STAY OF EXECUTION OF SENTENCE - THEORETICAL AND PRACTICAL APPROACH

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Abstract

The completion of the activity of achieving the criminal justice goals involves immediate execution of final criminal judgments and continuity in the enforcement activity. However, there are also exceptional situations, where criminal enforcement is suspended as a result of the intervention of some impediments in the execution of the sentence.

The stay of execution of prison or life imprisonment sentence is precisely such a situation, as regulated by Section II, Chapter III "Other provisions regarding execution", Title V "Execution of criminal judgments" of the Code of Criminal Procedure.

The stay of execution of sentence is not a removal of the penalty applied to the convict, but merely a postponement of the moment from which it should begin, making up an exception to the rule of immediate execution of the criminal judgment. In order to avoid situations of unjustified stay of execution of sentence or even removal of execution of sentence, the legislator expressly and restrictively laid down the instances and conditions in which the convicted person may obtain the stay of execution of sentence.

Without claiming to be exhaustive, this study may serve as a basis for certain legal or practical clarifications in connection with the institution of stay of execution of prison or life imprisonment sentence.

Keywords: *sentence, stay of execution, convicted pregnant woman, state of illness, revocation of stay of execution*.

1. Introduction

"The criminal enforcement under the law begins with the determination of the sanction for the convicted person and takes place during the execution of the content of the criminal sanction, until it has been completely served or until it is considered executed under the conditions set out in the law. [...] The criminal enforcement is characterised by the fact that it is imposed by the state by the law of execution of sentences, under which the parties have an equal position only with regard to the exercise of rights, obligations and prohibitions established during the execution of criminal sanctions and during such time when, after the execution of the sanctions, the convicted persons must bear the effects of the sanctions."[1]

The completion of the activity of achieving the criminal justice goals involves immediate execution of final criminal judgments and continuity in the enforcement activity. However, there are also exceptional situations, where criminal enforcement is suspended as a result of the intervention of some impediments in the execution of the sentence. The stay of execution of prison or life imprisonment sentence is precisely such a situation, as regulated by Section II, Chapter III *"Other provisions regarding execution"*, Title V *"Execution of criminal judgments"* of the Code of Criminal Procedure.

This procedure takes place after a court decision sentencing a person to imprisonment in a detention facility or to life imprisonment remains final, until the actual start of execution of sentence, while after the start of the execution of sentence another institution operates, namely the interruption of execution of sentence. Moreover, the provisions of article 519 of the Code of Criminal Procedure point to the possibility of staying the execution and of putting into place custodial educational measures for minors, consisting in admission to an educational establishment or a detention centre.[2]

There cannot be an order to postpone the execution of a penalty that is not likely to be enforced. In judicial practice it has been decided that, as long as the decision to convict the defendant is not final as at the date of formulating and hearing the application for stay of execution of sentence, the application being dismissed, there are no grounds for quashing the judgment, which is legal relative to the time of its delivery, even if in the meantime the conviction has become final.[3]

The stay of execution of sentence is not a removal of the penalty, but merely a postponement of the moment from which it should begin. Making up an exception to the rule of immediate execution of criminal judgments, the legislator expressly and

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[1] Ioan Chiş, Alexandru Bogdan Chiş, *Executarea sancţiunilor penale,* Universul Juridic Publishing House, Bucharest, 2015, p. 135.

[2] Within the same meaning see the provisions of article 184, paragraph 1 of Law no. 254/2013.

[3] Bucharest Court of Appeal, Second Criminal Division, *decision no. 313/1998,* in R.D.P., no. 1/2000, p. 144, apud Nicolae Volonciu coordonator, A. Simona Uzlău, R. Moroşanu, V. Văduva, D. Atasiei, C. Ghighenci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chiriţă, Noul Cod de procedură penală comentat, Hamangiu Publishing House, Bucharest, 2014, p. 1390.

restrictively laid down the instances in which the convicted person may obtain the stay of execution of sentence, precisely in order to avoid unjustified postponement or even the removal of execution.

2. Cases in which the execution of a prison or life imprisonment sentence may be stayed

As mentioned above, in order to avoid situations of unjustified stay of execution of sentence, the legislator has expressly provided for the cases in which this institution can operate. Thus, according to article 589 of the Code of Criminal Procedure, the stay of execution of prison sentence may take place in the following two situations: a) when it is found that the convicted person suffers from an illness, under the conditions of article 589, paragraph 1, letter a) and article 589, paragraph 2 of the Code of Criminal Procedure; b) if it is found that the convicted person is pregnant or has a child under the age of 1.

Unlike the previous criminal procedure code, according to the current regulation, the possibility to benefit from the stay of execution of sentence has been restricted, namely only two cases are provided, without recasting the third case provided by article 453, paragraph 1, letter c) of the 1968 Code of Criminal Procedure, referring to a situation in which the immediate execution of the penalty would have had serious consequences for the convict, the family, or the employer. This option of the legislator has been substantiated in the explanatory statement to the regulatory act based on the fact that this case is no longer consistent with the practical realities, since almost all court decisions for such applications have ordered their dismissal, and the current organisation of the activity of the National Administration of Penitentiaries allows to move detainees in special situations outside the place of detention by means of an administrative order.

