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Passing Illegal Liberty in the Romanian Law

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Abstract: In the paper we have proceeded in examining the offense of deprivation of liberty illegally, in the light of the new legislative regulations brought by the new Criminal Code. We have paid particular attention to examining the constitutive content of the offense, focusing on the new changes and additions made with the entry into force of the new law. We have also insisted on identifying and reviewing the provisions that have been retained in the new regulation, which are of some importance with regard to the criminal liability of the natural or legal persons who have committed such offenses. The work may be useful to both the university and practitioners in the field.

Keywords: offense; constitutive content; more favorable criminal law

1. Introduction

Provided in the provisions of art. 205 C. Penalty, the offense of deprivation of liberty illegally consists in the deed of a natural or legal person who is illegally deprived of liberty by a natural person, and the hypothesis in which the victim is abducted and is in a state of impossibility, And expressing his will or defending himself.

In addition to the type of deed, the legislator also provided for more aggravating norms that would be retained if committed in the following circumstances: by an armed person, a minor, endangering the health or life of the victim, or the deed As a result of the victim's death.

The penalties provided for in committing the act in these ways are more severe, given the seriousness of the offense when committed under the conditions described by the legislator in the rule of incrimination.

It can be argued that the deprivation of liberty illegally is the act by which a natural or legal person, without acting on the basis of a legal ground lacking liberty a natural person.

With the exception of the limitations implicitly or explicitly revised by the legal norms which establish either forbidden activities or activities whose fulfillment is required by law, the individual must be guaranteed the possibility of moving and acting in accordance with his interests and no one It is allowed to abduct or restrict that freedom.

Illegal deprivation of liberty poses a serious social danger because it is a significant attribute of the individual who is defended by law, therefore, he despises a social value for the defense of which society is directly interested” (Roșca in Dongoroz and Col., Vol. III, 1971, p. 284).

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The particular social danger of the deed is determined by the situation of a physical person, namely, that he is lacking for a certain time the opportunity to take part in the social life, that is to say, according to his situation in the process of realization Material and spiritual values (Rusu & Rusu, 2010, p. 142).

The offense examined corresponds in the previous law to the offense incriminated in the provisions of art. 189 C. pen of 1969.

Between the two regulations there are some elements of resemblance, but also of difference, on which we will continue to insist.

Among the elements of identity we mention the marginal title, the legal content of the type, and the sanctioning of the attempt.

As a novelty, we notice the provision in the new law of another type of normative manner, which will be retained when the act is committed by the kidnapping of the victim who is unable to express his will or to defend himself.

Unlike the previous regulation, the new law gave up the criminalization of aggravated ways in the following circumstances: the simulation of official qualities by two or more persons together, or if, in exchange for the release, a material benefit or other advantage is required, committing the deed In order to oblige the victim to practice prostitution if the State, a legal person, an international intergovernmental organization or a group of persons are required to release the victim to perform or not to perform a particular act and to commit the act by a person belonging to -A group organized.

Also, the new law gave up the incrimination as a tentative of preparatory acts, which consist in producing or procuring means, instruments or taking measures to commit the deed of para. (4).

The last distinction between the two crimes concerns the sanctioning regime, the minimum and maximum limits of the punishments provided by the new law being lower.

Thus, in the type of way, one to seven years imprisonment is provided, compared to the previous law, where the punishment limits were between 3 and 10 years in prison.

Within the aggravated ways provided in paragraph (3) the penalty limits are between 3 and 10 years in prison, compared to the old law, where these limits are between 7 and 15 years in prison.

Also, in the aggravated way that resulted in the death of the victim, the punishment provided in the new law is imprisonment from 7 to 15 years and the prohibition of the exercise of rights, while in the old law the penalty limits are between 15 and 25 for years.

2. Examination of the Offense

2.1. Preexisting elements

2.1.1. *The Legal Object*

The special legal object is represented by social relations related to the protection of a person's physical liberty.

The secondary legal object is "social relations related to the person's health if the deed has endangered the victim's health or the social relations related to the right to life if the deed endangered the life of the victim or resulted in his death" (Toader, in G. Antoniu et al., 2013, vol. III, p. 127).

2.1.2. The Material Object

In the case of the type normative procedures provided in the provisions of para. (1), (2) and (3) let. A) and b), the offense is not material, since the action or inaction of the active subject affects a subjective right, namely, the freedom of the individual. In the case of the aggravated ways provided in paragraph (3) lit. C) and par. (4) when the act endangered the victim's health or life or resulted in the death of the victim, the material object of the offense is the victim's body.

2.1.3. The Subjects of the Offense

A) Active subject

An active subject may be any natural or legal person with criminal responsibility.

