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THE CONTENTI CONTENTIOUS OF THE EXECUTION OF SENTENCES AND CUSTODIAL EDUCATIONAL MEASURES

- **Contents and summary**

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Keywords

Sentence, penitentiary, execution, judge supervising deprivation of liberty, regime, rights, prohibitions, conditional release

Summary

This paper is a foray into an "area" intended for individuals sentenced to custodial sentences, attempting to address some of the contentious issues encountered during the execution of a prison sentence. Altought the paper title leans towards the specific sphere of administrative law, the work presents litigation specific to criminal procedural law, covering aspects of the vast field governing the enforcement of custodial sentences, presented through the prism of several issues encountered in judicial practice.

The legal literature in our country has been writing about a contentious enforcement of sentences since the beginning of the criminal procedure, when Professor Vintilă Dongoroz stated that the incidents of execution are resolved by the court, because they have a contentious nature, affecting the very enforceability of the judgment, the incidence of the conviction or the regularity of execution.[1]

As it can be seen in the content of the paper, the multitude of legal issues that the supervising court or judge has to deal with brings to the fore what the reputed professor Traian Pop has stated, namely the need to enshrine a third code alongside the Criminal Code and the Code of Criminal Procedure, a code dedicated to the execution of punishment or prison criminal law. Even though the reputed professor stated that the unanimous recognition of this branch of criminal law does not seem to be forthcoming, he also noted that criminal law evolves along these three branches - substantive or material criminal law (also known as criminal law), criminal procedural law or formal law and prison criminal law or executive criminal law, given that we have three phases: the normative, abstract phase with criminalization and penalization, the active phase of the trial or judgment and the enforcement phase.[2] In France, efforts to adopt a penitentiary code have been long in the making, but were finalized not very long ago with its adoption in early 2022. [3]

The work is structured in five chapters, divided into sections and subsections, and the first part of the work deals with the presentation of the historical aspects of the execution of custodial sentences and the way in which these sentences have evolved. The first chapter also deals with the basic principles in the field of enforcement of sentences, in view of their practical usefulness in the enforcement legislation, which are the benchmarks for the interpretation and application of the rules with a narrower regulatory scope. The introductory presentation also includes the enforcement bodies and the main national and international

[1] Tr. Pop, *Criminal Procedural Law, Special Part,* Volume IV, Universul Juridic Publishing House, 2019, p. 598.
[2] Tr. Pop, *Drept procesual penal,* volume I, Ed. Tipografică SA Cluj, 1946, pp. 1-3. Nowadays, this branch is known as criminal enforcement law.
[3] The French Prison Code was adopted on March 1, 2022. https://www.enap.justice.fr/sites/default/files /note_synthetique_code_penitentiaire.pdf.

regulations on enforcement activity. The analysis in the main body of the work also includes prison systems and how they have developed over time.

The presentation of the historical development in national and comparative law was considered necessary in order to observe how the procedural systems applicable in the execution of punishments resemble or distinguish or influence each other. Thus it can be seen how the first generation of penalties consisted of the death penalty and corporal punishment, then deportation became applicable, which at the time meant civil death. The second generation of sanctions focused exclusively on deprivation of liberty in the form of life imprisonment, confinement and limited detention (imprisonment). Nowadays, in comparative law, variants of sanctions are being embraced in which technology is increasingly applied, for example, electronic surveillance.

This brief incursion into the history of the enforcement of custodial sentences made in the first chapter, including also aspects of comparative law, allows us to observe the applicability of the conclusions of some studies in the field of law. Thus, it can be seen how historical development can impose specific legal forms that ensure greater institutional viability and efficiency, and the international factor can ensure institutional harmonization, which in an era of globalization and globalization is a *sine qua non for* legal progress.[4] On a practical level, it is a question of increasingly fruitful cooperation in an area which concerns both individual states and the international community as a whole, such as combating crime.

This evolution of punishment over time can also be observed in the penitentiary system, a system in which many regulations have been adopted at international level and have influenced several legislations, including national legislation. The European Prison Rules, which outline minimum standards for the execution of sentences and have been adopted as national standards in most Member States, are discussed in this paper. The main pillars on which these standards on prison conditions have been based over time are the Universal Declaration of Human Rights, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Also presented are the Nelson Mandela Rules which reconfirm the belief in fundamental rights, dignity and worth of the human person, without distinction of any kind.

