# NEW PROCEDURAL RULES REGARDING THE ENFORCEMENT OF CRIMINAL JUDGMENTS[1]

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**Abstract**

*Whether it is perceived in the doctrine as a distinct stage of the criminal trial or as a sub-division of other stages, the enforcement of final criminal judgments represents an important procedural stage in the actual execution of the criminal justice.Unlike in civil trials, the official and mandatory character of the criminal procedural juridical relations is expressed in the enforcement stage as well, when the specific judiciary activity is launched automatically and it is carried out by official bodies according to their own rules.This study focuses on the analysis of the current normative framework regarding the activity of enforcement of final criminal judgments.The analysis refers exclusively to the criminal procedural norms applicable in this matter without taking into consideration the substantive law (included in the Criminal Code, the Law no. 253/2013, the Law no. 254/2014 and other laws as well) regulating the extra-procedural activity, the actual enforcement.Hence, the topics approached herein will refer to issued raised as a result of res judicata in criminal matters. The enforceability of the judgements and the moments when the judgements remain final, the judiciary bodies involved in the activity of enforcement as well as some common and specific provisions regarding the enforcement.*

**Keywords:** *enforcement, criminal judgment, authority, procedure.*

## Introduction

In the enforcement of the final criminal judgements a distinct judiciary function is undoubtedly being used, which, unfortunately, was not distinctively regulated in the article 3 of the Code of Criminal Procedure on the principle of separation of the judiciary functions[2].

In this stage of the criminal trial the specific activity refers to the *post judicum* activity, after the case was settled and thus the judiciary actions are brought to an end.

The enforcement may only be considered as a procedural stage if we consider the criminal trial notion in its broader sense, as suggested in the Art. 1 of the Code of Criminal Procedure and which includes not only the activity carried out in a criminal matter (when the judiciary actions are carried out as well), but also the activity carried out in relation to a criminal matter (when the substance is not solved).

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[2] The implicit existence of this judiciary function is recognised in the doctrine, to this end see I.Neagu, M.Damaschin, Tratat de procedură penală, Partea Generală (Treaty of Criminal Procedure, General Part), Hamangiu Publishing House, p.19 and p.62; B.Micu, A.Păun, R.Slăvoiu, Procedură penală (Criminal Procedure), Hamangiu Publishing House 2014, p.15.

The judiciary activity carried out in the procedural stage of enforcement of final criminal decisions is governed by its own rules following the pattern of some specific principles: mandatory, enforceable, jurisdiction and continuity.[3]

But same as any other procedural activity, the enforcement shall comply with the general principles and limitations in the application of the criminal procedural law and is included in the purpose of the criminal trial indicated in the Art. 1 para. 2 of the Code of Criminal Procedure.

**1. General remarks regarding the res judicata in criminal matters, the enforceable character and the time when the criminal jugements become final**

The res judicata represents, generally speaking, the legal situation arising from the final and irrevocable solution pronounced in a conflict presented in court.

In criminal matters, as an expression of the fundamental principle of officiality, used in the enforcement stage according to the rule of obligativity, the judgement becomes automatically a res judicata at the time when it remains final, according to one of the ways indicated in the Art. 51-552 Of the Code of Criminal Procedure.

Consequently, the final criminal judgement becomes res judicata as an effect of the law.

The res judicata in the criminal law represents the final judgments issued by the judges, in fact and in law, on the charge making the object of the criminal trial[4] (*V. Dongoroz*, Curs, op. quoted, p. 343).

In criminal matters, the res judicata generates two effects, one positive and one negative.

The positive effect of res judicata consists in giving rise to the subjective law (*potestas agendi*) on which the competent bodies rely in order to enforce the judgments.

The negative effect of res judicata consists in preventing a new criminal trial and a new criminal action against the same person and the same identity.

Unlike the civil procedure, the prevention is conditioned upon the existence of a double identity:

- of facts (material grounds);
- of persons.

In criminal matters, the cause identity (the legal ground) is prevented by effect of the law, according to the Art. 6 of the Code of Criminal Procedure: the prevention generates effects *even if the fact for which a final judgment was issued received a different juridical classification.*

This prevention is absolute and may be invoked as an exception (the res judicata exception) or using the main way (as grounds for appeal), even after the judgement that ignored it becomes final [art. 426 letter i) Of the Code of Criminal Procedure – as a distinct reason to challenge the judgement requiring its cancellation].

In the current Romanian criminal procedural system, the prevention arising from the negative effect of the res judicata is regulated both as a fundamental principle of enforcement of the procedural law (art.6 – the *ne bis in idem* rule*)* and as a distinct cause of prevention of the initiation or

[3] N.Volonciu, Tratat de procedură penală, Partea specială (Treaty of Criminal Procedure, Special Part) vol. II, 3rd edition, Paideia Publishing House, 1997, p.379-380; I.Neagu, M.Damaschin, Tratat de procedură penală, Partea Specială specială (Treaty of Criminal Procedure, Special Part), Universul Juridic Publishing House, 2015, p.584; D.Lupașcu, Punerea în executare a pedepselor principale (Eforcement of Main Punishments), Rosetti Publishing House, 2003, p.13.