Criminal participation is possible in all forms, namely co-sponsorship, complicity and instigation.

In all cases, co-authoring and concomitant voting also attract the retention of the aggravating circumstance provided in art. 77 lit. A) if there are at least three participants, as well as other aggravating circumstances, depending on the concrete circumstances of committing each act.

B) Passive matter

A passive subject can be any natural person.

The plurality of passive subjects will lead to the retention of a plurality of offenses.

2.2. Constitutive Content

2.2.1.a. The objective side

The material element of the objective side is accomplished by an act or inaction by which the injured person is deprived of physical freedom, which in concrete terms implies his impossibility to move and act according to his own will.

Most often, the action by which the material element of the objective side is made involves physical or even psychic violence.

Also, "the material element of the deed is accomplished when the victim is immobilized or only kept against his will in any place, and when he is prevented from going where he would have wanted to arrive (for example, a person is Prevented systematically or at some point (by the perpetrator) from entering an institution in which he or she has access to make a complaint in time or make a claim, or the perpetrator knowing that the victim usually moves by bicycle , Produces a malfunction, cuts the tires or breaks a few spokes and that is because the victim can not reach a certain place at the time when her presence was necessary) "(V. Roşca in V. Dongoroz et al., 1971 , Vol. III, p. 287).

Regarding the material aspect of the offense, another author claims that "the law does not require an absolute impediment to the victim's movement, that is, a complete constraint regarding the freedom of movement of the victim, but may also appear as a partial constraint in the report An activity, a determined action the victim wants to accomplish (for example, the perpetrator prevents the victim from attending a meeting where he wants to take part). Deprivation of liberty must be objective, whether the victim was aware or not that the right to freedom of movement was paralyzed or restricted. The victim's error in the status of the victim is not equivalent to his or her consent. Deprivation of liberty can occur in any way and by any means likely to lead to this result.

Thus, the author can resort to direct actions, such as physical constraint (the author links the victim by being unable to move), or the administration of substances that paralyze the victim's will (for example,

gives him alcohol, drugs, etc.) or Hiding clothes to prevent the victim from moving or moral compulsion (threat), deception (misleading the victim through false information or exaggeration of the danger, or the obstacles he has in front of you, etc.). The offense may also be committed by indirect action (for example, the victim's internment in a hospice by misrepresentation of the state of fact before the authority).

If the fraudulent means by which the deprivation of liberty was made is a distinct offense, the perpetrator will answer for a real contest of crimes "(G. Antoniu, in T. Vasiliu et al., 1975, vol. III, p. 164).

In court practice, most of the time the offense under consideration is in real competition with other offenses.

Thus, one of the courts decided that the defendant, penetrating the victim's home to commit a theft and being surprised by it, slammed her to the ground and, after striking her several times, when she He stood up, pushed it first to the access door in the basement and then on the staircase, securing the door to the doorbell at the doorbell; After which he returned to his home, where he acquired more property, being caught by the police in the North Railway Station, these facts characterized by both the first instance and the appeal court - which rejected the defendant's appeal - as robbery (Article 211 of the Penal Code), deprivation of liberty illegally (Article 189 of the Penal Code). The appeal by which the defendant criticizes his conviction for the offense provided in Art. 189 C. pen., Is unfounded. The circumstance invoked by the defendant that the injured party has managed to leave the basement of the building by forcing the access door, which he has broken with a piece of wood, is irrelevant to the existence of the offense of deprivation of liberty illegally; Which is objectively important, is the fact that the defendant immobilized the victim in the basement against his will. Also, from the same point of view, it is not important that the period of time the victim was deprived of his freedom; It is certain that this interval was enough for the defendant to evade the goods and leave the scene.

In another relevant case concerning the detention of the real contest between the offense examined and the blackmail, the court ruled that the act of depriving a person of liberty and forcing him to pay a sum of money in exchange for his release, Constitutive elements of the offense of deprivation of liberty illegally in the aggravated form provided in art. 189 par. (2) C. pen, and not those of the offense of blackmail, as the blackmail is absorbed as a circumstantial element of aggravation in this aggravated form of the offense of deprivation of liberty illegally.

Undoubtedly, given the new changes made to the content of the offense of deprivation of liberty illegally in the new law, in which the defendant's act of forcing the victim, in exchange for his release, to pay a sum of money, is no longer criminalized, The application of the new law, the offense of deprivation of liberty illegally will be retained in real contest with the offense of blackmail.

Essential requirement. Because the deed committed to collecting the constitutive elements of the offense of deprivation of liberty illegally it is necessary to establish the existence of the essential requirement that the deprivation of liberty be illegal, contrary to the law.

