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COMPARED LAW ISSUES REGARDING THE JUDGE SUPERVISING THE LIMITATION OF FREEDOM

Gabriela-Nicoleta CHIHAIA*

Abstract

According to Law no. 254/2013 regarding the execution of sentences and custodial measures ordered by the court during the criminal trial, the judge that oversees the limitation of freedom process to monitor and control the execution of sentences and ensures the legality of custodial measures. Although Spanish and Italian law systems influenced the institution of this judge it did not copy the regulation from these countries, but continues the line started in our country by Law no. 275/2006, which regulated the judge delegated for the execution of custodial sentences.

This study aims without trying to be exhaustive, to present different models adopted by European countries in the matter of justices that control the activity during the execution of custodial sentences. Thus we analyzed the laws of Italy, Spain and Germany.

Without trying to prioritize these European regulations, the paper aims to present the legal nature of the activity of this type of justice in relation to the regulated activity of the Romanian legislation, which mentions that his or hers responsibilities are administrative and also administrative jurisdictional. We also note the similarities between the powers of this type of judge in the European countries presented, regarding, for example, the complaints of inmates against prison conditions or infringements of their rights, but at the same time the difference which will be highlighted in particular in relation to the status of these judges.

In the last part of the paper we present a number of problems and we propose possible solutions to their law by adopting new legal provisions taken from the laws of the European countries analyzed in this study.

Keywords: judge, supervision, control, deprivation of liberty, comparative law.

1. Introduction

This paper aims to present some aspects of the laws of European countries with tradition in criminal law in general and penal execution law, especially concerning the judge of supervising the custodial sentencing phase. We will analyze existing legislation in this field in Italy, Spain and Germany. Incidentally, the first two countries have been a source of inspiration for the Romanian legislature when we created this institution of the judge in charge of regulatory oversight of deprivation of freedom in our land, as it appears in Law no. 254/2013 on the execution of sentences and custodial educational measures ordered by the court during the trial¹.

However, the Romanian legislature just inspired itself from the laws of other European countries, keeping the line that began with the adoption of Law. 275/2006 on execution of punishments and measures ordered by the court in criminal proceedings², which repealed the outdated provisions of Law no. 23/1969 and other previous laws, and updated the criminal execution legislation in Romania. This law was the first legislative

measure in Romanian which concentrated in a single framework imperatives and rules of enforcement regarding measures and penalties involving deprivation of freedom, through it the matter of sentencing came to rally the international acts of significance, such as the Universal Declaration of human rights, the European Convention on human rights and fundamental freedoms Recommendation of the Committee of Ministers of the Council of Europe R (87) 3 of 1987 on the European prison rules and is also intended to create a near optimal national legislation similar to that in other EU countries³.

This paper intends to present similarities, but especially the differences, primarily between the status such judges in Romania and the judges responsible for supervising the execution of sentences of the three European countries, and at his place of work. Romania is the only country, at least of those that are mentioned in this study in which the judge in charge of supervision of the deprivation of freedom operate effectively in places of detention or prisons, centers for detention and remand centers, educational centers and detention, in all other states his activity is done in the courts. It also notes, as we

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¹ Law no. 254 of July 19, 2013 on the enforcement of sentences and custodial measures ordered by the court during the criminal trial, published in the Official Gazette no. 514 of August 14, 2013.

² Law no. 275 of 4 July 2006 on the execution of punishments and measures ordered by the court in criminal proceedings, published in the Official Gazette no. 627 of 20 July 2006.

³ Costel Cristinel Ghigheci, Mihaela Vasilescu, role and place of the delegated judge for the execution of custodial sentences in the Criminal Law Review, no. 1/2008, p. 147.

will show below that in some countries, eg Germany, the work of judges with responsibilities on the execution of custodial sentences are carried out in chambers, meaning a body of judges, consisting of three members.

We will check and analyze the tasks that these judges have with regard to the execution of custodial sentences and we see the main purpose of these is to supervise and control the legality of sentencing and the resolution of various problems that may arise with regard to the rights of individual freedom for the prisoners in this four countries.

