



“NICOLAE TITULESCU” UNIVERSITY OF BUCHAREST
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PhD THESIS

MECHANISMS FOR THE PROTECTION OF PRISONERS
- Summary -

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KEYWORDS

- ✓ Execution of criminal penalties law
- ✓ Criminal law
- ✓ Universal Declaration of Human Rights
- ✓ United Nations Standard Minimum Rules for the Treatment of Prisoners
- ✓ Convention for the Protection of Human Rights and Fundamental Freedoms
- ✓ European Prison Rules
- ✓ European Court of Human Rights
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- ✓ Constitution of Romania
- ✓ Criminal Code
- ✓ Criminal Procedure Code
- ✓ Law no. 254/2013 on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceedings
- ✓ Prohibition of torture, inhuman or degrading treatments or other ill-treatments
- ✓ Prohibition of discrimination
- ✓ Freedom of conscience, of opinions and freedom of religious beliefs
- ✓ Right to petition and right to correspondence
- ✓ Right to vote
- ✓ Judge in charge of the supervision of deprivation of liberty
- ✓ Constitutional Court
- ✓ High Court of Cassation and Justice

THE TOPIC UNDER RESEARCH AND ITS SCIENTIFIC IMPORTANCE

The major changes that occurred in the last decade of the twentieth century in the world, in Europe and in the communist system brought new criminal challenges to the execution of criminal penalties law regarding the adaptation of the sanctioning system to the European Prison Rules, the Beijing Rules on the Standard Minimum Rules for the Administration of Juvenile Justice, to the conventions on the elimination of torture, inhuman or degrading treatment. The aforementioned conventions brought to the science of criminal law the necessity of the global evaluation of the penal, the execution of criminal penalties and the means of punishment systems and their application, especially in the penitentiary system, the reevaluation of the concepts of reeducation, resocialization, reinsertion of the prisoners and minors admitted in the education centers.¹

The present study, titled *Mechanisms for the protection of prisoners*, aims at analyzing and presenting in detail a little explored field at the level of the specialized literature in Romania, namely the mechanisms of protection available to the convicted persons to prison sentences.

The scientific approach has as starting point the national legislation, but the research also undertakes a comparative law analysis and, especially, the international and regional standards (in particular the analysis of the Strasbourg Court case-law), ensuring at all times a trilateral approach of the study and, obviously, an approach aimed at combining the theoretical and legislative aspects with the detailed analysis of national or supra-national case-law.

The present thesis is intended to be an analysis of the correspondence of the national legislation with the international standards in the field, as well as with the legislation of other states, by analysing the way in which the Romanian state fulfills its obligations regarding the protection of persons deprived of their liberty. From this perspective, the researched topic and the advanced solutions are based on arguments derived from the analysis carried out on three levels: internal legislation and case-law, comparative law, international standards and case-law, the aim being to present, obviously not unique and ultimate solutions, but solutions that are both logically and legally sustained.

Finally, we consider that the present scientific research is of interest both at the *academic level*, as it constitutes the first work that addresses, integrated and unitary, the mechanisms of protection of the prisoners, as well as in the *practical plan*, since the thesis tackles the effective and coherent practice of the legal provisions, international norms and standards in the field, as developed both by the penitentiary administration and by the judge in charge of the supervision of deprivation of liberty or by the court, aiming ultimately to ensure a unitary and balanced application of the legal rules in the researched area.

¹ I. Chiș, *Drept execuțional penal. Istoria închisorilor. Executarea pedepselor carcerale*, Ed. Wolters Kluwer România, București, 2009, p. 205.

SCOPE OF THE RESEARCH

The present research has the *purpose* of providing a thorough scientific research into the mechanisms of protection of prisoners by establishing an analytical, theoretical and practical framework, the following *objectives* being taken into account at the elaboration of the thesis:

- ✓ examination of the international and national normative framework, realised in Chapters I and II;
- ✓ performance of a scientific analysis on the rules applicable to prisoners (general principles and some of the rights of prisoners, realised in Chapter III);
- ✓ analysis of the protection ensured by means of criminal law, realised in Chapter IV;
- ✓ analysis of the activity of the judge in charge of the supervision of deprivation of liberty (including the complaint procedure against the conclusion of the judge), realised in Chapters V and VI.

