

THEORETICAL AND PRACTICAL ASPECTS REGARDING THE NULLITIES IN THE ROMANIAN CRIMINAL TRIAL

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Abstract

In the present study we are going to analyse the regime of the nullities in the Romanian criminal trial. This presentation will take into consideration the Criminal Procedure Code in force (adopted in 1968), the doctrine and the practice of the courts. Also, we took into consideration the new provisions of the Criminal Procedure Code which is going to enter into force in 2014. This study is focused on analysing the distinctive regime of the absolute and relative nullities and illustrating the situation in which absolute nullities do not lead ope legis to the annulment of the acts set up without respecting the requirements. In this way, we are going to analyse the situation in which in spite of absolute nullities existence, this sanction can be disregarded and the criminal trial will follow its course.

Keywords: criminal procedural sanctions, criminal trial, absolute nullities, relative nullities, initiation of proceedings before the court

1. Introduction. In the Romanian criminal trial, the most frequent situations which imply procedural errors are met in relation to the sanctioning of nullity, in both its forms, i.e. relative nullity, respectively, absolute nullity. It is true that there are numerous legal hypotheses which imply the sanctioning of delay or inadmissibility and which imply that, however, nullities represent the most frequent cases of sanctioning illegal pursuance of processual or procedural acts. Thus, in criminal trials, not only nullities, but also forfeiture of rights is *expressis verbis* regulated (forfeiture of rights sanctions delayed exercise of certain rights), as well as the sanction of inadmissibility (which takes into consideration the hypotheses that certain processual rights are exercised by persons who do not have a processual quality or the situation in which certain acts of disposal are appealed although there is not legal framework for exercising those means of appeal).

Nullity, as a procedural sanctioning, in its two regulatory forms, is provided by Article 197 of the *Criminal Procedure Code* (hereinafter referred to as *C. pr. c.*). The two categories of nullities are defined differently; thus, the criminal processual law points out a set of particularities that will be detailed in our study. In this section we only make reference to the fact that absolute nullities pose a nullifying character and are explicitly provided by the law, whereas relative nullities are not explicitly set forth and, in many circumstances, may be covered, which means that they actually produce no legal effects.

In the present research we intend to prove that even if absolute nullities cannot be covered, considering the presumption of damaging certain processual interests, in practice, in several hypotheses, the existence of absolute nullities does not lead to the annulment of the acts that were accomplished in this manner, while these acts continue to produce legal effects. In most cases, as we are going to see in our analysis, the possibility of “ignoring” the sanctioning of absolute nullity is legally grounded. Similarly, we are going to point out the existence of hypotheses that may convert absolute nullities into relative nullities (as regards the produced effects), cases in which processual damage, even if presumed, is effectless, while the trial continues; we are also going to point out hypotheses that may lead to the conversion of relative nullities into absolute nullities (as well as the consequences that derive from this conversion).

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2. Nullities: concept and classification. Particular aspects of absolute and relative nullities. According to Romanian specialty literature¹, nullities are the most important procedural sanctions and they may occur during the criminal trial (and even after the trial is over, through an extraordinary means of appeal) any time a processual or procedural act is pursued without strictly observing the law.

The sanctioning of nullities affect procedural or processual acts that were pursued without observing the law. According to specialty literature², the existence of nullities as procedural sanctions in Romanian criminal processual law is closely linked to an act of processual damage, which must have been produced by pursuing a particular act under illegal conditions. In this respect, Article 197 § (1) of the *C. pr. c.* stipulates that the infringements of legal provisions that regulate the pursuance of the trial produce the nullity of the act only when they result in damage which cannot be removed unless that act is cancelled.

Under these conditions, one can infer that not any infringement of the criminal processual law can lead to the annulment of the act that was pursued in an improper manner.

As we have mentioned above, nullities can be classified, in relation to the effects that they may generate, into absolute and relative nullities.

Absolute nullities occur in those cases that are explicitly provided by criminal processual law, i.e. by Article 197 § (2) of the *C. pr. c.* (from this perspective, they are also known as *express nullities*) and can be invoked at any time during the trial and by anyone. Absolute nullities can also be invoked *ex officio*.

Relative nullities are incidental, and they occur whenever a legal provision – apart from the ones stipulated by Article 197 § (2) of the *C. pr. c.* – is infringed, for they are not explicitly set forth by criminal law (under these circumstances, they are considered *virtual nullities*).

