

# MINORS OBLIGATIONS DURING THE PROBATION TERM AND THE IMPORTANCE FOR FULFILLING THEM IN THE PENAL JURIDICAL SYTEM IN MOLDOVA REPUBLIC

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**Abstract:** *As it results from the institution's name itself, the penalty execution suspension is conditioned, that means that the court establishes certain conditions, which usually look like some concrete obligations, respecting them is uncertain because penalty execution established by the court through a conviction sentence. The essence of this institution is that conditional suspension of penalty execution consists in having faith in the convict. On the other hand, this institution has a very powerful coercive, prohibitive character because the convict is not just release from penalty execution because through his/her attitude must prove that he/she deserve the given "favour". These elements will be analyzed in the contents of this work paper.*

**Key words:** *Minors obligations, penal juridical system, Moldova Republic*

As it results from the institution's name itself, the penalty execution suspension is conditioned, that means that the court establishes certain conditions, which usually look like some concrete obligations, respecting them is uncertain because penalty execution established by the court through a conviction sentence. The essence of this institution is that conditional suspension of penalty execution consists in having faith in the convict. On the other hand, this institution has a very powerful coercive, prohibitive character because the convict is not just release from penalty execution because through his/her attitude must prove that he/she deserve the given "favour". That is why the court may establish, during the probation period, certain *obligations* for the convict, provided in art. 90, align. 6, Moldova Republic Penal Code. From drafting the law text mentioned above, we observe that the disposal of these obligations represents a *power* and not a court's obligation by inserting the expression "it can oblige the convict".

Likewise, the legislator provides that these obligations do not have a definitive character, the court, during the probation period, on the proposal of the authority that executes the control on convict's behaviour with penalty execution conditional suspension, has the right to partially or totally cancel the obligations established before, or can bring new ones.<sup>1</sup> These obligations that can devolve upon as well as the minor convicts as well as the adults' ones are the following:

- a) Not to change the address without the agreement of the competent authority;
- b) Not to attend certain places;
- c) To follow a treatment in case of alcoholism, drug addiction, addiction or STD;
- d) To offer a material support to victim's family;
- e) To repair the caused damages in the term established by the court.

Analyzing the above obligations, that can be applied to the minor convict with penalty execution conditional suspension, we draw the following *conclusions*.

The court may dispose two obligation categories:

1. *To do something*, that means to have a certain behaviour, a certain active attitude – *committee* (to follow a treatment in case of alcoholism, drug addiction, addiction or STD, to repair the caused damages in the term established by the court, to offer a material support to victim's family);
2. *Not to do anything – omitted attitude*, to abstain from certain actions (not to change the address without the agreement of the competent authority, not to attend certain places).

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<sup>1</sup> Art. No. 90 align. 7 Romanian Penal Code: "During the probation term, the court, on the proposal of the authority that controls convict's behavior with penalty's execution conditional suspension, may cancel, totally or partially, convict's previous "established obligations or bring new ones".

As we presented, the obligations disposal provided at the art. 90, align. 6 Moldova Republic Penal Code remains on court's disposal. The decision of applying or not of the obligations is decided taking into consideration case's circumstances and, specially, taking into consideration minor's behaviour and personality.

There are as well in the Moldavian doctrine, but, especially, in the Russian one, opinions according to which the legislator should include in the legal disposals *the obligation* and not the power, for the court, to dispose these obligations. So, the Russian scientist I. A. Burlakova considers that the legislator should agree with the obligation and not the court discretion to impose to penalty execution conditional suspension convict certain obligations, because the lack of obligations in the probation term reduces the educational importance of the institution in cause, it limits its purposes, because the convict cannot stand this kind of restrictions, except one – not to commit any new crimes.

These opinions may be, as we think, at most interesting, but in no case may be taken into consideration as “ferenda” law to contribute to legislation modification in this sense.

