

**A COMPARATIVE VIEW ON FINES AS PENAL
SANCTIONS.
THE SWISS V. THE ROMANIAN PENAL CODES**

Ph.D. student **CONSTANTIN MIRCEA CRIȘAN**
THE POLICE INSPECTORATE OF THE COUNTY OF ALBA

Keywords: fine

Penal sanction

Swiss penal code

The sanction' presents system.

REVIEW

The author as an “officer of judicial police” in the Police Inspectorate of the county of Alba carries out a judicial analysis of the fine, as an institution of Romanian penal law.

In order to emphasize the role and the importance of the fine as main monetary penal penalty, mentioned in the Romanian Penal Code, the author makes a comparative analysis regarding the way this institution is settled in the Swiss penal legislation.

I appreciate the professional way in which the author argues with the personal suggestions and conclusions regarding the specification of each of the analysed law systems.

In this article, the author emphasizes the similarities and the differences of the present system of sanctions in the two legislative systems, issuing value judgements that are worth considering.

Universitatea BIOTERA

Conf. univ. dr. Chipaila Ion

ABSTRACT

There are essential similarities and differences between the Swiss and the Romanian Penal Codes, regarding the way of regulating and applying the fine penalty. The differences mainly consist in the manner in which the two

codes are structured and in the way the penalty and the re-education of the people who committed criminal acts are seen.

Both Penal Codes are considered to be of modern use, but we have to mention the fact that the Romanian Penal Code does not include the day-fine sanction¹, which I believe to be mandatory in order to make this type of sanction more efficient in Romania.

The Swiss Penal Code from 21.12.1937, which came into force on 01.01.1942, is still valid, with all the changes and the additions that have been brought to it. It was modified, completed and republished on 19.12.2006.

The Swiss Penal Code has three parts, as it follows: the general part, the special part and the penal procedure.

The Swiss federal Penal Code harmonizes and connects all the separate codes of each of the Swiss cantons, which are significantly different in some parts.

The Swiss federal Penal Code divides violations of the law into the following categories:

- capital offences, felonies;
- misdemeanours;
- minor offences.

The offences fall within one of these categories, according to the gravity of the act, which is the only criterion for classifying offences.

The law violations that belong to the category of felonies or misdemeanours are considered major offences, more or less, and the ones that belong to the minor offences category are seen as less dangerous for society.

The penalties for the felonies belonging to the categories of offences are, according to the Swiss Federal Penal Code, as it follows:

- custodial sentences;
- financial penalties;
- community service.

The monetary penalties applied according to this Code are as it follows:

- the fine
- the fine as a day-fine.

The fine, as a penal sanction in the Swiss Code, is a main penalty, but it is not considered to be the least serious main penalty. According to this Penal Code, the least serious main penalty is considered to be “community

¹A a daily rate system for fixing pecuniary penalties found as a particularity of the French and Swiss penal law systems.

service". According to the Art. 34 in the Swiss Federal Penal Code, the financial penalties applied to a person cannot exceed 360 days-fine.

These sanctions are passed by the criminal courts according to the social danger of the committed crime and the person's guilt. As I have stated above, these pecuniary penalties apply to offences with a lower social danger.

A day-fine equals 300 CHF. This amount has changed in time. The present amount was established on 19 .12.2006 and it has been applied ever since.

In order to apply the sentence in days-fine correctly, the judge will take into consideration not only the social danger of the committed offence, but also the person's guilt, as well as the following:

- the person's financial situation ;
- his/her way of living ;
- the number of family members he/she has to live with ;
- the minimum living needs of the person's family ;
- the person's incomes.

The cantonal and communal federal authorities give the judge -at his/her request- information on the author's address in order to set the penalty in days-fine. The judge or the court, in the sentence they give, will indicate the number and the value of the days-fine that the sentenced person will execute. In two months' time, the convicted person will have to pay the fine he/she was convicted for. The judge can extend the deadline in special cases, by up to 2 years.