Those presented above reveal a first particular difference between absolute and relative nullities. Thus, if absolute nullities are explicitly regulated – through a limitative enumeration – by Article 197 § (2) of the *C. pr. c.*, relative nullities reflect any infringements of the criminal processual law apart from those mentioned in Article 197 § (2) of the *C. pr. c.*³

Thus, absolute nullity sanctioning is applied for: the infringement of norms regarding subject matter competence or the competence of the person, as well as the infringement of norms regarding the notification of the court of law and the composition thereof, the public character of the trial, the prosecutor's participation, the presence of the accused or of the culprit, the assistance offered to the accused / culprit by the defense counsel, whenever these are compulsory according to the law, and, finally the infringement of the norms regarding the drawing up of the assessment report in juvenile cases. Apart from these provisions, the regime of relative nullities lacks an explicit regulation in Article 197 § (1) *C. pr. c.*, according to which the infringements of legal provisions regarding the pursuance of the trial (provisions that are different from the ones stipulated by § 2) generate the nullity of the act only when the produced damage cannot be removed except for annulling that act.

We would also like to underline that the Romanian lawmaker does not use, in Article 197 § (2), the expression “absolute nullity”; however, both specialty literature and judicial criminal bodies unanimously state that the norms which regulate the institutions provided by Article 197 § (2) fall under the category of absolute nullity.

Secondly, the regime set up for the damage caused through the infringements of legal provisions is a distinctive element as regards the two forms of nullity. Thus, absolute nullity leads to the identification *de plano* of the processual damage, which is presumed *juris et de jure*. Thus, the

¹ I. Neagu, *Tratat de drept procesual penal. Partea generală*, second edition, revised and completed, Editura Universul Juridic, București, 2010, p. 668; see also, N. Volonciu, *Tratat de procedură penală. Partea generală, vol. I*, Editura Paideia, București, s.a., p. 266.

² I. Neagu, *op. cit.*, p. 669.

³ Gr. Theodoru, *Tratat de drept procesual penal*, Editura Hamangiu, București, 2007, pp. 498-499.

one who invokes nullity does not have to prove the existence of the damage, while proving the infringement of the legal norm which falls under absolute nullity sanctioning regime is sufficient. If damage is presumed for absolute nullity and its existence is beyond doubt, damage must be proved for relative nullity. Thus, for the infringement of other legal provisions than the ones set forth by Article 197 § (2) to lead to relative nullity sanctioning it is necessary to adopt a supplementary measure whose role is to prove the existence of processual damage, which was caused either through the aggrievance of the parties' rights during the trial or through the wrongful pursuance of the trial.

Thirdly, the difference between the two categories of nullities is also due to the regime of the criminal processual law infringement. Thus, relative nullities are considered only if they were invoked by the person whose processual rights were aggrieved. The person who invokes nullity must prove the damage caused through the infringement of the law during the pursuance of the processual or procedural act. As regards absolute nullities, they can be invoked by any party in the trial and are taken in consideration even *ex officio*.

Last but not least, absolute and relative nullities are differently regulated as regards the moment when they can be invoked during the trial. Thus, relative nullities can be invoked only while the act is pursued, when the party is present or at the first trial date with full procedure. One can identify, consequently, a temporal confinement of the right to invoke the infringement of criminal processual norms, while it is presumed that by effectively getting over these processual moments the damage that could have been retained was covered by the silence of the party interested in invoking it.

On the contrary, absolute nullities can be invoked at any time during the trial and cannot be removed in any way.

3. Processual hypotheses in which procedural flaws provided under absolute nullity do not determine the occurrence of the sanction. In the next lines we are going to make reference to situations in which, according to the criminal processual law provisions, identification of absolute nullities does not determine the removal of the acts which were pursued improperly, while the trial continues and is not affected by absolute nullity.

3.1. Infringement of norms related to subject matter competence and the quality of the person. Defined as the fundamental form of competence whereby trials are distributed between criminal judicial bodies of different degrees, subject matter competence falls under absolute nullity, as a consequence of the fact that it must ensure a legal administration of the act of justice as regards the nature and seriousness of crimes.

As regards the competence in relation to the quality of the person, this is defined as the legal criterion according to which certain judicial bodies settle certain criminal causes depending on the qualities that the wrong-doers have⁴.

The regime set up by Article 197 § (2) of the *C. pr. c.* as regards subject matter competence, respectively competence in relation to the quality of the person, is also provided by Article 39 § (1) of the *C. pr. c.*, according to which the exception of material non-competence and the non-competence related to the quality of the person may be invoked in the whole course of the trial until the judgement is delivered.

The provisions that set forth subject matter competence are both the norms that regulate the jurisdiction of courts of law and the norms that regulate the competence of criminal investigation bodies. In consequence, when it is found that the criminal investigation and the judgement of the case infringed the norms related to subject matter competence, the acts pursued by the investigation body which lacked competence in the matter are subject to annulment.

⁴ I. Neagu, *op. cit.*, p. 360.

