

VIRTUAL ABSOLUTE NULLITIES

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Abstract

Criminal procedural sanctions represent an extremely controversial institution within the field of criminal procedural law, as they invite the actors participating in the course of the trial to carry out specific activities based on the principle of legality and to comply with its rigors to the extent that it has been disregarded. Since virtual absolute nullities are timidly taking shape in judicial practice and in specialized doctrine, the present study aims to bring this procedural sanction into the spotlight, in order for it to be recognized for its status, given its importance in the case of procedural or procedural acts carried out in violation of fundamental rights, freedoms, or the right to a fair trial.

Keywords: *criminal procedural sanctions, virtual absolute nullities, Constitutional Court, absolute nullities, relative nullities, fundamental rights.*

1. Introduction

Procedural sanctions have taken various forms in criminal procedural legislation in accordance with the dynamics and legislative amendments that have occurred, the present study being limited exclusively to the institution of virtual absolute nullities, addressing the doctrinal and jurisprudential imprint upon it.

Nullities are one of the most important procedural sanctions that have a decisive role in conferring guarantees when a procedural act, or procedural activity was carried out in violation of the provisions laid down by the legislator.

The notion of nullity is deeply rooted in the domestic legal culture and judicial practice. The overall analysis of procedural sanctions in criminal matters regulated by

Romanian procedural law reveals that nullity belongs, par excellence, to this category. The highlighting of the effects produced by the application of the sanction of nullity reflects the importance it holds in achieving the purpose of the proper administration of justice.¹

Starting from the etymological analysis of the word nullity in the legal field, it is defined as an action of the legal act which suppresses, in principle and retroactively, those effects of the act that are contrary to legal provisions.²

Considered the most important procedural sanctions, nullities intervene whenever a procedural or processual act, or a procedural activity, has been carried out without the strict interpretation of the law.³

With regard to the matter of nullities, the Court notes that the Constitutional Court has found that “nullity represents an extreme

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¹ Mihai Mareș, *Nulitățile în procesul penal*, Hamangiu Publishing House, Bucharest, 2019, p. 1.

² Ion Neagu, Mircea Damaschin, *Tratat de procedură penală. Partea generală, 3rd revised and expanded edition*, Universul Juridic Publishing House, Bucharest, 2020, p. 776.

³ The Constitutional Court of Romania, Decision No. 302 from 04 may 2017, para. 33.

procedural sanction, which intervenes only when other remedies are not possible. However, since not every violation of a procedural norm causes harm that can be remedied only by the annulment of the act, the legislator has established the rule according to which the nullity of the act performed in violation of the legal provisions governing the conduct of the criminal trial intervenes only when harm has been caused that cannot be remedied in any other way.⁴

Analyzing the institution from a historical perspective, it is observed that the legislator has shown an appetite for regulation, this sanction being identified in an incipient form in the Criminal Procedure Code of 1864 and, subsequently, in more developed forms in the Criminal Procedure Codes of 1936 and 1968.

Focusing on the current regulation, we observe that the most important classification of nullities is found within the provisions of Articles 280–282 of the Criminal Procedure Code, where the legislator distinguishes between cases of absolute nullity and relative nullity, depending on the criminal procedural norms that have been violated. Based on the very title of the study, the present article aims to analyze exclusively the institution of virtual absolute nullity, which will be thoroughly addressed in the sections that follow.

2. Virtual Absolute Nullities Doctrinal and Jurisprudential Considerations

Virtual nullities are inferred by reference to the imperative or prohibitive rules regarding the conduct of the criminal

trial or to the legal conditions governing the drafting of certain procedural or processual acts. The notion of virtual nullity arises from the interpretation of Article 2 of the Criminal Procedure Code, which states that the criminal trial shall be conducted according to the provisions set forth by law; *per a contrario*, in case of disregard thereof, this procedural sanction may become applicable.

Analyzing the Criminal Procedure Code with a focus on the matter of nullities, we observe that the legislator has embraced the mixed system, namely a blend between the formalist and non-formalist systems, the aim being to ensure a balance between the individual interests of the injured persons and the general interest.

