

CONCEPTUAL ANALYSIS OF SPECIAL MITIGATING CIRCUMSTANCES IN ROMANIAN AND EUROPEAN CRIMINAL LAW

Elena-Irina RAHIMIAN (CÎRCIUMARU)¹

Abstract: *Despite the emergence of new criminal legislation and the reconfiguration of the application framework for mitigating circumstances, the scope of their applicability and the timeframe within which they may be invoked remains far from uniformly clarified at both the national and European levels. This lack of clarity persists despite numerous rulings by the Constitutional Court of Romania accepting certain exceptions of unconstitutionality or providing interpretative guidance, as well as unifying decisions on judicial practice issued by the Romanian High Court of Cassation and Justice (Î.C.C.J.) in the field under examination. Consequently, I deem it necessary to conduct an in-depth study of the special mitigating circumstances for penalty mitigation within Romanian and European criminal law, in order to contribute toward a more coherent understanding and practical application of these provisions.*

Key words: *penalty individualization, modifying circumstances, special circumstances for penalty mitigation, European criminal law.*

1. Introduction

In addition to the general causes that eliminate criminal liability (amnesty – Art. 152 Criminal Code, statute of limitations – Art. 153 Criminal Code, lack of prior complaint – Art. 157 Criminal Code, withdrawal of prior complaint – Art. 158 Criminal Code, and reconciliation – Art. 159 Criminal Code) and those that mitigate it (mitigating circumstances – Art. 75 Criminal Code), the legislator has also provided for other causes which, unlike the former, have a more limited scope, resulting in the reduction of criminal liability only for certain specific offenses. These causes are provided for in the special part of the Criminal Code and are referred to as “Causes for Penalty Mitigation” – Art. 411 Criminal Code, Art. 172 Old Criminal Code.

If a person who has committed one of the offenses against national security aids, during the criminal investigation, in discovering the truth and holding the author or participants

¹ *Alexandru Ioan Cuza* Police Academy /Bucharest University of Economic Studies, irina.circiumaru@yahoo.com

accountable, the special penalty limits shall be reduced by half (Art. 411 Criminal Code "Causes for Penalty Mitigation" – Art. 172 Old Criminal Code "Certain Causes for Non-Punishment or Penalty Mitigation"). There are some special causes for penalty mitigation which are included and presented within special laws, such as: in Emergency Ordinance no. 43/2002 regarding the National Anti-Corruption Directorate, in Law no. 241/2005 for the prevention and combatting of tax evasion, in Law no. 143/2000 regarding the prevention and combatting of illicit drug trafficking and consumption, in Law no. 682/2002 regarding witness protection, and in Emergency Ordinance no. 78/2016 regarding the organization and functioning of the Directorate for Investigating Organized Crime and Terrorism.

2. Special Circumstances for Penalty Mitigation in Criminal Law

2.1. The process of individualizing penalties

The individualization of penalties is carried out within the limits established by the provisions in both the general and special parts of the Criminal Code, as well as in special laws in which acts are incriminated as offenses. Each offense presents penalty limits that provide for its typical situation, in which the act committed has been completed, and no mitigating or aggravating circumstances have intervened. Typically, in judicial practice, such situations are quite rare, as the specific circumstances surrounding the commission of the offense vary (Duvac et al, 2019, p. 549).

Within the process of individualizing penalties, the legislator has foreseen in both parts of the Criminal Code and in special laws with penal provisions, certain causes of penalty mitigation and aggravation.

Mitigating or aggravating causes are those conditions, circumstances, or qualities related to the offense or the offender, which precede, accompany, or follow the criminal activity, explicitly or implicitly regulated by criminal law, and which reduce or increase the severity of the offense or the dangerousness of the perpetrator, thereby mitigating or aggravating, as a consequence, the criminal liability (Molnar, apud. Dobrinou et al., 2016, p. 430). Legal individualization represents an adaptation of criminal sanctions, related to three important elements: the act, the perpetrator and the modifying circumstances.

2.2. Modifying circumstances

Modifying circumstances are those elements that alter the initial evaluations of the act and the perpetrator, leading to either the aggravation or mitigation of the penalty. Legal individualization is carried out by the legislator through the establishment of the nature, class, and limits of penalties in relation to the abstract gravity of the incriminated act. Additionally, the legislator may regulate certain monovalent legal circumstances for modifying the base penalty, which can be: general or special; personal or real; aggravating or mitigating.

Depending on certain criteria, the law regulates various types or categories of circumstances for mitigation or aggravation. Aggravating and mitigating circumstances are external situations or circumstances related to the content of the offense, and to

which criminal law attaches specific consequences (these include mitigating or aggravating circumstances, recidivism, concurrence, etc.).