[4] V. Dongorz, Curs de procedură penală (Course of Criminal Procedure), 2nd edition, 1942, p.343 apud I.Neagu, M.Damaschin, Tratat de procedură penală Partea Specială (Treaty of Criminal Procedure, Special Part), Universul Juridic Publishing House, 2015, p.585.

continuation of a criminal action, as a result of the lack of object of the action, art. 16 letter i) of the Code of Criminal Procedure.

In other law systems, as the Italian system, the prevention is used for acts made by ignoring it, as a procedural sanction in itself, called preclusion.

In the penal system, the judgments become enforceable as of the date of becoming final – art. 550 para (1) of the Code of Criminal Procedure.

The moment when the criminal judgments become final is explicitly stated in the law, being subject to different regulations depending if the judgements are pronounced by the first court (art. 551 of the Code of Criminal Procedure.), the appeal court or as a result of a challenge (art. 552 of the Code of Criminal Procedure.).

As an exception, the non-final judgments are enforceable when explicitly stipulated by the law. When these judgments are pronounced on the merits, the suspensive effect triggered by the appeal does not apply: the provisions of the non-final judgments regarding the preventive measures [art. 399 para (4) of the Code of Criminal Procedure], the interim measures [art.397 para (4) of the Code of Criminal Procedure] etc.

When they do not refer to the merits, the non-final, but enforceable judgments, the suspensive effect triggered by the appeal does not apply: the decision to take or to extend a preventive measure (art.204 para (3) of the Code of Criminal Procedure), the decision whereby a measure of medical safety was applied temporarily (art. 248 para (8) of the Code of Criminal Procedure) etc..

When a criminal judgment becomes final the criminal trial (in the sense of the activity in which the criminal action is carried out) ends. The trial (in the broader sense) will potentially continue with the enforcement of the criminal judgments, but without any criminal action.

This is the reason why the "final and irrevocable" term, correct and accepted in civil matters, cannot be used in criminal matters, as it is a pleonasm.

The judgments pronounced by the first court remain final (art. 551 of the Code of Criminal Procedure.):

1. as of the date of pronunciation, when the judgments is not challenged or appealed against;

2. as of the date of expiry of the deadline for appeal or for submitting the complaint against the judgment:

a) when no appeal or challenge was filed in due term;

b) when the appeal or the complaint, if any, was withdrawn within the deadline;

3. as of the date of withdrawal of the appeal or complaint, if any, if occurred after the expiry of the deadline for appeal or complaint against the judgment;

4. as of the date of pronunciation of the judgment whereby the appeal or complaint, if any, was rejected.

The judgment of the appeal court remain final as of the date of its pronunciation, when the appeal was admitted and the trail ended before the court of appeal (art. 552 para 1 of the Code of Criminal Procedure).

The judgment pronounced after the complaint against the first judgment was filed remains final as of the date of its pronunciation, when the complaint was admitted and the trial ended before the court that tries the complaint (art. 552 para 2 of the Code of Criminal Procedure.).

**2. Aspects regarding the competent body to enforce criminal judgments**

In order to identify this topic of the procedure we need to point out that, according to the sense mentioned, we focus on the activity of enforcement of the provisions regarding the criminal part of the final judgment and the enforcement of a part

of the civil provisions of the criminal judgment (regarding the return of assets and the capitalisation of the non-seized assets as well as the documents declared as false).

Pursuant to the Art. 581 of the Code of Criminal Procedure, the provisions from the criminal judgment regarding the civil damages and the judiciary expenses due to the parties shall be executed as required by the civil law.

The enforcement of the criminal judgments requires a judicial body to carry out the judicial function corresponding to this stage of the criminal trial.

This judicial body is the authority of enforcement.

Even if in the actual enforcement activity we come across other players (the prosecutor, the police officers, the gendarmerie, the administration of the place where the person is held etc.), the enforcement authority represents the only entity to carry out the judicial function of enforcement.

The enforcement authority shall mean the entity that enforces the final criminal judgment and which has the main competence to solve all incidents relating to the enforcement.

Pursuant to the art. 553 para (1) of the Code of Criminal Procedure, the judgement pronounced by the criminal court remained final in the first court, the court of appeal or the superior court shall be enforced by the first court that tried the case.

Practically, any court in our judiciary system (civil or military) may act as the court of enforcement, except for the supreme court.

Hence, pursuant to the art. 553 para (2) of the Code of Criminal Procedure, the judgments pronounced in first court by the High Court of Cassation and Justice shall be enforced by the Tribunal of Bucharest or the Military Tribunal as the case may be.

It must be noted that, although at the level of the High Court of Cassation and Justice there is no military section anymore, the specialised competence in case the perpetrator belongs to the military shall be reactivated at the level of the enforcement court.

Considering these provisions, the enforcement court may enforce judgements that were not pronounced by it, but by a superior court.

To this end, in order to enforce the judgements remained final at the court of appeal or at the hierarchically superior court, this shall send to the enforcement court an excerpt of the respective judgement, which is required for the enforcement, as of the day of pronunciation of the judgement by the court of appeal or by the hierarchically superior court, as the case may be.

There is only one exception to the general rule of establishing the enforcement court, namely in case of judgments regarding preventive measures, interim measures and safety measures: these shall be enforced by the judge of rights and freedoms, the preliminary chamber judge or by the court that issued the measures, as the case may be [art. 553 para (4) f the Code of Criminal Procedure].

