

DRIVING UNDER THE INFLUENCE OF PSYCHOACTIVE SUBSTANCES. „INFLUENCE” AN ISSUE IN JUDICIAL PRACTICE?

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ABSTRACT: *"At the end of the 19th century, the punitive celebration disappears, punishment becomes the most hidden part of the criminal process, leaving the domain of everyday perception to enter in abstract consciousness," recorded Michel Foucault in his famous work "Discipline and Punish: The Birth of the Prison" (Foucault, 1997). Therefore, it tends to a change of paradigm, it is desired that the effectiveness of the punishment is not the product of its visible intensity, but of the high degree of certainty. Metamorphosed from a theatrical act (often violent and public) into an administrative act, hidden from the eyes of citizens, criminal policy had to be adapted to encompass the new valence of the act of justice. One of the main means of punitive efficiency by referring to the abstract consciousness is that of the punishment limits that the legislator adjusts according to the criminal phenomenon, aiming both at an inhibitory, repressive and educational effect. It has often been assumed that the criminal recrudescence is due to low sentencing limits, and thus increasing the sentencing limits has been considered to fight all crime, omitting the adaptation of the entire legal norm to contemporary realities. Even the judicial act was not spared from this approach, although the scientific processes evolved and the probation together with them, in the face of a rigid legal norm, the judicial practice refuses to adapt to the new reality. Against the background of a national hysteria due to the scourge of drugs, legal arguments take precedence over scientific arguments.*

KEYWORDS: *criminal law; driving under the influence of psychoactive substances; the influence of the psychoactive substance; alteration of reflexes; medico-legal expertise*

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Driving a vehicle for which the law requires the possession of a driver's license by a person under the influence of psychoactive substances is punishable by imprisonment from one to 5 years or a penal fine. Unlike the basic form of the crime, we note that the legislator no longer establishes a value criterion of intoxication of the person with psychoactive substances for the existence of the crime (Radu, 2021). A legal norm, which offers, at first reading, the premises of an easy application, turns out to raise particular problems in current judicial practice.

Although the phenomenon is not a new one, the worrying increase in the consumption of psychoactive substances in recent years¹ has been the catalyst for public authorities to

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¹ in this sense, the Balance Sheet of the Cluj Court of Appeal for the year 2023, according to which "The number of drug cases, newly registered before the Cluj Court of Appeal, as an independent court, doubled in 2023

intervene. Sometimes through legislative changes, sometimes through interpretation of existing legislation.

Although this paper does not dare to deal with the offenses of trafficking, introduction into the country, possession for the purpose of consumption, provided for by Law 143/2000, we cannot fail to note the legislative amendment introduced by Law no. 45/2023 and to express our deep concern that the increase of the punishment limits in the case of these crimes exceeds any kind of patterns, and destabilizes the whole construction of the punishment limits in the current legislation. It should be noted that the amendments brought by Law no. 45/2023 are the result of a bill initiated with aplomb by a deputy in 2019. In 2020, the bill was sent for promulgation, but the President of Romania requested the re-examination of the proposed law, reasoning, among other things, that "the proposed legislative solution contradicts the National Anti-Drug Strategy 2013-2020 and the solutions proposed by international forums in the field and that the law should focus on developing the network of specialized services, not on increasing penalties". Thus, the project is sent back to the Parliament, for re-examination, but three years later, having a favorable social context, the project is sent again for promulgation, modified in some places, but with the same increased punishment limits. In an attempt to conclude, we will stop at a single example, in the opinion of the legislator, the degree of abstract danger that determines the limits of punishment in the case of the act of introducing high-risk drugs into the country is identical to that of murder, both acts being sanctioned with a prison sentence of 10 to 20 years.

Without contesting the dangerousness of the phenomenon of the consumption of prohibited substances, it must be recognized that the opinion of the President of Romania expressed through the request for re-examination seems to be a correct one, the social problem generated by drug consumption must be focused mainly on the development of specialized support services, therefore on a prophylactic strategy and not on the increase of punishments, since the measures aimed at punishing people addicted to drugs have a low social efficiency and significant costs.

However, returning to the object of the proposed exegesis, we note that although the phenomenon has evolved, psychotropic substances have diversified and procedures have been improved, the text of the norm contained in art. 336 of the Romanian Criminal Code has remained unchanged since 2009, in the original form of the Criminal Code. Even though article 336 of the Criminal Code has been the subject of criticisms of unconstitutionality (resolved by CCR Decision no. 452/2021 of June 29, 2021²; CCR Decision no. 101/2019 of February 28, 2019³; CCR Decision no. 138/2017 of 14 March 2017⁴), the text remained unchanged.