2.1. State of illness of the convict

The first case in which the stay of execution of sentence may be ordered is stipulated by article 589, paragraph 1, letter a) of the Code of Criminal Procedure and considers the assumption in which, based on a forensic examination, it is ascertained that the convicted person suffers from an illness that cannot be treated within the healthcare network of the National Administration of Penitentiaries and that makes it impossible for the sentence to be immediately executed, if the specific characteristics of the illness do not allow its treatment in conditions of provision of permanent guard within the healthcare network of the Ministry of Health and if the court takes the view that the stay of execution and release do not pose a danger to public order. Moreover, paragraph 2 of the same article further provides that the stay of execution of sentence in case of illness cannot be ordered if the convicted person" illness is self-inflicted by refusing medical treatment or surgery, by self-aggression or other harmful actions, or if they evade the forensic examination.

The conditions that must be met in order for this instance of stay of execution of sentence to apply result from the aforementioned legal texts, more specifically:

a) to ascertain on the basis of an expert examination that the convicted person suffers from an illness[4];

b) the illness makes it impossible for them to execute the sentence immediately;

c) the illness cannot be treated within the network of the National Administration of Penitentiaries nor under permanent guard within the network of the Ministry of Health;

d) the illness is not inflicted by the convicted person by refusing medical treatment or surgery, by self-aggression or other harmful actions;

e) the convict has not evaded the forensic examination;

f) the release of the convict does not pose a danger to public order.

The circumstance that justifies the stay of execution of sentence may be ascertained only on the basis of a forensic examination carried out by the competent forensic service, however, the merits of the application cannot be assessed only on the basis of a forensic record or other medical document, even by specialist physicians or by physicians within the penitentiary healthcare network, but they can be considered when performing the expert investigation. In the judicial practice prior to the current Code of Criminal Procedure - practice which is still relevant - it was established that "the court may rule on the application to interrupt the execution of the prison sentence only on the basis of a mandatory forensic expert examination determining whether the illness from which the convicted person suffers makes it impossible for them to execute the sentence. If the convict refuses to appear for the forensic examination, the court may not order the interruption of the execution of the prison sentence on the basis of other medical documents."[5]

Furthermore, the convict"s state of health will be assessed upon hearing the application, so that a previous expert investigation carried out in another case, having the same subject matter, cannot be taken into account when solving the new case, since it is possible that their state of health changes and that new medical documents are submitted, so that a complete assessment of the convict"s health is required. To this end, in judicial practice it has been shown that "in order

[4] In the old regulation, the stay of execution of sentence could be ordered only in the situation where the illness from which the convict suffered was *serious*. The legislator's option to no longer use the term "serious" is justified, since it is not the seriousness of the illness that is relevant, but the finding of the impossibility of immediate execution of the sentence.

[5] High Court of Cassation and Justice, Criminal Division, *decision no. 5519/2005*, www.legalis.ro.

to solve the application for stay or interruption of the execution of the sentence on the ground that the convicted person suffers from an illness that makes it impossible for them to serve their sentence, a forensic expert examination must be carried out after bringing such application to court, during its hearing; a decision by which the ruling is delivered on the basis of a previous expert investigation carried out in another case concerning the same convict is against the law."[6]

If the convict applying for the stay of execution of sentence is unable to bear the costs of the expert investigation, where that is the only method provided by the legislator, whereby it can be verified whether the petitioner suffers from conditions that make it impossible for them to serve their sentence, we consider that the court should order the payment of the related fee from the funds of the Ministry of Justice, and that, if the application is rejected, they should be ordered to pay the amount. For this same purpose, the judicial practice points out that "the amount of the legal expenses advanced by the state to be borne by the convict whose application to interrupt the execution of the sentence has been dismissed includes the expenses incurred in carrying out the forensic examination."[7]

The expert investigation will be performed according to the Procedural rules regarding the performance of expert investigations, findings and other forensic work[8], which in article 30 stipulate that the forensic expert examination for staying the execution of the custodial sentence on medical grounds is carried out only by direct examination of the person by a committee composed of: a forensic doctor, who chairs the committee; one or more physicians who are at least specialist physicians depending on the conditions from which the examined person suffers, physician/physicians who will establish the diagnosis and therapeutic advice; a physician, representative of the healthcare network of the penitentiary department who, knowing the treatment possibilities within the network to which the representative belongs, determines together with the forensic doctor where to have the treatment applied for the condition concerned: within the healthcare network of the penitentiary department or within the healthcare network of the Ministry of Health. After performing a new expert investigation at the "Prof. Dr. Mina Minovici" Institute of Forensic Medicine in Bucharest for the stay or interruption of execution of custodial sentence on medical grounds, it is not possible to request or perform a new expert investigation at another hierarchically lower forensic unit.