However, even if processual damage is presumed *juris et de jure*, the Romanian lawmaker, in order to confer trials a more dynamic nature, has included in the criminal processual law provisions that are meant to render effectless the infringement of legal provisions related to subject matter competence. Thus, first of all, in conformity with Article 42 § (2) of the *C. pr. c.*, if declining was due to subject matter competence or to the quality of the person, the court of law that is trying the cause may use the accomplished acts and maintain the measures imposed by the dismissed court. In other words, the acts pursued by the court of law that did not have subject matter competence will be maintained for the cause insofar as the competent court of law decides so even if absolute nullity occurs. The provision stipulates that criminal investigation bodies must apply these acts, as well, according to Article 45 § (1) of the *C. pr. c.* related to Article 42 § (2) of the *C. pr. c.*

In this respect, one can also analyse the provisions of Article 268 of the *C. pr. c.*, which sets forth the procedure that is applied in case the file is sent by the prosecutor to the competent criminal investigation body if it is found that the criminal investigation was pursued by a non-competent body. Thus, in such cases, the measures that were taken remain valid, as well as the processual acts or measures that were confirmed or approved by the prosecutor; the same is true for processual acts which cannot be pursued again. In comparison with Article 42 § (2) of the *C. pr. c.*, the context described by Article 268 *C. pr. c.* only maintains acts or measures that comprise the prosecutor's decision, respectively those measures and acts that cannot be pursued again. We also took into consideration the assurance measures that can be enforced only by the prosecutor during the criminal investigation stage.

The provisions of Article 332 § (1) *C. pr. C.* also set forth the legal hypotheses in which the occurrence of absolute nullity does not lead to the annulment of pursued acts or enforced measures. Thus, this legal text stipulates the possibility of dismissing the file of the cause by the court to the prosecutor insofar as it is found that in that cause the criminal investigation was pursued by another body and not by the one which had competence and on condition that judicial investigation is not completed. *Per a contrario*, if during oral debates it is found that the criminal investigation was pursued by infringing the norms regarding subject matter competence or the quality of the person, the sanction of absolute nullity cannot intervene. In this case, absolute nullity is covered through the complete pursuance of the judicial investigation.

We can notice, by analysing Article 332 § (2) of the *C. pr. c.*, the inconsistency of legislation which makes it possible for a file to be dismissed and for the criminal investigation to be pursued again if subject matter competence or competence related to the quality of the person are not observed, even if the two cases of absolute nullity are regulate in § (1) of Article 332 *C. pr. c.* as well.

3.2. Infringement of norms related to the notification of the court of law. This instance of absolute nullity refers to the infringement of legal provisions that regulate the notification of the court of law [accomplished through indictment or the aggrieved person's complaint or through the complaint of any other person whose interests were aggrieved as provided by Article 278¹ § (9) of the *C. pr. c.*] or the supplementary notification of the court (which is accomplished by extending criminal action to new material acts).

According to specialty literature the following provisions on subsequent notification⁵ are considered relevant for the hypothesis of „court notification”: action for annulment [Article 379 § 2 letter c)]; declining of jurisdiction (Article 42); judgement for settling the jurisdiction conflict [Article 43 § (9)]; change of venue [Article 55 § (1)].

Subsequent to confirming the infringement of norms related to subject matter competence or to the quality of the person, there are regulated exceptions for court notification, according to which

⁵ N. Giurgiu, *Cauzele de nulitate în procesul penal*, Editura Științifică, București, 1974, pp. 242-245.

absolute nullity does not have an incidental nature even if norms regulating notification were infringed.

Thus, according to Article 300 of the *C. pr. c.*, if the court finds that the notification was not legally conceived and that this inconsistency cannot be removed at once, neither by establishing a deadline for this purpose, the file is resent to the prosecutor for the latter to draw up again the notification act. In other words, absolute nullity does not intervene *ope legis*, since it is necessary for more chronological stages to be pursued: 1) identifying the improper nature of the notification act; 2) finding that it is impossible to remove the identified inconsistency at once (at the moment when the consistency of the notification act was discussed); 3) identifying the impossibility to remove the inconsistency by establishing a trial date. Absolute nullity is enforceable only if it is found that the procedure flaw cannot be removed unless the file is submitted again.

In this respect, in the Supreme Court jurisprudence we identify the same manner of settling appellate review in the interest of the law. Thus, it has been held, when enforcing provisions of Art. 264 § (3) of the *C. pr. c.*, that the indictment must contain the reference „verified as regards legality and grounds”. The lack of this reference makes the notification act inconsistent with the law, under Article 300 § (2) of the *C.pr.c.*; thus, the notification may be removed, as the case may be, immediately or at an established term. Consequently, in such a situation, the court will enforce the procedure set up by Article 300 § (2) of the *C. pr. c.*; absolute nullity can be invoked only insofar as the procedural flaw cannot be removed⁶.

3.3. Infringement of norms regarding the drawing up of the assessment report for juvenile causes. The obligation to draw up an assessment report is one of the special dispositions which are enforced for the investigation and judgment of juveniles.