The analysis of the mechanisms for the protection of prisoners is achieved through a highly multidisciplinary approach, encompassing important elements defining execution of criminal penalties law and criminal law, analyzed in relation to constitutional law and human rights law.

The present thesis aims to deepen, in a first attempt in the specialized national literature, the systems for the protection of prisoners, by detailing the essential concepts and by deepening the multidisciplinary scientific research on the normative framework and the case-law in the field. From this perspective, the *theoretical significance and applicative value of the thesis* can be highlighted by reference to a series of elements, among which:

- ✓ performing, for the first time in the national scientific literature, an analysis of the systems of protection of prisoners;
- ✓ comparative examination of the mechanisms of protection of the prisoners, observing, on the one hand, the current national legislative framework and, on the other hand, the standards and recommendations contained in the regional and universal instruments to which Romania is part;
- ✓ the theoretical, legislative, but also practical, case-law based approach, regarding the continuation of the alignment of the national legislation with the international standards and recommendations.

In particular, the analysis will be achieved by reaching the following benchmarks: national legislation and the reporting of such legislation to comparable legal elements or to the instruments and standards created within the Council of Europe (with particular attention being paid to the analysis of the European Court of Human Rights case-law), the European Union Law (EU system) and the United Nations system (universal system).

RESEARCH METHODOLOGY

In order to achieve the proposed objectives, the scientific research used several research methods, which, individually and as a whole, have allowed an in depth and consistent analysis of the mechanisms of protection of prisoners. Thus, research methodology is based mainly on:

- ✓ *documentary analysis method*, used to study and gather pieces of information from the specialty literature and from the national and international legislation;
- ✓ *grammar method*, used to perform a morphological and syntactic analysis of certain legal provisions;
- ✓ *logical method*, used for interpreting and corelating the legal texts and the interference of those texts with the case-law in the researched topic;
- ✓ *historical method*, which has considered the research of the historical evolution of some institutions and developments of the case-law (especially those carried out at the level of the national legislation regarding the institution of the judge in charge of the supervision of deprivation of liberty or those made at the level of the European Court of Human Rights case-law);
- ✓ *comparative method*, used for the analysis, evaluation and comparison of the national normative framework with the international instruments or the legislation of other states;
- ✓ *teleological method*, used to reach the purpose of some regulations and the aim pursued by the legislator;
- ✓ *systemic method*, used to establish the meaning of legal norms, but also to corroborate those texts with other norms of interest to other law institutions or other branches of law.

For research we used both primary sources (treaties, conventions, reports), as well as secondary sources of research, in the form of specialized articles and papers, observing the case-law of the national or supra-national courts.

THE STRUCTURE OF THE THESIS

Chapter I. International legal instruments regarding the protection of prisoners contains an examination of international and regional instruments to which Romania is a party (United Nations, Council of Europe, European Union). We took under examination, *inter alia*, the Universal Declaration of Human Rights, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention on human rights and fundamental freedoms, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, recommendations or reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

The Importance of the analysis resides in the fact that, as pointed out in the scientific literature, it never existed in the history of Western countries a consensus such as the current consensus in favor of accepting traditional freedoms.²

Chapter II. National legal framework regarding the protection of prisoners aims at identifying the legal provisions contained in the national law that are relevant in terms of the protection of the prisoners, thus setting the national legal framework.

Such a analysis is required on the one hand in order to achieve an overview of all legal instruments relevant for the execution of prison penalties (together with the ones existing at international level), more precisely the mechanisms of protection for the prisoners and, on the other hand, to facilitate, in the subsequent chapters, an analysis in order to determine whether the internal protection mechanisms are in line with the provisions of conventions, treaties, recommendations, standards or other international legal instruments to which Romania is a party.

Chapter III. Analysis of the rules applicable to prisoners contains a research of the rules applicable to prisoners.

The analysis focuses on two directions: firstly, is conducted a detailed examination of two fundamental principles of executing prison penalties: prohibition of torture, inhuman or degrading treatments or other ill-treatments and prohibition of discrimination; secondly, the research focuses on some of the specific rights and freedoms, as regulated in articles 28, 63, 64 and 76 of the Law no. 254/2013 on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceedings, namely: freedom of conscience, of opinions and freedom of religious beliefs; right to petition and right to correspondence, including the presentation of the measures set out in order to ensure the applicability of those rights; the right to vote.

