# SOME CONSIDERATIONS REGARDING THE PROVISIONS OF LAW NO. 254/2013 ESTABLISHING THE REGIME OF EXECUTION OF CUSTODIAL SENTENCES, THE SUMMONS PROCEDURE, THE HEARING, PRESENCE IN COURT AND RIGHT TO DEFENCE OF THE DETAINEE

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**Abstract**

*Art. 39 of Law no. 254/2013[1], bearing the title „Establishing the detention regime for custodial penalties" requires a wide debate, as it comprises regulations that are contradictory, to say the least, mainly within para. (14) to (19) of this legislation. These provisions pertaining to art. 39 are correlated within Law no. 254/2013 with art. 56, titled „The exercise of a convicted person's rights" - para. (12), and with art. 104 - „Challenging a decision by the disciplinary board" - para. (12). The regulations falling under the scope of this study are essential for the observance of convicted persons' rights, their right to free access to a court of justice (art. 21 of the Romanian Constitution), and to a fair trial, in proceedings related to challenges against the resolutions passed by the custodial supervisory judge in response to applications by inmates regarding the observance of their rights and against the decisions of the disciplinary board in matters relating to the customisation or the amendment of their custodial regime.*

***Keywords:*** *detainees, free access to justice, enforcement of custodial sentences law, right to defence.*

## 1. Introduction

*Ab initio*, we point out that, pursuant to provisions set forth under art. 56 para. (2) of Law no. 254/2013, „The provisions under art. 39 para. (14)-(19) will apply accordingly in regard to challenge applications submitted by convicted persons against the resolutions of the custodial supervisory judge, in regard to the exercise of detainees' rights."

When this type of cases is brought before a judge, the court may decide not to order the detainee to be brought before the magistrate, pursuant to art. 39 para. (16) of Law no. 254/2013, as the convicted person is summoned to appear before the judge only when the court so decides. In our opinion, this practice may spark a debate regarding the infringement of the right to defence (and to a fair trial), as there appears to be a disbalance in the principle that mandates that both the prosecution and the defence are able to employ equally powerful procedural instruments.

To the same respect, we conclude that a detainee will be discriminated against, as long as their presence in person before the court is by law not mandatory, while the prison administration (or their representative) and the prosecutor's office by default can raise exceptions, submit applications and argue, they can be heard by the court, as they participate in the proceedings in person, while the convicted person cannot effectively take part in the proceedings, as they are only brought to the court upon an order thereof.

This is how the principle of oral, direct and adversarial proceedings is breached, and this principle is inseparable from the requirements of a fair trial, one in which the court may discern between truth and error, thus ruling in accordance with the facts argued by both parties to the criminal proceedings.

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## 2. Paper content

Indeed, the convicted person and the prison administration are allowed to submit written arguments and memos, pursuant to art. 39 para. (15) of Law no. 254/2013, but in reality this right is closely tied to the right to consult the case file that is stored in the archive of a district court, *not inside the correctional institution*. Inmates can only access the case file following a written request submitted to the court, as this right is not provided for during the trial phase before a custodial supervisory judge, where proceedings are held inside the penitentiary.

In the trial phase before the custodial supervisory judge, the hearing of a detainee, pursuant to art. 56 para. (3) of Law no. 254/2013, is mandatory, and it should be carried out at the very place of detention.

In this phase, the convicted person has the possibility to argue their complaint or to withdraw their application, without being able to gain access to the arguments submitted by the prison administration, being therefore unaware of the motives behind whatever measures had been ordered in regard to the exercise of the prisoners' rights.

The custodial supervisory judge will issue a motivated resolution, settling the application, within 15 days of the submittal date, pursuant to art. 56 para. (6) of Law no. 254/2013, and the resolution is notified to the detainee and to the prison administration, within 3 days of the adjudication date.

Thus, the reasoning of the custodial supervisory judge will remain unbeknown to the detainee, who will not be able to learn why the court decided upon a certain solution, nor will they know what the prison administration argued in regard to the situation brought before the court.

The only possibility of a convicted person to consult the documents in their respective case file is, therefore, as mentioned above, to develop a request to consult and make photocopies of the case file and to submit it to the court, which represents a significant financial effort, in order for the prisoner to gain access in person to the court archives, and some inmates are unable to sustain such expenses. Therefore, in the trial phase before the custodial supervisory judge, the detainee is deprived of an effective possibility to consult the case file registered in the wake of their application, also being unable to be informed of the arguments of the prison administration or to study other documents therein.