When the judgment of the court of appeal was changed by decision of the High Court, pronounced in case of recourse for cassation, the supreme court shall send an excerpt of it to the enforcement court (the first court to try the case) for the enforcement of the judgment.

Given that the enforcement, as a stage of the criminal trial, is made up of two categories of activities, these are carried out by the enforcement court, in two ways:

- the concrete activities of enforcement are carried out via a gracious way (unilateral, non-contradictory) by the judge delegated to enforce the judgment;

To this end, one or several judges of the enforcement court is/are delegated (by administrative means) to carry out the

activities required in order to enforce the judgments.

- the incidents occurred during the enforcement (jurisdictional procedures) are solved by the enforcement court (or the equivalent court) in a panel made up according to the law, in a hearing, by way of litigation.

Art. 597 and 598 of the Code of Criminal Procedure regulate a general procedure (similar to a judgment activity) for solving these incidents.

Hence, if during the beginning or the actual enforcement of the judgment there is a situation of request for clarification or preclusion, the delegated judge may notify it to the enforcement court, which shall act according to the provisions of the art. 597 and 598 of the Code of Criminal Procedure.

In this respect, the contradictory character does not represent a principle governing the whole judiciary activity corresponding to this stage of the trial, but only the activity of solving (by way of litigation) the incidents occurred in relation to the enforcement.

In case of punishments and measures whereby the convict is not jailed, the judge delegated for the enforcement of the judgment within the enforcement court may delegate (this term is not the most suitable according to the art. 201 of the Code of Criminal Procedure and it refers to a hierarchically inferior body only) certain tasks to the judge delegated for the enforcement of the judgment to the equivalent court in the jurisdiction where the person concerned lives.

### 3. Considerations regarding the enforcement of the main punishments

The sentence to time in jail and the life time sentence shall be enforced by means of a *warrant of enforcement* issued by the judge delegated by the enforcement court.

The warrant is issued at different moments, after the court where the judgment remains final: the enforcement warrant is issued the day when the judgment remains final at the first court or the day of reception of the excerpt from the hierarchically superior court where the judgment remained final.

The enforcement warrant is a written procedural document drafted in three original copies.

In terms of content, the enforcement warrant is a *mandatory document*, containing the following *element*s: the name of the enforcement court, the issuing date, the details of the convict, the number and date of the judgment to be enforced, the name of the court that pronounced the judgment, the punishment established and the applied law, the additional punishment applied, the time of retention and custody or house arrest, which was deducted from the duration of the punishment, the mention whether the convict is a reoffender and the mention regarding the fact that the injured party was notified about the fact that the convict was left free, as the case may be, the arrest and detention warrant, the signature of the delegated judge and the stamp of the enforcement court.

If the convict is free, then the delegated judge will issue together with the enforcement warrant an order whereby the convict is forbidden to leave the country (the order is sent to the competent body that issues passports and to the General Inspectorate of the Border Police).

The enforcement warrant for a jail punishment or life detention punishment represents the mandate whereby the bodies in charge of the enforcement, always others than the body that issued the warrant, will execute the orders (as an expression of the judiciary power – *imperium*) referred to in the warrant.

Pursuant to the art. 555 para (1) of the Code of Criminal Procedure, the warrant is

the document comprising two distinct orders: the arrest order and the detention order.

These orders must be mentioned in the enforcement warrant, by the judge in charge of the enforcement, whether the convict is free or not.

In addition and separately, pursuant to the art. 555 para (2) of the Code of Criminal Procedure, in case the convict is free, the judge I charge of the enforcement of the judgment shall issue, together with the enforcement warrant, an order whereby the convict is forbidden to leave the country.

Thus, the third order issued in the procedure of enforcement of the jail punishment or life detention punishment has a potential character (if the convict is out of jail only) and is not included in the enforcement warrant.

The enforcement court sends two copies of the enforcement warrant, if need be, to the police unit where the convict's residence is, when the convict is free or to the place of detention when the convict is arrested.

*The police unit* has the following duties: based on the enforcement warrant, it shall arrest the convict, on the day of reception of the enforcement warrant; it may have access into a person's home or residence without the latter's permission and into a legal person's offices without its legal representative's permission; it shall hand over a copy of the warrant to the convict and shall accompany the respective person to the closest place of detention, where it shall hand over the other copy of the enforcement warrant.

When the warrant is to be enforced on a convict who takes care of an under aged person, a persons placed under interdiction, a person who because of the age, disease or other reasons I in need of help, the police staff has the obligation to inform the competent authority in order to take the required protection measures.

In case the person against whom the warrant was issued is not found, the police staff needs to mention this in a report and take the necessary measures in order to have the person tracked down and inform the border authorities.

If the person against whom the warrant was issued refuses to obey, they shall be forced to abide by it. A copy of the report and a copy of the enforcement warrant shall be sent to the court that issued the warrant.

*The commander of the detention place* has the following duties: hands over to the arrested convict a copy of the enforcement warrant; mentions in a report the date when the convict started to serve their sentence; sends a copy of this report to the enforcement court.

The enforcement warrant or the order forbidding the convict to leave the country may be sent to the competent bodies by fax, email or by any other means able to forward a written document in a form that enables the recipient authorities to establish the convict's identity.

In case of postponement of the enforcement of the sentence or suspension of serving the sentence under surveillance, throughout the duration of the surveillance, the surveilled person may submit a justified request to the enforcement court asking it to allow for the person to leave the Romanian territory.

