PERCEPTIONS OF MAGISTRATES AND PUBLIC OPINION RELATED TO COMMUNITY SANCTIONS

Gabriel OANCEA[1],
Mihai Ioan MICLE[2], *Andreea FAUR*[3]

Abstract: *The paper is intended to make an analysis of the way in which the public opinion and the magistrates from the penal law system relate to the community sanctions and measures, within the context in which several international regulations highlight the necessity to implement these community sanctions and measures extensively in the domestic legislation of the member states. The paper also shows the importance of the political factor in the practical implementation of the regulations and the way in which the governmental decision factors influence the perception at the level of the public opinion and of the magistrates.*

Keywords*: Community sanctions, community measures, public opinion, magistrates*

Introduction

The recent decades witnessed several essential changes in the correctional systems, which included a rethinking of their mission, of the methods of intervention and of their role within the broader process of rehabilitation of the offenders (Iancu M.A., 2010, Oancea G., Faur A.S., 2009, Abraham P., Nicolăescu D., 2006).

[1] Lecturer Bucharest University – Faculty of Sociology and Social Assistance, Email: oancea.gabriel@gmail.com
[2] Scientific researcher, Romanian Academy, Institute of Philosophy and Psychology „Constantin Rădulescu-Motru. Email: mihai_micle@yahoo.com
[3] PhD student, Bucharest University – Faculty of Sociology and Social Assistance, Email: andreeaotto@yahoo.com

These transformations aimed to increase the visibility of the community sanctions, as well as to allow a reflection of the academic environment and of the practicians within the systems of penal law regarding the efficiency of this type of sanctions. These concerns were directed towards several aspects such as the adequacy of these sanctions or the identification of the particular way of sanctioning which ensure both the requirement of public protection and of the social reintegration of the people in conflict with the penal law (Nicolăescu V., Sandu O., 2009).

Community sanctions – challenging approaches

Since we will constantly refer to the notion of community sanctions, as well because of reasons of terminological rigorousness, we will define this concept.

As far as we are concerned, we consider that the definition given by the Council of Europe Ministerial Committee in Regulation (92)16 regarding the European rules in matter of community sanctions and measures (still) meets the requirements of a proper definition given to this notion.

Thus, the term of community sanctions and measures refers to those sanctions or measures applied by legally appointed institutions, which presume maintaining the offender within the community and involve restrictions on his/her liberty by imposing conditions and/or obligations.

The appearance of this type of sanctions within the sphere of penal punishment relies, among other, on several observations done in time on the inadequacy of the punishment which deprives the people of liberty, the imprisonment.

The imprisonment, which appeared within the sphere of the correctional institutions some two centuries ago, was to become, rather shortly, the main penal punishment for the offenders.

It is important to highlight the fact that the programmatic purpose of this punishment was not the mere isolation of the offenders from the rest of the community, but their inclusion in an environment which allowed interventions with the purpose to change the offending behaviour. In other words, as Foucault (2005) mentioned, the punishment of imprisonment was not directed towards the body of the convict, rather to his/her *soul*.

During the two centuries of existence, the way in which the punishment of imprisonment was applied underwent several essential changes, circumscribed to a process designed as *punishment polishing* (Pratt, 2002).

These transformations aimed the increasingly visible involvement of practicians in the field of socio-human sciences (psychologists, social workers etc.) within the

process of rehabilitation of the offenders which take place within the penitentiary, granting elementary rights to the convicts and monitoring their observance by the administration of the penitentiaries, or the establishment of a framework within which the dignity of the inmate is respected.

Despite these progresses, the liberty-depriving punishments continue to have an adverse impact on the self of the inmates, being under constant criticism, criticism which accompanied these punishments from the very moment of their application (Brown, 2009; Foucault, 2005).

The research, observations and statements of the former inmates showed that the purpose of imprisonment, the behavioural rehabilitation of the convict, still is an *ideal*.

Concretely, the liberty-depriving sanctions are more liable to yield adverse effects on the convicts, such as their alienation, loss of responsibility, assimilation of new techniques for committing crime actions, or the loss of contact with the supporting environment (family). If we add the cost of building or maintaining the detention areas, not at all to be neglected[1], we get an image which makes us consider that the punishment of imprisonment should be a sanction enforced only is particular situations, when the level of social danger of the crime, or the level of personal danger represented by the offender, justifies this.

These adverse aspects of the imprisonment determined the appearance (since the 19th century) of the community sanctions and measures within the different systems of penal law, which involve punishments which don't deprive the convict of his/her liberty.

Several sanctions were developed in time which, while not depriving the convict of his/her liberty, may still fulfil the inherent functions of a punishment: coercion, social reintegration of the convict and example-providing (Bulai, 2007).