If the convicted person does not pay the fine he/she was convicted for during the period settled by the conviction sentence, the authority who executes the penalties will inform the court or the judge. Then, they will order the transformation of the financial penalty of days-fine into a custodial sentence.

According to the Swiss Penal Code, a day-fine corresponds to a day of custodial sentence.

Partial payment of the days-fine penalty will lead to a proportional decrease in the number of the days of deprivation of, or restrictions on voluntary freedom of movement.

If a person sentenced to the financial penalty of days-fine cannot pay the fine and the court changes the penalty into a prison sentence, while the financial and family situation of the offender gets worse, the judge or the court can suspend the execution of the prison sentence and rule the following:

- lower the penalty;
- change the penalty into community service;
- extend the due payment of the days-fine penalty to 24 months.

Turning the days-fine penalty, according to the Swiss Penal Code, into community service, can be done only if the judge or the court has the convicted person's approval.

The community service is done by the convicted person, in the area where he/she lives, and it is not financially rewarded.

The judge, according to the provisions of the Swiss Penal Code, can suspend the execution of a pecuniary penalty in days-fine and increase the penalty if the offender committed another felony or offence while executing the pecuniary penalty.

If 5 years have elapsed since the last offence, the author being convicted to a custodial sentence of maximum 6 months, or to a pecuniary penalty of 180 days-fine, he/she will not execute the penalty anymore, the more favourable private circumstances acting in this case.

The pecuniary penalty of days-fine is limited, according to the Art. 99, paragraph e) from the Swiss Penal Code, to a period of 5 years from the date of ruling.

The fine penalty is also applied in the case of minor offences, according to this Penal Code.

Minor offences present less danger for society and they are punishable by fines only.

Attempted offences and aiding and abetting are not considered to be minor offences, except for the case when the law stipulates this.

If the law does not stipulate anything else, the maximum fine is of 10,000 CHF.

In the case of minor offences, the penalty is decided by the judge, taking into account the seriousness of the committed offence. This shows us that even minor offences are well categorized, even if all the minor offences have a low social danger.

The penalty of the minor offence fine can also be changed by the judge, with the convicted person's approval, into community service, for not more than a 360-hour period.

In the case of the fine sentence for a minor offence, the penalty is limited to a period of 3 years.

Penalty by fine is mentioned in the offender's criminal record.

We have to mention the fact that according to the Swiss Penal Code, its provisions are applicable for the offences mentioned in the federal laws and the ones mentioned in the cantonal laws.

Regarding all this, the federal authorities co-operate with the cantonal authorities in order to establish and apply the penalties to the offenders. The minor offences are seen as sentences both in the Swiss Penal Code and in some federal and cantonal laws.

The minor offences are also mentioned in the criminal record of the person the sentence was given to. However, minor penalties of fine are not mentioned in the offender's criminal record.

According to the Romanian Penal Code in force, modified and completed by Law 278/2006, the penalties that can be applied to people are settled in the Art. 53 and they are divided into: main, complementary and auxiliary penalties.

The main penalties are:

- life detention;
- imprisonment from 15 days to 30 years;
- fine from 100 RON to 50,000 RON.

The complementary penalties are:

- prohibiting some rights from 1 to 10 years ;
- military rank reduction.

The auxiliary penalty implies the prohibition of the rights stipulated by the Art.64 (the right to elect and to be elected among the public authorities or in public elective positions; the right to have a position involving the state authority; the right to have a position or a profession of the same kind as the committed offence; parental rights; the right to be a tutor or a curator), under the circumstances stipulated by the Art.71 (which settles the contents and the way of carrying out the auxiliary penalty).

The penal fine is the third and the last main penalty settled in the present Romanian legislation.

The fine as a sentence, as well as a way of judicial constraint, can be a penal, civil, administrative, disciplinary, fiscal, for minor offences or procedural sentence.

The fine as a penal sentence is different from the administrative fine, which is a sentence that is applied to minor offences, or from the judicial fine, as a sentence with a process character, which is applied to offences committed during the criminal process, or from the fiscal fine.