The enforcement court provides a solution to the request in the board room, where after hearing the supervised person and the probation officer, it issues a final decision.

In case it admits the request, the court shall establish for what period the supervised person is allowed to leave the Romanian territory, as required in art.557 para(8) of the Code of Criminal Procedure.

Although it is a main punishment, the criminal fine is not enforced by means of an enforcement warrant.

This punishment is executed by the convict paying, *entirely*, the fine and presenting the payment document, in original, to the enforcement court, within 3 months from the date when the judgment remained final.

The criminal fine shall be paid to the tax administration where the convict is registered. The criminal fine shall not be mistaken by a civil fine, as the principle of ablation (payment of half of the minimum fine within 48 hours) does not apply.

When the person convicted to pay the fine is unable to pay the whole amount of the fine within the legal term, the enforcement court may, upon the convict's request, allow for a gradual payment of the fine, within maximum 2 years in monthly instalments – art. 559 para (2) of the Code of Criminal Procedure.

In case the fine punishment cannot be entirely or partially executed *for reasons unrelated* to the convict, with the latter's consent, the court shall replace the obligation of payment of the unpaid fine with the convict's obligation to perform unpaid community work, except for the case when because of health reasons, the convict is unable to perform this work.

Pursuant to the art. 64 para (1) of the Code of Criminal Procedure, a day of fine equals a day of community work.

The competent court to make this decision is the enforcement court.

This court is notified by the body that, according to the law, enforces the fine (the tax administration) or by the convict. The court may be notified automatically as well.

When the court decides to replace the fine with unpaid community work, it will mention two *entities* in the community where the person is to perform the unpaid community work.

More precisely, the entity and the type of activity to be performed will be decided by the probation officer, not by the court itself.

The obligation to perform community work starts to be enforced when a copy of the decision is sent to the *probation service.*

Although the fine was replaced by unpaid community work, the payment of the fine corresponding to the remaining fine-days leads to the termination of the community work.

If the convict does not execute the community work obligation as required by the court, the *enforcement court* replaces the fine-days for which the community work was not executed with a corresponding number of days in jail.

Moreover, the replacement of the unexecuted fine-days with a corresponding number of days in jail is decided when the convict commits a new crime which is uncovered before the obligation of community work is fully executed.

The days replaced by time in jail are added to the punishment for the new crime. The competent court to decide on the replacement is here the first court that tries the new crime.

In both cases, the court that replaces the unpaid community work with time in jail is notified automatically or by the body that according to the law, enforces the fine or by the probation service.

In case the fine punishment is not executed, entirely or partially, for reasons related to the convict, then the fine is replaced by time in jail.

Pursuant to the art. 63 of the Code of Procedure, in order for the fine to be replaced *directly* with time in jail, the failure to pay the criminal fine (as an objective element) needs to be accompanied by ill faith (as a subjective element) of the person that refuses to pay the fine.

It is only the fulfilment of the two conditions (proved, not presumed) that enables the court to replace the fine.

Moreover, the fine punishment is replaced directly with time in jail in cases when, although the failure to pay the fine is not due to reasons related to the convict, the latter *does not agree* to perform unpaid community work.

The replacement is decided, in both cases, by the *enforcement court.*

Pursuant to the art. 586 para (2) of the Code of Criminal Procedure, the court is notified automatically or by the entity in charge of the enforcement of the fine.

The convict is summoned to appear in court for the hearing, and if the convict is not accompanied by an attorney the court appoints one to assist the convict.

The convict found in detention will be brought to the court.

If the convict pays the fine during the case solving, the notification will be rejected as unjustified.

**4. Certain incidents regarding the execution of the jail and life detention punishments. The parole**

Considering the substantive provisions[5] that regulate the respective institution, the probation has a material and immediate effect of the release of the convict before serving the whole punishment in jail.

If in the period between the release from jail and the end of the duration of the punishment the convict did not commit a new crime, the parole was not cancelled and no reason for cancelation was found, pursuant to the art.106 of the Code of Procedure, the punishment is considered to have been fully executed.

The material conditions to be complied with for parole are:

- the convict served part of the punishment in jail;

- the convict serves the sentence in a semi-open or open regime;

- the convict fulfilled all the civil requirements set in the sentence, except for the case when it is proved that the convict was unable to fulfil them;

- the court is convinced that the convict has improved his/her conduct and may be reinserted into society.

As regards the first requirements, the part of the sentence to be executed differs depending on two elements: the total punishment and the age of the convict – art. 99-100 of the Criminal Code.

These parts vary between three quarts and one quart of the punishment. Although the law recognises for the convicts the possibility to consider as executed (based on work performed) a period longer than the detention period, the parole may not be granted before the convict actually serves the minim period required by law.

The time between the date of the parole and the date when the duration of the sentence ends represent the surveillance time for the convict.

During the surveillance period, the convict shall observe several surveillance measures, some of which are *mandatory*, if the remaining of the sentence as of the date of the parole is of 2 years or more, while others are *optional* – art.101 of the Criminal Code.

There is a jurisdictional procedure whereby the parole is granted. The parole is not granted automatically, but:

- upon the convict's request;

- upon the request of the parole commission operating in every penitentiary, pursuant to the art. 97 para (2) of the Law no.

