debates if the will of the man is free or not. The psychic ill people and the abnormal people are not conscious, and according to this category of delinquents, security, defence and curing measures should be taken; while regarding the category of delinquents that are normal, convictions and sanctions measures should be applied.

From this purpose, this school was established for mutual penal sanctions, which means that they apply the use of convictions, insurance and curing measures in a parallel way. But in contrast to the positivist schools, the representatives of the sociological school applies insurance or curing measures only after the author has committed the offense, and after the crime has been committed the same way as proposed by the positivist school. According to the sociological school, normal and accountable delinquents whom should be given other convictions and sanctions exist. However, sick delinquents who are in a dangerous state should be given insurance and healing measures which are not based on the level of responsibility of such persons but on the hazard rate of their state. In this way according to this school, the aim of the society reaction is the crime prevention and not repression and revenge. From this, the school predicts a general prevention and not a specific prevention in the fight against crime. Analyzing the above

measures from this school compared to other schools, it stands in compromise ratio with the last ones by ranking conviction as a main instrument in the fight against crime as well as launching the insurance and educational measures regarding the individual's personality.

2. The Methods of Conviction Individualisation in the Penal Right

The penal right pays a special importance to the conviction's individualisation. The penal legislation foresees a range of dispositions to apply the individualisation of convictions in practice. Consequently, the penal law in the specific part defines the types, the minimum and the maximum conviction for each offense separately. Thus by defining the types of convictions and the limits within which the court can decide, it claims to avoid the arbitrarily approach of the court, and ensure legitimacy; hence in the meantime, it has been made possible that the lawyers can be active in the conviction measurements considering all the concrete circumstances of the penal act and its author. In the function of the individualization of the conviction, the penal law foresees specific dispositions regarding this aim. Thus in several democratic legislations, even in that of the Common Law, the objective and subjective circumstances in which the offense has taken place should be considered.

Furthermore, besides the general rules, these legislations foresee specific rules in which for a wide range of cases, the court is authorised to alleviate the conviction of the author who has committed the offense.

Also, the penal right in general has assimilated the concept that the individualisation of conviction should be done even during the state of the verdict execution. This is based on the fact that only the individualisation of conviction during the determination of the sentence and its execution can realize the aim of the conviction. In this regard, the penal law and furthermore, the law on the execution of penal sanctions, foresee a range of rules which is used to define the way of sentence execution and the individualisation during the execution stage.

3. The Mitigating/Alleviating and Aggravating Circumstances

The measurement or the determination of conviction by the court within the minimum and maximum of sentence foreseen by the law for those penal acts as well as under the mitigating and aggravating circumstances is also considered.

The penal laws in general foreseen in a general way, what types of circumstances the court will consider during the measurement of the conviction and in such case it considers the circumstances with mitigating and aggravating nature by giving the possibility to the court that in every

case, it can consider other circumstance which would impact a more strict conviction or a less strict conviction.

In the mid circumstances foreseen by the penal law are found the objective circumstances which refer to the author of the penal act. With aggravating circumstances, we imply those circumstances which impact the conviction to be a strict one within the limits foreseen by the law regarding that penal act.

While with mitigating circumstances, we imply those circumstances that impact the conviction to be a mild one also within the boundaries defined by the law. As emphasized above, the up-to-date legislations affect in an exemplary way the mitigating and aggravating circumstances which more often happens; and which are the most typical ones. Thus, the court has been given the opportunity to consider other circumstances for every concrete case while doing the conviction measurement.

Based on what has been noticed, the mitigating and aggravating circumstances according to various legislations are numerous. This implied that for the tradition itself and the principles which inspire these penal systems, we see that the basic elements that constitute these circumstances are more or less the same in all the legislations and it walks on the rails of democratic principles. Therefore, these common elements are:

1. *The Scale (level) of penal accountability which affects the determination of conviction* .The scale of penal accountability contains in itself the level of accountability and culpability. Since the accountability and culpability as elements of penal responsibility can be graded, even the penal responsibility can be graded into responsibility. Thus, the penal responsibility can influence the circumstances that the author has committed the offense with direct or indirect purpose, due to carelessness which is similar to negligence or excessive self-confidence. Depending on the level of responsibility, the types of culpability define if there will be given a high or low mass of conviction

2. The motives on which is committed the penal act are the psychic reasons which have driven the person to commit an offense. This circumstance can be considered in the case of conviction determination only if it does not constitute element of the figure of the penal act. This is based on the fact that the same circumstance cannot be considered twice to determine one's conviction, first from the lawmaker and then from the court.

The causes could be of a moral nature, such as hate, maliciousness, egoism, revenge, jealousy which is usually considered to be the motives of moral or weak nature, and these cases of these motives are considered as aggravating circumstances. But the motives for which are committed the penal acts might be positive or human, such as tenderness from love, and from the feeling of obligation or honour. And in these cases, these

circumstances are considered as mitigating ones. With the contemporaneous penal rights, the causes/motives which is been paid more and more, is very important in the determination of the level of conviction since these explore the personality of the author who has committed the offense best.