The fine as penal sentence is a penalty and it implies the sum of money a convicted person must pay (Art. 63, ind. 1, The Penal Code).

The sanction of the penal fine, considering its contents, is a pecuniary penalty.

Its repressive character as a way of penal constraint, results from the forced reduction of the convicted person's patrimony, who must pay a sum of money settled by the court to the State.

The penal fine, compared to the function it fulfils, in constraining the convicted person, can be used either as a main penalty, a case in which an independent offence functions as well, or as an alternative penalty, which accompanies another penalty, completing it through its functionality. As a

secondary penalty, it usually accompanies the prison sentence, the expression being that of “imprisonment or fine”.

The fine as a main penalty can be stipulated in the regulations of the main part of the Penal Code either as a unique sanction, or as an alternative sanction, together with another main penalty.

The fine as a main penalty can be mandatory (for example a fine) or optional (for example imprisonment or a fine), when the Court decides how to apply it.

In the system of the present Penal Code, the fine is always a main penalty, being included in the system of penalties mentioned in the Art. 53 paragraph 1, line b, the last one mentioned, due to which it is considered the easiest one, less serious than the main penalty.

The general limits of the penal fine are mentioned in the Art. 63 ind.2, being from 150 to 10,000 RON.

We have to mention that the sanction with penal fine stipulated individually or alternatively with imprisonment is generally used for offences with lower social danger, offences mentioned both in the Penal Code and in special laws.

By Law 6/1973 modifying the Penal Code, the fine penalty was extended to be applied as an alternative to up to a 2 year prison sentence.

Through its particularities, the fine is different from other sanctions or measures with a pecuniary character, whether they are penal (confiscating the fortune, special confiscation), or extra-penal (civil damages, judicial expenses, judicial fine, administrative fine, the fine applied by the district attorney or by the court under the circumstances of the Art. 18, index 1 Penal Code).

As the present Penal Code does not establish any rule that may settle in which cases the fine or the imprisonment penalty should be applied, the Court, following the stipulations of the Art. 72 paragraph 2, will apply this measure of the fine only in the cases in which they consider that the aim of the penal penalty is achieved.

As the penal fine, just like the imprisonment penalty, is susceptible to quantitative differences, the penal law stipulates the limits within which the penal fine can be applied.

The limits are general and special and determining them is relative, each one having a minimum and a maximum limit.

The general limits of the fine are mentioned in the Art. 53, paragraph 1, line c), in the present Penal Code. The general minimum of the fine is of 100 RON and the special maximum is of 50,000 RON.

The special limits have the role of absolute extremes that you cannot exceed regardless of the number and the importance of the circumstances that accompany the offence and that should be taken into account when the penalty is individualized.

When it is necessary, the fine penalty can be changed into a prison sentence (in the case of repeated offence and of the Art. 78 line 1; in the case of aggravating circumstances), but the general maximum of the fine cannot be exceeded.

According to the Art.78 index 1, when there are aggravating circumstances, a maximum special penalty can be applied to the person.

If the special maximum is not enough in the case of the fine, an additional one third of the special maximum at the most can be applied.

The special limits concern the fine penalty particularly stipulated for sanctioning an offence.

In the cases in which the law stipulates the fine penalty for a certain offence, without showing its special limits as well, the limits that can be applied are the ones mentioned in the Art. 63 line 2 in the Penal Code.

The line 2 in the Art. mentioned above shows that whenever the law stipulates that an offence is punished only with a fine without showing its limits, its special minimum is of 150 RON and the maximum is of 10,000 RON.

If the law stipulates the fine penalty without showing its limits, alternative to the jail penalty, of a year at the most, the special minimum of the fine is of 300 RON and the special maximum of 15,000 RON, and when it stipulates the fine penalty alternatively with the jail penalty, more than a year, the special minimum of the fine is of 500 RON and the special maximum of 30,000 RON.

In other words, the present Penal Code sets up through this settlement a special regime of the fine, as well as its maximum and minimum.