[5] As regards the analysis of these substantial provisions regarding the parole, see C. Mitrache, CR. Mitrache, Drept penal român, Parte generală (Romanian Criminal Law, General Part), Universul Juridic Publishing House, 2014, p.487-497.

254/2013 on the execution of punishments and measures depriving the individuals from their freedom, as decided by the judiciary bodies during the criminal trial.

When the convict addresses the court directly, requesting for parole, the request is accompanied by the report prepared by the commission and the documents that certify the information in the report.

According to the old regulation, the Decision no. LXVII/2007 (the Official Gazette no. 537 of July 16, 2008), the High Court of Cassation and Justice, the Joint Sections, admitting the recourse in the interest of the law established that the court shall examine the request for parole in order to see if it fulfils all the legal requirements according to the situation at the time when it is examined not when it was submitted. The clearance provided by the supreme court is fully applicable to the new regulation as well.

The compliance with the material conditions does not automatically determine the admission of the request for parole. To this end, the request for parole is assessed in terms of legality and justification.

Hence, pursuant to the art. 100 para (1) letter d) of the Criminal Code, the parole is granted depending on the *court's conviction* regarding the convict's improved conduct and possibility to reinsert into the society.

Moreover, pursuant to the art. 97 para (3) of the Law no. 254/2013 on the execution of punishment and measures that deprive the individuals from their freedom as decided by the judiciary bodies during the criminal trial, when granting the parole the court takes into consideration the convict's conduct and effort to reinsert into the society, in particular through the work performed, the educational, moral-religious, cultural, therapeutic activities, psychological counselling and social assistance activities, school training and professional training as well as the responsibilities assigned to the person, the rewards and disciplinary sanctions and the criminal record of the convict.

The only court able to solve the request for parole in the court of the jurisdiction where the detention place is located.

Given its exclusive character, the competence for solving the request for parole is not a form of territorial competence, but a form of specialised material competence (even special).

Consequently, this competence is absolute, and cannot be changed by judiciary or administrative means and it may be invoked in case of failure to observe it, before the court able to solve the appeal.

When the court finds that the conditions for parole are not met, it issues a decision of rejection and sets a term after the expiry of which the proposal or request may be renewed.

The term may not exceed 1 year starting from the date when the decision remains final.

The decision whereby the court responds to the request for parole (admits or rejects it) is a sentence, which may be appealed against within 3 days from its communication.

The appeal is handled by the Tribunal of the jurisdiction where the detention place is located and the complaint formulated by the prosecutor does not suspend the execution of the jail term.

A copy of the final judgment is communicated to the competent probation service as well as to the police unit of the jurisdiction where the released person lives.

The parole may be cancelled, according to the art. 104 of the Criminal Code, following the same procedure of resolution, the court called upon to decide on the cancellation has a different competence depending on the reason for cancellation.

Moreover, if during the surveillance time, the convict is found to have committed another crime before being granted the release and a jail sanction was inflicted

against the convict or the new crime right before the expiry of this term, the parole is cancelled.

In this case, the court that tries or was the first to try the case for which the parole is to be cancelled shall decide on this automatically or upon the request of the prosecutor or of the probation officer.

**5. Postponement of the execution of the jail sentence and of the life detention sentence**

This procedural incident delays the immediate execution of the jail sentences. Compared to the prompt term in which the jail sentence or life detention sentence is enforced (24 hours form the date when it remains final), the postponement of the execution of the sentence is at present an institution without a consistent practical representation.

As it is an exceptional situation in the normal development of the enforcement procedures, the postwomen of the execution of the sentence occurs in cases explicitly stipulated by the law – art. 589 para (1) of the Code of Criminal Procedure.

The postponement of the execution of the sentence or of the life detention may be decided in two cases: when there is a medical impediment; when a convict is pregnant or has a child who is less than 1 year old.

The request for postponement of the execution of the sentence for reasons other than those indicated in the art. 589 of the Code of Criminal Procedure must be rejected as inadmissible.

a) *The convict suffers from a disease established by a forensic expertise, which can't be treated within the medical system of the National Administration of Penitentiaries and which makes it impossible to have the punishment executed right away* [Article 589 (1) a) of the Of the Code of Criminal Procedure].

*The conditions* which enable the postponement of the punishment's execution are: an issued final judgment; the convict suffers from a disease which makes the immediate punishment execution impossible; his/her release shall not represent a danger for the public order; his/her disease is established by a forensic expertise and can't be treated within the medical system of the National Administration of Penitentiaries; the illness specificity doesn't allow its treatment by ensuring ongoing guard within the medical system of the Health Ministry.

The current regulations are able to emphasize the clear difference between the concept of danger to the public order and that of concrete social danger (conclusively established by the judgment), no interdependence being possible between them.

The medical impediment which generates the postponement of the punishment's execution must not be *related to the convict*.

According to the Article 589, para (2) of the Of the Code of Criminal Procedure, the postponement *can't be applied* if the respective convict caused the illness him/herself, by refusing the medical treatment or the surgery, through self-aggression actions or other harming actions, or avoids having the forensic expertise done.

The punishment execution will be postponed until the convict is in the appropriate situation for executing the punishment, but always, for a limited period of time.

The court's decision on the *sine die* execution postponement due to this reason, until recovery, it's illegal if it fails to also establish the duration.