This category of procedural sanctions is contested among researchers in the legal field, with opposing opinions regarding its existence, given its virtual nature and the lack of an express regulation. This classification is based on the legislator's expression of will—either explicit or implicit—with respect to the existence of a nullity. The Constitutional Court has defined the two categories as follows: express nullities intervene in the case of violations of specific legal provisions expressly identified by the legislator, whereas virtual nullities may intervene in the case of non-compliance with legal provisions other than those expressly identified by the legislator.⁵

Thus, in a first opinion expressed⁶, it has been stated that absolute nullities can only be express, this being one of the criteria for classification into absolute and relative nullities. It pertains to the very legal nature of absolute nullities that they must always be expressed, namely expressly provided by the legislator, given the particular seriousness of

⁴ The Constitutional Court of Romania, Decision No. 302 from 04 may 2017, para. 30.

⁵ Alexandru Zampieri, *Aspecte controversate privind nulitățile în procesul penal*, Hamangiu Publishing House, Bucharest, 2021, p. 8.

⁶ Mihai Mareș, *op.cit.*, p. 224.

the harm caused by the violation of certain criminal procedural norms, and thus the author asserts that the thesis of the existence of virtual absolute nullities cannot be accepted.

In another opinion,⁷ the cases of absolute nullity are, in principle, expressly and exhaustively provided by law. In view of the Constitutional Court Decision no. 302/2017, this distinction, which appeared infallible in an early stage of the specialized literature, is currently being put to the test.

In a third opinion⁸, it is considered that, in general, express nullities overlap with absolute nullities, while virtual nullities overlap with relative nullities. However, from the case law of the Constitutional Court, it results that absolute nullity also intervenes in the case of violation of the provisions of Article 101 of the Criminal Procedure Code, thus referring to a virtual absolute nullity.

Last but not least⁹, it has been stated in the specialized doctrine that, as an exception, the Criminal Procedure Code contains a set of virtual absolute nullities, in cases where the legal exclusion of evidence intervenes, since the situations envisaged derive from the principles governing the application of criminal procedural law, among which are the principle of legality and, implicitly, that of fairness, the right to defence, and the respect for human dignity and private life.

Thus, it is observed that these virtual nullities are not predetermined by law, but derive from a fundamental principle of

criminal procedural law or even from the depth of the law, from its spirit.

In the same sense, in order to distinguish between virtual absolute nullities and virtual relative nullities, Ioan Tanoviceanu proposed a two-step analysis:

- it shall be examined whether a formality of an act, or the acts in their entirety, is imposed by a fundamental principle inherent in the criminal procedural norms or established by the criminal procedure law;

- it shall be examined whether, in the manner in which the law was expressed, it has somehow deviated from the fundamental principles of legality and mandatory application; it was considered that virtual absolute nullity shall be applicable if the non-observance of the formalities or acts, which appear as imperatively mandatory following this double verification, is found¹⁰.

We are faced with such cases of virtual absolute nullity when we are on the grounds of improperly conducted evidence gathering, in which case the evidence is automatically excluded, as the harm is presumed absolutely and considered *ope legis* to be irreparable. Analyzing the criminal procedural codification and certain opinions expressed in the specialized literature, which I have embraced, I have identified the following hypotheses:

- when the detained or arrested person has contacted their lawyer without ensuring the confidentiality of communications and in breach of visual surveillance measures, with

⁷ Andrei Iugan, *Procedură penală. Partea generală*, C.H. Beck Publishing House, Bucharest, 2023, p. 728.

⁸ Mihai Udrioiu, *Sinteze de procedură penală. Partea generală*, C.H. Beck Publishing House, Bucharest, 2020, p. 1157.

⁹ Ioan Tanoviceanu, *Tratat de drept penal și procedură penală*, Volume IV, 2nd edition, Curierul Judiciar Typography, Bucharest, 1924–1927, p. 483.