International regulations recognize that prisons are a necessary evil[5] and it is hard to imagine a time when deprivation of liberty, now predominant in the laws of all countries, would be replaced by a sanction of another kind which, while avoiding the evils inherent in

[4] V. Hanga, *Dreptul și tehnica juridică - încercare de sinteză*, Ed. Lumina Lex, Bucharest, 2000, p. 18.
[5] This statement is found in the preamble to the 1979 Spanish General Penitentiary Law.

imprisonment, would offer the same or even better social protection.[6] The fundamental aim of custodial sentences is to prevent further offending by rehabilitating and reintegrating sentenced persons into society, while ensuring that the necessary attention is paid to the purpose of intimidation and warning in proportion to the seriousness of the crimes committed, which any judicial system requires.

Before addressing the contentious aspects, the paper sets out the advantages and disadvantages of deprivation of liberty in today's society. Deprivation of liberty has become the punishment par excellence in civilized societies because of the advantages of its application. These advantages include the fact that it is flexible and allows for generous individualization in relation to the personal circumstances of the convicted person and the actual circumstances of the crime committed; it is sufficiently reversible and avoids the moral disadvantages of corporal or capital punishment; it also ensures effective monitoring of convicted persons and control of the procedures for their re-education, rehabilitation and social reintegration; the economic potential of convicted persons is harnessed in the interests of society; imprisonment makes it possible to temporarily neutralize individuals who are dangerous to society at an acceptable social cost, while being legally coherent in circumstances where it is an expression of the suspension of the most important modern human good: liberty; it is sufficiently exemplary, having the role of intimidating those tempted to commit offenses by the physical and moral suffering it entails; it is egalitarian, as all convicted persons feel the deprivation of liberty in the same way.[7]

In the context of enumerating these advantages, it would be naïve to consider as sufficient the alternative measures that are considered economically useful and taken solely for the purposes of re-education and social reintegration. Overcrowding has overwhelmingly negative consequences for all those involved in the execution of custodial sentences, and the cost of incarceration for a single person is surprisingly high; then, a greater number of prisoners requires a greater number of guards and an improvement in physical security conditions, but nevertheless, the analysis of the advantages and disadvantages leads to the conclusion that this necessary evil, to use the expression used by the Spanish legislature, cannot be dispensed with.

The historical evolution of punishments highlights the way in which they have progressed and it can be said that prison reform can mean reform in society, which is why it

[6] Eric Hilgendorf, Brian Valerius, *Alternative sanctions in criminal law excluding imprisonment and fines in selected European countries*, Duncker & Humblot Berlin, p. 101.
[7] F. Ciopec, *op.cit.* p. 57.

must be given the necessary attention, and the plethora of regulations, both national and international, emphasizes that reforms in the prison system are not ignored. The category of reforms also includes the changes that have taken place in recent times and which must continue in the area of the enforcement of sentences.

The free movement of persons and goods in Europe has also led to the spread of criminal law problems, which require similar solutions in order to be resolved as effectively as possible. The field of the enforcement of sentences, which is becoming increasingly influenced by international influences, must adopt and apply practices that are best suited to combating crime, which prove their effectiveness and are applied in the area of litigation in the enforcement of sentences.

In the following chapter, the judicial procedures applied during the period of detention are presented starting from the moment when the execution of the sentence begins, i.e. the moment when the warrant for the execution of the sentence is issued. Thus, the procedures followed by the delegated enforcement judge in the enforcement office after the sentencing judgment has been served are set out. From the moment the enforcement warrant is issued and forwarded, the procedures to be followed if the person is at liberty or under arrest are set out in detail. Subsequent to the issuing of the enforcement warrant and the imprisonment of the sentenced person, a series of procedures are followed with a view to individualizing or determining and changing the enforcement regime, the degree of risk or the vulnerability of the person concerned. It also highlights the "prison kitchen" or practical aspects of changing the decision on the enforcement regime, which are generally aimed at managing the number of prisoners in the detention facilities as efficiently as possible.

Furthermore, the paper is looking at the disciplinary procedure as well, which is one of the most important procedures carried out in the prison environment. This procedure is important in terms of the consequences it has on the rights of convicted persons and on the possibility of conditional release. The practical aspects that also give rise to contentious situations in the execution of sentences are addressed by discussing issues such as, for example, the assessment of the presumption of innocence versus the presumption of legality and soundness of the incident report drawn up at the time of the finding of disciplinary misconduct.