To sustain our opinion, we bring the conclusions of a poll performed by Martin Daniel, in 2007, during the period he was PhD at Moldova Republic State University. He requested an answer to the question: “What do you think about the court to apply in all cases the convict's supplementary obligations, or in a different way taking into consideration each case?”

For this poll contributed 43 judges and 34 prosecutors. 30 of the 43 judges mentioned that convicts' supplementary obligations appliance with penalty execution conditional suspension is necessary taking into consideration each case. Only 10 judges pointed the necessity of applying obligations in all cases, and 3 of these could not answer to that question.

All most the same thing happened with the prosecutors: 23 pointed that supplementary obligations will be established taking into consideration each case and only 8 prosecutors saw that these must be required for all conviction cases with penalty execution conditional suspension; 3 prosecutors that took part to this poll did not answer to the question.

Drawing the conclusions out of this poll we notice that most of the magistrates (prosecutors or judges) do not feel the need to apply the supplementary obligations in all cases.

We share the same opinion in minors' case the more in their case the regime that sanctions is, usually, more gentle.

The promoters of opposite solution sustain the court should, in all cases, establish certain obligations for the penalty execution conditional suspension convict because, this way, it would underline the coercive character of the measure concerned and it would exclude its interpretation as an unjustified grace of the guilty person of committing the crime.

We think that this opinion is wrong taking into consideration the nowadays settlement module to be the correct one because the court decision can be much more objective this way. The judge can appreciate taking into consideration each case if he applies or not any of the obligations. Obligatory applications have another “deficiency”, as we see it that is not specified if the judge must apply one or all the obligations. If one considers that all obligations must be applied, then, we can meet in practice cases that will not accept for this measurement to be applied on. For example, if a crime has no damages then the letter e obligation will not be applied. Also, one or more obligation appliance assumes fulfilling actual dispositions, because on art. 90, let. F we have the disposition:” to fulfil other obligations that may contribute to his improvement” without specifying which are these.

Certainly, as in minors' case the correct solution cannot e other than the one enounced by us and the Moldavian legislator.

The present regulation of art. 90, align.6 Moldova Republic Penal Code contradicts the art. No. 395 align. 1Romanian Criminal Procedure Code is wrong because it sustains that in sentence's device, obligatory, must be shown the obligations for the penalty execution conditional suspension convict. Reading the legal disposal mentioned above, we notice that the legislator included this provision only for the situations in which the judge decides imposing such obligations.

What we consider that can be brought for discussion is if present settlements of the art, no. 90 align. 6 of Moldova Republic Penal Code that does not contains an exhaustive obligations list is or not the best one, the one that is able to run the best fulfilling of the act of justice. It is to be mentioned that according to Russian Federation Penal Code, the court may establish for the convict other obligations besides the ones in penal law. This decision of the Russian legislator has been criticized by certain Russian theorists. This way V. F. Scepelkov considers that, except these obligations are some legal – criminal measurements, it would not be fair to let their list open because it would get to a violation of the equality principle. A. N. Tarasov agrees with this opinion and tells that the obligations not mentioned in the penal Code can be established in convict's task. O. Knijenko criticizes legislator's position and shows that this kind of situation may generate fraud and more than that, the obligations that limit the convicts' rights and liberties must have a precise determination.

Against these theorists' opinion we say that the obligations list established by the legislator does not have to be a limitative one (exhaustive) but an indicative one, with examples.

To sustain our opinion is another poll made by the same Moldavian PhD Martin Daniel who requested judges' and prosecutors' opinion concerning the same aspect. Most of the judges saw that obligations list does not have to be exhaustive and the court must have the possibility to apply taking into consideration each case other obligations provided by the law, too. Only 11 questioned judges though that the list should be exhaustive, 2 judges mentioned that, in general, in the penal law does not have to be established supplementary obligations for penalty execution conditional suspension convicts.

