

REVOKING THE SUSPENSION OF ENFORCEMENT OF THE PRISON MEASURE FOR NON-PAYMENT OF CIVIL OBLIGATIONS

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Abstract: *According to art. 84 from the Criminal Code, revoking the suspension (liberation on parole) of the enforcement measure of prison may be imposed if the defendant – the convict does not willingly fulfill his/her civil obligations to which he/she was bound by the definitive sentence of condemnation. Given that the legislature is not very explicit regarding the above mentioned text and regarding the moment in time when it is necessary to establish if the breach of civil obligations occurred, the judicial practice is conflicting as the legal text is interpreted differently nationwide. We appreciate the need for a case study regarding the applicability of this legal institution in practice, so through this article we will try to present various conflicting arguments enacted in practice.*

Key words: *conviction, revoquing measures, prison, civil obligations.*

1. Introduction. General notions regarding the legislation on the matter

The judicial suspension of serving a criminal punishment represents an individualization measure of executing a criminal punishment.

This type of measure can be decided by the criminal court through the sentence of punishment and consists in the suspension during a definite period of time and in particular conditions of the effective execution of the criminal punishment [1].

The purpose of this type of judicial individualization of the criminal punishment was inflicted due to the fact that the legislator and also the courts usually think that the purpose of the

criminal punishment can be attained if the convict keeps his/her freedom of movement and is stimulated to be reeducated without being incarcerated.

Thus, in order to benefit from this judicial institution, the convict has to meet several conditions that regard both the punishment that was inflicted and also the conviction. The conditions regarding the punishment are clear and objective, and need no clarifications. However, the conditions regarding the convict have the purpose of creating in the mind of the judge the assumption that, the person in question can be reeducated while no freedom limits are imposed upon him/her. If the convict had been convicted before to a criminal punishment with imprisonment for a period of time that exceeds 6 months,

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he/she cannot benefit from this type of individualization measure in his/her second conviction.

Also, an important aspect that is taken into consideration by the court represents a subjective appreciation from the judge, who, on the basis of legal facts and proofs appreciates that the convicted can be reeducated while no freedom limits are imposed upon him/her.

From this point of view, the personal situation of the convict prevails, as his/her family, his/her social environment and his/her living background are analyzed.

The requirements mentioned above, if they are present in some cases, do not entitle the convict to this type of measure, as it is not a right of the convict but an opportunity for the criminal court and of the judge to give this decision.

The essence of this type of individualization measure of the conviction is represented by the period of time that the judge establishes for the convict, period of time during which he/she cannot commit other crimes or criminal offenses.

This period of time is composed of the imprisonment period during which the convict will remain free, and also of a different period of time of 2 years (or 1 year if the criminal punishment consists in a criminal fine).

The important aspect of this matter is represented by the fact that, the suspension of the execution of the judicial punishment can be, at a certain time, revoked. The revocation of the suspension of the execution of a certain criminal punishment can be either mandatory or optional, depending on the case that engages the revocation.

The mandatory revocation is inflicted if the convict has committed another criminal action during the suspension period, the action was done intentionally and not by fault, and on condition that for the criminal

action, the convict received a definitive conviction.

The subject of the present article refers to the optional revocation of the suspension of the execution of a certain criminal punishment, when apart from the conviction the court established several civil obligations for the convict and he/she, culpably did not pay his/her civil obligations, although they could have had.

2. The optional revoking of the suspension

This judicial institution of optional revocation of the suspension of the execution of criminal punishments has its core in article 84 from the Criminal Law Code which states: *“if the convict, until the end of the suspension period, doesn't fulfill his/her civil obligations established upon him/her by the definitive criminal sentence, the court can revoke the suspension of executing the criminal punishment, except in the case when the convict proves the fact that he/she was unable to fulfill these obligations”* (Art. 84, Criminal Law Code as it was modified by the Law 278/2006 art. I, point 32.).

We can easily see that, the legislator has established two conditions in order to apply the optional revocation:

1. the convict does not fulfill the civil obligations that were imposed upon him/her through the definitive sentence of conviction;
2. the lack of fulfillment is not determined by the fact that he/she was unable to fulfill the civil obligations.