If the committee that performs the expert investigation is not established in accordance with the aforementioned legal provisions, we consider that the expert report is unlawful and that a redo of the report is required. The previous jurisprudence has also ruled in this very sense, stating that "The committee that prepared the forensic report did not include a cardiologist, although a cardiologist"s participation was necessary given the nature of the numerous heart conditions mentioned in the appellant"s medical file. Consequently, it is necessary to carry out a new forensic expert investigation by having the convict and the medical documents examined by a cardiologist, then the expert investigation should conclude whether it is possible for the convict to execute the sentence, which is why the appeal is admitted by referring the case to the first court for retrial."[9]

The expert committee will determine whether the convicted person suffers from the illness mentioned in the application for stay or from another illness and if that makes it impossible for them to execute the sentence immediately. "The law does not distinguish between curable and incurable, mental or physical illnesses, nor does it impose the condition that the illness endangers the life of the convict, as established in practice, but only to render them unable to proceed to the immediate execution of the sentence."[10] If the expert report states that the illness found does not make it impossible to immediately serve the sentence, the application for stay appears to be unfounded and will be dismissed. Moreover, the same ruling is required where it results from the forensic report that the convicted person"s illness can be treated, while under permanent guard, within the network of the Ministry of Health. As stated in the doctrine, in this case "the decisive element is to ascertain the possibility of procuring that the convict is under permanent guard while in the public healthcare system, and then to allow the application to stay the execution of the sentence or life imprisonment if it is found that the illness cannot be treated under permanent guard within the healthcare network of the Ministry of Health."[11] For example, serious oncological diseases the treatment of which is incompatible with ensuring permanent guard given the

[6] Supreme Court of Justice, Criminal Division, *decision no. 3159/2000*, www.legalis.ro. Within the same meaning, see High Court of Cassation and Justice, Criminal Division, decision no. 4595 of 3 August 2005.

[7] Braşov Court of Appeal, Criminal Division, *decision no. 741 of 10 October 2008*, www.jurisprudenţa.org.

[8] The procedural rules regarding the performance of the expert investigations, findings and other forensic work were approved by the Order of the Minister of Justice no. 1134/C/2000, and by the Order of the Minister of Health no. 2254/2000 respectively.

[9] Supreme Court of Justice, Criminal Division, *decision no. 2028/2000*, www.legalis.ro. Within the same meaning, see criminal decision no. 256/12 June 2009 delivered by Vrancea Tribunal, available at www.jrisprudenta.org, which held upon hearing the appeal that "the judgment of the court rejecting the application for interruption of execution of sentence based on a forensic expert investigation carried out by a committee which did not include a specialist physician to look into the conditions invoked by the convict was wrong."

[10] N. Volonciu, (coordonator), A. Simona Uzlău, R. Moroşanu, V. Văduva, D. Atasiei, C. Ghighenci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chiriţă op. cit. p. 1392.

[11] Ion Neagu, Mircea Damaschin, *Tratat de procedură penală, Partea specială*, second edition, Universul Juridic Publishing House, Bucharest, 2018, p. 624.

specificity of the healthcare unit which should provide a sterile environment may fall under this category.

It has been correctly assessed in the national judicial practice that it is not enough to ascertain that an illness can be treated, from a theoretical point of view, in the healthcare network of penitentiaries and that it is necessary to verify if there are practically optimal conditions for treatment and therapy at the place of detention, giving precedence to article 3 of the European Convention on Human Rights. Thus, it was held that "The court of first instance made a fair assessment of the convict"s situation and by referring to article 3 of the European Convention on Human Rights it gave precedence to the compliance with those rules. It is found that the execution of the sentence must be stayed in order to give the convict a real chance to benefit from the cytostatic treatment, which is absolutely necessary to improve their health and to therefore prevent irreversible and serious consequences on their physical integrity."[12]

Also relevant in this regard is the jurisprudence of the ECHR whereby it was held that the detention of a person who is ill "may raise issues under article 3. Although this article cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the state to protect the physical well-being of persons deprived of their liberty by, among other things, providing them with the requisite medical assistance. A lack of appropriate medical care, and, more generally, the detention in inappropriate conditions of a person who is ill, may in principle amount to treatment contrary to article 3."[13] According to the jurisprudence of the same court, it was also ruled that "the state of health ... was a factor that had to be taken into account under article of the Convention with regard to custodial sentences. Although there was no general obligation to release prisoners suffering from ill health, article 3 required states to protect the physical integrity of persons who had been deprived of their liberty, notably by providing them with any necessary medical assistance."[14]

The state of illness must not be self-inflicted by the convicts themselves by refusal to undergo medical treatment or surgery, by actions of self-aggression or by other harmful actions, as provided by article 589, paragraph 2 of the Code of Criminal Procedure. This condition was not expressly provided by the prior regulation, but the need for such a provision was previously emphasised in the doctrine,[15] being inadmissible for the convicted person to self-inflict a state of illness or to worsen their condition specifically for the purpose of not serving the sentence.