Analysis of the rules applicable to prisoners is achieved by a structural unitary approach, having as a starting point the identifying of the legal framework and, subsequently, identification of the specific concepts, namely: torture, inhuman or degrading treatment; discrimination; freedom freedom of conscience, of opinions and freedom of religious; right to petition and the right to correspondence; right to vote.

Furthermore particular aspects of interest to the rules for prisoners are observed.

A significant topic, which completes the framework of the PhD research. Consists in the examination of the European Court of Human Rights case-law, as well as the national case-law, for the latter with a focus on the analysis of conclusions of the judges in charge of the supervision of deprivation of liberty.

Chapter IV. Protection ensured by means of criminal law aims to analyze these means, by which is ensured the protection of prisoners.

² J. Morange, *Libertățile publice*, ediția a 7-a actualizată, Ed. Rosetti, București, 2002, p. 138.

We consider, in the first place, the analysis of the aggravating circumstance consisting in the committal of the crime for reasons related to race, nationality, ethnicity, language, gender, sexual orientation, political opinion or allegiance, wealth, social origin, age, disability, chronic non-contagious disease or HIV/SIDA infection, or for other reasons of the same type, considered by the offender to cause the inferiority of an individual from other individuals, as provided in article 77 h) of the Criminal Code.

Analysis then focuses on the research of the content of some important crimes, as regulated in the Criminal Code: *submission to ill treatment* (article 281); *torture* (article 282); *violating the privacy of correspondence* (article 302); *preventing the freedom to practice religion* (article 381); *hindering the exercise of electoral rights* (article 385).

Chapter V. Activity of the judge in charge of the supervision of deprivation of liberty. The new legal framework in the field of execution of criminal penalties,

namely Law no. 275/2006 on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceedings, envisages a modern development of the Romanian prison system, as a delegated judge on the execution of prison penalties was introduced, thus the execution of these penalties being carried out under the surveillance, control and authority of this judge, ensuring the lawfulness of the execution.³

Following the provisions set out in the previous legal framework (Law no. 275/2006), the institution of the judge in charge of the supervision of deprivation of liberty, in the terminology currently established by Law no. 254/2013 on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceedings, aims at consolidating while firmly expressing the Romanian legal framework approach for an effective control of the execution of prison penalties (regardless of the type of the deprivation space: prisons, detention and remand centers, remand centers, educational centers and juvenile detention centers).

It is important to note that the judge in charge of the supervision of deprivation of liberty is not part of the prison administration, although it operates physically in the prison block. The judge maintains the judicial status throughout the exercise of all his/her activity, being independent from the executive branch (the prison administration), thus maintaining the membership and the status of a judge.

The Chapter under discussion includes an analysis of the institution of the judge in charge of the supervision of deprivation of liberty, by featuring both elements regarding the appointment and incompatibilities and, also, detailing the duties of the judge in charge of the supervision of deprivation of liberty, whether administrative or jurisdictional-administrative duties, as follows:

³ R. F. Geamănu, *Implementing a National Preventive Mechanism for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment in places of detention in Romania*, The International Conference CKS 2012 Challenges of the Knowledge Society, Bucharest, May 11-12, 2012, 6th Edition, CKS eBook 2012, Ed. Pro Universitaria, 2012, p. 78.

It is important to note that the judge surveillance deprivation of liberty is not part of the prison administration, although it operates physically in the prison service headquarters. It carries the judiciary throughout the exercise activity is independent of the executive branch (the prison administration), maintaining membership and status of judges.