¹⁰ Oradea Court of Appeal, Criminal Chamber, Ruling no. 140 of 23 September 2016, unpublished: “the stipulation of this absolute nullity in the Special Part of the Criminal Procedure Code does not constitute an isolated case, hypotheses of absolute nullity... being also provided in other procedural provisions than those of Article 281 of the Criminal Procedure Code (emphasis added),” in M. Udrioiu, *op. cit.*, 2017, p. 124.

the conversation between them being intercepted or recorded (Article 89 paragraph 2 of the Criminal Procedure Code);

- when the principle of fairness in the administration of evidence is violated, as resulting from the provisions of Article 101 of the Criminal Procedure Code, such as when listening techniques are used that affect the person's awareness, when a person is incited to commit or to continue committing a criminal act, or when violence, threats, or coercive means are used for the purpose of obtaining evidence;

- when the evidence is obtained by torture and these are followed by derived evidence (Article 102 para. 1 C.p.p.);

- in the case of the relationship between the lawyer and the person whom they assist or represent, when this relationship has been subjected to technical surveillance, such evidence may not be used in the criminal trial and shall be destroyed immediately by the prosecutor (Article 139 paragraph 4 of the Criminal Procedure Code);

- in the case of a violation of the conditions regarding physical examination by the criminal investigation authorities (Article 190 paragraph 5 of the Criminal Procedure Code).

These hypotheses, in which evidence is automatically excluded, confer upon them the status of virtual absolute nullities, as they arise from the violation of fundamental principles of criminal procedure (legality, the right to defence, respect for human dignity and private life). In these cases, the incidence of absolute nullity is retained, including in respect of the acts through which the administration of evidence was ordered or authorized, since the harm is absolutely presumed and considered by operation of law to be irreparable.

This status is reinforced by the Constitutional Court, which, in Decision no. 802/2017, held that the elements of unfairness provided for in Article 101 of the Criminal Procedure Code may pass through a double filter of verification and may be invoked during the trial phase, even if they were subject to evaluation in the preliminary chamber procedure.

This interpretation is found, timidly, in judicial practice¹¹ as well in the sense that the cases of absolute nullity provided by the legislator in Article 281 of the Criminal Procedure Code are not exhaustive, and that there are also other, virtual, hypotheses, in cases where procedural or processual acts are carried out in an inadmissible manner, or exercised beyond the absolute legal time limit, as well as in the case of procedural or processual acts performed in violation of fundamental rights or freedoms, or of the right to a fair trial.

Thus, it has been rightly held in practice that the sanction of absolute nullity, and not that of relative nullity, shall apply in the case of the absence, from the operative part of the ruling ordering the measure of preventive arrest, of the provisions concerning the duration for which the preventive arrest was ordered and the date on which it shall cease, even though this case is not expressly mentioned in Article 281 letters a)–f) of the Criminal Procedure Code: “the absence, from the operative part of the ruling ordering the measure of preventive arrest, of the provisions concerning the duration for which the preventive arrest was ordered and the date on which it shall cease is such as to render the ruling unlawful... even though the provisions of Article 281 of the Criminal Procedure Code do not expressly provide for the omission of the above-mentioned elements as grounds for absolute nullity, I personally consider that

¹¹ Alba Court of Appeal, Criminal Chamber, Ruling no. 28 of 11 March 2016, unpublished.

this violation constitutes an absolute nullity, from the perspective of breaching the procedures through which the deprivation of a person's liberty may be ordered; any other interpretation would contravene the fundamental rights and freedoms of citizens, rights expressly stipulated in the Constitution of Romania and in the international agreements to which Romania is a party.”¹²

Another opinion expressed in the specialized literature is that, under the current regulation, nullities do not take into account the specificity of the legal norms governing the conduct of the criminal trial legal norms which are, as in the example above, of public order. It is also considered that virtual nullities result, on the one hand, from the general regulation concerning the non-observance of the law in the conduct of the criminal trial, and on the other hand, they implicitly derive from a fundamental principle of criminal procedural law. In the latter case, the violation of rights or the failure to fulfil obligations should be regarded as attracting the sanction of virtual absolute nullity.¹³

