

THE PERSONS DEPRIVED OF LIBERTY, AS PASSIVE SUBJECT OF THE CRIMINAL EXECUTION LEGAL RELATIONSHIPS

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Abstract

The study analyzes the behaviour of individuals deprived of their liberty both as an individual phenomenon and in relations established during the execution of custodial sentences. The impact of detention on these people is different, so their reactions are different. Isolation of society, loss or restriction of rights, separation from their families, subjection to a severe life regime, all perceived as a violation of his integrity as a human being.

The study also analyzes the conformism/discipline report, taking into account both personal factors and secondary (environmental) factors generating aggressive behaviours, circumstances that affect the psyche of a person deprived of liberty, lowering his tolerance to everything the authorities involve who consider them "malevolent entities" whose purpose is to punish the innocent, to destroy the prisoner's being by being subjected to ill-treatment or by applying disciplinary sanctions.

The study also focuses on the relationship between the person deprived of liberty and the restorative justice, the relationship between the offender, the victim, the criminal trial, the criminal sanction, the prison, in order to identify adequate remedies in order to recover the damage caused by the offense, as an alternative to the retributive penal system, focusing on the dialogue, on the negotiation, to enable offenders to assume active responsibility for their actions.

Keywords: *the person deprived of liberty, passive subject, rights, disciplinary liability, reparatory justice*

1. Introduction

The passive subject of the legal relationship of execution of the punishment or the other penalties of criminal law is represented by those categories of participants obliged to incur criminal liability.

In the usual language, the person (major or underage individual) executing a custodial sentence is inevitably named *condemned*, and a long period was considered to be so only because the law did not offer variants for the situation of persons in the execution of punishment. However, the new changes in our criminal justice system have imposed a differentiated treatment of these individuals according to the nature of the penal sanction applied: only punishments for the major people and and detention measures for the minor individuals, so that the terms used to indicate belonging to one category or another does not only reflect the teaching differentiation but, above all, the criminal treatment. The Government Decision no.157/10.03.2016 for the approval of the Regulation implementing Law no.254/2013 on the execution of sentences and deprivation of liberty ordered by the court during the criminal trial defines, in art.2, the term *persons deprived of their liberty* as the case may be, detained persons, arrested at home, preventive arrest, interned, convicted, and detained person who is the convicted person in custody or life imprisonment.

By introducing in the new Criminal Code the alternative measures of detention, a distinct legal value was granted to each of the three operations that the court usually carries out in the process of judicial

individualization of punishments, namely, the determination of the punishment, its application and the order of its execution¹, distinction from the previous criminal code when the three operations represented a succession of phases that the court underwent in the process of judicial individualization of the punishment, since it could only pronounce punishments.

Therefore, the passive subjects of the criminal enforcement legal relationship are:

– *convicted persons*, major natural persons and legal persons sentenced to custodial or non-custodial sentences, as the case may be. From the point of view of the criminal procedural law nature, the application of the punishment is a procedural solution of conviction issued in solving the criminal action against the defendant, which results also from the provisions of art.404 paragraph 2, sentence I of the Criminal Procedure Code, according to which the court when the court orders the conviction, the device includes the principal punishment applied. Only at the end of this phase, the defendant acquires the status of a convicted person².

– *the supervised persons*, the major persons to whom the court applied the measure of giving up the punishment or postponing the punishment, the status of a convicted person is incompatible with the measure of the application of these measures.

– *the underage individuals* against whom only custodial measures (internment into an educational centre or detention centre) and non-custodial measures (civic training, supervision, weekend and daily assistance) can be taken,

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¹ I.Borlan, *Amânarea aplicării pedepsei în teoria și practica dreptului penal*, Universul Juridic Publishing House, Bucharest, 2017, pp.41-45.

² I.Borlan, *ibidem*, p.43.

In the opinion of the author Petrache Zidaru³, the convict, as a matter of law, is:

- is the natural person whose criminal behaviour has led the judiciary to impose his prison sentence;
- is the natural person for whom the prison regime has to appeal to all educational means and all forms of assistance available to society in the purpose of his re-socialisation;
- is the natural person who can only be deprived of his or her liberty and of the rights the restriction of which derives expressly and necessarily from the deprivation of liberty.
- is the natural person by whose conviction the society carries out a social-political act that aims to achieve one or more of the following objectives: the deserved retribution or punishment, the general and individual prevention, the protection of the population, the impossibility to do harm, and social rehabilitation.

2. Content

2.1. The person deprived of liberty as an individual phenomenon.

Deprivation of liberty is a situation with great resonance both in the life of the person who supports it and in that of his relatives or friends. Every person deprived of liberty leaves behind the individual universe replaced now by the detention room, the educational halls, the walk, the institutionalized life becoming second nature. The penitentiary is a total institution, as defined by Erving Goffman⁴ a place where a large number of individuals of a similar status, separated from the rest of society for a considerable period of time carrying together a strictly defined life officially regulated by the institution. The detention impact⁵ on a person deprived of his liberty is felt dramatically by limiting the space of movement and the organization of life, by restricting personal relationships, lack of information, authoritarian and strict regime, closed environment and monotonous activities. All these characteristics are perceived by the prisoner as a touch of his integrity as a human being. Most of the individuals deprived of their liberty⁶ choose the way to execute the punishment or educational measure, in accordance with the rules imposed by the law and the administration of the detention facility, proving, at least formally, that they are on the road to reintegration, participating in the activities and programs penitentiary, participating in work, everything in order to execute the sentence and leave the penitentiary as soon as possible. Unfortunately, the involving of persons deprived of their liberty only in sports, religious activities, skills discovery, etc., is not

sufficient for reintegration into society, even if they end with proposals for reward or obtaining credits. It is that necessary for each type of activity to be selected people with certain attributes that make them suitable for that activity and, even more importantly, that these activities to become useful⁷ because the interest is not to keep him busy, but to give them a sense of usefulness, increase their self-esteem and, why not, also gain income from these skills.