Usually, the optional revoking of the suspension occurs at the demand of the prosecutor or the demand of the injured party, who is the beneficiary of the civil obligations (usually consisting in compensations for moral and material damages brought upon the injured party by the convict and his/her criminal actions).

Even if the convict defends himself/herself evoking the fact that they hadn't had the opportunity to pay their civil obligations to the injured party, the judicial opinion in the matter is that of rejecting the injured party's demand for revoking the suspension of the execution of the criminal punishment. Thus, in the opinion of criminal courts, only the bad faith of the convict who has the means to pay his/her civil obligations but decides not to, can be sanctioned by applying the revoking measure.

The Decision number 4/R/2009 rejected the appeal of the injured party who has demanded the Court to revoke the suspension measure of the convict because he/she hadn't paid the civil obligations on time. Both the first and the second Court of Justice rejected this demand based on the fact that the trial period has not expired at the moment of the demand. This above mentioned decision states the fact that: “*Through the criminal sentence no. 205/4.12.2008 issued by the court of Turnu Măgurele, the court rejected the revocation of prematurity of the suspension as it was demanded by the victim NG, and dismissed it as being premature.*”

The convict evoked before the lower court the fact that the trial period of 2 years and 6 months commencing on 09.07.2006 and ending on 09.07.2009 had not yet expired, thus he still had time to fulfill willingly his civil obligations.

The appeal against this sentence by NG - the injured party, criticized the court's substantive issues of illegality, arguing that such a request (that of revoking the suspension) may be made only during the probation period, up to its fulfillment.

The Court held that a default civil revocation may be ordered before the expiry of the probation period, if the convict doesn't fulfill his/her civil

obligations, and the law in this matter does not leave room for interpretation.

Since in this case of the probation period of 2 years and 6 months commencing on 07.09.2006, to be completed on the 09/07/2009, has not ended yet, the court rejected the appeal of the petitioner NG as unfounded.”

In our opinion, the probation period represents that period of time during which the convict has the opportunity to willingly fulfill his/her civil obligations, but the law does not state the hypothesis in which the convict being of bad faith doesn't pay his/her civil obligations. In this concern, we believe that there are at least two different types of situations:

1. the situation of the convict who has the means to pay but is of bad faith and doesn't want to pay the victim the moral and material damages received through the sentence of condemnation;
2. the situation of the convict who has no job and no income, who has no goods in property, and thus, from an objective point of view cannot pay the civil obligations.

While in the first example the judicial practice is quite unitary, and the courts easily revoke the suspension measure, as they can state the fact that the convict is of bad faith, the situation regarding the second example is not as simple.

Regarding the second situation in which the convict neither has an income, nor any goods in their property, the judicial practice is not unitary. Some Courts have decided that a convict who has no income or personal goods is of bad faith if he doesn't at least try to get a job, to earn money on a legal basis, and thus to try to earn a decent living and pay his/her civil obligations towards the victim, the injured party.

On the other hand, there were Courts that ruled in the favor of the convict and stated the fact that, if he/she has no income and no personal goods, he/she cannot be

presumed to be of good faith, as the probation period has not ended yet, he/she still has the legal opportunity to pay the obligations willingly.

3. The judicial practice on the matter

The General Prosecutor of Romania, Laura Codruţa Kovesi promoted on 30.05.2011 an appeal on points of law in criminal matters referring to the case of the revocation of suspended sentence if the convict fails to fulfill civil obligations.

The trend in criminal jurisprudence examination reveals several opinions on this issue and therefore the fragmented nature of the legal practice: thus, when the revocation of the conditional suspension of sentence was introduced inside the probation period, the judicial practice was represented by three opinions.

a) In the majority's opinion, courts have either admitted the demands of revocation if there had been proof of bad faith of the convict or rejected them as unfounded in the absence of bad faith of the convict, disregarding the fact that the proceedings took place after the expiration of trial.

b) On the contrary, in the same situation, other courts have rejected as premature or as ungrounded the demand for revocation issued by the civil party, on the ground that this demand can be made only after the expiry of the probation period, because until then the convict has the time to perform civil obligations.