Prior to the modifications brought by Law no. 356/2006, the drawing up of the assessment report was compulsory both for the criminal investigation stage and for the trial stage. Thus, in the light of the provisions that had been set forth before 2006, the criminal investigation of juvenile crimes could not lead to a trial without the juvenile assessment report. The presumption according to which the lawmaker imposed the obligation to draw up the assessment report required that it was compulsory for the juvenile to undergo this assessment before being summoned. In other words, the prosecutor's decision to serve a writ of summons had also to be grounded on the results of this assessment process. If the criminal investigation file is submitted to the court in the absence of the assessment report, the court of law will have to deal with this omission and the judge has the obligation to impose the drawing up of the assessment report.

In conformity with Article 12 of the Ordinance no. 92/2000⁷, the assessment report contains data about the accused or the culprit, his / her level of training, behaviour, factors that influence / might influence his / her behaviour, as well as his / her chances to be socially reintegrated. When the report is drawn up, the probation service may collaborate with psychologists, educators, sociologists, physicians or other specialists according to the recommendation of competent authorities.

The authority which has competence to assess the juvenile, i.e. probation services, is considered to lack the functional capacity to provide these reports to the criminal investigation bodies; according to Law no. 356/2006, the assessment report is compulsory during the trial, because it provides the court of law an instrument which individualizes the punishment. Consequently, the

⁶ The High Court of Cassation and Justice, United Sections, Decision no. 9/2008, published in the Official Gazette of Romania, no. 831/2008.

⁷ See Ordinance no. 92/2000 on the organization and functioning of social services for the reintegration of criminals and the surveillance of non-custodial punishments (Official Gazette of Romania no. 423/2000). This normative act was altered by Law no. 123/2006 on the statute of probation service personnel (Official Gazette of Romania no. 407 / 10th May 2006), in the sense that this institution was to have a different name (probation service instead of service for protection of victims and social reintegration of criminals, probation directorate instead of directorate for the protection of victims and social reintegration of criminals).

drawing up of the report for the assessment of the juvenile criminal has become facultative during the criminal investigation stage and its use depends on the prosecutor.

Subsequent to these modifications, one can notice that the violation of norms related to the drawing up of the assessment report for causes that imply juvenile offenders brings about the sanction of absolute nullity only insofar as the assessment report is absent during the trial. In consequence, according to the legal provisions (Article 482 of the *C. pr. c.*), criminal investigation for juveniles may be pursued in the absence of this assessment, and the sanctioning does not apply.

4. Hypotheses in which relative nullities are transformed into absolute nullities.

According to the regime of relative nullities the sanction can be invoked whenever any legal provisions apart from those laid down by Article 197 § (2) *C. pr. c.* were infringed on condition that the produced damage cannot be removed outside the annulment of that act. Nullity can be invoked, as we have pointed out, only if it was invoked during the pursuance of the act, when the party is present or at the first trial date with complete procedure if the party was absent during the pursuance of the act.

However, the last part of Article 197 § (4) of the *C. pr. c.* stipulates that the court of law considers *ex officio* the infringements that occur at any time during the trial if the annulment of the act is necessary for finding out the truth and for fairly settling the cause.

According to this norm relative nullity can lead to invoking the application of absolute nullity. Thus, even if procedural flaws are not provided in the explicitly limited framework of Article 197 § (2) of the *C. pr. c.*, absolute nullity of the act or of the measure can be invoked provided that *it is found that the annulment act is necessary for finding the truth and the fair settlement of the cause.*

In this respect, for example, procedural flaws – which are identified when the criminal investigation material is presented – fall under the sanction of relative nullity since this type of infringement is not provided by Art. 197 § (2) of the *C. pr. c.* However, insofar as the criminal investigation material is not presented to the culprit and this procedural flaw is corroborated with the extension of criminal investigation for a new crime and the culprit is not informed about it, one can invoke the aggrievance of the right to defence during the criminal investigation. In this situation, we appreciate that it is possible for the absolute nullity to be invoked.

5. Conclusions. In the present study we have attempted to prove that relative and absolute nullities may overlap as a consequence of the fact that the legal regime set up by the provisions of the Criminal Procedure Code is different for the two categories of sanctions that imply numerous particularities.

Thus, from a legal point of view it is possible – under certain conditions – for absolute nullity to be converted into relative nullity and, in other cases, for relative nullity to be converted into absolute nullity. By making reference to criminal processual norms and jurisprudence, we have proven that absolute nullity does not necessarily lead, even when identified, to the disposal of the performed acts or of the illegally adopted measures. From the same point of view, i.e. the perspective that points out the way in which relative nullity may be invoked under the regime of an absolute nullity, one can notice that there are situations (indefinite situations that are ruled by the need to settle the cause in a fair way and to find out the truth) in which procedural flaws that fall into the category of relative nullity lead to the disposal of processual acts or measures.

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