In the last part, the paper aims to identify possible solutions, taking into account the laws of the three European countries mentioned, which can be adopted by our country, to improve the status and role of the judge in charge with supervision of deprivation of liberty, proposing some solutions needed in the law on the regulation of this institution.

O the romanian regulation of this institution, particularly important for enforcement of custodial sentences, but exercising supervision of the legality of enforcement of preventive measures executed by prisoners as subjects to be addressed are not only convicted persons but also those who are in remand, reason which does not make clear the status of judge. The vast majority of written work, otherwise not many on the problem of Criminal Sanctions Enforcement, does not address the institution of the judge in charge of supervision of deprivation of liberty and merely present legal provisions concerning the designation and its powers. We believe that because of this, the regulations of the three countries may still be a source of inspiration for the Romanian legislature in an eventual completion and / or amendment of laws in this matter.

1. Supervision judges in Italy (Giudici di sorveglianza)

Italian law regulates a whole judiciary oversight as part of the Italian judicial system, which is responsible for overseeing the functionality of enforcement. It is regulated by Law no. 354 of 26 July 1975 on the penitentiary rules and the application of restrictive measures of deprivation of liberty⁴. The law implementing the provisions of article 27 of the Italian Constitution, according to which criminal liability is personal, the defendant is not considered guilty until final conviction. However, the punishments can not consist in

treatment contrary to humanitarian principles and should aim to re-educate prisoners, excluding the death penalty⁵.

The law confers such judge in Italy an expanded role that includes resolving issues concerning the rights of prisoners during the sentence, and prison management including alternative sanctions or their arrangement either for the final part of the sentence or the period before execution. Thus, this type of judge in Italy operating in the field of criminal execution after his conviction became final.

While in other legal systems we note that the execution of the sentence, even in detention, has an administrative nature, in Italy it has a full jurisdiction⁶.

Italian law does not regulate the institution of this type of judge as the sole judge, as happens in our country, but provides two judicial bodies, the first being the magistrate surveillance, operating in small groups as part of the Office of Probation, competent for part or all district Court of Appeals, and the second is the Probation Court, established as a branch since 1986 with jurisdiction extended to all Courts of Appeal⁷.

Regarding magistrate surveillance it should be noted that according to Italian law this type of judge is the only judge, so although the name in Romanian institution of law Criminal Sanctions Enforcement Italian is "magistrate surveillance", in this paper we prefer using the term "judge in charge of supervision" not to create confusion about the jurisdiction of the magistrate in our country, knowing that according to Romanian law, magistrates are both judges and public prosecutors.

Judge supervision decisions are subject to appeal to the Court of Probation, but in many cases they are executed provisionally, as the Court does not decide cases only after a few months, thus exceeding the term of forty-five days mentioned by law.

In turn, the judgments of the Court of Probation can be appealed.

By decree of the President of the Court of Appeal, a judge may be delegated temporarily to exercise oversight functions as a magistrate when he or she is missing. The magistrates exercising oversight functions must not exert in the same period other judicial functions.

Law no. 354 of 26 July 1975 in article 69 provides that the judge in Italy has the following responsibilities:

⁴ <http://www.ristretti.it/areestudio/giuridici/op/opitaliano.htm>, accessed January 25, 2016.

⁵ Italian Constitution, translated into Romanian, <https://constitutii.files.wordpress.com/2013/01/costituzeitaliana-rumeno.pdf>, <http://codex.just.ro/Tari/IT>, accessed 3/3/2016.

⁶ Alessandra Crushing, *La magistratura di sorveglianza e caratteri definizione, pubblicato in criminal processuale it diritto* 06.16.2015, <http://www.diritto.it/docs/37152-la-magistratura-di-sorveglianza-definizione-e-caratteri>, accessed January 17, 2016.

⁷ Giulia Giangregorio, *Il ruolo e del Giudice di sorveglianza to funzione nella sua Azione della pratica. Indagine presso it tribunals di sorveglianza di Firenze, L'altro diritto - Centro di su documentazione carcens, devianza's marginalia*, 2008 <http://www.altrodiritto.unifi.it/ricerche/misure/giangreg.htm>, accessed December 19, 2015.