Many of the detainees involved in the skills discovery only find out that they possess some abilities they did not even know or, even if they knew, could not practice them (painting, origami). Therefore, it may be more appropriate for activities and programs to be tailored to the specifics of the prison population from the place where they occur, and not vice versa. However, unfortunately, for various reasons, the penitentiary institution can not always provide for some detainees the right re-socialization programs, which would increase their chances of finding a post-release job, e.g. intensive care courses qualification in different trades. The issue of detainees, not necessarily of the young ones, but also of those who are at the age of professional maturity entering the prison without having previously a job or occupation and leave him, sometimes after years, just as skilled how they came, is another one that can increase the risk of relapse after leaving the penitentiary at term or conditional release. A *lege ferenda* proposal would be welcomed in this respect by which legal persons convicted to the penalty of the fine could benefit from the reduction if they organize training and retraining courses for the persons deprived of their liberty. But until such a legislative initiative, prisons are currently facing the prolonged inactivity of prisoners, boredom, lack of lucrative activities, the monotony of activities or the lack of continuity of these activities and programs, because during the summer many of these programs are suspended, caused by staff leave or school holidays, etc., situations that influence the behaviour of people deprived of their liberty, causing them to wish nothing more but waste time.

The pathogenic environment of the penitentiary is often reflected in the incapacity of some of the persons deprived of their liberty to integrate into the requirements of the rules imposed by the law and the internal regulation, claiming their dissatisfaction with everything that represents the penitentiary system (institution, director, staff, etc.) through all sorts of protests, demands, complaints, by resorting to food refusal, as extreme solutions to solve their problems. The discontents may be real but, most often, are the expression of exaggerated ambitions ("to show who he is") or the belief that he is the victim of permanent

³ *Drept execuțional penal*, Edit Press Mihaela S.R.L. Publishing House, Bucharest, 1997, p.110.

⁴ Renowned american sociologist (1922-1982), which in one of his books, *Asylums*, published in 1961, makes a profound analysis of "total institutions" such as psychiatric hospitals, prisons, military barracks, ships, boarding schools, monasteries, homes for the blinds, sanatoriums, etc.

⁵ I.M.Rusu, *Drept execuțional penal*, Hamangiu Publishing House, Bucharest, 2015, p.258.

⁶ I.Chiș, *Drept execuțional penal*, Universul Juridic Publishing House, Bucharest, 2013, p.276.

⁷ E.g., enrolling in the "Literary Creation" activity of a detainee who had only two classes and who, not after a long time, abandoned his activity.

injustice because the administration of the penitentiary specifically targets him in decision-making (moving to another room, for example). The practices refusal of nourishment and self-injury (cutting on arms with sharp objects, blades, swallowing objects, etc.) are very common amongst detainees in order to capture the attention of staff or in order to get what they want, that is why that's are only "demonstrative", a game of refusal of nourishment (sometimes the refusal to eat lasts from one meal to the next) with the intention of impressing, to tease staff, and not with the intention of reaching to suicide, often justifying their behaviour through the existence of psychic illnesses they suffer or by the adverse effects of treatment they receive, making a practice of using the medical condition or invoking amnesia to justify nonconforming behaviour⁸.

2.2. The person deprived of liberty in interpersonal relationships

The deprivation of liberty environment brings together people from different social backgrounds with different degrees of culture or understanding, and their long-term influence on the structure of the personality of persons deprived of their liberty cannot be ignored. The deprivation of liberty environment brings together people from different social backgrounds with different degrees of culture or understanding, and their long-term influence on the structure of the personality of persons deprived of their liberty cannot be ignored. At the institutional level, the person deprived of liberty is in the middle of two types of relations: a report detainee - the institution of the penitentiary, e.g., a report of *compliance* with the internal regulations, by Law No. 254/2013 on the execution of sentences and detention measures ordered by the court during the criminal trial, the Internal Regulations, the provisions of the director of the place of detention, and a relationship detainees-detainees and detainees - contact person (other persons deprived of liberty or personnel at the place of holding). The strong influence that the deprivation of liberty environment exerts on detainees personality generates and maintains the tensions between these persons, increasing exponentially the opportunities of occurrence of indiscipline acts, both vis-à-vis the staff of the detention facility and the other persons with whom it comes in contact.

The analysis of the conformism/indiscipline ratio should be made taking into account two categories of factors: main and secondary.

The *primary factors* category (personal) includes the person's bio-behavioural characteristics, namely increased verbal and physical aggressiveness, formed in childhood, amplified in adolescence, for the adult being, this behaviour to accompany him all his life, a low self-control (lowering self-esteem, envy, resentment), low levels of education, untreated mental illness, tobacco dependence, alcohol and/or drugs,

provocative attitude, especially in the case of interned underage individuals, eager to impress entourage with the obvious intention generated conflicts between them and the staff in the penitentiary, avenging themselves precisely because "they embarrassing him in front of the other interned persons"⁹. The aggressive behaviours also affect relationship detainees- detainees, the violence ranging from verbal forms (offences, ironing) to extreme forms, harassment, corporal injuries, even killings, collective violence, "scores settling" on the background of some conflicts prior to the imprisonment, or caused by the tensions accumulated during detention.