2.3. Criteria for Classifying Modifying Circumstances

Depending on the effect produced by the modifying circumstances, these are classified into states and circumstances (Duvac, Neagu et al., 2019, p.550).

Legal aggravating circumstances are referred to as states of aggravation when they are unrelated to the offense committed (for example, the concurrence of offenses or recidivism) and as aggravating circumstances when they are related to the act committed (for example, premeditation). Legal mitigating circumstances are referred to as mitigating excuses when they concern the subjective aspect of the offense (for example, provocation or accidental intoxication) and as mitigating legal circumstances when they refer to the objective aspect of the offense or the perpetrator's conduct post-offense (for example, the minimal amount of damage or facilitating the identification and arrest of other participants). Within this category, general differentiating causes that determine a more lenient penal treatment (such as the attempt) are also included.

States of aggravation or mitigating excuses produce effects separately and successively. Thus, the penalty is aggravated or mitigated as many times as states of aggravation or mitigating excuses are acknowledged by the court. For example, in the case of the concurrence of offenses and recidivism, the simultaneous application of both will result in a double aggravation of the penalty.

In contrast to states of aggravation and mitigating excuses, circumstances produce the effect provided by law only once (either aggravation or mitigation), regardless of the number of circumstances acknowledged.

Depending on their applicability, the causes can be general (applicable to all offenses) or special (applicable only to certain offenses).

General circumstances appear in the general part of the Penal Code, while special circumstances are found in the special part of the Penal Code or in special laws. Depending on the object they refer to (the act or the perpetrator), the modifying circumstances are divided into real circumstances and personal circumstances. Real modifying circumstances (objective, relating to the act — for example, the commission of the act by three or more persons together, or through cruelty, or if the act produces particularly grave consequences) affect all participants when they lead to mitigation and apply to them only insofar as they were known or foreseen when they lead to aggravation. On the other hand, personal circumstances (relating to the perpetrator — for example, the commission of the offense under voluntary premeditated intoxication) do not affect any participants in any situation. Depending on the mandatory nature of their application or not under criminal law, we distinguish between legal and judicial modifying circumstances.

Legal aggravating or mitigating circumstances are expressly provided by criminal law, and the judge is obligated to consider them when individualizing the penalty. Judicial aggravating or mitigating circumstances are those circumstances that may be considered by the judge in the process of individualizing the penalty. If both mitigating and

aggravating circumstances apply to the same offense, the court will first apply the mitigating circumstances, followed by the aggravating circumstances. Unlike circumstances (aggravating or mitigating), which have a single effect regardless of the number of circumstances involved in a case, modifying circumstances (whether aggravating or mitigating) apply successively if more than one is applicable (Udroiu, 2015, p.190). According to Article 79, paragraph (1) of the Penal Code, when two or more provisions that result in penalty mitigation are applicable to the same offense, the special limits of the penalty provided by law for the offense committed will be reduced through the successive application of the provisions concerning the attempt, mitigating circumstances, and special cases of penalty mitigation, in this order (Duvac, Neagu et al., 2019, p.578).

2.4. Special causes for mitigation of penalty in Romanian Criminal Law

Special causes for the mitigation of penalty are represented by: the provisions of Article 15 of Law No. 143/2000 on the Prevention and Combatting of Illicit Drug Trafficking (a person who has committed one of the offenses stipulated in Articles 2-9 and, during the criminal investigation, denounces and facilitates the identification and prosecution of other persons who have committed drug-related offenses is entitled to a reduction of up to half of the penalty limits provided by law); Article 19 of Law No. 682/2002 on the Protection of Witnesses (a person who is a witness and has committed an offense, and prior to or during the criminal investigation or trial denounces and facilitates the identification and prosecution of other persons who have committed such offenses is entitled to a reduction of up to half of the penalty limits provided by law); Article 15 of Government Emergency Ordinance No. 78/2016 regarding the Organization and Operation of the Directorate for Investigating Organized Crime and Terrorism Offenses (a person who has committed one of the offenses specified by this emergency ordinance, within the jurisdiction of the Directorate for Investigating Organized Crime and Terrorism Offenses, and, during the criminal investigation, denounces and facilitates the identification and prosecution of other participants in the commission of the offense is entitled to a reduction of up to half of the penalty limits provided by law); Article 19 of Government Emergency Ordinance No. 43/2002 on the National Anticorruption Directorate (a person who has committed one of the offenses assigned by this emergency ordinance within the jurisdiction of the National Anticorruption Directorate, and during the criminal investigation, denounces and facilitates the identification and prosecution of other persons who have committed such offenses is entitled to a reduction of up to half of the penalty limits provided by law); Article 10 of Law No. 241/2005 on the Prevention and Combatting of Tax Evasion (if, during the criminal investigation or trial, until the first trial session, the defendant fully covers the civil party's claims, the penalty limits provided by law for the committed offense are reduced by half); Article 396, paragraph 10 of the Criminal Procedure Code, which provides a reduction of one-third of the penalty limits when using the abbreviated procedure of admitting guilt. Causes of aggravation or mitigation are external to the elements constituting the offense. When a general cause of mitigation or aggravation of criminal responsibility is found within the content of an