1. monitor prevention and punishment organizing institutions, reporting to the Minister, the needs of different services, the most attention heading towards rehabilitation measures;

2. to inform the Ministry of Justice on the need to implement new services in prisons;

3. exercise, among other things, direct supervision to ensure that the execution of custody of the accused is implemented in accordance with the law and regulations;

4. oversees the implementation of the measures of personal security;

5. Reviews the degree of social danger of a convict, in accordance with paragraph 1 and 2 of art. 208 Criminal Code, the application, implementation, transformation or revocation, even anticipated, of safety measures.

6. by decree approve the rehabilitation treatment program for each prisoner or, if it considers that there are elements which constitute an infringement, he returns it with comments. Also approved by decree is admission decision of the administration of the detention as a prisoner working outside it. He or she also gives during medical treatment, provisions designed to eliminate any infringement of the rights of detainees or internees.

By order, which may be appealed only at the Supreme Court, decides on complaints of prisoners and internees involving the compliance of rules on the allocation of prisoners to jobs, reward and remuneration thereof, as well as training activities in labor and social security and on the conditions for the exercise of disciplinary power, the sanction, the statement of objections and the right justification;

7. decides by decree with reasons about permissions, the period of semi-freedom for the prisoners and hospitalisation, and approves changes in probation programs, social services and home detention.

8. decides by ordinance on reducing the penalty before full execution of the punishment, and to reduce debt.

9. expresses a reasoned opinion on the proposed pardoning of prisoners.

10. carries out other duties prescribed by law.

At the same time, this judge shall be given extensive powers, regarding complaints of prisoners that are object of carrying out labor in detention and regarding disciplinary action. For exercising its discretion, the law expressly provides supervisory judge obligation to go frequently to listen prisoners in jail on the complaints they make.

It should be noted that before the 1986 reform, on issues regulated by sections 4, 5, 6, 7, the judge shall decide on all measures by service order, but by Law no. 663 of 10 October 1986 was implemented a full jurisdiction by eliminating service orders and

there was adopted so the judge's decisions can be appealed at the Court of Cassation Court (Supreme Court).

Court supervision, constituted as I stated earlier in the Courts of Appeal, is a collegial body and specialized, consisting of magistrates fulfilling these functions exclusively with help in their work by experts in various fields, such as psychology, social services, education, psychiatry and criminology and forensic science teachers.

Court supervision is led by a president who is now responsible on the leadership and organization of court supervision, the proposal of the Superior Council of Magistracy on appointing experts or members to help the tribunal, to insure the replacement of judges in case of absence and works in emergency activities designated by law and by regulations.

Court supervision functions as both first instance and the appeal court on judge's decisions.

As a first instance tribunal is competent on the supervision regarding the granting and revocation of alternatives to detention, probation and optional execution of custodial sentences. As the court of appeal, the Court decides on some of the surveillance measures ordered by judges supervision.

The actual work is done in a full four members, two of whom are judges, one being the president and the other are two experts, a change in the judges or experts leading to the invalidity of the decisions. Court always decides ordinance, passed in a closed hearing.

Court oversight has the powers to grant and revoke sanctions alternative measures to deprivation of liberty, such as house arrest, probation, parole, postponement of punishment.

As appears from powers presented an important role is supervisory matters the judge of parole / early persons sentenced to imprisonment (art. 70-71 of the Law no. 354/1975).

Thus, the judge of probations shall adopt, by ordinance, in a closed hearing without the presence of the parties request for release early, no later than 15 days after an opinion from the prosecutor in this regard, but can even in his absence. Against this ruling, appeal may be filed by the convict's lawyer, the prosecutor and the convicted person, within 10 days from notification to supervisory tribunal.

