REFLECTION ON THE PRINCIPLE OF HUMANISM DURING THE EXECUTION OF CUSTODIAL SENTENCES

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Abstract:

This article aims to present some reflections on the principle of humanism of criminal law but it also considers the essential role the judge has in supervising the execution of judgements. One of the principles underlying the execution of custodial sentences is the principle of humanism. Most important of all is that enforcement of criminal sentences shall always reflect the main purposes of the penalty: the right to re-education and social reintegration of the convicted person. The re-education of offenders and their successful social reintegration should be among the basic objectives of criminal justice system and in accordance with the mandatory rules established by criminal law and criminal enforcement law.

Keywords: *custodial sentence, the judge charged with the supervision of the execution of judgements, food refusal, hearing the detainee.*

1. Introduction

The considerations in this study regarding the way how the principle of humanism should be found in executing custodial sentences starts from the inseparable link between man and law.

No matter how many the regulations are and the legal force they enjoy within the architecture of the national and international legal system is, the role of the man is indisputable, and the manner he understands to exert the responsibilities he was assumed by law will lead him to obtain some favourable results (the awareness of the social danger, re-education of the convicted persons and their preparation for social integration) or some unfavourable one (as abuses, systematic infringements of rights, as well as the enforcements of sanctions disproportionate to the social danger generated by).

On a national level the custodial sentences are regulated by the provisions stipulated in the Criminal Code[1] and resumed in the Law no. 254/2013. Within the first law there is a general presentation in the respect to the essential features and in the second one the option of the lawmaker to make a detailed presentation of the all the aspects related to the implementation and execution of the custodial sentences.

However, the general regulations represented by the Criminal Code and the special regulations represented by the Law no. 254/2013 are not to be regarded as separate and the specialized literature[2] emphasized over this aspect in the respect that they should be regarded from a comparative approach. The legal reference on criminal law is similar to the legal reference of criminal executional in the following respects:

a) both of them include definitions of the concept of "social protection", as well as the rules leading to its compliance;

b) both of them are references of public order, because the branch of criminal law is a branch of public law. The laws regulating this relationship have an imperative character, being the result of the will of the state, not of the person (which situation we could find ourselves in case of some rules with suppletive character);

c) both references present a close relationship with the rule of law, which is an aspect leading to the conclusion that the enforcement of the criminal law and of the executional criminal law it is not facultative, it is free-will applying, when the recipient of the law understands the gravity of the deed committed and the social danger he had generated, or it is enforced by constraint, when the recipient of the law does not understand neither the gravity of the deed or the social danger he had created and has the option to disregard the law.

2. The custodial sentences in Romania – notion and content

According to national law, the custodial sentences are imprisonment and life imprisonment. Both of them benefit from the general regulation of the Criminal Code and of the special regulation contained in the Law no. 254/2013.

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[1] Art. 56-60 Criminal Code.

[2] I. Chiș, A.B. Chiș, *Executarea sancțiunilor penale,* 2nd ed. revised and added, Universul Juridic Publishing House, Bucharest, 2021, pp. 168-169.

From a criminal law approach, the specialized literature[3] has emphasized that the principle of humanism is observed in conditions where the person investigated and subsequently judged for a criminal offence is a human being – which reason for he should be treated with respect and his rights must be respected.

Moreover, the state must have the necessary means to be able to guarantee the protection to the victims of the offences, and equally to ensure the resocialization process of the persons who have committed offences[4].

No matter how the custodial sentence is applied, that is, life imprisonment or the punishment, it is important to have in view that the purposes of their enforcement are the same: to prevent new offences to be committed, and also to build up a correct behaviour in respect to the rules of social cohabitation, towards the developed activities and lawful order, and these are the aspects the legislator chooses to expressly regulate in art. 3 of the Law no. 254/2013. Because the lawmaker understood these are to be expressly stated in the regulatory deed intended to execute the custodial sentences and measures of constraint ordered by the judicial bodies during the trial, hereby we can draw the conclusion that the purposes the punishments are ordered have a special importance and we have to take them into account when their role from an approach of the principle humanism is analysed.