Furthermore, if the convicted person evades the expert examination, the court may return to this evidence, in which case the application is rejected as unfounded, as expressly provided by the legislator, thus enshrining the previous rulings in the judicial practice in legislative terms as well.[16]

The ascertainment of the illness, as characterised by the features presented above, is not enough per se to order the postponement of execution of penalty, since the court is under the obligation laid down by the legislator to verify that the release of the convict will not pose a danger to public order. Although it operates with this notion, the legislator did not provide a legal definition of this concept, so we take the view that said danger is to be assessed by reference to the seriousness of the crime for which the conviction was ordered, the criminal history of the convict, their behaviour in society, family. Moreover, even in a situation where the court should consider that the release would cause concrete danger to public order, the provisions of article 3 of the ECHR, as well as the constant jurisprudence of this court must be taken into account, as we have shown above, where according to the ECHR, in certain situations, keeping a person who is sick in detention may constitute inhuman treatment. In most cases, the lack of concrete danger to the public order will implicitly result from the ascertainment of the convicted person"s illness. Thus, it was shown in the doctrine that "if the forensic report concludes that the convicted person suffers from an illness that makes it impossible for them to execute the sentence and cannot be treated in the healthcare system of the penitentiary or the Ministry of Health (in this case under permanent guard), the seriousness of the illness from which the convict suffers and which will prevent them from being capable of endangering public order is obvious."[17]

Regarding this condition (that the court should determine that the stay of execution of sentence and the release do not pose a danger to public order), the Constitutional Court of Romania also ruled by Decision no. 323 of 29 March 2007[18] delivered in settling an exception of unconstitutionality relied on before the Bucharest Tribunal, whereby it held that the criticised legal text was not contrary to the constitutional provisions enshrining the right to the protection of health and the right to physical and mental

[12] Piteşti Court of Appeal, Criminal Division, *decision no. 701 of 28 October 2010*, www.legalis.ro.

[13] ECHR, judgment of 17 June 2012 in the case Radu Pop v. Romania, paragraphs 104, 105.

[14] ECHR, judgement of 14 November 2002 in the case Mouisel v. France.

[15] Nicolae Volonciu, *Tratat de procedură penală. Partea specială*. Paideia Publishing House, Bucharest, 2002, p. 428.

[16] Judgement no. 1665 of 7 December 2007 delivered by Bucharest Tribunal, First Criminal Division (in R.D.P., no. 3/2009, p. 106-107), ruled that "the forensic expert investigation can be carried out only after the direct examination of the person concerned. Having regard to the conduct of the convict who evades the service of the sentence and has failed to appear on any court date, as well as to the fact that the documents submitted by him through his lawyers fail to prove an objective impossibility to appear before the court, it can be assessed that this evidence cannot be examined, because with his visit at the forensic unit the convict would reveal his location."

[17] Ion Neagu, Mircea Damaschin, op. cit. p. 625.

[18] Published in the Official Gazette no. 283 of 27 April 2007.

integrity of the person. In stating the reasons for its decision, the Court pointed out that, in the specific situation of the criticised legal text consideration was given to the possibility for the judge to weigh, on the one hand, the evidence requesting the protection of the convicted person"s health and physical integrity and, on the other hand, the need to protect the general interest from a possible danger which the postponement of the execution of the sentence could have generated, a danger materialised either by committing new crimes or by trying to evade the execution of the penalty or even by the reaction of the population who could have attempted to take revenge on the convict, beyond the bounds of justice.

If the application for the stay of execution of sentence is accepted for this case, the stay will be ordered for a fixed period of time, as expressly provided by the legislator, until the convict"s health improves and the sentence can be enforced. The expert report sometimes mentions the time interval considered necessary for the improvement of the health and the application of the treatment, therefore, in our opinion, in these situations it is necessary to postpone the execution of the sentence for that period of time. The period for which the stay will be ordered must be expressly mentioned in the operative part of the decision, so as to enable the enforcement court to take measures for issuing the warrant of execution of sentence at the end of the period, and if the warrant has been issued, to take measures for its carrying out, as set out in the provisions of article 591, paragraph 6 of the Code of Criminal Procedure, since the stay of execution of sentence cannot turn into a cause of total removal of the sentence. However, it is possible to admit several successive applications if the legal conditions are met. If the execution of the sentence has been previously stayed and the convicted person brings a new application for stay during the stay period and the court accepts it before the previous stay has expired, the subsequent stay will be ordered from the expiry date of the previous stay, not from the date when the decision becomes final.[19]

If the decision rendered does not set a period for which the postponement of execution of the sentence is ordered, according to article 591, paragraph 6 of the Code of Criminal Procedure, the judge designated for enforcement purposes is required to notify the enforcement court with a view to verifying the actuality of the grounds for stay. The Code of Criminal Procedure does not stipulate the obligation to have a forensic report prepared in this procedure, therefore, we estimate that it is possible to ascertain that the health has improved by means of medical documents.[20] If the enforcement court finds that the ground for stay has ceased, the judge in charge of enforcement is under the obligation to take measures for the issuance of the warrant of execution or for its carrying out.