However, analyzing the optics of the courts and prosecutor's offices in recent years, we find that something has changed.

Going in chronological order, we start from Criminal Decision no. 38/A of March 9, 2011 of the Cluj Court of Appeal⁵, according to which: "*taking into account the fact that,*

compared to 2020: if in 2020 there were 458 cases, they increased to 704 cases in 2021, to 789 cases in 2022 and to 949 cases in 2023"

² CCR decision no. 452/2021 of June 29, 2021 published in M.Of. no. 1138/26 Nov. 2021;

³ CCR decision no. 101/2019/28 Feb 2019 published in M.Of. no. 405 din 23 May 2019;

⁴ CCR decision no. 138/2017/14 March 2017 published in M.Of. no. 537 din 10 July 2017;

⁵ Criminal decision no. 38/A din 09 March 2011 a Curtii de Apel Cluj disponibilă pe www.portal.just.ro;

by scientific methods, the concentration of tetrahydrocannabinols in the collected urine sample could not be established and that no reference can be made to the defendant's clinical manifestations, the court assessed that there are serious doubts regarding the existence of the objective side of the imputed crime, doubts which, of course, benefit the defendant, according to the "in dubio pro reo" principle (in this sense, we invoke the recent jurisprudence of the High Court of Cassation and Justice in file no. 622/36/2010, he upheld the decision of the Tulcea Court from file 2152/88/2009 by which the defendant was acquitted for the offense provided for in art. 87 paragraph 2 of OUG 195/2002). Even if the law does not define in any way the notion of driving under the influence of narcotic substances or products, it is obvious that this circumstance must be proven and not just presumed. Or, from the evidence in the case, it does not appear that the defendant's ability to pay attention and concentrate necessary to drive a motor vehicle was altered in any way, aspects on which even the specialists who (as I stated earlier above) have verified the fact that there are no objective scientific, medical criteria that would allow them to refer to the defendant's clinical manifestations. Compared to the above, based on art. 379 point 2 letter a of the Civil Code, the appeal declared against the criminal sentence no. 124/F/2010 of the Bistrița-Năsăud Court, which was abolished only with regard to the wrongful conviction of the defendant for the crime. of art. 87 paragraph 2 of OUG no. 195/2002. Pronouncing a new decision, within these limits, based on art. 11 point 2 letter a of the Civil Code. rap. to art. 10 letter d C.p.p. it was ordered to acquit the defendant S.S.E. under the charge of committing the offense provided of art. 87 paragraph 2 of OUG 195/2002, driving a motor vehicle on public roads by a person under the influence of narcotic substances." Therefore, in the opinion of the Cluj Court of Appeal, the circumstance that a person is under the influence must be proven.

In this sense, the provisions of art. 7 para. (1) of the *Methodological Norms regarding the collection, storage and transport of biological samples for the purpose of judicial probation by establishing the blood alcohol level or the presence in the body of narcotic substances or products or of drugs with similar effects in the case of persons involved in events or circumstances related to trafficking road*, according to which the finding of the state "under the influence of some psychoactive substances" is based on laboratory analyzes related to the presence of psychoactive substances in blood and urine, respectively on factual elements, such as behavior, attitude, orientation in time and space, the ability to describe, to calculate, the way of moving, the safety of hand gestures, smell, the condition of the pupils, etc. Additionally, according to the provisions of art. 16 of the methodological norms mentioned above, the medical examination in order to interpret the clinical condition induced by the recent consumption of alcoholic beverages or psychoactive substances of the person subjected to the collection of biological samples is performed only at the request of the traffic police, if the person in question was involved in an accident resulting death or injury to the integrity or health of one or more persons, the doctor who performed the clinical examination must fill out a certain form.

So, we could say that the simple presence of the prohibited substance in the body does not automatically lead to the conclusion of the existence of an alteration of the senses and

reflexes, but a thorough research is required (Radu Bodea, 2018)⁶. Even so, we subscribe to the doctrinal opinion according to which the presence of psychoactive substances in the body of the defendant is established on the basis of expertise or technical-scientific findings (M.A. Hotca, 2013).

So, we could say that the mere presence of the prohibited substance in the body does not automatically lead to the conclusion of the existence of an alteration of senses.