From my point of view, the purpose of custodial sentences must be analysed in consonance with the respect of human dignity. Although this principle is distinctly regulated in art. 4 of the Law no. 254/2013, I consider that the state cannot impose the custodial sentences and measures depriving of liberty, and even less can draw as conclusion that their purposes are fulfilled, as long as the dignity of the person is affected and violated by the methods which the competent bodies understand to put them into execution.

When we analyse the principle of humanism from an approach of the manner this is applied and observed when a person is subject to a punishment or to a measure of constraint, it is important to make reference to the Universal Declaration of Human Rights adopted in 1948.

The specialized literature[5] underlines the essential role and the fundamental character of these provisions and also the importance to accept the Declaration in order to protect and guarantee the rights of the persons who are under custodial sentence.

The applicable international regulatory framework in the field of execution the custodial sentences is completed by the Resolution adopted in the First Congress of the United Nations about prevention of crime and the treatment of delinquents - on August 30th,1955. Within this document clear rules have been established regarding the treatment applied to the delinquents and the following principles have been adopted[6]:

a) the custodial sentence shall be performed within that moral and material conditions meant to ensure the necessary respect toward the human dignity;

b) the rules shall be impartially and without discrimination applied;

c) the purpose of the treatment for persons being under custodial sentence shall such supported to protect their health and their own respect;

d) the individual rights of the detainees are protected;

e) measures against tortures and other punishments or against cruel treatments or inhuman and degrading treatments shall be adopted.

At the level of 1992, in the national legislation was proposed to be introduced a provision according to which "*through the regime and treatment during the execution of the sentence, to the convicted person shall not be caused any sufferance, physical or psychical other than those caused by the punishment itself*"[7].

Unfortunately, disregarding the principle of humanism during the execution of custodial sentences has led to some international sanctions, which Romania started to experience beginning with 2007. The ECtHR in case *Brăgădireanu v. Romania*, in December 2007[8] has delivered a judgment stating that Romania does not fulfil minimal standards necessary to execute the custodial sentence in normal conditions.

The case *Băncilă and others v. Romania*[9] was the most recent conviction Romania has received from the ECtHR, as result of the same improper conditions which the authorities provide for the persons subject to custodial sentence. The Court has find out that the rooms where the detainees were housed in were overcrowded, with insufficient natural light and that the persons under custodial sentence does not benefit from a reasonable amount of food.

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[3] F. Streteanu, D. Nițu, *Drept penal. Partea generală,* vol. I, Universul Juridic Publishing House, Bucharest, 2014, pp. 73-74.

[4] M.A. Hotca, *Manual de drept penal. Partea generală,* 2nd ed. revised and added, Universul Juridic Publishing House, Bucharest, 2020, p. 55.

[5] I. Chiș, *Umanismul dreptului execuțional românesc – acordarea drepturilor în mediul penitenciar*, Hamangiu Publishing House, Bucharest, 2007, p. 7.

[6] *Idem*, pp. 8-9.

[7] I. Oancea, *Drept execuțional penal*, All Publishing House, Bucharest, 1996, p. 27.

[8] M.A. Hotca, *Manual de drept penal. Partea generală,* 2nd ed. revised and added, Universul Juridic Publishing House, Bucharest, 2020, p. 57.

[9] See ECtHR, judgement no. 35045/16.12.2021.

3. The role of the Custody Supervisory Judge – between humanism and efficiency

Returning to the applicable legislation at national level, a very important role is played by the custody supervisory judge. Though his position is well defined in the Law no. 254/2013, and his responsibilities are expressly specified in this regulating document, actually his position is not fully valued.

His role is defined in art. 9, para. (1) of the Law no. 254/2013, where the supervisory judge has to supervise and control the modalities the custodial sentences and privative measures of liberty are executed. Actually, the supervisory judge has an administrative role, and his responsibilities fully confirm this aspect. The supervisory judge resolves the complaints made by convicted persons; participates in commission of release on parole, participates in proceedings of refusal of food, but he also exerts other responsibilities provided by law.

In case of the complaints made by the detainees following the classification they are put into punishment enforcement regimes (maximum safety mode of incarceration, closed mode, semi-open mode and open mode of incarceration), the procedure stipulates that the detainee has the possibility to be listen by the supervisory judge, and I consider that this aspect to some extent violates the principle of humanism.