In case the forensic expertise doesn't establish an approximate term in which this medical impediment could be removed, then the court must set a reasonable (random)

term upon whose expiring, it should check if the impairment still exists or not.

b) *A convict is pregnant or has a baby younger than one year old* [Art. 589 para (1) b) of the Of the Code of Criminal Procedure].

Obviously, this postponement case refers to women-convicts only. The men convicts shall not be subject to this case even if they would be the sole living parents of the children.

*The conditions* which enable the postponement of the punishment's execution are: an issued final judgment; the convict is pregnant or has a baby younger than one year old.

The existence of the case of postponement of the execution of prison punishment or life-detention, given the convict's state of pregnancy can be proved based on any medical document issued by the relevant body, the forensic expertise not being required because – in order to establish the punishment execution postponement case stipulated by Art. 589 (1) b) - of the Of the Code of Criminal Procedure – the evidence is not pre-established by the lawmaker, unlike the postponement case stipulated by Art. 589 (1) a) of the Of the Code of Criminal Procedure for whose conclusion the *forensic expertise is mandatory*.

The punishment execution shall be postponed until the cause which determined the postponement (the baby reaches the age of one year) ceases.

The convict is entitled to request the postponement again if she finds herself in the same situation as before starting the execution (is pregnant again).

The postponement of prison or life detention punishment execution can be requested by the attorney and by the convict (in person, through an authorized agent based on a special proxy or through a lawyer).[6]

The request may be withdrawn by the person who submitted it. The new express regulation transposes an older jurisprudential solution with mandatory effect[7].

The competent court entitled to grant the postponement of the punishment execution is the enforcement court.

In case the request is based on the medical impediment, then its drafting shall not have the immediate effect of *investing the court*; the new procedure establishes a preliminary stage.

Thus, in the situation stipulated by the Art. 589(1) (a) of the Of the Code of Criminal Procedure, the request for postponement of the punishment's execution will be submitted to the *judge in charge with the enforcement* alongside the medical records.

The judge checks the competence of the court and orders, as the case may be, through sentence, the declining of the case settling competence or the performing of the forensic expertise. As soon as the expertise report is received, the enforcement court settles the case with the enforcement, according to the procedure's joint provisions, stipulated by Art. 597 of the Of the Code of Criminal Procedure.

Thus, the President of the court will order the subpoenaing of the concerned parties. There will be measures taken for assigning an ex officio lawyer, for the cases which require mandatory legal assistance. The convict, in detention or confined in an educational centre, is brought to trial. The participation

[6] For details regarding the procedure, as it was established by the former regulations, similar, in general, see *D. Lupaşcu*, Amânarea executării pedepsei închisorii sau a pedepsei detenţiunii pe viaţă (Postponment of the execution of the punishment in jail or life detention), in Dreptul no. 4/2002, p.166-184; *L. Herghelegiu*, Amânarea executării pedepsei. Cereri succesive. Criterii de admitere sau respingere (Postponment of Sentence Executions. Succesive Requests. Admission or Rejection Criteria), in Dreptul no. 9/2003, p. 214-217.

[7] High Court of Cassation and Justice, Joint Sections. Decision to Admit the Recourse in the Interest of the Law no. XXXIV/2006 (Official Gazette no. 268 of May 30, 2007).

of the attorney is mandatory. The sentence will be decided after the prosecutor presents the conclusions and the parties are heard.

In case the prison or life-detention punishment execution postponement is ordered, then the court must ask the convict to observe the obligations provided by the Art. 590(1) (a) – (e) of the Of the Code of Criminal Procedure.

The obligations stipulated by Art. 590(2) (a)-(c) may be ordered by the court (they are optional).

The court's omission to mention the obligations leads to the cancellation of the judgment on these grounds.

When issued, the enforcement court communicates the judgment whereby the punishment execution postponement was decided: to the police body assigned within the postponement decision in order to put the person on the spot; to the gendarmerie, to the police unit in whose jurisdiction the convict lives, the bodies competent to issue the passport, the border authority, as well as to other institutions in order to make sure the imposed obligations are observed.

The decisions whereby the punishment execution postponement is ordered are *enforceable* as of the date of their issuing. The decision whereby the court decides on the punishment execution postponement may be appealed against to a higher court within 3 days from its communication.

In case the established obligations are infringed with *ill-faith*, then the enforcement court revokes the postponement and orders the execution of the jail punishment.

The police unit assigned by the court in the judgment verifies, on regular basis, the observance of the obligations by the convict and submits a monthly report in this regard to the enforcement court. In case the police unit notices infringements of the established obligations, it advises the enforcement court in this regard, *immediately*.

The enforcement court keeps the record of the granted postponements and, when the term expires, takes measures regarding the issuance of the execution of sentence and, in case the warrant was issued, takes measures for its fulfilment; in case the postponement term wasn't established, then the judge appointed by the enforcement court must inform the enforcement court over the subsistence of the postponement grounds and, when it concludes that this has ceased, it must take the measures for the issuance of the execution warrant or, as the case may be, for its implementation.

### 6. The interruption of the jail punishment and life-detention execution

Unlike postponement, the interruption of the jail punishment or life detention occurs only after the commencement of the execution.

The execution of the jail punishment or life detention may be interrupted in the same cases for which the postponement of the punishment execution can be ordered. The conditions in which the interruption of the punishment execution is granted are the same as those stipulated for the postponement of the punishment execution.