In support of this point of view it has been argued that the phrase "*to the end of the probation period*" is not equivalent to the right of the civil party to request at any time the revocation of the suspended sentence mainly because such a solution would leave the probation period ineffective and would ignore the fact that the assessment of behavior of the convict can be done only at the end of this probation period.

Moreover, it was argued that in such a case the civil party is not deprived of the opportunity to fulfill their civil rights, as long as they have both the ability to require enforcement from the civil law, and the opportunity to request the revocation of suspended sentence after the expiration of the probation period.

c) In another case, the revocation introduced during probation was denied as an effect of the intervention of the rehabilitation of the convict during the probation period.

On the other hand, if the revocation demand was introduced after the expiry of the probation period, the Court also had different opinions.

Some courts rejected the application of the revocation as being forwarded too late or as unfounded on the grounds that according to art. 84 of the Criminal Code, the civil party has the right to obtain debt recovery established by conviction and is entitled to request the revocation of suspended sentence only during the probation period, until its fulfillment.

Based on the same hypothesis, the revocation of the suspended sentence was allowed and admitted, as according to art. 84 of the Criminal Code the essence of demanding the revocation is represented precisely by the expiration of the probation period.

In arguing this point, the courts argued that art. 84 of the Criminal Code unequivocally shows that the court can revoke the measure if the convict has not executed his/her civil obligations until reaching the last day of his/her probation period, the last day of payment being the very last day of the term.

Up to this date, the civil party is not allowed to ask for the revocation of suspension because he/she can assume that the convict still has time to execute the payment and thus, the revocation exceeds the limits of the law.

This latter orientation is found in the Decision no. 3144 of 17 May 2006 of the Criminal Division of the High Court of Justice according to which, in order to revoke a suspended sentence if the civil obligations had not been paid, it is absolutely necessary that the probation period should have been expired.

The Attorney General finds that the correct orientation of jurisprudence according to which the application for revocation of suspended sentence in case of civil infringement must be issued prior to the expiration of the probation period, regardless of the fact that the proceedings are debated after the expiration of this term.

The revocation of suspended sentence for failure to fulfill civil obligations established by the sentence of conviction until the end of the probation period, is governed by the provisions of art. 84 and art. 864 paragraph (2) of the Criminal Code, representing a penalty instituted for the convict who demonstrates that he/she has not been reeducated.

The exception to this rule exists. According to the exception the revocation does not apply if the convict proves the fact that it was not possible for him/her to fulfill the incumbent civil obligations, the burden of proof falling on the party that claims such an impossibility.

The revocation of the suspended sentence on the grounds that the convict has not repaired the damages caused by crimes, imperative and expressly regulated by the legislature is based on the idea that failure and bad faith of the convict during the probation period, evidence of the fact that the offender does not show the desire to straighten his/her behavior.

Repairing damage caused by the offense is not purely of civil significance, but it appears as an expression of the will of the perpetrator to straighten without performance of the criminal penalty, which

should begin by straightening and repairing the harm of their deed and that should reveal their decision to reduce the outcome of his/her crime as much as possible. Therefore, even if the law has not suspended the sentence based on the fulfillment of civil obligations arising from committing the crime, the convict's attitude towards these obligations is an important element in assessing attitude improvement.

The targeting problem regarding when the demand to revoke the suspended sentence may intervene, in case of failure of the condemned to pay his/her civil obligations became the object of controversy both in doctrine and in legal practice and is caused by poor drafting of art. 447 paragraph (2) of the Criminal Procedure Code.

Thus, under the current law, if by the end of the probation period the civil obligations stipulated in art. 84 or those stipulated in art. 864 paragraph (1) of the Criminal Code were not respected, the interested party or the prosecutor can notify the lower court that delivered the suspension to revoke the suspended sentence.