In this chapter, a number of judicial procedures encountered during the execution of a custodial sentence have been outlined, but also administrative aspects that are less emphasized in the works dealing with the procedure of execution of custodial sentences. Starting with the

commencement of enforcement of the sentence and the determination of the enforcement

regime, the procedure for determining and changing the enforcement regime and the other procedures that mark the custodial sentence were analyzed.

At the same time, an aspect that has had an impact on decisions to change regimes during the execution of a custodial sentence is analyzed. Thus, even if in theory the sentence can be served in one of the 4 regimes, in practice this distribution is decided by the prison administration, which has a wide margin of discretion in changing the regime; this decision also takes into account the occupancy rate of the detention spaces in each regime that the prison has in management or for various other reasons. [8]

A legislative intervention in this sector should allow more independence to prisons in managing the number of detainees in each detention regime, so that each establishment has the possibility to determine the number of detainees allocated to a regime from the total number of detainees. Thus, if the prison administration cannot refuse to accept a prisoner to serve his sentence, it could, depending on the detention facilities available to it, be given greater independence in determining the number of prisoners assigned to a regime, without having to make representations to higher hierarchical institutions, as is currently the case.

The same chapter also deals with appeals against enforcement, the most common procedure for resolving issues arising during the enforcement of a sentence. The cases of appeal against enforcement are presented in the light of the way they are analyzed in judicial practice.

The third chapter deals with the institution of the judge supervising the deprivation of liberty, starting from the difference between this institution and the judge delegated with the execution of sentences. The chapter presents the origin and history of this institution, but also deals with the practical aspects of delegating the judge by presenting some decisions that allow the work to be carried out both in court and in prison.

An important part of this chapter is devoted to the work of the supervising judge and the issues that give rise to divergent interpretations in his work. The way in which the place of execution of the sentence is regulated and the manner in which these regulations are applied has been a source of many grievances among persons deprived of their liberty; among these grievances, those concerning the competence to resolve them required the intervention of the Supreme Court.

[8] Among these reasons are also the use of the prisoner for various prison work.

The examination of its powers, both of an administrative and of an administrative-jurisdictional nature, is an incursion into the contentious issues encountered in the institution's work. The work covers practical aspects of complaints lodged by persons deprived of their liberty concerning the enforcement regime, starting from the moment of its establishment to the various changes that may occur during the enforcement; then, aspects arising from complaints lodged against the decisions of the disciplinary committee are presented, followed by the infringements of the rights of convicted persons.

At a glance, it is possible to observe the role of the judge supervising the deprivation of liberty, which is notable, first and foremost, for the intervention he has when dealing with complaints lodged by persons deprived of their liberty. The decisions it takes on the enforcement regime, the penalties imposed by the prison administration and, secondly, the rights guaranteed or infringed by the prison administration ultimately contribute to achieving the aim of enforcing a custodial sentence for each prisoner. The same solutions adopted in complaints also contribute to the efficient organization of the prison environment in the detention facility, since the consequences of a decision to uphold a complaint lodged by a prisoner are also felt in the detention facility. Consistency in the decisions taken on complaints lodged by persons deprived of their liberty thus contributes to the organization of the detention facility in accordance with the principles and guidelines laid down by a magistrate. The fact that a judge, who is no longer required to work in court, works permanently in the detention facility represents a substantial step forward in criminal enforcement law, which is ultimately also reflected in the purpose of enforcing custodial sentences imposed by a magistrate.

The issues concerning administrative powers, even if they do not give rise to litigation as extensive as that which is the subject of administrative jurisdictional powers, are presented in a section dedicated to them. In addition, the contentious aspects arising from requests for transmission for enforcement of judgments under Law No 302/2004 are dealt with through the prism of issues encountered in judicial practice.

The duties of the judge hearing convicted persons and those in the food refusal procedure are analyzed in the section on administrative duties. These duties are approached very differently by the judges working in this area and it was considered useful to present them in the context that they generate different interpretations in the application of the legal provisions.

The paper also does not neglect the role it plays in the parole board by organizing the hearing and by imposing compliance with certain rules applicable in court hearings. Although

it currently has no decision-making role, as a *de lege ferenda* proposal, the possibility of conditional release of persons deprived of their liberty should be considered, following an analysis which could initially take place before the committee of the detention facility (a committee which does not have to include the supervising judge and which gives reasons for its decision), with the possibility of appealing to the supervising judge and then to the court within the prison's radius in the event of a postponement. In the case of a conditional release decision, this decision by the committee should be reviewed by the supervising judge and then by the competent court. If the appeal is upheld by the judge and conditional release is ordered, this decision should also be confirmed by the court.