Those who request the interruption of the jail punishment or life detention execution are the prosecutor and the convict, and in case the interruption is based on illness, the request can be also filed by the penitentiary's administration.

The court entitled to decide if the punishment execution interruption is granted, is the court in whose circumscription the detention place is located, equivalent to the enforcement court. In case the convict has been freed following an interruption prior to punishment execution, then the court entitled to order the interruption of the punishment execution is the enforcement court.

The request for extending the previously granted interruption will be settled by the court

which ordered the interruption of the punishment execution.

The provisions regarding the request for interruption, the settlement procedure, the obligations which have to or may be ordered once the application is admitted, the nature of the decision whereby the request is solved and the remedies stipulated for the implementation of the punishment execution postponement are applied accordingly.

In case the request for punishment execution interruption was admitted, the court which granted the interruption shall have to immediately advice the enforcement court, the detention place and the police unit in this regard.

The enforcement court and the administration of the detention place keep the record of the granted interruptions. In case the jail sentenced person fails to present him/herself at the detention place as soon as the interruption term expired, then the administration shall immediately send the sentence execution copy to the police unit, for enforcement. The copy of the sentence execution warrant shall also mention how much time is left from the sentence execution.

The administration of the detention place informs the enforcement court about the date when the recommencement of the sentence execution started. The interruption period is not accounted for in the sentence execution.

In accordance with Art. 519 of the Of the Code of Criminal Procedure, the execution of the educative measure of keeping the minor in an educative centre, or in a detention centre may be postponed or interrupted in the cases and conditions provided by the law.

### 7. Joint provisions regarding the procedure at the enforcement court

As we mentioned, the second batch of activities which composes the procedural phase of enforcement – the settlement of the jurisdictional incidents regarding the execution, involves the intervention of the enforcement court.

As any other court, the enforcement court carries out its activity in legally established panels, in court hearings, by means of litigation.

As this activity doesn't involve the settling of the legal actions, it is not ruled by the general provisions regarding the proceedings, appropriate to the second procedural phase, but by other provisions of *lex generalia*, specific to enforcement, named *joint provisions regarding the procedure at the enforcement court - Art. 597 of the Of the Code of Criminal Procedure.*

The activity whereby the enforcement court solves the execution incidents is not included in the *trial* activity, but in the *settling* activity; therefore, the use of the inappropriate term, even by the lawmaker, doesn't have to induce the identity of legal regime.

From a *functional* stand-point, the litigation activity carried out by the enforcement court (which may be a civil court, a tribunal or a court of appeal) corresponds to the competence of the courts to *also solve other cases stipulated by law* – Art.35(2) for law court, Art.36(3) for tribunals and Art. 38(4) for the court of appeal.

There are normative hypotheses in which the competence for solving certain incidents regarding the execution, such as sentence amendments, sentence interruption or parole etc., belongs with courts other than the enforcement court, such as the court in whose circumscription the detention place is located, corresponding with the enforcement court, or the civil court in whose circumscription the detention place is located.

Through the express will of law, the joint procedure which we take into

consideration is also applied for the incidents resolved by these courts – Art. 597(6) of the Of the Code of Criminal Procedure. In this case, the solution is communicated to the enforcement court.

The procedure which has to be observed in this phase imposes the following rules:

- the President of the panel orders the subpoenaing of the concerned parties and takes measures for assigning an *ex officio* lawyer, for cases when the legal assistance is mandatory; furthermore, when the cases of interruption of jail sentence or life-detention execution are on trial (inappropriate term used in Art. 597(1) of the Of the Code of Criminal Procedure, the penitentiary's administration where the convict's sentence is executed is also subpoenaed;
- the convict, in detention or kept in an educative centre is brought *to trial*;
- the prosecutor's participation is mandatory.

The court decides *through a judgment*, after hearing the prosecutor's and parties' conclusions.

As we mentioned, the joint procedure at the enforcement court includes the obligation of president of the panel of the enforcement court to order the subpoenaing of the concerned parties – Art. 597(1) of the Code of Criminal Procedure.

As the criminal action is no longer exercised within the procedural phase of enforcement or during the execution, being extinguished through the final judgment, the term *party* used in the joint provisions which regulate the procedure at the enforcement court doesn't refer to the procedural subjects stipulated by Art. 32 of the Code of Criminal Procedure (defendant, plaintiff, civilian responsible party), but to the subjects involved in the legal relations specific to this phase (convict, complainant, petitioner, respondent, etc.).

*The ordinary remedy* for the judgments issued, for the first time in this procedural phase is the appeal. The deadline for lodging an appeal is of 3 days and starts from the communication of the judgment, in all cases.

The appeal is settled by the court higher than the one which issued the judgment in a public hearing, by subpoenaing the convict. The convict, in detention or kept in an educative centre, is brought *to trial*. The participation of the prosecutor is mandatory, and the court's *decision* whereby the appeal is solved, is final.

Even though the activity carried out by the court during beginning of the enforcement or actual enforcement, in first court or in solving the appeal, doesn't represent a trial activity, by will of law the provisions which establish the *Trial* from Title III of Special chapter, providing that they are not contrary to the provisions which regulate this phase, *will be appropriately applied* – Art.597 (5) and (8) of the Code of Criminal Procedure.