From a literal perspective of interpretation of the texts from art. 84 of the Criminal Code, art. 447 paragraph (2) of the Criminal Procedure Code, supported by other logical reasons to be outlined below, results the fact that, the demand for revocation of suspended sentence on the grounds of non-fulfillment of civil obligations may be filed until the expiry of the probation period.

If the filing of the demand is made after the deadline of the probation period, it will inevitably lead to its rejection due to the rehabilitation by law.

If we were to embrace the point of view that states the fact that the application for revocation of suspension made during the probation period is premature (because until now the convict can fulfill his/her obligations) and the revocation would

operate only after the expiry of that probation period, the idea that for the fulfillment of civil obligations was granted a period of time equal to the period of the suspended sentence probation period. That would mean that the civil obligation fulfillment is suspended in the same manner as the criminal conviction. Thus, the suspension of civil obligations is contrary to the provisions of par. (5), art. 81 and paragraph (4), art. 861 of the Criminal Code, according to which the suspended sentence does not entail the suspension of the safety and civil obligations stipulated in the sentence.

With this express provision the legislator tried to eliminate the possibility that the clemency shown towards the convict by non-punishment of the criminal measure, could maintain and perpetuate a state of danger by not taking immediately the safety measures and thus to create for the civil party an injustice by suspending their civil payment.

Or, by rejecting the demand for revocation as early introduced (during the probation period), the convict would find himself/herself both in a position to receive the suspended sentences, and in that of being temporarily relieved of meeting his/her civil obligations to the detriment of the injured civilian, taking thus an advantage against the will of the legislator and benefiting from a grace period regarding civil obligations with a duration equal to that of the probation period.

Therefore, by using the term “*until the expiry of the probation period*” the legislator wanted to express the idea that the revocation of suspension of the sentence could take place only as a result of failure to fulfill the civil obligations during the probation period, and not to set a deadline, situated after the expiration of the probation period, from which the court may receive such a request of revocation.

On the other hand, the point of view according to which the application of the revocation on the grounds of failure to fulfill civil obligations may be made only after the expiry of the probation period is in flagrant contradiction with art. 86 and art. 866 of the Criminal Code according to which, if until the end of the probation period, the convict did not commit a new offense and the court didn't revoke the suspended sentence pronounced according to the art. 83 and art. 84 and art. 864 of the Criminal Code, he/she is rehabilitated by law.

Thus, the complaint to revoke the suspended sentence for failure to fulfill the civil obligations must be introduced within the probation period, and it's solving can be made after the expiry of the probation period, as long as the legislator provisions that the courts should rule upon the revocation either in this period or after it's expiry.

We reach the conclusion that the end of the probation period does not prevent the revoking of suspended sentence, as long as the application has been lodged within that probation period. This type of reasoning is based on the logical reasoning *similar ad similaribus*, considering the fact that the revocation of the suspension is mandatory in case of committing new offenses during the probation period, whether the new trial takes place after the probation period expires.

Also, in support of the point of view that the revocation of the suspension of the civil penalty for failure to fulfill the civil obligations to be introduced until the expiry of the probation period, there is art. 93 paragraph (5) of the new Criminal Code, approved by Law no. 286/2009, according to which the convict must fulfill civil obligations established by full conviction, not later than 3 months before the expiry of the supervision period.

Moreover, with regard to the deadline of the request for revocation, the new Code of

Criminal Procedure supports the idea that the notification of criminal courts could not be done after the expiration of the probation period, art. 583 paragraph (2) provisioning that the application should be made before the expiry of supervision, without making any indication as to when the trial of the case should be [2].

At present, the appeal on points of law in criminal matters is applicable through the Decision of the High Court of Justice of Romania, and the judicial practice struggles with the distinction between good faith and bad faith of the convict.

The difference of opinion at present is not represented by the specific time at which the injured party should demand the revocation but by the interpretation of the fact whether the convict had the possibility to pay his/her civil obligations viewed from an objective point of view, or he/she was of bad faith and could not pay because of lack of interest, thus remaining unemployed, selling his/her properties, and so on.

We believe that, if the convict has no personal assets, no personal belongings, and no income on a regular basis, he/she can easily be considered of good faith if he/she doesn't fulfill his/her civil obligations if he/she can at least prove that they did their best to get a job, to get a monthly legal income, coming from a legal activity.