In the *secondary (environmental) factors* category that generating the aggressive behaviours can be included those situations, external circumstances that affect the psyche of a person deprived of liberty, lowering his tolerance to everything that involves authority, and rejecting everything that comes from authority, courts of law, prison administration) which they consider to be "malevolent entities" whose only aims are to punish the innocent, to destroy the detainee by subjecting him to ill-treatment, by limiting his rights as a result of the imposition of regulations, or following the disciplinary sanctions applied.

Considered as the first cause of aggressive behaviour, overcrowding of detention places produces dramatic effects on at least three levels¹⁰:

a) *at the level of the detainees* there are dissatisfactions regarding the quality of the services to which they are entitled (food, medical assistance), there are acts of indiscipline, aggressions among persons deprived of liberty, as well as self-aggressions, increasing the smuggling among detainees, the feeling of boredom and of monotony;

at the level of staff working directly with the inmates increases the psychological overload, there are complaints about the working conditions caused by overtime and uncompensated time or unpaid or caused by the transfers of staff to other units;

b) *at the management level*, the management act is difficult because of the malfunctions in the dynamics of the institution, connected with the increasing demands of detainees in order to respect them the accommodation conditions, the management of the funds meant to carry out the capital repairs of the accommodation spaces, the prison security, to monitoring the incidents, the surveys, the assessments, the responsibilities, the establishing responsibilities takes most of the unit's command.

Psychologically, the changes in family life, such as divorce, the impossibility of seeing their children, the death of a parent, the material difficulties or the age of the relatives, the large distances from their home to the place of detention, the transfer to another

⁸ The Closing of the judge of surveillance of deprivation of liberty from Braila Penitentiary nr.315/07.08.2018 (unpublished).

⁹ The Closing of the judge of surveillance of deprivation of liberty from Braila Tichilești Detention Center, nr.9/17.05.2018 (unpublished).

¹⁰ Gh.Florian, *Fenomenologie penitenciară*, Oscar Print Publishing House, Bucharest, 2006, p.99.

penitentiary, the rejection of applications intimate visit, inappropriate medical care at the place of detention, disciplinary sanctions, etc., are just as many reasons for depression, accentuation of meaninglessness, of existential void, which sooner or later will turn in crisis of self-aggression or aggressions on other prisoners (hetero-aggressions, on staff or on property of the penitentiary (the destroying of windows, furniture, etc.).

Another form of aggression is instrumental¹¹, which manifests itself in the form of individual or group conflict, being a desire to stake it is necessary “in the territory” or the desire to have the right to the best bed. The typical expression of the verbal and physical aggression is expressed towards those who are convicted of felonies openly repudiated even carceral environment such as incest, child rape, the murder of children, the parents of his wife. Aggressiveness is manifested through slavery, consisting in the use of the inmates to other prisoners for housework and other activities demeaning.

The paradox is that in a full violence universe and opposition, there is also the normality of interpersonal relationships that functions as a “defense system” against persons deprived of liberty recognized as having non-conforming behaviours that tend to break the cohesion of a group adapted to institutionalized life, sanctioning these attitudes by the vehemently rejected refusal to accommodate such persons in that space for fear of being assimilated to such behaviour.

2.3. The system of rights of persons deprived of their liberty.

During the execution of criminal sanctions, the participants in social relations emerging within the framework of the criminal enforcement legal report (the state, through its specialized bodies, and the persons under a criminal or non-custodial sanction) have a special legal status, e.g., a total of rights and specific obligations arising from the particularities of the legal relationship in question. Article 6 of the Law no.253/2013 on the execution of sentences and non-custodial measures provides that non-custodial punishments and non-custodial educational measures ordered by the judicial bodies during the criminal proceedings are enforced under conditions that ensure compliance rights and fundamental freedoms, with the inherent limitations of the nature and content of these punishments and measures.

Regarding persons deprived of their liberty, Article 7 of the Law no.254 / 2013 on the execution of sentences and deprivation of liberty ordered by the court during the criminal trial, in connection with the exercise of rights, extends the scope of correlative rights and obligations beyond those which results from the condition of a person deprived of his liberty, the law

stipulating that inmates shall exercise all the civil and political rights except those taken away from them in compliance with the law by the decision sentencing them, as well as those rights that cannot be exercised or are limited inherently by the status of being imprisoned or for reasons related to the safety of the prison facilities. This means that the legal status of the person deprived of liberty (convicted persons serving the prison sentences, persons in a custodial educational measure, the person in remanding custody) reflects a duality of legal relations:

- *criminal execution legal relationships* specific to persons deprived of their liberty because their legal status involves a certain restriction of the rights of individuals but the exercise of rights and freedoms can not be subject to restrictions other than those provided by law,

- and another of *civil law*, as the owner of patrimonial or non-patrimonial rights whose violation allows its holder to obtain the restoration of the right through a civil trial.

I. In terms of the law regarding the execution of the punishments and of the custodial measures, the persons serving a custodial sentence are and remain human beings. Like all human beings, like citizens with the rights consecrated by the Romanian Constitution, the persons deprived of liberty have rights, but also obligations because the penitentiary it operates under the law¹². At the admission, all prisoners receive information about their rights, duties and disciplinary misconduct, but also about the rewards that can be granted to. If the person sentenced does not speak or understand the Romanian language, the prison administration takes all necessary measures to inform them in their native language.