The provisions under para. (14)-(19) can also be found within art. 104 - Challenging the decision of the disciplinary board - which allows convicted persons to appeal the decisions of the disciplinary board, in regard to any disciplinary sanctions handed down for the prisoners' acts of misconduct.

In accordance with art. 104 of Law no. 254/2013, in the event of a challenge lodged by an inmate against the resolution that settles the (application) against the disciplinary board's decision, in the trial phase, the court will hear the convicted person, with no exceptions, and the provisions under art. 39 para. (14)-(19) will apply accordingly.

And so, we find ourselves in the same above mentioned situation, similar to art. 56 para. (12) of the Law no. 254/2013, regarding the violation of the right to a fair trial, the breach of the principle that mandates equally powerful procedural means to be at the disposal of both prosecution and defence, and the infringement of the principle of oral, direct and adversarial proceedings.

A paradoxical situation is created by the need to hear the convicted person, in the context where the court may order the detainee to be brought in person before the judge for one or more court dates, but only when so requested. Failure to bring the prisoner to court in the trial phase inherently brings an impossibility for the detainee to be heard and to effectively argue their defence, thus being unable to make applications or requests, to raise exceptions, to be asked and heard by the court, in order to clarify all the circumstances and aspects required if the court is to discern the truth.

In accordance with art. 39 para. (14), the convicted person and the prison administration will be summoned to appear before the court in the proceedings related to the settlement of a challenge - this means that the summons to the prisoner will be served at the correctional facility, pursuant to art. 257-260 CPP.

Summoning a person to appear before a court implies that the presence of that person is mandatory, taking into consideration the provisions of art. 257 para. (1) CPP, that defines this notion as the „summoning of a person before a criminal investigation body or a court of law"; so the legal provisions therein are clear, otherwise the lawmakers would have opted to use the concept of „notification" or „communication" instead of „summoning".

In practice, courts will issue so-called summons „without the need to appear", which means that the convicted person will not be brought before the judge by the prison administration on the day of the trial and

the proceedings will unfold in the absence of the detainee, preventing the latter from being able to argue their own case.

Pursuant to art. 39 para. (17) from Law no. 254/2013, the „prosecutor and the prison administration representative will take part in the proceedings and submit arguments", meaning that the trial phase will be completed without any contribution from one of the parties (namely, the convicted person), which constitutes a lack of proportion that breaks the balance between prosecution and defence taking part in criminal proceedings, in terms of procedural means.

Moreover, the proceedings before the custodial supervisory judge are assimilated, mutatis mutandis and de plano, to a first instance adjudication on the merits of a case, and the judicial procedure before a trial court - where the resolution of the custodial supervisory judge is challenged - becomes assimilated to an avenue of appeal.

As we previously demonstrated, the convicted person has no actual possibility to consult their case file and to gain knowledge of the criteria/motives argued by the penitentiary's administration, so it would be mandatory for the detainee to take effective part in the proceedings before the court, if we are to observe their right to a fair trial and to defence.

It should be noted that, in the legal framework regarding the enforcement of criminal judgments, there are no provisions that could ensure the actual presence of a convicted person before a court of law.

As for the participation of the convicted person in the trial and the consultation of the documents pertaining to the case file, we consider them to be mandatory, in order to prepare a defence, but art. 39 para. (16) of Law no. 254/2013 prevents both: „The convicted person is brought to the proceedings only if so ordered by the court, in which case the detainee shall be heard". Thus, the defence is not effective, but merely formal, and in this case we are in the presence of a discriminatory practice afflicting the convicted person, in comparison to the rights enjoyed by the legal counsellor representing the penitentiary (who is a party in the proceedings) and the representative of the prosecutorial service, who both take part in the proceedings and are offered the chance to submit arguments, to submit requests, to raise exceptions and to offer evidence, etcetera.

Pursuant to art. 351 para. (1) CPP, „the case is tried before a legally constituted court of law and it shall unfold in an oral, direct and adversarial court session".

However, the existence of para. (16) in art. 39, containing the actual wording „only if so ordered by the court", contradicts the principle set forth under art. 351 CPP, insofar as the proceedings must be carried out „before a court of law", and the practice of bringing over the convicted person only if so ordered by the judge creates a contradictory and adverse situation, detrimental to the detainee.

An examination of the current-day court rulings will reveal that only 4% of the cases involving a petition to challenge a resolution by the custodial supervisory judge or against a decision by the disciplinary board are granted, which is an insignificant number, compared to the number of the registered applications.