The legal provision stipulated in art. 32, para. (5) of the Law no. 254/2013 should be modified in respect that hearing to the detainee should not be facultative for the supervisory judge, but an obligation, similar to that instituted in the case of complaints made against the way in which the rights of detainees are violated.

In order to provide a better efficiency to the institution of the supervisory judge, I consider the lawmaker should rethink the legislative architecture regulating this institution and to prioritize the procedure before the supervisory judge. In this situation, the appeal exerted by the convicted person against the decision of the supervisory judge (appeal) would represent a genuine appeal, where the court will be able to administer evidence and will deliver a sentence by which to resolve the object of the appeal.

At present, the whole procedure before the supervisory judge is of administrative nature, in spite of the role he was assigned to by the legal provisions. The role of the supervisory judge can be exploited in a larger extent as long as he has the possibility to directly interact with the detainees and to perceive by his own senses the problems they are confronted with.

Indirectly, through the complaints formulated by the detainees, the lawmaker wanted to significantly reduce not only the number of abuses which the competent bodies could commit during the exercise of their duties, but also the possible errors that could occur on fulfilling the legal procedures.

The principle of humanism is applied and transposed in the case of custodial sentences and the measures privative of liberty also in Chapter IV of the Law no. 254/2013, untitled "*Conditions of imprisonment*", where the lawmaker decided some rule that must imperatively be observed within the relationship of the authorities with the persons deprived of their liberty.

Firstly, transportation of the convicted persons – regulated by the provisions of art. 46 of the Law no. 254/2013, can be performed by certain transportation means provided with adequate conditions for the fulfilment of such a procedure. The transportation means must comply with the minimal requirements for ventilation, lighting, but also for the passengers' safety during the ride, without producing humiliating physical sufferance. One of the humiliating situations the convicts can be transported by violating the principle of humanism is that when a great number of convicts are transported by a special vehicle. They have no seats to sit down, there is no artificial light inside the vehicle, there is no light coming through the windows and the ventilation system is not working. Therefore, the conditions of such a journey is performed by, could be considered as humiliating and equally causing physical sufferance.

Secondly, the transportation means must provide the least exposure of the persons deprived of their liberty to public audience. Usually, the special vehicles are provided with smoky windows that block the view from outside to inside. The discomfort that a person deprived of liberty would feel by exposing him to the public in situation when he is transported from one detention place to another or to siege of the judicial bodies, is consider contradicting the principle of humanism.

Another applicability of the principle of humanism exists within the legal provisions about the lodging conditions for the persons deprived of their liberty. The rooms of the detainees executing custodial sentence must benefit of normal living conditions. Likewise, the number of beds allotted for each room is different according to the execution mode applied to the persons lodged in them. If the convicted person is executing the punishment in maximum safety mode of incarceration, his room shall have one single bed, different from those convicts executing the punishment in closed mode, where the rooms are provided with two beds. In situation of a semi-opened mode or open mode

of incarceration, the detainees can be lodged even 10 in a room[10].

Moreover, even at international level there have been in view the provisions according to which the detainees should benefit of conditions for the execution of custodial sentences. Among the rules included in REC Recommendation (2006) of the Ministers Committee for the states member of European Union of January 11th 2006, hereby I mention the followings:

"a) the windows shall be wide enough to let the detainees be able to read and work under natural light, in normal conditions and to let fresh air to enter, excepting the rooms where there are adequate air-conditioning equipments;

b) the artificial light provided must correspond to the acknowledged technical standards of this field;

c) an alarm system must allow the detainees to contact the staff immediately[11].

It is not unimportant at all, that the regulations according to which the clothes worn by the convicted persons during the execution of the sentence must be respected. The lawmaker established the possibility the detainees to wear civil clothing, uniform not being imposed by the authorities. Such a possibility let the detainees to benefit of the goods received from family or relatives, and therefore the risk that the convicted person could wear humiliating or degradant dress it is excluded.

A special procedure, regulated in art. 54 and the followings of the Law no. 254/2013 is about refusal of food. This distinct regulation regarding the refusal of food indicates the fact that the legislator has understood, on one side the importance of such a measure, which any person deprived of his liberty can appeal to, and on the other side, the need to make a clear distinction within the rights which the convicts enjoy. The refusal of food it is not a right and it is neither qualified as such by the specialized literature, but it grants an increased importance, for which reason were established a number of measures and guarantees for the benefit of the convicted person who avails himself of such a procedure .