The institution of the rights of persons serving prison sentences recognizes, in chapter V of Law no.254/2013, between art. 56-80, the right to express their opinions and religious beliefs (art.58), to information (art.59), to confidential and professional record access (art.60), to legal advice (art.62), to correspondence (art.63), to telephone calls (art.65), to online communication (art.66), to exercise and recreation (art.67), to be informed of the death or serious illness of any near relative (art.68), to intimate visit (art.69), to receive visits and goods (art.70), to proper health care (art.71), to a medical examination (art.72), to specialised medical care (art.73), diplomatic assistance for foreign nationals (art.74), to marriage (art.75), to vote (art.76), to rest day (art.77), to work (art.78), to education (art.79), to allocation and accommodation (art.80).

Therefore, as stated in the doctrine¹³, we are dealing with a criminal law enforcement report, in which the prison administration has a negative

¹¹ M.I.Rusu, *op.cit.*, p.267.

¹² I.Chiș, Al.B.Chiș, *op.cit.*, p.359.

¹³ A.Ciobanu, T.Manea, E.Lazăr, D.Părgaru, *Legea nr.254/2013 privind executarea pedepselor și a măsurilor privative de libertate dispuse de organele judiciare în cursul procesului penal, comentată și adnotată*, Hamangiu Publishing House, Bucharest, 2017, p.173.

obligation to do nothing that could undermine the rights of the persons detained, and the positive obligation of to ensure that the rights of persons deprived of their liberty are respected. Persons deprived of their liberty also have the obligation to observe the rules of internal order and to execute the custodial sentence or measure. The compliance of the rights of the persons deprived of their liberty is ensured by the judge of surveillance of deprivation of liberty. Against the measures regarding the exercise of the rights provided by the present law taken by the administration of the penitentiary, the inmates may file a complaint within 10 days from the date when they became aware of the measure, according to art. 56 of Law no.254/2013 regarding the execution of sentences and custodial measures ordered by the court during the criminal trial.

II. From the point of view of the legal relationship of civil law, the person deprived of liberty is the owner of patrimonial or non-patrimonial subjective rights, whose violation allow their holders to obtain the restoration of the right through the civil trial. In a concise formulation, the Civil Code, in Article 25 paragraph 2, defines the *natural person* in the following terms: "The natural person is the human being, viewed individually as the holder of civil rights and obligations".

Every human being is a subject of law. For a person to be able to be part of the legal relationship, she must have legal capacity, that is the general and abstract ability to have rights and obligations. By subject of law, we understand the person who can exercise multiple prerogatives and, in particular, subjective rights. The subject of law is nothing more than the person represented in his legal position, equally designating as both the participant in legal relations - the holder of rights and obligations - and the vocation of the holder to participate in such relations, materialized in the ability to value the rights and obligations that are recognized and imposed. A human being is not necessarily a subject of law, he becomes so only if the positive right attributes that quality¹⁴. Therefore, a person deprived of liberty may be a party not only in the civil legal relations but also in legal relationships of another nature as a subject of labour law, tax law, inheritance law, etc. However, the capacity of persons deprived of their liberty to be subject of law and to participate in legal life has not always been recognized in legal systems. A legal deprivation of rights in the middle of the nineteenth century was civil death (*deminutio capitis*),

which usually results from a criminal conviction (life imprisonment) or voluntarily from religious professions (*professio religiosa*). The civilian deaths, living beings, were dead for the world, they were no longer subject of law. The one who has been convicted of hard work or who has dedicated himself to monastic life was considered dead and therefore his inheritance was declared open, the marriage was free and all civil or political rights were lost¹⁵.

The current legal provision regarding the individual are spread in various normative acts, starting with the Constitution of Romania (art.16, art.25, art.49, etc.) provisions that shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party, in the Civil Code, 1st Book, About Persons, art. 25-257, in 2nd Book, About the Family, art.258-534, in Government Emergency Ordinance no.97/2005 on the registration, domicile, residence and identity papers of the Romanian citizens¹⁶, Law no.14/2018 on the approval of Government Emergency Ordinance no.33/2016 for amending and completing some normative acts regarding the civil status documents and the identity documents of the Romanian citizens¹⁷, Law no.272 / 2004 on the protection and promotion of the rights of the child¹⁸.

A premiere in Romanian civil law is Article 58¹⁹ with the marginal title *The rights of personality*, rights which should not be confused with the debt rights or the personal rights (*iura in persona aliena*), whose achievement requires the support of the passive subject, forced to procure an active subject or refrain from anything that they could have done in the absence of its legal commitment, nor with real rights (*iura in re incorporali*) or intellectual property rights (*iura in re incorporali*) which confer on their holder prerogatives that are directly exercised over tangible non- tangible goods. According to Article 58 of the Civil Code, any person has the right to life, health, physical and mental integrity, honour and reputation, the right to respect for private life, and the right to his/her own image. These rights are not transferable. Furthermore, at art. 60, civil law recognizes the right of the individual to dispose of himself, unless he violates the rights and freedoms of others, public order or good morals.

Deprivation of liberty does not mean deprivation of dignity, therefore, as any natural person, the person deprived of liberty enjoys legal protection provided by civil law through the defensive means provided by art.253 of the Civil Code²⁰, by way of reparation action

¹⁴ O.Ungureanu, C.Munteanu, Drept civil. Persoanele în reglementarea noului cod civil, Ediția a 2 a revizuită și adăugită, Hamangiu Publishing House, Bucharest, 2013, pp.4-6.

¹⁵ ibidem

¹⁶ Published in Official Gazette of Romania, Part I, no.719 of October 12th, 2011.

