

## DISCUSSIONS REGARDING THE PRESCRIPTION IN CRIMINAL LAW

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**ABSTRACT:** *This study displays certain controversial issues related to the prescription of criminal liability and the prescription of the punishment execution, analyzing them both theoretically and practically, based on the resolutions of the courts in Romania. Thus, the study debates upon the acts that can lead to interruption of the course of prescription and the punishment to be taken into account when calculating the prescription period of the punishment execution, as well as upon the relevance of the period when the trial was suspended in the course of adjudication in what concerns the plea of unconstitutionality, under the former regulations in this matter.*

**KEYWORDS:** *prescription of criminal liability, prescription of the punishment execution, criminal law*

**JEL CLASSIFICATION:** *K14*

The analysis of the Constitutional Court starting its foundation and until 30<sup>th</sup> September 2011, analysis published on its official site<sup>1</sup>, displays the following aspect: the Constitutional Court was informed about an increasing number by 2009 regarding the resolving of the pleas of unconstitutionality raised in the courts, from a number of 24 pleas of unconstitutionality in 1992, reaching to a number of 8819 in 2009, eventually this number being reduced by half (4743) the following year, so that in 2011 only a number of 1075 pleas of unconstitutionality to be recorded.

There is no doubt that the reason for the sudden reduction in number of the pleas of unconstitutionality is a result of the modification of the Law no. 47/1992 regarding the organization and functioning of the Constitutional Court, of the Code of Civil Procedure and the Code of Criminal Procedure, modification brought by the Law no. 177/2010<sup>2</sup>, which led to the removal of the automatic suspension of trials in case of raising a plea of unconstitutionality. The legislative initiative followed a series of suspensions of the corruption cases in the High Court of Cassation and Justice in May 2007, also criticized

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<sup>1</sup> [http://www.ccr.ro/statistics/pdf/ro/activ09\\_2011.pdf](http://www.ccr.ro/statistics/pdf/ro/activ09_2011.pdf)

<sup>2</sup> Published in the Official Gazette of Romania no. 672 of the 4<sup>th</sup> October 2010.

by the European Commission in the country reports. The challenging compliance with the Constitution of the legal provisions had been transformed from a legitimate right into abuse, widely used to delay the resolution of certain cases.

But what was the purpose for delaying the resolution of cases? The answer of any practitioner would be the same: the intervention of criminal liability prescription, namely, special prescription.

The Criminal Code provides two forms of prescription, namely the prescription of criminal liability (Article 121 Criminal Code) and the prescription of punishment execution (Article 125 Criminal Code).

*The prescription of criminal liability* lies in the quashing of the criminal legal settlement of conflict produced by a crime commission as a result of its failure within a term set by the law<sup>3</sup>. Criminal liability is prescribed for any offense other than crimes against peace and humanity, whose particular seriousness manifested in the Second World War, forced them to be declared as imprescriptible<sup>4</sup>. It is to be noted that in the new Criminal Code which would enter into force, the regulation differs in that the crimes of genocide, the crimes against humanity and war crimes are excluded from prescription.

*The prescription of punishment execution* means the extinction of the executive force of a sentence of conviction due to the passage of time<sup>5</sup>. Both the course of the prescription of criminal liability and the course of the punishment execution prescription may be interrupted or suspended, the reasons being those provided by the Criminal Code, a situation that caused some controversy in practice and doctrine.

Thus, Article 123 of the Criminal Code provides that the interruption of the course for the criminal liability occurs when any act performed, according to law, will be sent to the accused or defendant in the course of the criminal trial. Regarding this aspect, the practice held that acts of research, even pre-start of the criminal trial no matter how brief they would be and carried out by the prosecution in order to discover the crime, interrupt the criminal liability prescription as this discloses the fact that this authority was concerned with finding the truth. In a particular case, the juvenile defendant who had committed manslaughter, after four years of committing the crime, was taken a statement regarding his activity the day when he committed the crime. The court decided that although the initiation of the criminal action took place only after six years, the prescription period must be calculated from the moment of making the statement, as this act has interrupted the course of prescription<sup>6</sup>. The doctrine criticized this solution by showing that in order for the interruption to intervene the act should be carried out against the defendant, meaning that the criminal trial should be started and that not any act, even pre-start of the criminal proceedings may discontinue the course of prescription.

Regarding the prescription of the punishment execution, the jurisprudence shows that delaying the punishment execution but also its interruption establishes grounds for suspension of the prescription course, the prescription resuming its course starting the day when the trial of suspension ceased<sup>7</sup>.

<sup>3</sup> See C. Bulai – *Manual de drept penal partea generală*, All Publishing House, Bucharest, 1997, p. 331.

<sup>4</sup> *Ibidem*, p. 334.

<sup>5</sup> See Constantin Mitrache, Cristian Mitrache - *Drept penal român, partea generală*, Universul Juridic Publishing House, Bucharest 2006, p. 430.

<sup>6</sup> The Supreme Tribunal, Criminal Division, Decision no. 1816/1978.