2.2. Female convict"s state of pregnancy. Existence of a child under the age of 1

The second case provided by law to order the postponement of execution of the prison or life imprisonment sentence refers to a female convict who is pregnant or has a child under the age of 1 [article 589, paragraph (1), letter b) of the Code of Criminal Procedure].

The provisions of article 1, letter b) of the Code of Criminal Procedure, were subject to an a posteriori constitutional review in which the court of constitutional review allowed the exception of high unconstitutionality and ruled that the legislative solution contained in the provisions of article 589, paragraph (1), letter b), first phrase, second sentence of the Code of Criminal Procedure, which excluded a male convict who had a child under the age of 1 from the possibility of postponing the service of prison or life imprisonment was unconstitutional[21].In the recitals of the decision, the Constitutional Court found that, from the perspective of the right to care for their child - a fundamental component of the right to respect for family life enshrined in the provisions of article 26, paragraph (1) of the Constitution - a male convict who had a child under the age of 1 was in a situation similar to that of a female convict who had a child of the same age and that the difference in treatment between the two categories of convicted persons, in terms of recognition of the possibility to stay the execution of a prison or life imprisonment sentence, had no objective and reasonable justification. The court of constitutional review also held that by the Judgment of 3 October 2017, delivered in Alexandru Enache v. Romania, the European Court of Human Rights found that - although the institution of staying the execution of a custodial sentence, being of a criminal nature, is essentially different from parental leave, which is a measure under employment law - in the question of whether, during the first year of a child"s life, an imprisoned father was in a similar situation to that of an imprisoned mother, the criteria which had been set out in the cases of Petrovic v. Austria and Konstantin Markin v. Russia were fully applicable to the instant case. Indeed, the stay of execution of a custodial sentence has the primary aim of safeguarding the best interests of the child in order to ensure that it receives the appropriate care and attention during the first year of its life. However, even though there may be differences in their relationship with the child, both the mother and the father can provide such attention and care. Moreover, the Strasbourg Court observed that the entitlement to a stay of execution of sentence continued until the child reached the age of one year old, and therefore extended beyond the period following the mother"s pregnancy and birth.

[19] High Court of Cassation and Justice, Criminal Division, *decision no. 2661 of 24 May 2002*, www.scj.ro.
[20] Within the same meaning, I. Neagu, M. Damaschin, op. cit. p. 625.
[21] Romanian Constitutional Court, *decision no. 535 of 24 September 2019*, published in the Official Gazette no. 1026 of 20 December 2019.

Having regard to the decision of the Constitutional Court, the stay of execution of sentence for the care of a child under the age of 1 may currently be ordered also for imprisoned men, regardless of whether or not they are sole earners with respect to the minor.[22]

Unlike the first case of stay of execution of sentence, for the finding of which the legislator stipulates the obligation to carry out a forensic examination, for the stay of execution of sentence based on this ground the legislator did not stipulate the mandatory performance of an expert examination as the state of pregnancy can be demonstrated by any medical document issued by a specialised body. The existence of the child under the age of 1 of the convicted person can be demonstrated by the birth certificate showing that the convicted person is the mother of the child.

The nature and seriousness of the crime for which the conviction is ordered are not of interest for determining the applicability of this instance of stay, since a requirement is that the convicted person is not subject to the denial of the exercise of parental rights as accessory punishment in case the convicted person has a child under the age of 1, as this instance of stay is put into place solely in the interest of the minor, in order to ensure its right to be raised and protected by its mother in the first year of its life. Therefore, if the evidence examined in the matter at hand shows that this measure is not in the interest of better care for the child, the court is under no obligation to order the stay or interruption of execution of the sentence.[23]

The stay of execution of sentence will take place, in the case of the pregnant female convict, until the child is born or until the minor reaches the age of 1 year old respectively, assuming that the application relies on the provisions of article 589, paragraph (1), letter b), second sentence of the Code of Criminal Procedure. In the case of a pregnant female convict, it cannot be ordered from the beginning to stay the execution of the sentence until reaching the age of 1, since such order is issued after the birth of the child, where the female convict will have to make a new application for stay in this regard as the postponement does not operate automatically.

Upon the expiry of the period for which the execution of the sentence has been postponed, the enforcement court will take measures for issuing the warrant of execution of sentence or for carrying it out if the warrant has been issued. If no period of time has been set for stay in the situation of the pregnant female convict, the judge designated for enforcement purposes will carry out checks and will find out if the pregnancy ended by birth or miscarriage and will consequently take measures for issuing the warrant of execution or for its carrying out.

3. Procedural issues

3.1. Owner of the application

According to article 590 of the Code of Criminal Procedure, the application for stay of execution of sentence or life imprisonment may be made by the prosecutor and the convict. In the case of the convict, it can be made by him personally or through a lawyer.

If the application is made by a person other than the convict, we consider that the court should not reject it as being made by a person without standing to do so, without asking the convict they endorse it and if they do, the court will have to proceed to solving it.