In 2019, the Constitutional Court of Romania by Decision no. 101/2019⁷, in a laconic way, notes that "in order to ascertain the consumption of psychoactive substances - as an essential requirement specific to this crime - the laboratory analysis is necessary, which must establish the existence of these substances in the body of the driver of the vehicle". Rejecting the exception, the Court showed that "the legislator understood to criminalize the act in any situation of driving a vehicle after the consumption of psychoactive substances, by consumption we mean the introduction of a product into the human body, regardless of whether it was dissolved, impregnated, dispersed or diluted, in one of the following ways: by oral or injectable route, inhalation, smoking or external application to a person's body, in any other way, in such a way that the product reaches a person's body. It is irrelevant that the condition of the driver of the vehicle who is under the influence of psychoactive substances is the result of abuse - which involves the consumption of plants, substances and preparations containing substances likely to have psychoactive effects outside of a medical prescription - or is the result of medical use, which signifies the legal, prescription-based use of drugs under the control of national legislation, as the recipients of the criticized legal text carry out an activity with permitted risk, for which purpose they are subject to some forms of schooling, so that they are authorized persons and diligent, who, while holding the driver's license, have the obligation to stay up to date with the legal norms in the matter".

In 2020, probably taking into account the considerations of the Constitutional Court, the High Court of Cassation and Justice, motivating a solution in an *Appeal in cassation*, Decision 356/RC of 16.10.2020⁸, considered that "for meeting the constitutive elements of the driving offense under the influence, the amount of psychoactive substance in the defendant's body or whether it affected his behavior in any way is irrelevant." By the same Decision, the High Court also reasoned in the sense that, "the state of danger for social relations regarding traffic safety on public roads arises as a result of the simple act of driving a vehicle by a person who has consumed substances with psychoactive effect, because the cognitive functions, including the driver's attention and reaction capacity, are inevitably affected by the consumption of psychoactive substances, even when the ingestion of said substances is not objectified in unequivocal, easily perceptible behavioral changes", effectively giving rise to a presumption .

In this context, many of the Prosecutor's Office units in the country have embraced this approach, considering that there is a presumption that the simple detection of some substances in the body causes a psychoactive effect. No extensive evidence has yet been administered, although the multitude of psychoactive substances is likely to generate

⁶ for the contrary opinion: "the state of influence of narcotic substances or products or of drugs with similar effects can only be ascertained by the authorized medical personnel". We believe that a difference must be made between the state *under influence* and the *presence in the organism*.

⁷ CCR decision no. 101/2019 in Monitorul Oficial n. 405 din 23 mai 2019.

⁸ Decision of the High Court of Cassation and Justice no. 356/RC of 16.10.2020 available on www.iccj.ro;

different conclusions, from one substance to another and from one person to another, depending on the metabolism of each one.

In 2021, in the meeting of the presidents of the criminal sections of the High Court of Cassation and Justice and the Craiova Courts of Appeal, June 3-4, 2021⁹, it is stated that "During the debates, it was mentioned that in some of the cases pending before the Bucharest Court of Appeal, the problem of the different effects of the consumption of alcohol and narcotic substances, respectively, in terms of their duration". In the case from which the question arose, the evidence was administered with the forensic expertise, the specialists concluding that "although the narcotic substances were present in the defendant's body, they no longer had any effects on him".

Thus, the unpredictability of the norm was put into question, as well as the need to adapt it by replacing the phrase "being under the influence of psychoactive substances" with the phrase "who consumed psychoactive substances".

The opinion of the National Institute of Magistracy, adopted unanimously by all the participants in the meeting, was in the sense that "in order to achieve the typicality of the offense provided for by art. 336 paragraph 2 of the Criminal Code, the phrase "person under the influence of psychoactive substances" must be interpreted as referring - it is the simple finding of the consumption of psychoactive substances through laboratory analyzes that establish the existence of these substances in the body of the driver of the vehicle". In order to retain this perspective, the meeting participants referred to the Decision of the Constitutional Court no. 101/2019 and to the Decision of the High Court of Cassation and Justice 365/RC of October 16, 2020.