It was also noted in a specialized paper¹⁴ that there are cases of absolute nullity even expressly unforeseen in the text of the law, so that the enumeration of cases of nullity in Article 281 letter a)-h) C.pr.pen is not exhaustive and so that virtual nullity may be absolute in case of performing inadmissible procedural or procedural acts or exercised beyond the absolute legal term

or in case of performing procedural or procedural acts in violation of fundamental rights or freedoms.

In a criminal case pending before the Cluj Court of Appeal, the court rendered a decision to quash the first instance judgment and ordered a retrial, finding that the judicial investigation before the trial court had not been properly conducted, which entails the absolute nullity of the judgment rendered. In the specific case, we are dealing with a judgment delivered following a cursory judicial investigation, in which the trial court failed to administer the evidentiary material proposed by the defendants, which included essential evidence for establishing a correct and complete factual situation. Thus, before the appellate court, the annulment of the challenged judgment was requested on the basis of Article 421 paragraph (1) letter b) of the Criminal Procedure Code, in conjunction with Article 6 of the ECHR and Article 2 of Protocol No. 7 to the Convention, it being considered that the lack of a complete judicial investigation and, consequently, the lack of appropriate reasoning attracts the sanction of absolute nullity, violating the right to defence, the right to a fair trial, the principle of equality of arms between the prosecution and the defence, and the principle of double degree of jurisdiction.¹⁵

I have identified this perspective regarding the existence of cases of virtual absolute nullity also in the case law of the Constitutional Court. Thus, the Court holds that the failure to comply with the deadline

¹² Monica Câmpăan, *Nulități absolute virtuale vs. nulități relative exprese în Noul Cod de procedură penală*, Themis Journal no. 2/2018, p. 77.

¹³ Georgian Toader, Daniel Manolache, *Aplicarea directă a art.6 CEDO în materie penală. Desființarea sentinței pentru efectuarea defectuoasă a cercetării judecătorești* (available at: <https://www.juridice.ro/619421/aplicarea-directa-a-art-6-cedo-in-materie-penala-desfiintarea-sentinței-pentru-efectuarea-defectuoasa-a-cercetării-judecătorești.html>).

¹⁴ The Constitutional Court of Romania, Decision no. 336 of 30 April 2015 regarding the exception of unconstitutionality of the provisions of Article 235 paragraph (1) of the Criminal Procedure Code, para. 49.

¹⁵ Constitutional Court Decision no. 802 of 5 December 2017 regarding the exception of unconstitutionality of the provisions of Articles 342 and 345 paragraph (1) of the Criminal Procedure Code, para. 29.

for submitting the request for the extension of preventive detention to the judge of rights and liberties “at least 5 days before the expiry of the duration of preventive detention” is capable of causing a procedural harm, materialized in the violation of the fundamental right to defence of the detained defendant, so that the provisions of Article 268 paragraph (1) of the Criminal Procedure Code become applicable, the sanction for non-compliance with this time limit being the prosecutor’s forfeiture of the right to submit the request for the extension of the preventive detention and the absolute nullity of the act carried out after the expiry of the legal deadline¹⁶.

With regard to the competence of judicial bodies, through Decision no. 302/2017 of the Constitutional Court, it is shown that the violation of the provisions concerning the material and personal competence of the criminal investigation body, initially provided by the legislator under the sanction of relative nullity, must be regarded as falling within the category of absolute nullities, as it was later regulated by Law no. 201/2023, the aforementioned decision includes an extensive exposition on the matter of nullities.