2. The supervison judge in Spain (El juez de Vigilancia penitenciaria)

By establishing the position of judge in charge of supervision of deprivation of freedom (prisons), the Organic Law General Penitentiary since 1979⁸ has sought to create a specialized judge, to be

⁸ General Penitentiary Organic Law no. 1 / 09.26.1979, http://www.institucionpenitenciaria.es/web/export/sites/default/datos/descargables/legislacion/LEY_ORGANICA_GENERAL_PENITENCIARIA_1979.pdf, accessed January 20, 2016.

invested with certain powers and to perform a number of tasks in order to ensure execution of sentence of imprisonment on a person who has been convicted and receive appeals to resolve on amendments that could arise during the execution of punishment. Prior to this law, the execution of imprisonment in Spain was in the hands of the Administration⁹.

Under Spanish law, the judge in the position of supervision of deprivation of freedom means strengthening security for penalty, which is governed by the principle of legality.

As a result, the judge shall perform the following tasks:

1. duties incumbent upon the court in controlling the actual execution of punishments and the rest of the powers derived from extending the right to exercise powers with respect to this type of control.

2. through the Organic Law General of Prisons, the Judge is also entrusted with the judicial review of the Prison punishment affecting fundamental rights or the rights and privileges of inmates in their execution.

As a result of the above, via Article 76.1 of the Law, shall be assigned the task of protecting the rights of detainees and address the abuses and irregularities that might occur within a prison sentence. This stems primarily from the need to guarantee individual rights of detainees. Judges exercises control in all matters involving both regime and that could influence the treatment and rights of detainees in the absence of this feature as fell to the administrative jurisdiction.

So, in Spain, the judge guarantees the proper functioning of prisons, to the extent that it can directly affect the rights and privileges of prisoners.

Effectively, the Organic Law General Penitentiary gives judges the right to submit proposals to the General Directorate of Prisons on: organizing and conducting supervision services, coordination of cohabitation in the prisons organization of the workshops tuition / education / training, health, religious and economic administrative activities and prison treatment. On the other hand, decisions on requests or complaints by prisoners against the regime and treatment in prisons as far as they affect fundamental rights or their rights and privileges at the prison.

Spanish law establishes, however, some limitations regarding judges' supervision, he has no right to modify or change the destination of a convicted prisoner or to order the transfer of detainees to other prisons because these matters are within the competence of administrative bodies in according to Article 77 of the General Penitentiary

Organic law judge surveillance just having the right to address proposals Administration.

In Spain, judges in charge of supervision operate in the courts of first instance and appeal.

According to the law, in the Court of First Instance, these judges have jurisdiction to rule on the motions for conditional release of prisoners and agree the revocation of enforcement which could translate to execution of the sentence in custody. Regulation of 1996 on law enforcement, provides that the dossier forwarded to the judge before the execution of three quarters of his sentence, he verifies the compliance with rules of conduct during detention in the Criminal Code of 1995.

Spanish Penal Code provides for two exceptional situations when one can get parole, in both cases the prior consent of the judge's oversight of the custody situation where the prisoner has already conducted two thirds of the sentence and was marked by constant progress of activities through work, cultural or occupational, prisoners who have reached the age of seventy years, those who are to meet this age during the end of the penalty or for those suffering from incurable diseases serious, regardless of the duration of execution of the sentence.

However, as a member of the Court of First Instance, the judge has the right to revoke parole, if the person released commits a new crime or do not follows the rules of conduct that have been imposed and the right to approve the proposals of the prison on the sentence reduction privileges involving the division of inmates in isolation cells, authorise permission from prison exceeding two days.

In the Court of Appeal such judges have jurisdiction to hear appeals on decisions of an administrative nature, namely: to rule on appeals against disciplinary sanctions imposed on prisoners, to rule on appeals on initial classification and advancement, promotion or relegation. Regulation enacted in 1996 on enforcement law, extends the period of handing down the decision on the status of the initial two months to be able to analyze more closely the behavior of the prisoner. Moreover, every six months is necessary to analyze carefully each inmate in order to review, if appropriate, the execution of his sentence. If not a change of regime / status of the prisoner, this is notified to the person concerned. In this case, the detainee may request a report by the Director, who will decide on maintaining or regime change. Against the judgment of directors can bring supervisory appeal by the judge.

According to the Organic Law on the Judiciary, rulings by Judge surveillance deprivation of liberty may be challenged through petitions for review, appeals or complaints.