¹⁷ Published in Official Gazette of Romania, Part I, no.50 of January 21th, 2018.

¹⁸ Published in Official Gazette of Romania, Part I, no.557 of June 23th, 2012.

¹⁹ Superior Council of Magistracy, National Institute of Magistracy, The Conference of the New Civil Code, available online on <http://www.inm-lex.ro/NCC/doc/BrosuraNoulCodCivil.pdf>, pp.105-109, consulted on 11/27/2018, 06:07AM.

²⁰ Art.253 Civil code, *Means of defence*: (1) The natural person whose non-patrimonial rights have been violated or threatened may request the court at any time:

brought in the court, in reparation both material and moral damage, the difference between these types of actions is that, while the former is open to the victim from the moment she suffered an unlawful harm to her personality, the repressive action requires proof of guilt. Thus, the petitioner's claim²¹ for 150.000 euros from the penitentiary administration was dismissed on the ground that the amount claimed as moral damages for the violation of more detainees' rights cannot be granted by the judge of surveillance of the deprivation of liberty, but only by the court because there is need for adequate evidence to enable the court to find criteria for assessing its extent, since the court's free expression is not sufficient, based on the degree of it perceives the psychic universe of each person.

Protecting the rights of personality often intersect with press freedom and the right to inform the public. The European Court of Human Rights²² decided that the freedom of the press is so important that it includes a possible dose of exaggeration or even provocation, and that is why it must promote debates instead of the "sensational journalism"²³. We refer to the situation of persons deprived of their liberty who works on public domain of the state and who, without their consent, have been photographed carrying out this activity, the photos accompanying articles in the press concerning their status of being deprived of their liberty or when they are filmed or photographed at the entrance to the buildings of the prosecutor's offices, the courts or the police.

2.4. Disciplinary liability of persons deprived of their liberty - a form of legal liability specific to the execution of punishments law.

As we have seen in previous explanations of the content of the criminal execution legal relationships, this content is made up of the totality of the rights and obligations of the subjects involved in the legal relationship of criminal execution. The subjects of the legal relationship always appear as holders of rights and obligations and behave according to the position of each of the right or obligation holder, the current legal doctrine rejecting the idea of the existence of rights without obligations. Upon the inmate's admission to the detention facility, the person deprived of his liberty is informed of his rights and obligations, restrictions or penalties as are prescribed by law to be applied in the

event of misconduct and of the remedy against the disciplinary sanction applied.

The disciplinary misconduct is the deed in connection with the execution of the punishment, of the custodial, educational measures or of the preventive arrest which consists in an action (though the law prohibits) or in an inaction (although the law imposes) committed with guilt by the person deprived of liberty, by which he violated the legal norms, the internal order, the orders and the legal provisions given by the management of the place of detention in connection with the execution. The disciplinary offence is, therefore, the necessary and sufficient condition, the only basis of disciplinary liability, which is expressed by the application of disciplinary measures.

Disciplinary liability of the inmates is a form of legal liability, a specific institution for the enforcement of criminal sanctions and measures involving the deprivation of liberty, which derives from the content of the legal relationship of criminal execution and which is achieved by applying of disciplinary measures by the competent bodies (the administration of the place of detention - through the discipline commission for the persons deprived of their liberty) of appropriate sanctions.

Disciplinary liability of persons deprived of their liberty is characterized by the following features:

- a) is engaged only in acts which, according to the law, are considered disciplinary misconduct;
- b) is engaged only in the case of committed with guilty of the disciplinary misconduct - a conscious act by which the person deprived of liberty is aware that his deed is an act not in accordance with the law, with the internal order or the administrative decisions (e.g., the refusal of a person to comply with binding decisions adopted by the administration of the place of detention or the refusal to undergo non-invasive testing of the body). Law no.254 /2013 on the execution of sentences and deprivation of liberty ordered by the court during the criminal trial classifies the obligations of the persons deprived of their liberty in two categories:
 1. *positive obligations*, which imply an action, e.g., to obey. ... to comply ... to comply with the provisions of Art.81, letter a) -l), and

a) prohibiting the commission of the illicit acts, if is imminent;

b) the cessation of violation and banning it for the future, if it last;

c) establishing the unlawfulness of the offence, if the disorder that has occurred subsists;

(2) By way of exception to the provisions of paragraph (1), in the case of violation of non-patrimonial rights through exercise of the right to freedom of speech, the court may only order the measures provided for in para. (1) letter b) și c).

(3) At the same time, the person who has suffered a violation of such rights may require to the court to oblige the perpetrator to carry out any measures deemed necessary by the court to achieve the restoration of the right attained, such as:

a) to order to the perpetrator to publish the criminal sentence on his expense;

b) any other measures deemed necessary for the cessation of the unlawful act or for the repair of the damage caused.

(4) The injured party may also claim damages or, as the case may be, patrimonial reparation for the damage caused to him by the author of the prejudicial act. In these cases, the right to action is subject to extinctive prescription.

²¹ The closing of the judge of surveillance of deprivation of liberty of Braila penitentiary no.373/28.09.2018 (unpublished).

²² The European Court of Human Rights judgment in the case of Toma c. României, (Cererea nr. 42716/02), Ageyevy v. Russia (Cererea no. 7075/10), Godlevskiy v. Russia (Cererea no. 14888/03).

²³ O.Ungureanu, C.Munteanu, *op.cit.*, p.77.