Sanctions appeared such as the conditioned suspension or under surveillance of the imprisonment, probation, work to the use of community, conditioned release from the penitentiary accompanied by surveillance, mediation between the victim and offender etc.

Furthermore, the application of these sanctions is encouraged by the adoption at the regional[2] or even global[1] level of regulations meant to urge and support the countries

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[1] For instance, the budget allocated for the US penitentiaries amounted to 6.8 billion USD in 2011.

[2] Also see the European Regulation on the community sanctions and measures - Recommendation nr. R (92) 16, Recommendation R(2000) 22 concerning the improvement of implementing the European rules regarding the community sanctions and measures,

in the process of rethinking the system of sanctions by the inclusion and wider application of the community sanctions.

However, the promotion of this alternative approach is not an easy undertaking. Several evolutions noticed these recent decades in some countries[2] prove that, many times, the enforcement of these sanctions is conditioned by subjective aspects which are not necessarily correlated with their efficiency.

Under these circumstances, as shown (Junger-Tas, 1993), the broad promotion and application of the community sanctions and measures is conditioned by the trust which the public opinion, the judges and the governmental factors of decision have in these community sanctions and measures.

Of these three factors, we will analyse briefly in this paper the way in which the public opinion and the courts of law relate to this type of sanctions. The exclusion of the third factor is rather apparent because, as it will be noticed, the activity of the political and governmental factors has a determinative role in relation with the other two factors.

1. Specific attitudes of the public opinion perception of the community sanctions and measures

When the decision factors outline the penal policy of a state and decide the strategies designed to control the crime acts, they (also) do it to improve the safety of their citizens. The reason for this is the increasing feeling of insecurity among the citizens, as reported by many opinion and sociological surveys conducted both in Romania and abroad[3].

It is paradoxically that this feeling of insecurity appears on the background of a general phenomenon of decreasing delinquency[4], phenomenon noticed both in Romania and in western countries (Blumstein & Wallman, 2006; Zimring, 2007).

Recommendation R(2010) 1 on the rules for probation adopted under the aegis of the EU Council of Ministers.

1 Minimal UN standards in the matter of the measures not depriving of liberty (the Tokyo rules).

2 See, *three strikes law* from the USA, which established the possibility that the offenders (previously convicted at least two times) may be punished by a much longer sentence (sometimes lifetime imprisonment) than the normal sentence for the new crime.

3 Thus, an INSOMAR survey conducted in 2009 on a sample of 1216 people, representative for the population of Romania, showed that three quarters of the interviewed persons expected the crime rate to increase over the subsequent 6 months and considered that delinquency was to increase. More than half of the respondents claimed that they don't feel safe in the street at night.

4 The decrease of the crime rate in the western countries during the past three decades was a subject debated in the literature with the view to detect the causes of this phenomenon.

Speaking strictly of the situation of Romania, we notice that the "peak" year of delinquency was 1997 (according to the Statistical Yearbook of the National Institute of Statistics, 2009), the subsequent trend being a constant decrease of the number of people convicted for criminal activities.

Despite this evidence, we may notice that the discourse of the politicians and the penal policies assumed this feeling of insecurity displayed by the public and transposed it into penal policies oriented rather to repression.

Actually, we may notice a convergence of the opinion expressed by the decision factors and by the public, that the penal law is much too soft and that it has to be hardened.

Under these circumstances, at the first sight, the public opinion tends to be rather in disagreement with the possible initiatives of expanding community-type sanctions, since the predominant feeling is that of unsafety. We may also notice that, up to now, no in-depth research has been conducted in Romania on the public perception regarding the penal sanctions, except the surveys mentioned earlier which often depict general aspects.

However, systematic research in this direction has been conducted worldwide, which yielded surprising results which we will present subsequently.

Thus, Hutton (2005) showed that most times the public perception is shaped under the influence of the messages transmitted by the mass media or by other factors shaping the public opinion.

Consequently, 75% of the people included in a study considered that the crime rate increased dramatically, while actually it remained constant or even decreased over the past 10 years. Likewise, the perception of the trend of the proportion of violent crimes was that of a significant increase, while the statistics actually proved the contrary; the perception of the public regarding the sentences was that they were too soft and that the penal procedures were indulgent.

In other words, the premises of a discourse for a more severe treatment of the delinquency were in full agreement with the desire of the public opinion.

The approach of a more specific level yielded surprising results. Thus, when the actual case of a crime was presented, as new details were revealed, the opinion of the interviewed people started to get closer to a solution similar to the one ruled by the court. Being a crime with low social danger, the general opinion was in favour of applying a treatment in the community.

The roots have being identified in the changes in the culture and life style of the youth, in the fewer opportunities to commit a crime because of the improved and mode diversified security systems, in the rethinking of the programs intended to prevent delinquency etc.