It can also be noted that in all of the cases, albeit legally summoned before the court, the parties did not attend the proceedings (the detainees were absent on the trial date) and the trial unfolded in the absence of the prisoner. It is not a refusal from the part of the detainee that invariably causes their impossibility to be present in court, but it is also a consequence of the prisoner not being brought before the court for the settlement of the case, as previously pointed out.

Another relevant aspect concerns the letter of summons issued by the court, where there is a mention made in respect to the provisions of art. 258 para. (1) letter e) CPP, namely „the mention that the summoned party has the right to an attorney to accompany them on the trial date that was set". In practice, this requirement is not met, on one hand as a result of the convicted person's failure to participate or to be present in court and, on the other hand, as a consequence of the detainee's impossibility to contact their respective lawyer (who, most of the times, is court-appointed), again, because the detainee is not personally brought to court, and the appointed attorney does not show up at the detention facility to confer with the petitioner, in order to prepare a defence.

This explains why courts will grant so extremely few applications against the resolutions of the custodial supervisory judge, regarding the customisation of the detention regime, and against the decisions of the disciplinary boards; another factor is the lack of actual merits or the omission to properly explain the reasoning behind an application, both in terms of the facts and of the applicable law, in the absence of an effective defence, that could be able to submit a sound reasoning, based on conclusive, useful evidence, that allows the court to draw conclusions as to the merits of the detainee's application.

We will now revert our attention to the exercise of due process rights and to the procedural timeframes set forth under the law, ascribing the manner in which a prisoner is to be summoned before the court, for the purposes of arguing the merits of their application.

The relevant legal provisions in this respect set forth certain regulations regarding the service of a court's letter of summons, as well as other documents pertaining to the procedure. Thus, in accordance with art. 155 para. (1) point 11 CPC, the inmates will be served their court summons at the penitentiary's administration.

In civil cases, the service of court summons is regulated by peremptory norms, laying down two principles regarding the summoning of parties to a civil case:

- in civil matters, the parties' presence is not mandatory, but it is mandatory that all parts to the case be duly served with their summons, as per art. 153-157 CPC;
- as a rule, the parties will be served with their court summons, and only in exceptional circumstances the case is adjudicated without the actual participation of the litigants (such as resolving a conflict of jurisdiction, a challenge regarding the unreasonable duration of the proceedings, a complaint against the resolution of the said challenge), or sometimes the participation of the parties is left at the discretion of the court (for example, the procedure for securing evidence, the non-contentious judicial proceedings, injunction orders, small claims applications, etcetera).

There is a major difference between the contents of the criminal court letter of summons and the contents of the civil court letter of summons, namely, in the case of criminal summons, pursuant to art. 258 para. (1) letter e) CPP, it is mentioned that the *summoned party has the right to an attorney that will accompany them on the due date*, while the civil summons will mention that „*once the letter of summons has been served, and the party acknowledged the receipt thereof by signing the advice of delivery slip, either personally or through legal representative or retained counsel (…) the summoned party is presumed to have knowledge of the following court dates, subsequent to the one for which the summons was served to them*".

It should also be noted that, in the case of civil proceedings, even if the party has been duly served with the letter of summons, pursuant to regulations of a peremptory nature set forth under the provisions of art. 153 CPC - „The obligation to summon the parties", as previously explained, the summoned party is under no obligation to show up in court or to participate in the proceedings.

Thus, according to scholars[2], the service of court summons is a law institution that allows a person to be summoned at a given date before a judicial body (the judge for rights and liberties, for example, in such circumstance when a proposal to remand a person in pre-trial detention, when the defendant was not previously taken into custody, or for the purpose of an early hearing or early securing of evidence), before the prosecutorial bodies (for instance, the suspect or the witnesses will be summoned for a hearing), the preliminary chamber judge (where the civil party is summoned in order to specify whether or not they request that the introduction of a party who bears civil liability in the case), or before the trial court (either first instance, court of appeal or when exercising extraordinary legal remedies, after sentencing).

Further on, the service of due process acts is defined as the procedural means by which the judicial bodies:

- convey a process act or a copy thereof to a participant (for example, a copy of the indictment that is notified to the defendant or a copy of the minutes of the criminal sentence that is notified to the prosecutor, to the parties, to the aggrieved person and, when the defendant is in preventive custody, to the administration of the respective place of detention, so that a legal remedy may be exercised;
- notifies the participants in criminal proceedings of a process act or measure that was taken or is about to be taken or it informs the participants about a procedure incident that needs to be settled (for example, informing the aggrieved person that charges were dropped).