Working in a penitentiary environment, which is very different from a court environment, requires a certain specialization in the field, and the one-year delegation currently provided for in the legal rules is limited. The number of those wishing to work as supervising judges in general is quite low, and the presidents of the Courts of Appeal are often faced with the impossibility of identifying a magistrate who will accept delegation to the penitentiaries of the Courts of Appeal. In this context, consideration should be given to drawing up a list at national level of the judges willing to serve as permanent or substitute supervisory judges and the prisons in which they wish to work. In this way, there would no longer be any difficulties for supervisory judges to take their much-needed statutory leave, and this would solve this problem.

From the supervising judge's point of view, all this period of work in a detention facility contributes to a specialization in the penitentiary field, but at the same time it inevitably leads to a de-professionalization compared to the work carried out in the courts. Thus, returning to work as a court judge after the end of the secondment entails an effort that should be compensated for by a period of refresher training provided by the court, which does not necessarily have to involve study leave.

Chapter IV of the paper presents the parole procedure in the prison and court commissions. The introductory part of the chapter presents some historical landmarks of conditional release, both nationally and internationally, in the context of which some lesser-known influences on the evolution of the institution of release are not omitted.

The chapter presents the issue of compensatory days granted to detainees, which has been a source of divergence requiring the intervention of the High Court of Cassation and

Justice and the Constitutional Court.[9] The interpretations of these courts in the judgments they handed down have led to other divergent solutions in the courts. The difficulties in the parole procedure in foreign judgments mentioning the date of parole or benefits earned through work are also presented.

In the section on comparative law aspects, the institution of conditional release found in other European or American countries is presented, but at the same time the way in which the commissions assess a criterion that is missing in national legislation, namely remorse or regret of the crime, is also presented. The legislation that does provide for such a criterion imposes a difficult task on the evaluation committees, but also indicates certain ways of analyzing whether the prisoner meets this criterion.

Also in the comparative law section, situations where the granting of conditional release is analyzed differently, such as convictions for terrorist offenses or humanitarian cases, were presented. The ever-increasing incidence of terrorism has led countries faced with this problem to adapt their legislation in the most effective way possible to combat this phenomenon. The provisions of Spanish and French legislation imposing more restrictive conditions for convictions for terrorist offenses were analyzed. Also in the category of special procedures, there is legislation which derogates from the common provisions and allows release in humanitarian cases, even if the conditions are not met. Such rules are not to be found in national legislation, but may be a source of inspiration.

Whether considered as a criminal policy measure[10] or as a means of individualizing the sentence[11] , conditional release is also a direct source of litigation due to the importance it represents for the incarcerated person through the acquisition of the most important right that has been deprived of the person in detention - freedom.

The importance of having rules, but at the same time applying them in a way that does not lead to different outcomes for people in similar situations, is crucial in terms of the effects that the execution of a custodial sentence has on the person in custody.

It is for this reason that it is important for the legislator to intervene in order to specify the aspects that cannot be omitted from a parole hearing. The hearing of the detained person before the parole board is important, and the absence of an express legal provision gives rise in practice to different ways of dealing with this possibility in the parole board. A discussion with the prisoner in the Parole Board or the opportunity to explain the reasons why a prisoner

[9] These are Decision No 7/2018 of the High Court of Cassation and Justice and Decision No 242/2024 of the Constitutional Court.
[10] E. Dumbravă, *op.cit.*, p.11.
[11] A.D. Băncilă, *op.cit.*, p. 116.

does or does not want conditional release are essential in shaping the opinion of the Board members. This is the point at which the perspective of the person under review to comply with the rules of living in society (at least on a declarative level) can be analyzed. . [12]

At the same time, the legislator should allow the possibility of refusal of parole. Even if such situations would be quite limited, it should not be ignored that the execution of the remainder of the sentence in the case of revocation of conditional release may be inconvenient for certain persons.

The legislator should also detail the way in which disciplinary offenses raised or not sanctioned by reward should be assessed by the discharge board and provide guidance to the board in setting the time until the next review in these situations. We also note the need to regulate the valorization of the days earned through work after the moment of analysis in the release commission. In this way people who have been granted a deferred release would be motivated to continue working.