3. The previous life and the personal circumstances of the author are as well important in judging the author's personality as guilty and his social hazardous. For instance, if a person in his previous personal life had good behaviours and has served as a good example in his environment, it indicates that the author is not morally damaged and the application of a mild sentence can be achieved in the educating purpose of the law of conviction. Otherwise if the author of the penal act has been previously sentenced (recidivist), or if he has lived a parasites life such as gambling, unemployment, wandering around etc., then these characteristics will be considered as aggravating circumstances for the determination of conviction, since they indicate clearly that severe type and measure of conviction should be given so as to achieve the aim of conviction.

4. The author's behaviour after the penal act has been committed is of importance in defining the conviction measure. This is based on the fact that the behaviour of the author's offense indicates not just only the author's attitude toward the offense committed by himself, but also the type of behaviour that he will portray in the future. However, admitting the execution of the penal act is also important as well in determining the conviction measure. However, admitting the execution of the penal act or denying it categorically even though an uncontested proof is available, then the real repentance or the pleasure indicated for having committed the penal act, and the assistance given to the victim and his family etc, are circumstances that necessarily affect in giving a mild or strict sentence.

5. The intensity of danger or damage of the defended good is an objective circumstance which indicates a higher or lower level of social dangerousness of the penal act and as such, it affects the determination of conviction.

Since the penal act is considered to be accomplished by damaging or risking the defined judicial relation, the conviction will be a strict or a mild one, depending on if the judicial good is being damaged or risked.

6. The circumstances in which the penal act has taken place can be of an objective or subjective nature and can be referred to the offense, and its author can as well be referred to as the passive subject of the penal act. These circumstances can belong to the time, means, the manner and the location where the penal case is committed, and to some psychic states of the author and the victim as well as their relations etc. In order to consider these circumstances as alleviating or aggravating, it is important that the lawmaker should not regard them as such as in the framework of the penal act.

7. The property status of the author usually does not affect the conviction judgement according to the principle that the conviction should affect the poor citizens. However, in order to effect the conviction with money the same way, all citizens, should be bear in mind the material state of the author. If the conviction in money will affect severely one person, it depends on the material status of that person. So the court is obliged that the conviction in money should be measured not just only according to the weight of the penal act and other circumstances, but also according to the property possibilities of the author.

4. Sentence Alleviation

a. The alleviating and aggravating circumstances can have an impact on the measurement of the conviction only within the minimum and maximum conviction defined by the law regarding that penal act. But in the everyday life, penal acts can be committed in such circumstances which make the act specifically a light one. In such cases, defining the conviction within the minimum and maximum specific limits, it would not be in compliance with justice principles and it would not respond to the aim of conviction, and as such, the conviction would be a strict one. For this reason and for such cases, the law remains a tentative one even for the assistance of the commitment of the penal act. These cases of conviction alleviation are of general character because they can be present in all penal cases. Therefore, the possibility of alleviating the conviction is usually foreseen in specific dispositions by allowing such possibility for a certain category of offenses.

b. The Sentence alleviation according to the court conviction is allowed by law, respectively with the respective dispositions of the law in some cases of penal acts committed especially in alleviating circumstances which authorizes the court to alleviate the sentence according to free judgment. This possibility shows that the court will use cases where there exist such objective and subjective circumstances that indicate clearly that the aim of punishment will be achieved even with a mild sentence or with milder types of sentences. However, this way of sentence alleviation is of the character of the general institute.

5. Release and Condemnation

In the penal right, there is the principle that any person that commits an offense and that is penal accountable should be penal sentenced. However against this principle, in some cases, it can happen that the court ascertains that the penal act is committed and that its author is penal accountable, but the verdict of sentence would not be reasonable due to the low intensity of the offense or due to penal-political reasons.

In such cases, by law, the court is authorised to declare anyone guilty for the committed penal act and to release from condemnation as the penal right of many legislations such as that of the continental family as well as that of Anglo-American ones, where they foresee the release possibility from condemnation by the court.

Thus, it should be emphasised that the court can release the author of the penal act from the sentence only in cases when the law textually foresees this possibility. So one aspect should be very clear that the court according to its free conviction can release the author of the penal act from the condemnation.

According to the penal–continental legislation, two groups of cases when the author can be released from sentence are acknowledged.

- First group of cases is foreseen in special dispositions of the penal legislation. With the dispositions of this part of the penal law, the possibility of release from condemnation is foreseen for instance; in cases when the member of the criminal association discovers it prior when the penal acts was committed.

- The second group is that of the disposition of the general part. With these penal–judicial dispositions, the possibility of being released from sentence is foreseen in cases when the penal act is committed in a judicial error, while overcoming the necessary defence limits and the extreme need as well as in cases when, people submit themselves voluntarily for having committed a penal act.

The possibility of being released from condemnation as a prerogative of the court is facultative. To release them from condemnation, the court issues the judgement act which declares guilty the author of the penal act but releases them from condemnation. However, the release from condemnation on the other hand does not result to any consequences.

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