offense as a constituent element or as a circumstantial element of aggravation or mitigation of the offense's statutory content, the special rule renders the general circumstance inapplicable (for example, the consideration of manslaughter will not lead to the consideration of the circumstance relating to the commission of the criminal act through methods or means that pose a public danger). The existence of a circumstance cannot replace the absence of an element of the offense's content, as causes of mitigation or aggravation are secondary in nature and presuppose the existence of the elements of a determined offense.

2.5. Special causes for mitigation of penalty at the European level

Special circumstances for mitigation of penalty include, at both the national and European levels, the timely reporting by a participant of certain offenses (notably those against state security or offenses regulated under special laws) to prevent their consummation or the participant's own act of preventing the offense's completion, followed by reporting the deed (art. 172 of the 1968 Romanian Criminal Code). A similar special circumstance for penalty mitigation exists in French criminal law, where, for example, in the chapter on crimes against life, explicit norms exempt from punishment individuals who, while attempting to commit a murder (art. 221-3 of the 1994 French Criminal Code) or poisoning (art. 221-5 of the same code), avert the victim's death by notifying the authorities or reporting their co-participants in the offense (Dunea, 2022, p. 460). Another category of special circumstances for the mitigation of penalty in European criminal law is represented by circumstances based on explicitly required post-offense conduct, typically involving cooperation with authorities. For instance, the French Penal Code stipulates in art. 132-78 para. (1) that, in cases expressly provided by law, a person who attempted a crime or offense but notified the authorities, thereby preventing the offense's commission and enabling the identification of other participants, in cases where such participants existed, shall be exempted from punishment (Dunea, 2022, p. 480). Typically, the special circumstances for mitigating penalties are provided for by the legislature in cases involving the most serious offenses. For example, Article 278(5) of the Criminal Code of the Republic of Moldova stipulates that "the minimum penalties provided under this article may be applied to a person who has committed an act of terrorism, as well as to other participants, if they have alerted the authorities about the respective acts and thereby contributed to preventing the loss of life, harm to bodily integrity or health, other serious consequences, or to the identification of other perpetrators." (Dunea, 2022, p. 481). Regarding offenses against state security or public order, Articles 98(2) and 99(3) of the German Criminal Code allow the court to mitigate penalties if the perpetrator voluntarily ceases their criminal conduct and informs a government agency, providing information in their possession concerning the committed offense. These provisions apply specifically to two categories of offenses: treason committed in the capacity of an agent and the performance of activities as an agent of an espionage service (Dunea, 2022, p. 482). Other offenses for which such mitigating circumstances are recognized include crimes against life, unlawful deprivation of liberty, drug trafficking, human trafficking, and criminal activities related to the restrictive regime

on weapons and ammunition. Certain offenses against the administration of justice are also addressed. For example, Article 434-13(2) of the French Criminal Code stipulates that false witnesses shall not be punished if they spontaneously and freely retract their false testimony prior to the issuance of a decision in the case in which the testimony was provided (Dunea, 2022, p. 484). Similarly, certain offenses against human dignity and forgery crimes are addressed under such provisions. For example, Article 463 of the Italian Criminal Code establishes the benefit of non-punishment in forgery cases, provided the perpetrator prevents the counterfeiting, alteration, manufacture, or circulation of falsified materials before the authorities become aware of the respective offenses (Dunea, 2022, p. 485).

3. Conclusions

At the level of each state, there is a well-organized criminal policy aimed at protecting citizens from crime and abuse. The special circumstances for mitigating penalties, present in the legislation of Romania and Europe, represent important legislative measures necessary for each criminal policy. By implementing the concept of special circumstances for mitigating penalties, as outlined in the Criminal Code and special laws, the legislature has focused not only on the idea of punishment but also on the idea of preventing and combating the alarming increase in crime within each European state.

The special circumstances for mitigating penalties in European criminal law represent important means of achieving a particular criminal policy at a given moment and within a specific criminal context. They play a significant role in the administration of criminal justice within a system determined by law.

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