The last chapter is dedicated to the rights and obligations of persons deprived of their liberty, and it was considered appropriate to deal with these two subjects in the same chapter because of the link between them in many respects, but first of all because in the prison environment both are a source of litigation in which the supervising judge is involved. This connection can also be seen in the choice of the legislator for which the regulation of rights and obligations in Law no. 254/2013 occupies an important place within the same chapter, namely Chapter V of Title III of Law no. 254/2013. If in the content of Articles 58-80 of Law no. 254/2013 the legislator has detailed the rights that persons deprived of liberty may enjoy during deprivation of liberty, the following articles regulate, the obligations and then the prohibitions of persons deprived of liberty.

If we recall Dante's famous expression inscribed at the entrance to hell ("*Leave all hope, you who enter*"), we note, by contradiction, the innovative ideas that seek to apply new mentalities to prison staff and humanize the prison regime by recognizing and respecting the rights of prisoners, respecting a living environment as close as possible to that existing in society and maintaining ties with the family. One of the first measures to be taken when sentenced persons are admitted to prison is to inform them of their rights, obligations and prohibitions, as well as of the rewards that may be granted, misconduct and disciplinary sanctions that may be imposed.

[12] As we have seen in the legislation of other countries, it is important to expose a purpose in life after release.

Chapter V of Law no. 254/2013 addresses in detail and succinctly the rights of convicted persons: freedom of conscience, opinions and religious beliefs, right to information, right to consult documents of personal interest, right to legal assistance, right to petition and right to correspondence, right to telephone calls, right to online communication, right to daily walk, right to receive visits and right to be informed about special family situations, the right to intimate visitation, the right to receive, buy and own property, the right to medical care, treatment and care, the right to diplomatic assistance, the right to marry, the right to vote, the right to rest and weekly rest, the right to work, the right to education, the right to food, clothing, clothing and minimum accommodation. These rights provided by law for sentenced persons are enforced by the judge supervising the deprivation of liberty, while at the same time being limited to the rights mentioned.

These rights are also linked to the rights set out in the general provisions of the law, namely respect for human dignity (Art. 4), prohibition of torture, inhuman or degrading treatment or other ill-treatment (Art. 5), prohibition of discrimination (Art. 6) which, together with all civil and political rights that have not been denied by the final judgment of conviction, are rights that can be the subject of a petition to the supervising judge.

The presentation of these rights and obligations is approached through the prism of contentious issues encountered in judicial practice, and during this presentation it could be observed that the solutions identified in case law to the issues raised have generated a quite different judicial practice. Issues such as infringements of the right of visitation in the context of serving a custodial sentence in a prison located far from the place of residence, which are raised by prisoners in their complaints, are resolved by the supervising judge by analyzing the infringements of the provisions of the European Convention, since there are no legal provisions in national rules that mention the respect of the right of visitation in the context of the issues raised. Thus, if the possibility of challenging the place of execution of the sentence has generated a dispute that has required the intervention of the Supreme Court, the infringements of rights must be very carefully analyzed by the judges and the competent court in the context that such grievances often end up before the European Courts. In such situations the legislator must intervene by amending the law and prevent divergent practice in the analysis of the rights of detained persons.

The regulations on the obligations and prohibitions of convicted persons leave a fairly wide margin of interpretation in certain situations to administrative bodies, and thus represent a source of litigation generating divergent practice in the courts and at the same time in the offices of the supervising judges. The consequences for the detained person can be quite

significant in the context where, for example, a certain expression frequently used by detainees is considered to be a bad attitude and a sanction is applied to one detainee, while other detainees are not given similar sanctioning treatment, as is the case for example with the sanction for bad attitude.

The intervention of the legislator in detailing and clarifying such rules would not only help to avoid divergent practice, but would also help to achieve the aim of enforcing the sentence. To this end, the need for rules that are as clear as possible, especially in the case of those concerning penalties, is essential. At the same time, the regulation of the rights of detainees must also be very carefully considered in the context of a custodial sentence, and the purpose of the sentence laid down in the legal provision must be achieved on release (or at least efforts must be made to achieve it during the period of enforcement of the sentence).

Summa summarum, throughout this paper I have tried to point out some of the divergent issues that are a source of litigation during the enforcement of custodial sentences. The numerous rules governing the enforcement of sentences sometimes make uniform judicial practice difficult and thus facilitate the development of an ever-widening litigation. The solutions that can be found are a matter for the legislature, but also for the practitioners who are responsible for applying the legal provisions.