But, these provisions regarding the *Trial* can only complete the provisions regarding the enforcement, but they can't replace them.

### 8. Appeal against the enforcement

The appeal against execution represents the procedural remedy whereby, on jurisdictional way, any uncertainty or encumbrance regarding the execution is *avoided or removed*, and any incident occurred during execution *is solved*.

At the same time, it represents the procedural way through which any execution deed or the execution itself *is challenged*.

The appeal against execution is not a remedy; therefore it can't replace, modify or change the provisions of the final judgment. This procedural remedy regards, usually, only the enforcement and not the decision itself.

In case the appeal against execution aims to modify the solution which became *res judicata*, then this should be rejected as inadmissible.

In order to prevent the alteration of the appeal against execution and its transformation in a way of challenging the decision, its use is limited to some cases, expressly stipulated by the law.

The appeal against the enforcement of a criminal sentence can be done in the following *situations* (Art. 598 of the Code of Criminal Procedure):

*a) when a judgment which is not final, has been enforced;*

*b) when the enforcement regards a different person than that stipulated in the sentence;*

*c) when an uncertainty occurs in relation with the judgment under enforcement (appeal against the title) or any encumbrance to the enforcement.*

Due to the fact that the appeal against the enforcement is not a remedy meant to modify or cancel the final judgment, even when it's promoted on the grounds under letter c), its conclusion can only be the clarification of the judgment under enforcement.

For instance, according to the former regulations which, in this regard, are identical, the erroneous deduction of the preventive arrest, in the sense that the sentence issued by the first court comprised a longer period of time than the effective custody period has drawn the incidence of this case of appeal against execution[8].

*d) when the amnesty, prescription, reprieve or any other cause of ending or decreasing the punishment is invoked.*

In case that a deed of clemency (amnesty or reprieve) occurs after the sentence becomes final, and the judge assigned for enforcement failed to apply it according to the provisions of Art. 596 of the Code of Criminal Procedure, the convict may file an appeal against the execution, based on this case.

The competence for solving the appeal against the enforcement is established differently, in accordance with the case on whose grounds it was invoked.

For the cases stipulated by letters a), b) and d), the competence belongs to the *enforcement court* or *to the appropriate court in whose circumscription the detention place is located*.

For the case stipulated by letter c), the competent court is the one which issued the judgment under enforcement.

In case the appeal refers to the execution of the civil provisions of the sentence, the competence belongs to either the court of enforcement [for the cases stipulated by Art. 598(a) (b)], or the court which issued the judgment under enforcement [for the case stipulated by Art. 598(c)].

The appeal against the deeds of enforcement of the civil provisions within the criminal sentence will be solved by the civil court of law, according to the provisions of the *civil law* (Art. 600 of the Code of Criminal Procedure).

The appeal regarding the civil provisions of the criminal sentence may be filed only on the grounds of the first three cases from Art. 598-of the Code of Criminal Procedure; the fourth one regards the criminal side *only*.

In case the appeal is aimed against the enforcement of judiciary fines, this will be solved by the court which enforced them.

Taking into consideration its functionality, the doctrine pertinently established that this appeal (against the enforcement) may be filed:

[8] I.C.C.J., Dept. of criminal law, Sentence no. 167/2006, in B.J. 2006, Ed. C.H. Beck, Bucharest, 2007, p. 818-820.

- before the enforcement of the final criminal judgment, if an incident stipulated by law occurred up to this moment;

- during punishment execution, if the incident occurred during execution;

- right after the punishment was executed, but in relation with its execution.

Unless otherwise provided by law, the appeal may be filed *anytime*.

The procedure for solving the appeal against the enforcement is stipulated by Art. 597-of the Code of Criminal Procedure.

The request may be withdrawn by the convict as well as by the prosecutor, when this was filed by him/her.

In case the amnesty, prescription or any other cause of punishment ending or decreasing is invoked and provided that no data and situations result from the enforced sentence upon whose existence depends the solving of the appeal, their finding is done by the court with competence *in judging* the appeal –599(2)-of the Code of Criminal Procedure.

*A new enforcement* is carried out as soon as the final solution is issued following the admission of the appeal against execution.

According to Art. 599(5)-of the Code of Criminal Procedure, the further requests of appeals against execution will be rejected as *inadmissible* if there is identity of person, legal grounds, reasons and defences.

In case the same person has previously filed an appeal against execution and, later-on, files a new request invoking the same reasons, grounds and defences, the inadmissibility solution is not justified if the first request was withdrawn by the petitioner without having the merits assessed by the court, because it would block the access to justice for solving the issues related to the enforcement of the final judgment.

**Conclusions**

The new laws of procedure have brought modifications regarding the enforcement of the final judgments as well. By analysing the relevant procedural provisions we may establish that they have a procedural character and there are two categories of activities included in this stage or phase of the criminal trial:

- activities regarding the means of enforcement of the final criminal judgments (the issuing of the enforcement warrant, the issuing of the order preventing the convict to leave the country, the communication of a copy of the judgment to the health directorate etc.).

- activities regarding the procedural incidents related to the enforcement and which need to be solved by jurisdictional procedures (postponement and interruption of the execution of the sentence, appeal against the execution of the sentence, parole etc.).

Irrespective of their nature, these activities shall be consistent with the strict rules of the law, their implementation starting from the key premise of the integration and appropriation of the new normative framework.

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