In this regard, the courts have stated in the case of the convicted who proved not to be of bad faith, but only unable to pay his civil obligations, the following: *“Analyzing all evidential material received in question, the court considers that the honoring of civil obligations was restricted and the convict is not of bad faith because he proved not to have sufficient income and he had to honor his legal obligations regarding the maintenance of two minors. Thus, the payment of civil obligations did not depend on the petitioner as the minors resulting from a cohabiting relationship had to be brought up, thus the convict finds*

himself in the posture stated by the last paragraph of Article 84 of the Criminal Code.”

Concluding, in our opinion, if the convict can prove that the un-fulfillment of civil obligations was not a result of bad faith, that he/she tried to have a monthly income but did not succeed, that he/she has no personal belongings, nor properties that are valuable, we believe that the ruling of dismissing the demand for revocation is righteous.

The above aspects are strictly related to the convict's obligation to prove all the attempts he/she had made before the revocation demand was made.

On the other hand, if the demand of revocation is made, we believe that the convict cannot defend himself/herself only based on the fact that he/she has no properties and no income in order to pay their civil obligations.

We believe that, in order to be considered of good faith the convict has the obligation to prove that he/she did his best in getting a job, in earning money in a legal manner, and under these conditions he/she could not earn enough money to pay the civil debts to the injured party.

In this case, we believe that, the convict has an active part in the trial as they have the obligation to produce proof of good faith, while the injured party should only prove the fact that all his/her attempts to obtain in a restricted manner the money mentioned in the criminal sentence failed.

However, the judicial practice in this matter states the fact that according to art. 84 Criminal Code, which applies accordingly to suspension under judicial surveillance, until the end of the probation period if the convict did not fulfill his/her civil obligations established by the criminal sentence, the court can revoke the suspended sentence, unless the convict proves that it was not possible to meet these obligations.

The text does not require a specific duration in which the civil obligations should be fulfilled, thus, deducing, that it must be a reasonable period of time in relation to the duration of the probation period and the convict's payment possibilities [3].

The institution of revocation of the suspended sentence is governed by the provisions of Article 83 and 84 of the Criminal Code, which sets out, in principle, the rule that the revocation of suspension occurs when committing a new crime within the probation period or in case of nonpayment of civil obligations, with bad faith.

Note that the effects of the two cases mentioned above are identical regarding the judicial regime, more precisely the operation of effective revoking, represents the enforcement of deprivation of liberty.

The differences stated by the legislator concern the period of time within which one should invest the courts with this type of demand and the procedure of solving the demands.

Thus, in the case provided by Article 83 of the Criminal Code, the notification of the court to revoke suspension takes place on its own, even after the expiry of the probation period, if the new offense committed within the probation period has been discovered by the end of this period (according to Article 83 paragraph 2) and reached a final conviction even after this period.

In the case provided by Article 84 of the Criminal Code, the notification of the court in order to revoke the suspension may take place both at the request of the prosecutor and at the request of the person concerned, or the civil party towards whom the convict has been ordered to pay civil

damages, conditioned by filing this action and resolution of the probation period.

In this respect, it should be noted that the provisions of Article 84 of the Criminal Code were not set for the benefit of the convicted person, for the purposes of granting a period of grace in which to pay the civil obligation awarded by the sentence, but as a deadline in which the civil party may request the revocation of the suspension.

Moreover, in order for this principle to If the probation period is fulfilled, in the absence of a final judgment that would revoke the suspension of the sentence, Article 86 Criminal Code states the fact that a person convicted by law is rehabilitated, which entails the inability to enforce sanctions, which, by law, are considered executed.

This conclusion is drawn from the content of Article 86 of the Criminal Code, which stipulates that legal rehabilitation of the convicted person, whose prison sentence was conditionally suspended, occurs in all cases when the probation period reaches the end and the sentenced person did not commit a new crime within this period nor the courts ruled the revocation of suspension according to the provisions of Article 83 or 84 of the Criminal Code.

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