Chapter discussed include an analysis of judge institution supervision by featuring both elements to inquire designation and its incompatibility, and detailing tasks judge supervising the deprivation of liberty, whether administrative, and the administrative jurisdiction as follows :

a.) jurisdictional-administrative duties:

- ✓ solving the complaints of the prisoners concerning the exercise of the rights;
- ✓ solving the complaints of the prisoners about the establishment and changing the regimes of enforcement of custodial sentences and educational measures involving deprivation of liberty;
- ✓ solving the complaints of the prisoners concerning disciplinary sanctions.

b.) administrative duties:

- ✓ *granting the possibility for the prisoners to be heard by the judge;*
- ✓ *participation in the food refusal procedure;*
 - ✓ participation in the commission for conditional release;
- ✓ *inspections and controls of the prison;*
 - ✓ other duties, as provided by the law.
- ✓ *granting the approval for the collection of biological samples for testing the prisoners I norder to find out if one has consumed drugs, alcohol or ingested toxic substances without medical prescription, likely to cause behavior disorders.*

According to the legal provisions (article 9 paragraph 1 from on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceedings), *the judge in charge of the supervision of deprivation of liberty shall supervise and control that the legality of custodial sentences and measures of deprivation of liberty is ensured, by exercising the duties established by law.*

Consequently, all aspects regarding the supervision and control of the legality prison penalties are within the competence of the judge in charge of the supervision of deprivation of liberty, which rules by a conclusion.

Finally, we mention that an important part of this chapter consists in the examination of the national case-law, focusing on the study of judges' rulings (conclusions).

Chapter VI. Complaint procedure against the conclusion of the judge in charge of the supervision of deprivation of liberty contains an analysis, which is an inherent extension of the study conducted in the previous chapter - Chapter V - on the activity of the judge in charge of the supervision of deprivation of liberty.

The mechanism of protection of the prisoners would not be complete without providing the possibility for the prisoner to challenge the conclusion of the judge in

charge of the supervision of deprivation of liberty, by means of public and contradictory judicial proceedings.

The complaint procedure covers only the jurisdictional-administrative duties of the judge in charge of the supervision of deprivation of liberty. Consequently, the conclusions of the judge can only be challenged in relation with the following duties:

- ✓ solving the complaints of the prisoners concerning the exercise of the rights;
- ✓ solving the complaints of the prisoners about the establishment and changing the regimes of enforcement of custodial sentences and educational measures involving deprivation of liberty;
- ✓ solving the complaints of the prisoners concerning disciplinary sanctions.

The Chapter provides detailing on the procedural aspects, which concern the material competence of the court, the person entitled to file a complaint, the competent court, the filing and forwarding the complaint to the competent court.

Further, the analysis addresses the proceedings rules, namely: operation of the trial, the court judgement and its communication and the enforcement of the judgement.

Particular attention was paid to the study of the existing case-law against the conclusions of the judges in charge of the supervision of deprivation of liberty.

Finally, an analysis of the Constitutional Court case-law is put forward, with a focus on the validation of the protection mechanism for the prisoners in relation with the constitutional principles, as without such an analysis the jurisdictional-administrative mechanism (conclusion of the judge in charge of the supervision of deprivation of liberty) and the judiciary mechanism (complaint procedure against the conclusion of the judge in charge of the supervision of deprivation of liberty) can not be considered complete.

Final considerations and *de lege ferenda* proposals concludes the scientific research, as it contains assessments of the results of the research and a series of proposals *de lege ferenda*, in order to improve the current regulatory framework, to ensure a unitary interpretation of laws and provide consistency for the institutions already covered by the national legal framework.

For example, *de lege ferenda* proposals concern, on the one hand, the organizing of the activity of the judge in charge of the supervision of deprivation of liberty (such as proposals concerning the incompatibility) and, on the other hand, elements of interest regarding the duties of the judge or even the rights of the prisoners [e.g. the proposal for amending article 40 paragraph 11 of Law no. 254/2013 in order to include the solution of maintaining the current prison regime as a solution which allows exercising the complaint mechanism in front of the court].

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§ 3. European Union level

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2. Directiva Consiliului 93/109/CE din 6 decembrie 1993 de stabilire a normelor de exercitare a dreptului de a alege și de a fi ales pentru Parlamentul European pentru cetățenii Uniunii care au reședință într-un stat membru în care nu sunt resortisanți
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4. Tratatul privind funcționarea Uniunii Europene
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§ 4. Comparative law

1. Codul penal al Austriei
2. Codul penal al Bulgariei
3. Codul penal al Franței
4. Codul penal al Germaniei
5. Codul penal al Italiei
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VI. 2. Foreign case-law

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2. C.J.U.E., hotărârea din 12 iunie 2003 în cauza Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, C-112/00

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