2. *negative obligations*, which imply abstinence, prohibitions, e.g., the obligation not to do, provided in Art.82, letter a)-y): exercise of acts of violence; organizing, supporting, participating in group violence actions that could jeopardize the order, discipline and safety of the penitentiary; introducing into the penitentiary, the production, possession, sale or consumption of narcotics, alcoholic beverages or toxic substances; instigating others to commit disciplinary misconduct, the refusal of a person to comply with binding decisions adopted by the administration of the place of detention, the refusal to undergo non-invasive testing of the body, etc.
- c) is strictly personal, and no responsibility for the deed of another person or collective liability;
- d) is engaged only once for committing a deed or behaviour, a person deprived of liberty shall never be punished twice for the same deed or behaviour (*ne bis in idem*);
- e) the presence of a causal link between the action and the specific result as well as a harmful result;
- f) is a form of independent liability to all other forms of legal liability.

The autonomy of disciplinary responsibility is manifested by the fact that it's triggering is independent of producing any material damage. Disciplinary liability coexists with material liability, criminal liability, etc. Thus, the criminal liability, even material, would be applied in parallel with disciplinary liability, as long the criminal liability includes the constitutive elements of a crime (destruction, physical violence on other persons, the introduction of prohibited goods into the penitentiary, etc.).

In practice, however, there are cases where, although the act seems to fulfil the conditions of disciplinary misconduct, the certain specific circumstances existing at the time of its commission, they lead to the conclusion that, in fact, the author's conduct is not illicit and that liability will be removed. Thus, the deed of the person deprived of his liberty to retain, after testing, the packaging of the rapid test of the use of prohibited substances to prove the test was carried out with the one year test validity period expired, does not constitute the disciplinary misconduct provided by art.82 of the Law no.254/2013, consisting of the stealing or destruction of goods or values from the workplace or belonging to the administration of penitentiary, staff, visitors, as well as goods belonging to other persons, including those convicted, misbehaviour for which it was sanctioned, because, after unsealing and use, both the packaging and the test

are no longer goods belonging to the penitentiary since once disposable, they are discarded after use, so that the judge of surveillance of deprived of liberty admitted the person's deprived of his liberty complaint and the disciplinary sanction was annulled on grounds of illegality²⁴. In another situation²⁵, the *de facto error* was held by the judge of surveillance of deprivation of liberty as a cause of exoneration, situation in which a person of Albanian nationality, arriving by transfer from another penitentiary, even with a few hours before being sanctioned, because, in the courtyard, walking, he kindly offered a cigarette to another prisoner in the refusal of nourishment room, a person who asked him if he could give him a cigarette, but without these two people knowing each other and without the person sanctioned knowing that the person was the refusal room. In so doing, the judge of surveillance of deprivation of liberty admitted the petitioner's complaint and annulled the disciplinary sanction applied for committing the disciplinary misconduct consisting of the introduction into the penitentiary, the procurement, manufacture, possession, exchange, receipt, use or transmission of weapons, explosives, objects and substances which jeopardize the security of the penitentiary, missions or persons, money, medicines, mobile phones, accessories of mobile phones, goods or other values under conditions other than those permitted Article 82, letter j of Law no. 254/2013, motivated by the fact that a detainee arrived a few hours before the incident did not have time to know the architecture of the penitentiary where he was, and the petitioner of Albanian nationality barely understand the Romanian language, was reading and expresses himself hardly in this language.

2.5. The private person of liberty and restorative justice.

The concept of restorative justice²⁶ offers a new way of approaching and understanding all the concepts that criminal law professionals bearing in mind: offence, offender, the victim, criminal trial, criminal sanction, imprisonment, etc. Restorative justice seeks to balance the victim's and the community's problems, as well as the need for the social reintegration of the offender, to assist the victim in the process of recovery and to grant all parties the right to be present and to engage actively in justice, to repair the damages caused by committing the offence, based on an approach involving not only the parties but also the community in general, in close connection with the specialized institutions in the field. Appeared in North America in the 1970s²⁷, this criminal philosophy is based on

²⁴ The closing of the judge of surveillance of deprivation of liberty of Braila penitentiary no.261/13.07.2018 (unpublished).

²⁵ The closing of the judge of surveillance of deprivation of liberty of Braila penitentiary no.332/29.08.2018 (unpublished)

²⁶ See details on the concept of restorative justice online on <https://legeaz.net/dictionar-juridic/justitie-restaurativa>. Consulted on 15.08.2018, 11:01 hour.

²⁷ The term of restorative justice comes from english, which demonstrates the Anglo-Saxon origins of the concept that applied practically for the first time in 1974 when two Canadians, Mark Yantzi and Dave Worth, asked a judge in Kitchener, Ontario, to allow them to try a different approach in the justice intervention on two young criminals arrested for the destruction of goods. The idea was to allow the victim and the offender to play the main role in deciding on the most appropriate method of responding to the harm produced. Apud Elena Bedros in the article Conceptul de justiție restaurativă și legătura acestuia cu tendințele moderne de dezvoltare a procesului penal (The concept of

programs aimed at reconciling the victim with the offender and identifying appropriate solutions for repairing the damage caused by committing the offence, developing as an alternative to the retributive criminal justice system.

In 1996, the British criminologist, Tony Marshall²⁸, gave the world a definition of the concept of restorative justice, a definition recognized as valid for the entire world movement in this field: *restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.*

From the perspective of international documents²⁹, the interest of the specialists in the implementation of the ideas of restorative justice in the judicial practice of more and more states in the world, as well as the introduction of restorative practices that correspond to high methodological requirements, but which also take into account the particularities of each state, in developing international documents on the basic principles of restorative justice in criminal matters.