Among the prosecutors there was another opinion, this way 12 of the poll participants prosecutors considered that the court should have the possibility not to apply the obligations that are not provided by the penal law, while 22 consider that the obligations list should be exhaustive.

Besides, analyzing the opinions from the doctrine and the court practice we tell that only the court after the cause pertinent analyze, may determine what kind of supplementary obligations can be applied to the convict, the more if he/she is a minor one. The determination of the obligations, taking into consideration cause's concrete circumstances and convict's personality, takes to a better and more efficient individualization.

That is why, federal law, we propose reintroducing letter f in its initial form: "to fulfil other obligations that can contribute to his/her improvement". This legislative modification would be a good one in minors' case of penalty execution conditional suspension appliance because it would allow the court to individualize more reasonable the applied penalty and to decide what supplementary measurements are considered to be imposed for the minor's social reintegration imperative to be achieved.

Besides, in its initial editorial, art. No. 90 align. 6 in Moldova Republic Penal Code included letter f, also. Through the Law for Modification and Fulfilling Moldavian Republic Penal Code no. 211 – VX dated 29<sup>th</sup> of May 2003, this provision has been put out. The Moldavian legislator wanted this way to transform the settlement in an exhaustive one and to limit (we say this is an unjustified way) court's right to impose other obligations than the ones in the Code.

It is imposed to verify and, eventually, correct another legislative disparity occurred after the appearance of the Law for modification and completion some legislative papers no. 184- XVI dated 29<sup>th</sup> of July 2006<sup>2</sup>, according to which as an obligation during the probation term period of the penalty execution conditional suspension convict, may be applied unpaid work in community use (not in the minors' case).

As long as in case obligation is not inserted in by the legislator in art. No. 90 align. 6 Moldova Republic Penal Code and the legislative provision do not stipulate the possibility of appliance other obligations too, we consider that the courts will avoid the appeal to art. No. 63 align. 2 Moldova Republic Penal Code. Here is another argument for in a future provision to be

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<sup>2</sup> Moldova Republic Law to modify and completion some legislative papers, no. 184-XVI dated 20<sup>th</sup> of July 2006, in Moldova Republic's Official Monitor no. 126-130/599 dated 11<sup>th</sup> of August 2006.

stipulated court's right to dispose other obligations than in art. No. 90 align. 6 Moldova Republic Penal Code.

### **Minor's Obligations during Probation Term and the Importance of Fulfilling them in Romanian Criminal Justice System.**

Once the court's decision to conditional suspension is definitive, its effects start to appear. After effects' situation in time, these separate one to each other starting, also, from the obligations that incumbent the convict in immediate effects (temporary) and definite effects (final).

*The immediate effects* are produced when the conditional suspension decision is definite and consist in net executing the penalty.

The effects are temporary because during the probation term period are conditioned by minor convict's good behaviour that must not provoke a situation that would determine the recalling for penalty execution conditional suspension.

As an immediate effect of conditional suspension, as we showed above, penalty's execution will not be effectively realized.

After the prison penalty, the penalty suspension convict is not imprisoned any more to execute the penalty, and, if he was preventive arrested, he will be released as soon as the penalty's execution conditional suspension has been pronounced without waiting for the decision to remain definitive. This will not happen as a consequence of penalty's execution suspension decision, which because is not definitive, cannot be performed, as a logical consequence that results from court's appreciation about minor convict, that he may improve himself without executing the penalty, and keeping him/her from now on is not founded, it comes in contradiction with pronounced suspension decision.

This setting free, before the decision to be definitive does not restrict judiciary control court decision to decide in another way, to dispose penalty's effective execution.

Through the accordance of the accept penalty's execution suspension it is suspended the main penalty as well as complementary ones that have been applied next to the main one, even if the law does not provide anything.