Compared to the general limits mentioned in the Art. 53, the limits mentioned in the Art. 63 in the Penal Code, even though they are mentioned in its general part, are special limits. A derogation from the general rule for the fine, which is applied to all the other types of penalties (if the special limit is not mentioned, the general limit values as much as the special limit), was determined in order to give mitigating circumstances the possibility to work in the case of the offences sanctioned with a fine as well.

According to the Art. 76, paragraph 1, line e), when the special minimum of the prison sentence is of 3 months or more, a fine that cannot be less than 200 RON is applied.

As the fine is the last main penalty in this general framework of penalties and as the Art. 76, paragraph 1, line f), stipulates that when the penalty mentioned by the law is the fine, it becomes lower than its special minimum, up to its general minimum, so that the mitigating circumstances can also work if the offender is sentenced by law with a fine and the incriminating text does not mention any minimum at all.

The regulation from the Art. 63, paragraph 2, even if it is a general regulation, is applied not only to the stipulations from the special part of the Penal Code, but also to the regulations from the special laws that are in the situation mentioned in this line.

The present Penal Code has kept –regarding the special limits of the fine– the general system of the relative determination of the penalty within minimum and maximum limits.

The special limits of the penalties can be exceeded in the system of the Penal Code if certain mitigating or aggravating causes of the penalties are identified.

Regarding the effects of the aggravating circumstances, the Art.78, paragraph 1 stipulates that a penalty can be applied until the special maximum, and if this is not enough, a penalty up to the general maximum of the fine can be applied, as well as an addition of a third of the special maximum at the most.

The provisions in the line 2 of the Art.63 in the Penal Code only state as a general rule that the general limits of the penalties cannot be exceeded under any circumstances. In the case of applying the mitigating or aggravating causes of the penalties, the fine cannot exceed the general limits shown in the Art.53 paragraph 1 line c).

This was necessary to be cleared in order to emphasize the difference between the general and the special limits, as well as the meaning of these two categories of limits.

Consequently, the rule is that under no circumstances can the general limits of the fine be exceeded. When applying the general maximum of the fine is considered an insufficient sanction, the Court is not allowed to exceed this maximum. Nevertheless, the law gives the Court the right to replace the fine with imprisonment.

We have to mention that according to the stipulations of the Penal Code, the fine is settled taking into account the general criteria of individualizing the penalty, without putting the offender in the position of not being able to fulfil his/her duties regarding rent, bringing up, teaching and professionally training the people towards whom he/she has legal obligations.

The penal fine penalty is has a 3-year period of criminal limitation.

According to the Art. 425 of the Code of Criminal Procedure, regarding the execution of the penal fine penalty, the offender has to leave a copy of the fully paid fine receipt at the executing Court, in 3 months' time since the final conviction decision.

When the convicted person cannot fully pay the fine in 3 months, stipulated by the Law (the Law 275/2006 regarding the execution of the penalties), the executive Court, at the convicted person's request, can require to pay the fine in not more than 2 years, in monthly instalments.

If the fine is not paid, or if an instalment is not paid, the executive Court gives the competent bodies a copy of the law that obligates the offender to pay the fine, according to the legal regulations regarding the garnishment of the fiscal debt and with the procedure stipulated by these situations.

When the offender does not show any proof the payment of the fine after the final date of the decision and after the Court has been informed (even if it was a legal subpoena), the Court will consider that this person refuses to pay the fine in mens rea, thus to carry it out.

According to the Art. 63¹ of the Penal Code, if the convicted person refuses to pay the fine, the Court can replace this penalty with the imprisonment penalty, within the limits stipulated by the law for the committed offence, taking into account the part of the fine that was already paid.

In order to prove that the person convicted to the penal fine refuses to pay it entirely or in instalments, the Penal Executions Office will have to find more information on the convicted person regarding the following aspects: if he/she lives at the address mentioned in the conviction sentence legally; if he/she has not changed his/her address meanwhile; if he/she has incomes that can ensure his/her and his/her family's living; if he/she has or not legal work papers; if he/she has left abroad to work; if he/she owns mobile or immobile goods, as well as regarding other data necessary in order to carry out the conviction sentence.