Furthermore, it was also revealed the fact that the level of information of the public regarding the real life in the penitentiary and the organisation of the penal system were scarce; when the costs of the custodial treatment were revealed, the opinion of the participants in the study was favourable to the frequent use of sanctions not depriving the convicts of their liberty (Hutton, 2005) . These conclusions are not singular. There is a lot of literature on the public perception of the sanctioning system, much so as the public security is the central idea of the discourses supporting the introduction of tougher measures.

These researches (Mattheus, 2005) revealed that as long as the approach is at the general level (feelings), no useful results are expected regarding the change of the public perception, in which the opinions for a tougher treatment of the delinquents coexist with those favourable to the rehabilitation of the people in conflict with the penal law.

As Morgan (2002, p. 220) was noticing, *when the public is asked "Which should be the purpose of a sentence" the answers will not be in terms of penalty, deterring or rehabilitation... Most often, the answers will mention curbing criminality, establishing a safer community or reducing the crime rate, with no reference to the way in which the process of sanctioning can facilitate the accomplishment of these results. The people, in general, are not favourable to any philosophy of the penalty; all they want is that something is done to change the behaviour of the offenders.*

Under these circumstances, it is only legitimate to ask what can be done to increase the public awareness on the problem of the penal sanctions under the conditions in which, as shown, the discourses on the penalty are rather general, with an approach with affective connotations, rather than an approach which to make reference to the different variants available to the legal system.

Some authors (S. Maruna, & King, A, 2004) showed that the education of the public is very useful but that it must not be seen as a panacea. Thus, in order to increase the trust of the public in the community sanctions, it needs to have more information (for instance, the results of studies) on the phenomena of crime and on the process of enforcing the penal law.

There are evidences that such approaches can yield results, particularly under the circumstances in which the people are asked to make a decision regarding a specific case on the basis of all the information they need. On the other hand, we must not overlook that the impact of the education on the attitudes is a short-term one.

However, the same authors suggested that the public is indeed drawn by the affective side of the penal issues and particularly of the penal actions, but it is also true that it is concerned by the efficacy of the legal system and attentive to the aspects regarding the cost-benefit ratio of the different types of penal sanctions.

Thus, regarding the problem of the efficacy of the punishments, some researches (S. Maruna, 2008) revealed that the hesitations of the public regarding the sanctions which not deprive the convict of his/her liberty can be surmounted, for instance, if they are presented as having an intensive, not formal character, because the public is concerned by the efficacy of the community sanctions.

The conclusion that can easily be inferred from the above statements is that, generally, the public is not that punitive in attitudes as the politicians want to show and that there is a gap between the discourse and the social reality.

As long as the discourse will continue to be at the general level, focusing on an approach which puts forward the emotional side, it is little probable that discernible progress can be made towards modifying the perceptions of the public opinion.

Furthermore, the approach focusing on repression has several adverse effects on the modalities of serving the punishment within the community, undermining their credibility or diverging them from the purpose for which they have been enforced.

2. Specificity of judges' perception of the community sanctions

As far as the judges are concerned, it seems (Roberts, 2004) that *skepticism* is definitory for their attitude regarding the community sanctions. This attitude was established mainly due to the lack of trust in the activity of agencies legally entrusted with the iomplementation of these sanctions, which prompted the need to identify punishments, not depriving the person of his/her liberty, but which have a much more pregnant activity of surveillance of the offenders.

Thus, the electronic monitoring or the house arrest appeared as sanctions not depriving the person of his/her liberty, innovations facilitated by the technological developments specific to the recent decades.

On the other hand, the fact that the judges make increasing use of community sanctions is also justified by several legal measures which limit drastically their freedom of choice.

In other words, although is some circumstances the judges consider that a punishment not depriving the person of his/her liberty may be an adequate response to the delinquent behaviour, the normative framework only stipulates sanctions depriving the person of his/her liberty.

Thus, regulations have been adopted in the 1990s in countries such as the United States, Canada or the United Kingdom, which stipulated the compulsory sentence to imprisonment in the case of some criminal acts (Roberts, 2003).

Another factor which narrows the freedom of decision of the judges is the establishment of the sentencing guidelines in some countries from the Anglo-Saxon legal system (United States and United Kingdom). They were introduced from reasons of uniformization of the sentences made by the courts of law and aimed to establish a correlation between the prejudice, punishment and the previous criminal behaviour of the defendant. Despite this desiderate, another consequence of this policy was the limited freedom of decision of the judges when they considered that no such sanction was needed.

Although in many legal systems there are explicit stipulations which promote and guarantee the independence of judges, we must not overlook that sometimes in their ruling they are submitted to external pressures from politicians, mass media of public opinion (Slotnick & American Judicature Society., 2005; Streb, 2007). Under these conditions, in order not to give the impression of being too soft on crime, the judges are tempted to use more (and sometimes without grounds) sanctions depriving the people of liberty.