As I have previously mentioned, the supervisory judge, among his responsibilities it is also that of participating in the procedure of food refusal. His role is clearly defined in art. 54 para. (8) and para. (9) of the Law no. 254/2013, and according to these one, the supervisory judge has the obligation to listen to the detainee who is in situation of refusal of food (when his decision takes into account aspects related to the mode the punishment is executed, his rights or the appeal exerted against the decisions adopted by the commission of discipline). The supervisory judge can also listen to the convicted person whenever the refusal of food is justified by other causes than those the legislator established the obligation to listen to him.

The fact that the lawmaker has expressly and limitative established a number of situations where listening to the person who is in refusal of food is compulsory, indicates the fact that the principle of humanism is observed in this case too. Making a distinction from the situation where the convicted person is during the period of refusing to feed, the reasons he has chosen such a manner to protest against the authorities need a detailed analysis.

First reason the supervisory judge must listen to a detainee being in state of refusal of food it concerns the mode of his punishment execution. How this was established, as well as the changing of his execution mode, that is, from an inferior one to a superior one or from a superior to an inferior mode, all assume psychological and affective implications manifested by the convict. The rigors of the execution mode can generate severe problems which solving can be done only by the intervention of the medical staff to apply an adequate medical treatment.

The second reason concerns non-compliance with the rights of the detainee. According to the law provisions, the convicted persons benefit of a number of rights – expressly and limiting stipulated, whose violation must lead to sanctions commensurate in respect to the injured social value. The refusal of food can legally occur in the situation his rights are violated by the authorities of the prison, as well as in the situation they are violated by the other detainees.

The third reason is represented by the decisions adopted by the commission of discipline, when it is notified about the incidents the detainees are involved in. The solutions considered to be unjust by the convicted can be attacked with complaint to the supervisory judge, but this procedural approach shall not exclude the possibility for the detainee to start refusal of food.

Regarding this proceeding, it is important to mention how the whole system in the prison is working when one of the convicts starts refusal of food. Beginning with the notification method (*ex officio* notification included) until the measures of putting the detainee under observation during the whole period he refuses to feed, indicates an increased interest on the part of the legislator, taking into account the major implications that can occur with the detainee's life.

Last but not least, I shall also mention the way in which the principle of humanism is reflected in medical procedures the convicted person can benefit from. There are several situations when the detainees need

[10] I. Chiș, A.B. Chiș, *op. cit.*, p. 413.
[11] *Idem*, p. 414.

specialized medical treatments, which cannot be ensured in the penitentiary.

A relevant example is that of the pregnant women during the period of custodial sentence, and the birth happens during this period. According to the law provisions these women receive antenatal care and they are given the possibility to give birth in a medical unit outside the penitentiary.

The role that the mother has in the relationship with her own child, as well as the importance of her presence in the first part of the child's life, led to the adoption of regulations that allow women who have given birth in the penitentiary to be able to take care of their child until the age of one year, unless she is fallen of parental rights.

4. Conclusions

The principle of humanism is one of the fundamental principles that must be respected during the execution of the custodial sentence. This is expressly reflected in the regulations concerning the rights of the convicted persons, but this principle is present also in the other rules by which the lawmaker tried to establish efficient mechanism aimed to combat possible abuses that could be done both by the authorities and by other detainees too.

Failure to comply with an internationally recognized principle incur sanctions for the states in respect with the ECtHR finding irregularities that create unfair conditions for the execution of custodial sentences. On one hand, the states must insure themselves to have efficient criminal rules, leading to the accomplishment of a policy able to reduce the criminal phenomenon, and on the other hand, that convicted persons benefit from adequate means and procedures for the execution of custodial sentences, without prejudice to their health, dignity or integrity.

Within the present regulations, the role of the supervisory judge proves to be inefficient, because the whole set of procedures that he must follow in a detention place are not harmonized with the European standards on the execution of custodial sentences.

In situation where the supervising judge will exercise those duties provided by law and will have the necessary means to be effectively involved in the problems that the persons being in custodial sentence claim, then the number of abuses will decrease considerably – and this aspect it will also lead to the reduction of the reasons that currently attract convictions for Romania, as a result of the violation of the ECHR.

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