CONCLUSIONS

The fine as a penal sanction mentioned in the Swiss Federal Penal Code is a main pecuniary offence, applicable both for misdemeanours and for minor offences.

The difference between the Romanian Penal Code and the Swiss one lies in the fact that in the Romanian Penal Code, the fine is a main sanction, the last sanction of this kind, and it is considered the easiest one, a main penalty. Whereas, in the Swiss Penal Code, the fine is not the last main penalty, which is community service, the easiest main penalty.

Another important difference lies in the fact that in the Swiss Penal Code, the fine is settled in days-fine and can be changed by the judge into community service only with the convicted person's approval.

In this Penal Code, the fine cannot be turned into a prison sentence if it is not paid by the convicted person in mens rea.

Unlike these stipulations, if the penal fine is not paid, the Romanian Penal Code stipulates the change of the fine into prison sentence, taking into account the part of fine that has been paid.

The same categories of offences as in the Swiss Penal Code - felonies, misdemeanours and minor offences - cannot be identified in the Romanian Penal Code. This can be a positive suggestion to be introduced into the new Penal Code, as the penalties would be structured differently as well, according to the seriousness of the committed crime and could better achieve its goal of re-educating the offenders.

Both Penal Codes stipulate that the fine penalty is mentioned in the convicted person's criminal record.

Not carrying out the fine penalty, according to the Penal Codes in both countries, is barred by limitations after some period. In both Penal Codes, the bar by limitations comes after a 3-year period, if this period has not been interrupted. If the period has been interrupted, the two Penal Codes stipulate that the limitation term will start again from that interruption.

Another similarity of the two Penal Codes is that both state that the person convicted to fine penalty can be rehabilitated after a 3-year period since it was acquitted.

Regarding the stipulations of the two Penal Codes, the fine penalty is applied only to the people who committed less serious offences. This is another similarity in their stipulations.

As a final conclusion, I have noticed that the two Penal Codes—regarding the fine penalty- bear similarities but mostly essential differences, that consist especially in the way the two codes are structured and regarding the sentencing and re-education of criminal offenders.

BIBLIOGRAPHIC REFERENCES

- [1] The Romanian Penal Code, with changes brought by Law 278/2006;
- [2] Matei Basarab, Drept penal, (Criminal Law), general lines, Editura didactică și pedagogică, Bucharest 1983;
- [3] Vintilă Dongoroz, Siegfried Kahane, Ioan Oancea, Rodica Stănoiu, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Victor Roșca Explicații teoretice ale Codului Penal Român, (Theoretical explanations of the Romanian Penal Code), the Romanian Academy, Institute of Legal Research, Volume II, 2nd edition, Bucharest, 2003;
- [4] Alexandru Boroi, Drept penal, (Criminal Law), general lines, Juridica, Curs Universitar, AllBeck Publishing, 1999;

- [5] Maria Zolyneak, Maria Ioana Michinici, Drept penal, (Criminal Law), general lines, Curs universitar, Editura Fundației Chemarea, Iași 1999;
- [6] Augustin Ungureanu, Drept penal român, (Romanian Criminal Law), general lines, Lumina Lex Publishing House, Bucharest, 1995;
- [7] Constantin Butiuc, Elemente de drept penal, (Criminal Law), Lumina Lex Publishing House, Bucharest, 1998;
- [8] Gheorghe Alecu, Drept penal, (Criminal Law), general lines, Europolis Publishing House, Constanța 2005;
- [9] Lidia Barac, Elemente de drept penal, (Criminal Law), general lines, “Eftimie Murgu” University Press, Reșița 2001;
- [10] The Swiss Penal Code of 21.12.1937, in force since 01.01.1942;
- [11] Federal law of 08.10.1999, changing the Swiss Penal Code;
- [12] Federal law of 24.03. 2006, changing and adding the Swiss Penal Code;
- [13] The Constitution of Switzerland, of 18.04.1999.