<sup>7</sup> The Supreme Tribunal, Criminal Division, Decision no. 1069/1971

The suspension of the prescription course during the deferment of punishment execution was also presented by the recent jurisprudence<sup>8</sup>. Thus, by the criminal sentence no. 716 of the 14<sup>th</sup> December 2001, the Court of Turda admitted the challenge on enforcement of the convicted RS and stated that the execution of the 3 years and 4 months imprisonment sentence is prescribed. But according to Article 128 paragraph 2 and 3 of the Criminal Code, the term course of the prescription regarding the punishment execution is suspended in the cases and conditions provided by the Criminal Procedure Code, the prescription resuming its course the day the trial of suspension ended. These include also the case provided by Article 453 in the Code of criminal procedure. Thus, although the convicted received a deferment of the punishment execution of 3 years, 8 months and 11 days, this period is added to the term of 8 years and 4 months, resulting from adding the penalty of 5 years, as the suspension of the prescription term occurred<sup>9</sup>.

In another case, the defendant alleged interference of the prescription regarding the sentence execution, claiming that he found himself in the situation of executing the sentence of 18 years prison, criminal sentence whose execution was suspended for one year by the Tribunal of Bucharest and on the expiry of interruption, the convict never presented to continue the punishment execution. The court held that in this situation the provisions of the Article 127 paragraph 2 of the Criminal Code are applicable, according to which avoiding the punishment execution after the beginning of the punishment execution brings about another term of prescription since the purloining. On appeal, the appellant argued that, by Decree no. 11 of the 26<sup>th</sup> January 1988 regarding the amnesty of certain crimes and the reduction of the penalty, the punishment of 18 years was reduced by half, to 9 years prison sentence, in which case the term of the execution prescription is 14 years according to Article 126 paragraph 1 letter b of the Criminal Code, a term which was fulfilled. In the statement of reasons for the decision of dismissing the appeal, the Supreme Court noted that the prescription terms of execution are set in relation to the punishment imposed by the final decision of conviction. Starting that day the prescription term begins to flow and the term shall not be reduced in relation to the subsequently reduced penalty, as in the case of the application of the Article 2 of the Decree nr. 11/1988 or as a result of the partial pardon or as a result of the commutation of the sentence into an easier one. The only case of reduction for the prescription terms is provided by the Article 129 and refers to the situation when at the moment of the crime commission the defendant was a minor<sup>10</sup>.

We believe, however, that this matter requires certain explanations in favor of the defendant. Thus, the current Criminal Code does not provide what exactly *the sentence to be executed* means. The jurisprudence established that this would mean the penalty imposed by the final decision of conviction. But this definition would signify an interpretation of the legal text that tells against the accused/convicted.

In our opinion, we can interpret the text, by referring to the provisions related to rehabilitation. In this case, the legislator, aiming to show in a definite way the fact that the period of rehabilitation is calculated according to the penalty imposed in the decision, he

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<sup>8</sup> The Supreme Court of Justice, Criminal Division, Decision no. 4692 of the 22<sup>nd</sup> October 2003.

<sup>9</sup> See Marina Constantinescu – *Executarea hotărârilor penale, practica judiciară*, Hamangiu Publishing House, 2006, p.96.

<sup>10</sup> The Supreme Court of Justice, Criminal Division, Decision no. 792 of the 12<sup>th</sup> February 2002.

expressly claimed that by using the term “in case of imprisonment sentence for more than ...”. But in the case of prescription he does not use the term “conviction” but “execution”, which leads our thoughts to the mandate of execution. Thus, if for some reason, the penalty was reduced, the court would issue a mandate of execution for reduced penalty, eventually executing only this penalty. Therefore, we believe that in the case of prescription, the legislature had in view the punishment that the convict actually had to execute. This is also confirmed by the fact that the notion of *the punishment that is to be executed*, as a definition, will be introduced in the new regulation of the Criminal Code, which means “penalty set by the court, taking into account the subsequent causes for its changes.”

Returning to the problem raised in the beginning of this study, we conclude that the legal practice has been inconsistent in terms of prescription in case a plea of unconstitutionality has been raised and the trial was suspended pending its resolution. Thus, the Supreme Court<sup>11</sup> has established that prescription eliminates criminal liability no matter how many interruptions would occur, if the prescription term provided by Article 122 of the same Code was still exceeded by half. In the case where the trial was suspended according to the former Article 303 paragraph (6) Code of criminal procedure, during the course of adjudication for the plea of unconstitutionality, the provisions of the Article 124 – Criminal Code would be incident if the term of prescription provided by Article 122 of the Criminal Code is supplemented with an additional half of its length and as well the period of trial suspension pending the resolution of the plea of unconstitutionality.

We disagree with this practice as this case of suspension for the course of prescription is not found among the cases of suspension counted restricting by the legislator, a resolution like the one shown above, doing nothing but add to the law, which is an inadmissible fact.

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<sup>11</sup> The High Court of Cassation and Justice, Criminal Division, Decision no. 3473 of the 6<sup>th</sup> October 2010.