On the other hand, although attempts have been done to rationalise the system of punishments, it still has aspects which yield an inadequate application of the community sanctions and on the sanctions depriving the people of liberty. As the authors said, *too many offenders are in prison and too little are kept free (...) Many times, we are too soft on people who are on probation and which should have actually been in the penitentiary, and too hard on the inmates which should have actually been on probation because they are no danger for the community (Morris & Tonry, 1990).*

The consequences of these factors are represented by the intensive application of the imprisonment, with all the adverse consequences both for the inmates and in terms of the social and economic costs of this sanction.

Under these circumstances, the concern for the factors that may determine a change of the judges' perception on the efficiency of the community sanctions is only legitimate.

First, given the existence of the sceptical attitude mentioned earlier, we need to identify the factors that might increase the trust of the judges in the efficacy of these sanctions.

Several studies may provide relevant information for our endeavour.

Thus, a premises of building this trust is the existence of an efficient professional relation between the institutions implementing the community sanctions and the courts of law (Kangaspunta, Joutsen, Ollus, & European Institute for Crime Prevention and Control affiliated with the United Nations., 1998). This professional relation is translated into practice in their preoccupation to cover the professional

needs of the judges (for instance, support to individualise the sanctions). Furthermore, the courts of law must necessarily be consulted when the institutional strategies and policies are developed. The courts of law are considered to be the main partners of the institutions assigned to apply the community sanctions (Morgan, 2003).

Another factor that may increase the trust of the judges regards the professionalism and professional integrity of the staff working within the institutions assigned to apply the community sanctions.

Analysing the international legal stipulations mentioned earlier, we may notice that they stress the importance of the proper professional formation, which must be continuous. All these regulations highlight the need for a proper payment of the staff in order to avoid the possible corruption by the people with which they interact during the process of applying the community sanctions imposed by the court of law.

Another factor is the efficient organisation of the institution. We think first of the human resources and of the materials required for the proper run of the activity. Although many times the overcrowded penitentiaries were the subject of discussion, it is not less true that overcrowding also affected institutions such as probation (Chute & Bell, 1956; Ferdico, 2012). The immediate consequence of this situation is the possible functional incapacity of the particular organisations, incapacity reflected in a low trust of the judges in their viability.

Local surveys conducted in Romania (Oancea, 2010) on the perception of the judges regarding the services of probation only support the previous observations. Thus, the preponderantly positive perception of the judges regarding the activity of these services and the trust in them relied on the fact that the professional training of the probation advisers is high; they are perceived as honest, professionally fair people. Another factor important for this perception is the certitude of the judges that the sanctions they ruled will actually be put into application under the conditions that they ruled. Moreover, they were concerned by the evolution of the probation system and even supported the idea that the mere employment of the staff doesn't have a positive effect on the activity of the probation services, if its professional training or personal integrity are not given proper attention.

All these make us consider that the wide use of the community sanctions by the judges is not conditioned nu trust or mistrust per se in these sanctions, rather in the institutions assigned with their enforcement.

Under these circumstances, the problem is that the organisation and financing of these institutions is the prerogative of the political factors, which creates the premises for the establishment of a vicious circle.

If the political factors make use of populist images, trying to establish a perception of intransigency towards the criminal activities, sometimes even openly declaring war to the criminal activities, the actual endeavour to establish an efficient system of sanctions which don't deprive the offenders of their liberty goes in the background.

Lacking the resources required for its activity, unable to cope efficiently with its legal assignments, this system ends being considered inefficient by the judges who will, implicitly, rule preponderantly punishments depriving the offenders of their liberty.

3. Conclusions

Given the above arguments, a first conclusion is that the intensive application of the community sanctions and measures is conditioned mainly by the involvement of the political factor.

If the political discourse regarding the crime rate and the penal treatment of the offenders remains at a general level, avoiding a specific approach which to reveal the complexity of the phenomenon, it is little probable that the attitude of the public opinion and of the practicians from the system of penal justice will change significantly, in favour of a penal treatment which doesn't deprive the offenders of their liberty.

Most times, these attitudes are transposed into practice by the adoption of a normative framework which narrows the possibility of the efficient application of such sanctions; however, these legislative changes are not grounded in the results of in-depth studies or research.

The reticence of the political factor to display its trust in the community measures and sanctions contributes directly to the establishment of an attitude of mistrust of the public opinion and judges in these sanctions. Under these circumstances, as long as the decision factors at the non-governmental level don't adopt and implement strategies for the support and large scale application of the punishments which don't deprive the offender of his/her liberty, the imprisonment remains the only choice, with all the associated consequences.

Thus, the first thing to be done at the decision-making level is to give up the general, subjective/affective approach, and to focus on objective elements related to these sanctions, such as efficiency, impact and costs.

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