Besides, in judiciary practice was brought to discussion that next to a prison penalty, of which execution was suspended, it can be applied the complementary penalty of forbidding some rights when its appliance is compulsory according to art. No. 65 Romanian Penal Code and it was correctly decided in the sense that through conditional suspension appliance is not put away courts mandatory to apply complementary penalty when this appliance is obligatory.<sup>3</sup>

One more argument represents the fact that the court, first applies the main penalty and the complementary one only if it is mandatory or if appreciates that this is necessary and after that disposes penalty's execution conditional suspension. Consequently, the appliance of complementary penalty is not restricted by the way it follows to decide towards suspension or execution the main penalty.

If the complementary penalties application is not restricted by the penalty's execution, the complementary penalty's execution – that takes place after the execution of the main penalty, after total grace or the rest of the penalty, or after its prescription – is influenced by main penalty execution fate. This way, as an effect of fulfilling the probation term, without interfering a recalling cause or a suspension measurement revocation, it comes up convict's rehabilitation, and complementary penalty is groundless, is not justified because the rehabilitation makes the bans to stop, the inabilities, the decays that result from a conviction.

In connection with the accessory penalties' situation, when it is disposed execution conditional suspension, the problem was solved by the legislator through Law no. 278/2006 provisions that modified the provision in art. No. 71 Romanian Penal Code that concerns the contents and the way the accessory penalty is executed this way, in accordance with the provisions on art. No. 71 align. 4 Romanian Penal Code" during prison penalty's execution conditional

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<sup>3</sup> C.S.J. s.p.d.no. 2855/2<sup>nd</sup> of July 1999, law no. 7/2000,p. 167-168.

suspension or under surveillance suspension of prison penalty's execution, it is suspended the accessory penalty execution".

When the court applies prison penalty, it must do a complete individualization, not only for the main penalty but as well as for complementary penalties and to mention the accessory penalty, then it will decide if the penalty is to be executed or suspended. Of course, the main penalty being suspended, the accessory penalty execution is suspended, too.<sup>4</sup>

A limitation of conditional suspension effects was provided through the provisions of the art. No. 81 align. 5 Romanian Penal Code: "Penalty's execution conditional suspension does not attract safety measures suspension and that for civil obligations provided by the conviction decision".

We consider that the legislator adopted is the right one because the purpose of the safety measures (putting away a danger state and prevention committing new facts provided by the penal law) is not incompatible with the followed target through penalty's execution conditional suspension – convict's improvement without penalty's execution- these being able to be independent or tide together.

Immediate effects lay the whole period of the probation term and if there was no annulment or revocation cause of penalty's execution suspension, these will be substituted by the final effects, the definitive ones.

*The definitive effects* for penalty's execution conditional suspension interfere in probation term fulfilment, period during which the convict proved through his/her behaviour that he improved himself/herself.

As a notion, as it is underlined in the penal doctrine : "penalty's execution conditional suspension are those consequences that when the probation term is fulfilled come out, according to the law, of suspension working and which, despite temporary effects, definitively solves convict's criminal liability problems inside this institution".<sup>5</sup>

Through the provisions in art. No. 86 Romanian Penal Code there have been established penalty's execution conditional suspension measure definitive effects. If the convict has not committed another crime during the probation term and it had not been pronounced penalty's execution conditional suspension revocation according to art. No. 83 and 84 Romanian Penal Code, he/her is fairly rehabilitated".

This way, according to nowadays regulation, to penalty's execution conditional suspension to fulfil its final effects – convict's fairly rehabilitation - it is necessary that three conditions to date in a cumulative way:

- a) The probation term to be finished;
- b) The convict has not committed a new crime during the probation term;
- c) Not to have been pronounced suspension cancellation or revocation for any of the motifs provided by the law.

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<sup>4</sup> Mircea Badila, *Complementary Penalty in Case of Penalty's Execution Conditional Suspension*, Public Right Magazine, no. 2/2000, p. 105-106.

<sup>5</sup> *Criminal Law*, General Part, Lumina Lex Publishing, Bucharest, 1998, p. 645.

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