⁹ Ramón García Albero, NÚRIA TORRES ROSSELL El juez de Vigilancia penitenciaria [https://www.exabyteinformatica.com/uoc/Dret/Ejecucion_y_derecho_penitenciario/Ejecucion_y_derecho_penitenciario_\(Modulo_6\).pdf](https://www.exabyteinformatica.com/uoc/Dret/Ejecucion_y_derecho_penitenciario/Ejecucion_y_derecho_penitenciario_(Modulo_6).pdf), accessed January 3, 2016.

The petition may be directed against all actions taken by Judge surveillance custody. Such appeal shall be submitted to the same judge who delivered the judgment against which we act, within three days after the last notification of the decision. The advantage is that if the request for review does not require the presence of a lawyer or a prosecutor.

According to the Organic Law on the Judiciary¹⁰ there are two types of decisions that can be challenged in this way: decisions on execution of punishments, unless they have been issued with the aim of resolving the appeal against a judgment of administrative unconnected status prisoner and decisions that make reference to the prison regime if they were not delivered with the aim of resolving administrative appeal against a judgment.

Given that the provisions of the Organic Law on the Judiciary ha certain inconsistencies, it was later established that one can resort to appeal and complaint in the following cases: against decisions on the status of the detainee and against decisions on prison regimes, namely: approval of sanctions isolation for a period exceeding fourteen days to establish measures to be taken in case of complaints or requests by inmates on the regime and treatment of prisons which affects their fundamental rights, licensing permission for a longer period of two days, except third-degree prisoners, the transfer of detainees in prisons for enforcement in closed regime based on the recommendation of the Director of the prison, against decisions relating to enforcement.

The appeal may act against the decisions can not be challenged by appeal. This type of action to be submitted to the same body in which power is call.

3. Judges of supervision in Germany (Richter Überwachung Freiheitsberaubung)

In Germany, the regulation of the judge supervising the execution of punishment is regulated by the Prison Act, act concerning the execution of prison Sentences and Measures of rehabilitation and prevention involving deprivation of liberty¹¹, but the law requires more than one individual judge, but a room / full criminal Court (Straf Landsgericht) - second degree court in whose jurisdiction the penitentiary is, which has special jurisdiction and exclusive execution of sentences, both custodial and non-custodial.

Decisions shall be taken as a Chamber composed of three judges, including the judge acting as president.

Among the powers of this room includes, inter alia, the determination of appeals on measures penitentiary administration governing individual matters regarding the execution of the imprisonment or execution of reform and prevention in the deprivation of liberty, whether the applicant argues that rights have been violated by adopting a measure or if it has been refused or omitted. This includes disciplinary action on detainees in detention. Parties to the case are the applicant, the detainee and the prison authority that ordered the measure challenged or refused or failed to apply a measure, the prosecutor and a lawyer is not compulsory.

The court will rule without a hearing, an order that will include a brief description of the essential elements of facts and the dispute status. As for the details, they can be found in the documents in the dossier, containing its source and the date they were issued, so that documents can support the facts and the dispute status. The court is not obligated to explain the reasons for its decision can not be challenged if it contains the motivationg, as stated in the decision. There may be a prisoner hearing by audio-video system.

If a measure is unlawful, the prison administration is wrong or other rights have been violated if the detainee Court will annul the measure and when the measure has already been applied, the court may decide that the measure be canceled by the prison authority. Even if the measure became meaningless after the previous withdrawal or otherwise, the Court may decide to request that the measure was unlawful, whether the applicant has a legitimate interest for such a statement.

Against this judgment only to appeal, which will be submitted to the judgment of the General Court, within a month of the decision.

Another task of the Court of execution is the delivery of early release after serving condemned by at least 2/3 of their sentence. This sitting is done by a sole judge, unless the ordering parole from a sentence of life imprisonment where there is need for a panel of three judges, after serving at least 15 years of imprisonment. To dispose conditional release, the court receives a report on prison inmate behavior during detention. The detainee is heard, but this can also be done by video, not necessarily that it be physically presented to the court.