One of the basic international documents in the field of restorative justice is ECOSOC Resolution 2002/12 on Basic principles on the use of restorative justice programmes in criminal matters adopted at the 37th plenary session of the United Nations Economic and Social Council (ECOSOC) on 24 July 2002, which in Article 2 of the Resolution of the Resolution defines the restorative process means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles. The same document defines the restorative outcome as a means an agreement reached as a result of a restorative process. Restorative outcomes³⁰ include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender. The model of restorative justice was one of the topics addressed at United Nations congresses, such as at the Eleventh United Nations Congress on Crime Prevention and Criminal

Justice- Bangkok, Thailand, 18-25 April 2005, and the Twelfth UN Congress on Crime Prevention and Criminal Justice- Salvador, Brazil, 12 – 19 April 2010. The works of both congresses focused on the need to reform the criminal justice system and to implement the model of restorative justice as an alternative to the traditional criminal justice system, in order to avoid the negative effects of imprisonment, in order to reduce the workload of courts, emphasizing the need for to reinforce the alternatives to imprisonment, which may consist of community service, restorative justice, electronic surveillance, and the need to support rehabilitation and reintegration programs, including those aimed at correcting criminal behaviour, alongside educational and vocational training for convicts³¹. The approach and interpretation of the concept of restorative justice was consecrated on the European continent³² as well because “*those who are most vulnerable or who find themselves in particularly exposed situations, such as persons subjected to repeated violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crimes in a Member State of which they are not nationals or residents, are in need of special support and legal protection*”.

Emphasizing, as a priority, that the victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice, Art.12 of the Directive 2012/29/EU³³ of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, provides that member states shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services, such as the victim's free and informed consent, which may be withdrawn at any time; providing to the victim of the fully and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement; the acknowledgement by the offender the basic facts of the case; any agreement arrived at voluntarily may be taken into account in any further criminal proceedings

restorative justice and its connection with modern trends in the development of criminal trial), p.39, available online on: <http://www.legeasiviata.in.ua/archive/2014/6/8.pdf>, Consulted on 15.08.2018, 17:51 hour.

²⁸ T.Marshall, Restorative justice: an overview, p.8, available online on: http://www.antoniascella.eu/restorative/Marshall_1999-b.pdf. Consulted on 15.08.2018, 18:58 hour.

²⁹ National Institute of Criminology, Restorative justice programmes in the contemporary world (documentary analysis), 2005, p.11, available online on <http://criminologie.org.ro/wp-content/uploads/2015/08/Programe-de-justitie-restaurativa-in-lumea-contemporana-Studiu.pdf>, consulted on 16.08.2018, 16:26 hour.

³⁰ I.M.Rusu, op.cit., p.417.

³¹ E.Bedros, Conceptul de justiție restaurativă și legătura acestuia cu tendințele moderne de dezvoltare a procesului penal (The concept of restorative justice and its connection with modern trends in the development of criminal trial), p.39, available online on <http://www.legeasiviata.in.ua/archive/2014/6/8.pdf>. Consulted on 16.08.2018, 19:17 hour.

³² Art.2.3.4 The Stockholm programme — an open and secure europe serving and protecting citizens (2010/C 115/01), document consulted on 17.08.2018, 09:00 hour, available online: [https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:52010XG0504\(01\)](https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:52010XG0504(01)).

³³ Published in Official Journal of the European Union L 315/14.11.2012, available online on <http://data.europa.eu/eli/dir/2012/29/oj>.

and the discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest. In this spirit, as the terminology of “restorative justice” proliferates across the globe³⁴, emphasizing the benefits of restorative justice, as well as the limitations that characterize traditional approaches to criminal justice, considering the provisions of the Directive 2012/29/EU, *Recommendation CM/Rec(2018)8* concerning restorative justice in criminal matters³⁵ updated the list of international documents and agreements taken into account and placed greater emphasis on restorative justice principles and the recent developments in research evidence, adding timely to the growing number of international instruments working on the use and evolution of justice restorative. The Recommendation reflects the view that restorative justice should be regulated only to the extent necessary and that restorative justice services should be given independence and autonomy in performing their duties. Also, the Recommendation ask the member States to develop the capacity to deliver restorative justice in all geographical areas in their jurisdictions, with respect to all offences, and at all stages of their criminal justice processes.

In the Romanian criminal justice system, most part of the Directive 2012/29/EU has already been transposed, in particular through the provisions of the Criminal Procedure Code, and Law no. 211/2004³⁶ on certain measures to ensure the protection of victims of the offence.

But there are also a number of provisions of the directive that require adaptation to internal legislation by creating a legislative framework to modify and supplement, e.g., Law no.211/2004 as well as Law no.192/2006³⁷ on mediation and organization of mediator profession. By the Law no.97/2018³⁸ on certain measures for the protection of victims of crime, have been transposed into our national legislation art.3 paragraph (3), art.4 paragraph (1) letter i) and j), art.5, par. (1) and (3), Article 12 (1) (c) and Article 19 (2) of Directive 2012/29 / EU to ensure that victims are treated with respect and to allows them to take informed