All this time, on the ICCJ's docket was a request to resolve a question of law, regarding the meaning of the phrase "psychoactive substances", with a deadline of June 9, 2021. The hope of a complete and correct analysis was dashed with the pronouncement of Decision no.48 of June 9, 2021¹⁰, when the High Court of Cassation and Justice ruled that "the use of the phrase "psychoactive substances" within the criminalization rule of art. 336 para. (2) of the Criminal Code includes, in addition to the category of substances referred to in Law no. 194/2011 on combating operations with products likely to have psychoactive effects, other than those provided for by the normative acts in force, republished, and the substances provided for in the content of Law no. 143/2000 on the prevention and combating of illicit drug trafficking and consumption, republished, with subsequent amendments and additions, and of Law no. 339/2005 on the legal regime of narcotic and psychotropic plants, substances and preparations, with subsequent amendments and additions". Therefore, the High Court of Cassation and Justice offered a resolution regarding the scope of the notion of "psychoactive substances" without undermining the unpredictable nature of the rule by referring to the phrase "being under the influence of psychoactive substances".

Medical opinions have revealed since that time, that in the case of cannabis consumption for example, the psychological changes include a euphoric effect associated with emotional and cognitive changes that are difficult to quantify on an individual level. Cannabis also produces a reduction in performance while driving, with a decrease in

⁹ Minutes of the meeting of the presidents of the criminal sections of the High Court of Cassation and Justice and the Craiova Courts of Appeal, June 3-4, 2021;

¹⁰ ICCJ decision no. 48 of June 9, 2021 available at www.iccj.ro/2021/07/16/decizia-nr-48-din-9-iunie-2021;

reaction speed to various stimuli, a decrease in distributed attention and a delay in hand-eye coordination." But even more importantly, the effects appear at a dose varying between 2 and 22 mg of psychoactive substance (THC - tetrahydrocannabinol), manifest in 30 minutes, with a maximum reached 2 hours after administration, yielding approximately 4 hours after consumption. Afterwards, the psychoactive substance - THC - is transformed into an inactive metabolite that persists in the body for days or weeks without psychoactive effects. The period of time in which the metabolite can persist in the body depends on the frequency of use, the dose of psychoactive substance in the smoked cigarette, but also on individual characteristics¹¹.

Starting with the year 2022, scientific arguments began to contradict the optics of the High Court of Cassation and justice. In other words, the thesis proposed by the author of the exception of unconstitutionality cited above, began to find evidentiary support even from toxicologists.

As an example, in 2023 requesting the opinion of IML Târgu Mureş, to answer the question: whether the substance 11-hydroxy-delta-9-tetrahydrocannabinol, present in the urine sample, it is or not a substance with a psychoactive effect, the specialists answered: "11-hydroxy-delta-9-tetrahydrocannabinol if present in the blood, is a psychoactive substance."

As such, the medical specialist's view is that: only the presence of the 11-hydroxy-delta-9-tetrahydrocannabinol metabolite in the blood could cause psychoactive effects. As such, not every detection in the body creates a presumption that the person in question has suffered a reduction in performance while driving the motor vehicle.

This medical opinion is not a singular one, the specialists from IML Cluj-Napoca formulate a similar answer, but elaborate: *"tetrahydrocannabinol (THC) can be found in the blood as such and in the form of metabolites, but in the urine it is mainly excreted in the form of the metabolite 11-nor-delta-9-THC acid. We would like to specify that the acid metabolite 11-nor-delta-9-THC-9 does not exhibit psychoactive properties. The detection window (the time interval in which a substance can be detected after consumption) of compounds eliminated by the renal route is usually more extended in the case of the analysis of urine samples than in the case of blood samples. Blood concentrations of THC usually fall rapidly within the first 3-4 hours, but complete elimination takes longer. The parent substance (THC) can be detected in the blood sample 3-12 hours post-consumption. Urine sample analysis generally allows for confirmation of THC exposure even up to several days post-consumption by being able to detect the longer half-life THC-COOH metabolite. Thus, the possibility of detecting THC-COOH by usual analytical methods is usually indicated for 3-28 days post-consumption, respectively up to 90 days in case of chronic consumption. Regarding the effects of THC on the person's central nervous system, with changes in mental, cognitive and behavioral functions, including the alteration of the ability to pay attention and focus necessary to drive a vehicle, it is considered that the person can be affected by THC for 3-4, even 6-10 hours after consumption."*

As such, if the substance is detected in the blood, then yes, a discussion of sensory impairment can be initiated, as sometimes the time when the metabolite can be detected in the blood coincides with the time when a person can be affected by the psychoactive

¹¹ CCR decision no. 101/2019 of February 28, 2019

effects. On the other hand, the detection in the urine is done long after the psychoactive effects have ceased, as such even if the substance is found in the urine it cannot prove an influence, but at most an older exposure to the active substance.