The procedure on conditional release is not public and is conducted without the presence of the prosecutor, who, however, send the file a report. The decision handed down by Judge supervisory appeal on both the prosecutor and the detainee, the call will be resolved by a higher court, the Court of Appeal.

¹⁰ Organic Law on the Judiciary. 6 of 07.01.1985, as amended by Organic Law 5/2003 of 27 May, whose provisions have been amended by Organic Law no. Organic Law 5/2003 and no. 7/2003 Publicado en BOE 02 de Julio 1985, http://noticias.juridicas.com/base_datos/Admin/lo6-1985.11t4.html, accessed January 3, 2016.

¹¹ Prison Act of 16 March 1976 (Federal Law Gazette Part I p. 581, 2088), as last Amended by Article 7 of the Act of 04.25.2013 (Federal Law Gazette I p. 935), https://www.gesetze-im-internet.de/englisch_stvollzg/englisch_stvollzg.html, accessed November 29, 2015.

4. Considerations on the similarities and differences between judges surveillance of imprisonment in European states presented and Romania

It is noted that the laws of the three European countries covered by this study, regarding the judges supervising the execution of custodial sentences judicial is not one strictly administrative-judicial, as regulated by Law no. 254/2013 in our country. Their work aims at precisely the issues on, for example, protecting the rights of detainees do not undergo an administrative review, but a judiciary one. Thus, complaints of inmates against the limits of their rights during detention is performed by judges supervising the execution of punishment as a court, in a first instance, and not as an intermediate stage / preliminary inspection.

I conclude that the legislation offered by European countries could be adopted by our country, in the sense of recognizing judge oversight of the custody status completely as a magistrate judge who exercises powers exclusively jurisdictional and to work in the enforcement court. It could thus be established in the courts or a special section on execution of punishments in the case of larger courts or some specialized in this respect, the courts with a personnel scheme reduced.

Thus, these judges would not have the administrative duties for the purposes of the present (chaining the conditional release), but would settle directly release prisoners prematurely, solve detainee complaints against decisions of the prison, and on the administration regarding rights or decisions of the committee to establish, individualization and regime change execution of custodial sentences as judges chair with full jurisdiction in the matter of enforcement.

It may issue verdicts that can be appealed to by them, to appeal to a higher court, the Court having jurisdiction over the place of detention where there was also a subsection specialized in criminal section on execution of punishments.

However, I believe that these specialized panels could take over tasks that currently meet them as judges delegates at the offices of enforcement, on the issuance of warrants of execution, the execution of educational measures custodial and non-custodial supervision and control sentencing and other non-custodial sanction ways (waiving of punishment,

conditional sentence, suspension of sentence under probation, parole) in close contact with the Probation Service.

Conclusions

This study aimed to present the judge institution regulating supervision of deprivation of liberty in three European countries, Italy, Spain and Germany, with a long tradition in the field of penal execution, the first two of them being a source of inspiration for the Romanian legislature.

In Romania, the judge was introduced by Law no. 254/2013, but it has largely continued the previous law regulating sentencing, Law no. 275/2006, its role is to oversee and control the execution of custodial sentences and custodial educational measures (which apply to those who committed crimes during the minority), the powers of the legislature even being qualified as administrative tasks and Administrative - jurisdictional.

We have made a short on the three other European countries, although judges conduct also administrative activity, represented for example by performing checks at places of maintenance, their main business is a full jurisdiction court in the courts in which it operates. It is noted that these countries have preferred the creation of sections or rooms court specialized in the field right Criminal Sanctions Enforcement, in which the magistrate supervising the execution of sentences in the criminal courts or in addition, unlike the Romanian legislation which provides that judge in charge of supervision of deprivation of liberty, although part of a court, is named as such in a prison or place of detention, working exclusively in that prison.

In the absence of papers addressing this issue, we considered it useful to present how they solved sentencing supervision of European countries, these regulations can be a source of inspiration for any legislative amendment. I wish that this work will pave the way of other studies on the right Criminal Sanctions Enforcement in general, and activity of the judge in charge of supervision of freedom, in particular, to come to a knowledge and understanding of the role of particular importance in the custodial sentencing phase.

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