In another ruling, delivered in the field of fairness in the administration of evidence, it was held that the categorical prohibition under the law of obtaining evidence through unfair or unlawful practices/procedures justifies the competence of the trial judge to examine such matters also during the trial phase. In other words, the evidence upheld as legal by the preliminary chamber judge may be subject to a new legality review during the trial, from the perspective of

establishing the inadmissibility of the procedure by which it was obtained and the application of absolute nullity to the procedural and processual acts by which the evidence was administered, in circumstances in which, in such a case, it is presumed *iuris et de iure* that the legality of the criminal proceedings has been affected, the harm being irremediable. Moreover, according to Article 346 paragraph (5) of the Criminal Procedure Code, only the evidence excluded during the preliminary chamber phase may no longer be taken into account at the trial of the case on the merits¹⁷.

Likewise,¹⁸ the Constitutional Court has also held that the administration of evidence in violation of the principle of fairness, as regulated by Article 101 of the Criminal Procedure Code a principle encompassed by the principle of legality leads to the finding of absolute nullity thereof, just as the administration of evidence in violation of the provisions of Article 102 paragraph 1 of the Criminal Procedure Code attracts the same sanction. Under these circumstances, considering that this sanction is not expressly stipulated in Article 281 of the Criminal Procedure Code, the only conclusion that can be drawn is that, in such hypotheses, the automatic exclusion of evidence is subsumed under a virtual absolute nullity, and not under an express relative nullity.

Thus, we observe that in light of the recent case law of the Constitutional Court, the idea emerges that the sphere of absolute nullities also extends to virtual ones, as reflected in the Court’s previous decisions.

Likewise, in the specialized literature, the opinion has been expressed that the

¹⁶ The Constitutional Court of Romania, Decision No. 633 of 12 October 2018 regarding the objection of unconstitutionality of the provisions of the Law amending and supplementing Law No. 135/2010 on the Criminal Procedure Code, as well as amending and supplementing Law No. 304/2004 on judicial organization.

¹⁷ Mihai Mareş, *op. cit.*, p. 396.

¹⁸ Mihai Mareş, *op. cit.*, p. 396.

performance of procedural or processual acts prohibited by law, which take the form of inadmissibility or forfeiture, constitutes cases of virtual absolute nullity, since the law does not expressly indicate them, and therefore, they are virtual in nature.

3. Conclusions

The beauty of criminal procedural law lies in the fact that it manifests its fairness and viability over time, through its inherent dynamism. The timid recognition of virtual absolute nullity both in the specialized literature and in the case law of the Constitutional Court, as well as in the practice of the judicial courts represents a jurisprudential reversal that provides additional guarantees to the principles governing the application of criminal procedural law, as well as to other provisions disregarded by procedural actors.

We recognize the merit of doctrine and jurisprudence, but especially of the Constitutional Court, which has triggered a genuine dialectic in the matter of virtual absolute nullities one that can only benefit the recipients of criminal procedural law and incite the legislator to regulate this institution.

In the absence of a clearly established judicial practice in this regard and of legislative intervention, it remains uncertain whether the legislator's intention was to recognize this category of nullities in legislation, or whether, rather, through the

mechanism of a posteriori constitutional review, a legal consequence of the regulation of the institution has been revealed one which naturally follows from its structure, but which had not been consciously considered by the drafters of the current Criminal Procedure Code.

Last but not least, we consider that the legislator must also take a critical view toward the case law of the ECtHR and the CJEU, so that the legislation may evolve in harmony with European and Union standards and transpose into the current codification clear rules by which these cases of virtual absolute nullity may be formally recognized.

Thus, although the institution of nullities has undergone a lengthy evolution, as shown at the beginning of the present study, it must remain dynamic and flexible in order to adapt to the passage of time and the needs of judicial practice, with a view to achieving a fair balance between the proper conduct of criminal proceedings under conditions of legality and the observance of the rights of the parties and procedural subjects.

The necessity of legislative intervention is imperative in order to avoid leaving a margin of discretion to the judicial bodies, which could confer upon cases of virtual absolute nullity the status of relative nullity, and, in the context of requiring proof of the harm caused, lead us onto the ground of *probatio diabolica*, which may result in the failure of the right to evidence and, implicitly, the right to a fair trial.

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