Even so, contrary to the specialist opinion cited above, in the cases to which I have referred, the courts have tended to give effect to the presumption of the High Court of Cassation and Justice expressed in a cassation appeal decision, to the detriment of a medical opinion expressed punctually with express reference to the situation in the case under analysis.

There were also courts that tried to offer their own solution to the issue and did not limit themselves to referring to the ICCJ Decision 356/RC of 16.10.2020 and the CCR Decision 101/2019. E.g:

Braşov Court of Appeal by Decision no. 340/2022¹² pronounced on 09.05.2022 ruled that, "in the same expert report it was also shown that "the presence of tetrahydrocannabinol in the urine indicates that the defendant was once exposed to the psychoactive substance, but, regardless of the concentration of tetrahydrocannabinol in the urine, no interpretations are made on the ability to drive motor vehicles only on the basis of the presence of the psychoactive substance in the urine. Given that it was not proven beyond any reasonable doubt that the defendant, at the time of driving the vehicle, was under the influence of the psychotropic substance, the benefit of the doubt will be given to him, the criticisms brought by him will be accepted and, in the retrial, it will be ordered the acquittal of the accused, the act committed is not foreseen by the criminal law".

Zărneşti Court by Decision no. 229/2023¹³ dated 29.06.2023, noted that "blood and urine samples were taken from the defendant on the same day, at 18:38 (blood) and 18:35 (urine). The result of the toxicological analysis bulletin indicated the presence of bezoilecgonine 0.013 µg/ml in serum, in urine: positive for cocaine, negative except for cocaine (GCMS work method). Expert report no. A1 confirmed the presence of bezoilecgonine, the main metabolite of cocaine, in the defendant's biological samples, concluding that, given the results of the toxicological determinations as well as the clinical examination, the defendant was not under the influence of psychoactive substances. This conclusion is based on the low value of the cocaine metabolite detected in the blood, corroborated with the data from the specialized literature, as well as the result of the clinical examination, which did not find any pathological element specific to recent cocaine use. However, this evidence established, based on the result of this bulletin, and on those found during the clinical examination, that the defendant was not under the influence of psychoactive substances. Thus, it was considered "that it was not proven beyond any reasonable doubt that the defendant, at the time of driving the vehicle, was under the influence of the psychoactive substance, the benefit of the doubt will be given to him, the defendant should be acquitted, the act committed not being foreseen by the criminal law" .

Against the background of a non-unitary practice, we will conclude this paper with a short review of the conditions the crime through the considerations set out above, because a correct conclusion starts from the correct identification of the premised situation.

¹² Criminal decision no. 340/2022 pronounced by the Braşov Court of Appeal on 09.05.2022

¹³ Criminal sentence no. 229/2023 pronounced by the Zărneşti Court on 29.06.2023

Contrary to the view of the ICCJ expressed by Decision 365/RC of October 16, 2020, the premise situation of art. 336 of the Criminal Code is not "previous consumption of psychoactive substances", but driving a vehicle under the influence of psychoactive substances, the pre-existence of certain situations in which the active subject is likely to alter his mental position and create a state of danger in the activity of driving a vehicle on public roads. The objective side of the crimes is the act of driving a vehicle on public roads by a person who is under the influence of psychoactive substances. The immediate consequence in the case of these crimes consists in creating a state of danger for social relations regarding the safety of traffic on public roads, relations protected by the norm of incrimination, the causal link resulting *ex re*. The form of guilt is intention, with both of its (sub)forms.

However, even going through the previously cited jurisprudential view, the issue of guilt in the form of intention arises to the extent that the active subject, although he admits to the consumption of prohibited substances, the evidence shows that it took place long before he was caught in traffic. The question arises whether the active subject, in the absence of morphological or behavioral changes, could have realized that he was under the influence of certain substances, if he could therefore fulfill the condition of the subjective side of crime.

We are not supporting a thesis of the indirect decriminalization of the act provided for by art. 336 paragraph (2) of the Criminal Code, but we consider that, until a legal resolution, or any intervention by the legislator, the courts must show increased care in the administration of evidence in cases whose object is art. 336 paragraph (2) Criminal Code.

There is obviously a fine distinction that must be made from case to case, not always the detection of a psychoactive substance in a person's body also determines the alteration of the reflexes necessary to drive a car on public roads. The correct identification of the situation requires a medical point of view from some specialists, but it is not limited to this, the formation of the magistrate's opinion is done according to the principle of *free assessment of the evidence*, and although important, the medical opinion must not distort the magistrate's role in the judicial system.

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