The application may be withdrawn by the person who lodged it.

3.2. Court having jurisdiction

Article 590, paragraph 1 of the Code of Criminal Procedure provides that the court having jurisdiction to rule on the stay of execution of sentence is the enforcement court.[24]

If during the hearing of the application, the convicted person is arrested and placed in a penitentiary located within the territory of another court, the court having jurisdiction for handling the application is still the notified enforcement court. In this case, the application will be qualified as application for interruption of execution of sentence, but the enforcement court will remain competent to solve it as the first court notified.[25]

In the case provided in article 589, paragraph 1, letter a) of the Code of Criminal Procedure, the application for stay of execution of sentence on medical grounds is submitted to the judge designated for enforcement, along with medical documents. The judge in charge of enforcement verifies in closed session whether the court has jurisdiction, without summoning the petitioner and without the participation of the prosecutor, and orders, as the case may be, by means of a ruling, the decline of the jurisdiction over the matter or the performance of a forensic expert examination. After the forensic report has been received, the case is solved by the enforcement court. In accordance with the opinion previously expressed in

[22] The possibility for a father caring for a minor child up to the age of 1 to apply for the stay of execution of sentence is not found in the legislation of other states, since this right is mainly recognised to the mother. Therefore, in countries such as Italy, Austria, the Czech Republic, Finland, Estonia, Bulgaria, Slovakia, Lithuania, Liechtenstein, the possibility of staying the execution of a sentence can be granted only to a pregnant female convict or the female convict caring for a small child whose age differs from one state to another.

[23] High Court of Cassation and Justice, Criminal Division, *decision no. 1220 of 11 March 2003*, www.scj.ro.

[24] In accordance with the provisions of article 553, paragraph (1) of the Code of Criminal Procedure, enforcement court means the first court that tried the convict, regardless of whether the punishment was applied by this court or by the court of judicial review. Paragraph 2 of the same article stipulates that the decisions delivered in the first instance by the High Court of Cassation and Justice shall be executed, as the case may be, by the Bucharest Tribunal or the Military Tribunal.

[25] Supreme Court of Justice, Criminal Division, *decision no. 1794 of 3 April 2002*, www.scj.ro.

the doctrine[26], we consider that the application for stay of execution of sentence can be heard by the very person who acted as judge in charge of enforcement, as they are not in any situation of incompatibility.

The legislator no longer provided for a procedure by which the judge designated for enforcement should be notified in the situation where the application for stay of execution of sentence is based on the provisions of article 589, paragraph (1), letter b) of the Code of Criminal Procedure, in which case the enforcement court is notified directly. In case a court lacking jurisdiction is notified, the decline of jurisdiction will be made by means of a judgment following the public hearing with the summoning of the convict and the participation of the prosecutor.

3.3. Procedure for solving the application for stay of execution of sentence

As shown above, in case of stay of execution of sentence on grounds of illness, there is a preliminary procedure in which the judge in charge of enforcement verifies the provisions regarding the jurisdiction of the enforcement court and orders the forensic examination.

After the expert examination has been carried out, the judge designated for enforcement purposes will notify the court in order to solve the application.

This preliminary procedure is not applicable in the case of an application for stay of execution of sentence where the state of pregnancy or the existence of a child under the age of 1 is relied on, in which case the application is submitted directly to the enforcement court.

The procedure for solving the application for stay of execution of sentence is carried out in a public hearing, with the summoning of the convict and the mandatory participation of the prosecutor, in accordance with the provisions of article 597 of the Code of Criminal Procedure. The legal text also stipulates that the judge presiding over the court panel will take measures to have a court-appointed counsel designated in the cases set out in article 90 of the Code of Criminal Procedure.[27]

The judgement by which the court rules on the application for stay of execution of sentence may be appealed to the hierarchically higher court within 3 days from the communication thereof. The appeal is heard in public session, with the summoning of the convicted person and the mandatory participation of the prosecutor. The decision of the court solving the appeal is final.

3.4. Effects of the decision to accept the application

The decision to accept the application for stay of execution of sentence results in the release of the convicted person for the period set by the court, where the judgment is enforceable. If the warrant of execution of sentence has been issued, it remains valid, as the stay is not a cause for annulment or suspension of execution. The admission of the application for stay of execution of sentence does not have effects on the other provisions of the judgment, so that the other provisions can be enforced (for example the provisions on court expenses, special confiscation, civil obligations). During the stay of execution of sentence, the accessory punishment will be executed, considering that the provisions of article 65, paragraph 3 of the Criminal Code stipulate that "the accessory punishment of the prohibition of exercising certain rights shall be executed from the moment when the conviction becomes final until the main custodial sentence is executed or considered as having been executed."

The stay of execution of sentence constitutes a reason for suspending the course of the limitation period of sentence execution.

If, during the stay of execution of sentence, another warrant of execution of the prison sentence is issued to the convict"s name, it cannot be enforced before the stay period set by the court expires, or, as the case may be, before the cause of the stay has ceased [article 589, paragraph (6) of the Code of Criminal Procedure].