In regard to the notification, it has been noted by scholars that it represents the means by which a judicial body informs the participants to a criminal process that a certain act was or was not carried out or that a measure was taken (for instance, the parties are notified of the date when the application to transfer the case is set to be examined, with the mention that they can submit arguments and memos, also being allowed to attend the court session where the matter is to be settled; the same is when the aggrieved person is informed that the defendant was released from pre-trial custody).

The aspects set apart the institution of summoning, on one hand, and notification, on the other hand, and we will point out that „*whenever the rules set forth in regard to the service of court summons are disregarded,*

[2] M. Udroiu, *Criminal Procedure Synthesis*, General Part, 3rd ed., vol. 2, C.H. Beck Publishing House, Bucharest, 2022, p. 1403.

*the person, the person can be brought before the judicial body on the basis of a bench warrant, pursuant to art. 265 para. (1) CPP, whereas the law provides no retaliatory measures when a civil court notification/invitation or notice is be disregarded*"[3].

Scholars have made detailed arguments[4] on the differences between the summoning and the invitation of a person, the service of the summons, the means employed for serving a letter of summons, thus defining the criminal procedure law institution of summoning.

In the matter of summoning parties and participants to a criminal process, a major difference stands out, in comparison to civil cases, which is that parties are not mandated to appear (to actually present themselves before the court), but it is mandatory for all parties to be duly served their letters of summons, and the court may examine the case even when the parties are absent, provided that the service was duly rendered (if the parties acknowledged the receipt of the summons).

In regard to the notification of parties in civil cases, this institution falls under the provisions set forth in art. 229 CPC, which stipulates that „*the party who personally or by agent filed an application to the court and is informed of the court date, as well as the party that was present in court, either personally, through legal representative or through retained counsel, even when their power of attorney does not include being informed of the following court date, will no longer be served a letter of summons for the trial phase before that court, as it is presumed that the party is informed of all subsequent court dates*".

It is also worth noting that the service of court summons in criminal proceedings is peremptory and, also, the summoned person is under an obligation to present themselves at the date and place set by the summoning judicial body; when a party who was duly served a summons letter fails to appear before the judicial body, as a rule, the criminal process can continue in the absence thereof, while material witnesses, expert witnesses and court interpreters who fail to appear can be subject to a judicial fine; also, failure to appear when summoned constitutes grounds for the issue of a bench warrant.[5]

One supplemental reason, besides those already examined above, that is worth considering, is the fact that it is impossible to exercise any judicial remedies against a final criminal district court ruling (revision, challenge against enforcement, challenge for annulment, reopening criminal proceedings in case of an in absentia trial), if the object thereof is a challenge against the resolution of the custodial supervisory judge in regard to the exercise of prisoners' rights or if the object of the trial was a decision by the prison panel in charge with customisation, establishment and amendment of the detention regime or if it was a decision by the disciplinary board; the only possible solution in these situations is the dismissal of the application, as inadmissible, and for that reason it becomes imperative that the convicted person participates/is brought before the court, in opposition to the current regulations set forth under art. 39 para. (14)-(19) of Law no. 254/2013, which stipulates that the effective participation of the detainee is left at the court's discretion.

## 3. Conclusions

To conclude, in light of the abovementioned arguments, and taking into account that the right to justice is fundamental in a democratic state, that the right to free access to justice should be guaranteed for all categories of persons, even to prisoners, as knowing this right to be enshrined in art. 21 of the Romanian Constitution, it is mandatory to submit a proposal to amend the law, prompting the legislators to modify the provisions set forth under art. 39 para. (14)-(19) of Law no. 254/2013, in the way that a convicted person's presence in court to be actual and effective, not just formal, when the scope of the trial is a challenge against the resolutions of a custodial supervisory judge or against a decision by the discipline board. This will ensure that the effective (and not illusory) right to a fair trial is observed, if the convicted person is to be present in court by default (except when the detainee requests, prior to the hearing and in writing, that they want the application settled in their absence), and also if the convicted person's other procedural rights are observed as well (the consultation of the case file and access to legal counsel, etc).

[3] I. Neagu, M. Damaschin, *Criminal Procedure Treatise. General Part - in Light of the New Criminal Procedure Code*, Universul Juridic Publishing House, Bucharest, 2014, p. 672.

[4] Gh. Mateuț, *Criminal Procedure, General Part*, Universul Juridic Publishing House, Bucharest, 2019, p. 932-950.

[5] M. Udroiu, *op. cit.*, p. 1403-1423.

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