decisions about their rights as well as their participation in the mediation procedure. These provisions must be correlated with the provisions of the of Criminal Code Procedure, which in Article 16, paragraph 1, letter g (concluding a mediation agreement is one of the cases preventing the to initiate both the prosecution and the trial by a court in criminal proceedings, art.23 para.1 mediation and recognition of civil claims), art.81, par.1, lit.i (right of the injured party to appeal to a mediator), art.83 para.1 letter g (the right of the defendant to call a mediator) art.108 paragraph 4 (communication of rights and obligations), art. 111 paragraph 1, lit.b (hearing of the injured party), art.313 paragraph 3 (mediation is one of the cases of suspension of criminal prosecution), art. 318 paragraph 4 (submission by the prosecutor to the court of the agreement for the recognition of guilt- guilty plea, accompanied by the transaction or the mediation agreement criminal prosecution), art. 486 (solving the civil action) recognize both the injured party and the defendant the right to appeal to a mediator in the cases provided by the law. By forming the “triad victim-criminal-community”³⁹, the new criminal philosophy differs from the traditional justice in that the restorative justice focuses on reparation of the damage caused by the offence, while the traditional one focuses on punishing a crime; then, restorative justice is characterized by dialogue and negotiation between the parties, while traditional justice is based on the principle of contradictorality, and, thirdly, restorative justice requires community members or organizations to play an active role, to assume responsibility for both sanctioning and social reintegration of offenders, while for traditional justice, the “community” is represented by the state⁴⁰. The mediation in the criminal proceeding as an alternative method of resolving conflicts applies both to the criminal and to the civil side of the criminal trial. In the criminal area of the trial, the mediation provisions apply only to cases of offences for which, according by the law, the withdrawal of the previous complaint or reconciliation removes the criminal liability⁴¹. The law does not limit, in relation to the type of offense committed, the possibility call a mediator for solving of the civil aspect of the case, thus recognizing the right to call a mediator for solving the civil aspect

³⁴ Commentary to Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States, available online on https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808cdc8a, consulted on 26.02.2019, 18:35 hour.

³⁵ Adopted by the Committee of Ministers on 3 October 2018 at the 1326th meeting of the Ministers' Deputies.

³⁶ Published in Official Gazette of Romania, Part I, no.505 June 4th 2004.

³⁷ Published in Official Gazette of Romania, Part I, no.441 May 22th 2006, with subsequent amendments.

³⁸ Published in Official Gazette of Romania, Part I, no.376 May 2nd 2018.

³⁹ M.I.Rusu, op.cit., p.416.

⁴⁰ K. Daly, Revisiting the Relationship between Retributive and Restorative Justice, p.6, To appear in *Restorative Justice: From Philosophy to Practice*, edited by Heather Strang and John Braithwaite, Australian National University. Aldershot:Dartmouth(2000), consulted on 16.08.2018, 10:53 AM, available online on https://www.griffith.edu.au/data/assets/pdf_file/0028/223759/2001-Daly-Revisiting-the-relationship-pre-print.pdf,

⁴¹ Art.II para.2, thesis II by the Law no.97/2018 on certain measures for the protection of victims of crime, the conclusion of a mediation agreement in the criminal area, according to the present law, might take place until the court notification has been read . By the Decision no.397/June15th 2016, the Constitutional Court of Romania, called to decide over the unconstitutionality of the provisions of art.16 par. (1) letter g) of the final thesis of the Criminal Procedure Code and of art.67 of the Law no.192/2006 on the mediation and organization of the profession of mediator, admitted the exception of unconstitutionality and established that these provisions are constitutional insofar as the mediation agreement with regard to the offences for which reconciliation can take place until the court notification has been read.

of any criminal case. However, the exercise of this right may be restricted in certain situations, such as the taking of a preventive measure against the defendant which implies, inter alia, the prohibition of approaching and communicating directly with the injured person or the reasonable suspicion that the defendant is trying to achieve a understands fraudulently with it. However, the parties to the criminal conflict, both on the criminal and the civil side, may givespecial empowerment to another person to conclude the mediation contract, thus allowing the possibility of avoiding direct contact between the the subjects of the offence⁴².

3. Conclusions

The execution of criminal penalties involving deprivation of liberty is not just a mere administrative problem, but a legal issue governed by law. It has been said at some point that the detainee will be resocialized only if he really wants it, true indeed, if we look at the criminal persistence reflected in a long list of crimes committed by some of the persons deprived of liberty. During the execution of punishments and detention measures, most of the persons deprived of their liberty choose the way of complying with the requirements of the law and those of the administration of the place of detention, at least formally proving that they are on the road to reintegration.

Reintegration into society means not only returning to the free world, but also the assumption of the result of the crime by repairing the harm produced

as a result of its commission, as well as changing the mentality regarding the importance of the social values to be defended.

The issue of maximum actuality remains that of the risk of recidivism due to the lack of a job. The lack of a professional qualification, the lack of studies, the lack of interest of persons deprived of their liberty from the activities carried out at the place of detention, and the habit of persons deprived of their liberty to live in crime (theft, robbery, deception, etc.) several causes that dramatically reduce the chances of community integration, with the risk of transforming the person deprived of liberty into a state-maintained (“scholar”) state.

Taking recovery measures for prisoners under the custody of the penitentiary system is an essential prerequisite for successful social intervention to facilitate social reintegration and prevent relapse. The purpose of preventive measures and the formative function of educational measures and custodial sentences is highlighted as a priority and contributes significantly to increasing community safety by improving education, psychological assistance and social assistance provided to people deprived of their liberty and by raising awareness and raising awareness of social reintegration issues of persons deprived of their liberty. The expected outcome is to prepare people deprived of their liberty from an educational, psychological and social perspective, for socio-professional reintegration or, as the case may be, to take them into a post-detention assistance.

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⁴² N.Volonciu (Scientific coordinator), A.S.Uzlău (coordinator author), R.Moroșanu, C.Voicu, et.alii,Codul de procedură penală comentat, Hamangiu Publishing House, București, 2017, p.236.

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