Furthermore, where the application for stay of execution of sentence is allowed, the court must impose on the convicted person the observance of several obligations. In this regard, article 590, paragraph 1 of the Criminal Code stipulates that during the stay of execution of sentence, the convict must comply with the following obligations:

a) not to go beyond the territorial limit set except under the conditions established by the court;

b) within the time limit established by the court to contact the police body designated by it in the decision to stay the execution of the prison sentence in order to be registered and to agree on the means of permanent communication with the supervisory body, as well as to appear before the court whenever summoned;

c) not to change their home without prior notice to the court that ordered the stay;

d) not to possess, not to use and not to carry any category of weapons;

e) for the case provided in article 589, paragraph (1), letter a), to report immediately to the healthcare unit where they are to undergo treatment, and for the

[26] Mihail Udroiu, *Procedură penală, Partea specială*, fifth edition, C.H.Beck Publishing House, Bucharest 2018, p. 753.

[27] Article 90 stipulates that legal assistance is mandatory: a) when the suspect or defendant is a minor, admitted to a detention centre or an educational establishment, when detained or arrested, even in a different case file, when the safety measure of medical admission was ordered relative to the same, even in a different case file, as well as in other cases provided by law, b) if the judicial body considers that the suspect or defendant could not defend himself, c) during the preliminary chamber proceedings and during the trial in cases where the law provides life imprisonment or imprisonment for more than 5 years for the committed crime.

case provided in article 589, paragraph (1), letter b), to care for the child under the age of 1.

Also, according to article 590, paragraph (2), the court may impose on the convict the compliance with one or more of the following obligations:

a) not to attend certain places or certain sporting, cultural or other public gatherings, as determined by the court;

b) not to communicate with the injured person or with their family members, with the persons with whom they have committed the crime or with other persons, as determined by the court, or not to approach them;

c) not to drive any vehicle or certain specific vehicles.

4. Revocation of the stay of execution of sentence

During the stay of execution of sentence, the convict is required to comply with the obligations imposed by the sentence by which the application was allowed. In connection with such obligations, the legislator also laid down sanctions in case of their breach. Thus, article 591, paragraph (4) of the Code of Criminal Procedure stipulates that in case of breach in bad faith of the established obligations, the enforcement court revokes the stay and orders the execution of the custodial sentence.

The police body designated by the court in the decision as being in charge of the supervision of the person relative to whom the execution of the sentence was stayed regularly verifies that the convict complies with their obligations and draws up a monthly report in this respect for the enforcement court.

The procedure for handling the revocation application is carried out according to the general rules regarding the execution provided by article 597 of the Code of Criminal Procedure, more specifically in public hearing and adversarial proceedings, with the summoning of the convict, the participation of the prosecutor and the designation of a court-appointed lawyer in cases of compulsory legal assistance, as set out in article 90 of the Code of Criminal Procedure.

The enforcement court rules by its judgment and may dismiss the application if it is found that the obligations have not been breached, or that they have been breached but not in bad faith, or may allow the application if the obligations have been breached in bad faith.

An appeal may be lodged against the judgment by which the application for revocation is handled within 3 days from communication. The hierarchically higher court rules on the appeal by final decision.

5. Comparative law issues

The **Italian Criminal Code** provides for two categories of stay of execution of sentence. Particularly, article 146 provides for the situations in which the stay of execution of penalty is mandatory, whereas article 147 provides for the cases of optional stay of execution of sentence.

In accordance with article 146 of the Italian Criminal Code, the execution of a non-monetary penalty is postponed: if it refers to a pregnant woman, if it refers to the mother of a child up to the age of 1, if it refers to a person proven to suffer from AIDS or a serious immune condition acknowledged according to article 286-bis of the Code of Criminal Procedure or another extremely serious illness due to which their state of health is incompatible with the state of detention, when the person is in a stage of the illness so advanced that they no longer respond to treatments and therapies provided in the penitentiary. The Italian legislator provided that the stay would not be ordered, or if ordered, would be revoked, in case the pregnancy is interrupted or the mother is declared deprived of her parental rights over the child, or if the minor dies, is abandoned or entrusted to others.

Unlike national law, the Italian Criminal Code also provides for certain optional cases of ordering the stay of execution of sentence. Consequently, article 147 of the Italian Criminal Code stipulates that the execution of the penalty may be postponed:

a) if an application for pardon has been submitted and the execution of the sentence must not be postponed according to article 146;

b) if a custodial sentence must be applied against the person who is in a state of physical infirmity;

c) if a custodial sentence must be applied against the mother of a child up to the age of 3.

In the latter case, if the mother is declared deprived of her parental rights over the child, or the child dies, is abandoned or entrusted to other persons, the revocation of the stay of execution of sentence will be ordered.

In **Spain**, the serious incurable disease of the convicted person is a reason for conditional release, without requiring the fulfilment of other conditions necessary to order the release, not even the execution of a certain fraction of the sentence, while being necessary to draw up a forensic report on to the condition of the convicted person.

In **Greece**, too, the convict"s illness is a reason for conditional release, without the need to meet the other conditions required for release. Thus, article 110 A of the Greek Criminal Code stipulates that conditional release is ordered regardless of whether or not the conditions laid down by article 105 and article 106 are met if the convict suffers from an acquired immunodeficiency syndrome or chronic renal failure and undergoes regular haemodialysis, or from drug-resistant tuberculosis or is tetraplegic or has undergone liver, bone marrow or heart transplantation, or from terminal stage malignant neoplasm, or from liver cirrhosis with disability of more than 67%. Moreover, the same code stipulates that release will be ordered for

convicted persons who are in a state of disability of more than 50% if the view taken is that detention in penitentiary would be extremely burdensome due to their inability to self-care. The fulfilment of the aforementioned conditions will be verified upon the request of the convict by carrying out a special expert investigation. If it is found that the convicted person suffers from one of the illnesses mentioned above, they will be conditionally released and the period elapsed from the date of release is calculated as actual time of execution of sentence.

In **Slovakia**, the Code of Criminal Procedure provides that the execution of a prison sentence may be postponed in the case of a pregnant woman or a woman who has a child under the age of 1. The law allows for the stay of a prison sentence by up to one year for other serious reasons as well, but a stay of more than 6 months is possible only in exceptional circumstances, especially if the service of sentence could have particularly serious consequences for the convicted persons or their families, which is assessed individually.

6. Conclusions

The completion of the activity of achieving the criminal justice goals involves immediate execution of final criminal judgments and continuity in the enforcement activity. However, there are also exceptional situations, where criminal enforcement is suspended as a result of the intervention of some impediments in the execution of the sentence. The stay of execution of prison or life sentence is precisely such a situation.

The stay of execution of sentence is an expression of the humane character of law, an institution whereby the legislator aims at addressing the issue of people in special situations, in situations of inferiority or helplessness, so that immediate deprivation of liberty does not cause serious consequences on the health of the convicted person or the child up to the age of 1.

The stay of execution of sentence is not a removal of the penalty applied to the convict, but merely a postponement of the moment from which it should begin. In order to avoid situations of unjustified stay of execution of sentence or even removal of execution of sentence, the legislator expressly and restrictively laid down the instances and conditions in which the convicted person may obtain the stay of execution of sentence.

The legislator also provided how the convicted person should be supervised, the obligations that they must comply with, as well as the sanctions that incur in case of non-compliance in the event that the stay of execution of sentence is ordered.

References

- Chiş Ioan, Alexandru Bogdan Chiş, (2015), *Executarea sancţiunilor penale*, Universul Juridic Publishing House;
- Neagu Ion, Mircea Damaschin, (2018), *Tratat de procedură penală, Partea specială, second edition,* Universul Juridic Publishing House, Bucharest;
- Udroiu Mihail, (2018)*Procedură penală, Partea Specială, fifth edition,* C.H. Beck Publishing House, Bucharest;
- Volonciu N. (coordonator), A. Simona Uzlău, R. Moroşanu, V. Văduva, D. Atasiei, C. Ghighenci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chiriţă, *(*2014), *Noul Cod de procedură penală comentat*, Hamangiu Publishing House, Bucharest, 2014;
- Code of Criminal Procedure;
- Criminal Code;
- Law 254/2013 regarding the execution of sentences and custodial measures ordered by judicial bodies during criminal proceedings;
- Order of the Minister of Justice no. 1134/C/2000;
- Order of the Minister of Health no. 2254/2000;
- European Convention on Human Rights;
- Italian Criminal Code;
- Spanish Criminal Code;
- Greek Criminal Code;
- Slovak Code of Criminal Procedure;
- Romanian Constitutional Court, decision no. 535 of 24 September 2019;
- Romanian Supreme Court of Justice, Criminal Division, decision no. 2028/2000;
- Romanian Supreme Court of Justice, Criminal Division, decision no. 3159/2000;
- Romanian Supreme Court of Justice, Criminal Division, decision no. 1794 of 3 April 2002;
- High Court of Cassation and Justice, Criminal Division, decision no. 2661 of 24 May 2002;
- High Court of Cassation and Justice, Criminal Division, decision no. 1220/11 March 2003;
- High Court of Cassation and Justice, Criminal Division, decision no. 4595/3 August 2005;
- High Court of Cassation and Justice, Criminal Division, decision no. 5519/2005;
- Bucharest Court of Appeal, Second Criminal Division, decision no. 1534 of 2 December 2008;
- Piteşti Court of Appeal, Criminal Division, decision no. 701 of 28 October 2010;
- Braşov Court of Appeal, Criminal Division, decision no. 741 of 10 October 2008;
- Bucharest Tribunal, Criminal Division, decision no. 1665 of 7 December 2007;

- Vrancea Tribunal, criminal decision number 256 of 12 June 2009;
- ECHR, judgement of 17 June 2012 in the case Radu Pop v. Romania;
- EC HR, judgement of 14 November 2002 in the case Mouisel v. France.