The essential requirement will not be met when a citizen or more retains a person who has committed a crime and handles it to the police; In this case, it is necessary to carry out the detention only for the period necessary to hand it over to the bodies with attributions in the field; The essential requirement will not be met even in the case of parents who, within the exercise of parental authority, restrict the free movement of their child within certain reasonable but reasonable limits.

In court practice, it was decided that there was no offense of imprisonment if the defendants linked the aggressive victim to immobilize it until the police arrived.

If it is found that detention, preventive arrest, home arrest, or conviction were ordered if the person who knew it knew the person was innocent, the essential requirement would not be met, but the deed would meet The constitutive elements of the unjust criminal offense provided in art. 283 par. (2) C. pen.

In this respect, it has been decided in the judicial practice that the evidence administrated in question shows that the four persons were arrested and their investigation was made at the defendant's order. The order not to release the detainees, received by the defendant from the deputy of the former interior minister, was manifestly contrary to the law and, being unlawful, should not have been executed by him. Such an order, without the condition of legality, can not justify the exoneration of criminal responsibility of the person who executes it. This conclusion is also necessary because the law does not foresee legal consequences for failure to comply with such a provision. The defendant, receiving the illegal order and ordering his execution, became knowledgeable in lawful activity and had the impression that the illegal detention and investigation of the four minors were made in violation of legal provisions. To admit that criminally responsible persons are held accountable, motivating that a higher order would be to justify committing any offense in this way and to paralyze the performance of justice.

Also, "in the event of committing the offense in fulfillment of an obligation imposed by the law in compliance with the conditions and limits stipulated by it (the law order), respectively fulfilling an obligation imposed by the competent authority, in the form stipulated by law, if it is not manifestly illegal (command of the legitimate authority), will operate the justifiable cause provided by art. 21 NCP" (Udroiu, 2013, p. 92).

In this respect, it has been decided in judicial practice that the existence of the offense is essentially conditioned by the requirement that the deprivation of liberty has been committed unlawfully. Individual freedom and people's safety are inviolable. There are categories of people whose personal situation imposes and justifies taking measures to restrict or deprive them of their freedom. It is the case of persons against whom the measure of preventive arrest or arrest, detained for the purpose of executing a custodial sentence, armed soldiers, hospitalized patients (psychologically dangerous, sufferers of some contagious diseases), athletes in training, Of certain categories of employees during the performance of certain tasks, actions. Only in situations such as those shown, the restriction or deprivation of liberty has no criminal significance, because either they are admitted being socially useful, or those who bear them fulfill an obligation, have consented to it with the acceptance of a certain status.

The offense under investigation may also be committed by inaction if the perpetrator, in the performance of his / her duties, refuses to release a person who has expired the period of preventive arrest (eg where the person in charge of a decision within a Detention center and pre-trial detention, refuses to release a person whose pre-trial detention order or detention order has expired).

The immediate consequence is the absence of the person injured by the freedom of movement and action in accordance with his will; In the aggravated ways provided in the provisions of art. 205 para. (3) (c) and (4) C. pen., The consequence is to endanger the health or life or death of the victim.

In judicial practice, it was decided that in case of an offense of deprivation of liberty illegally, the immediate consequence is highlighted by the impossibility of manifesting the victim at a time when his interests necessarily required a useful manifestation. The fact that the defendant drove the car

where they were and the injured parties for a relatively short distance is irrelevant in terms of the arrest of the offense foreseen and punished by art. 189 par. (2) C. pen., Since his criminal behavior has attempted the full freedom of the victims.

Regarding the period of time for which the victim was deprived of liberty, we specify that the law makes no clarification, which leads to the interpretation that it will be appreciated according to the concrete circumstances of committing each act. For the existence of the offense it is necessary that the period of time during which the victim was deprived of liberty should be sufficient for him to be unable to act according to his will.

The offense will subsist if the existence of the causal link between the incriminated action or inaction and the resultant result is established.

2.2.2. Subjective Side

The form of guilt with which the offense is committed is direct or indirect intent.

In the doctrine it was considered that "the judicial bodies should analyze the whole of the evidence material by reporting and the defendant to exclude the incidence of the error as a cause of non-immutability (for example, when the perpetrator had all the premises to consider that the freedom of movement to a person" (Udroiu, 2013, p. 95).

In the aggravated ways provided in the provisions of art. 205 para. (3) (c) and (4) C. pen., The offense is committed with *praterintentia*.

For the existence of the crime, the mobile and the purpose have no juridical relevance, these being of importance only in the process of individualization of the penal law sanction made by the court.

The offense will not survive if the interpretation of the evidence shows that the perpetrator did not act with direct or indirect intent.

Thus, in the judicial practice it was decided that the act of the defendant who, believing that he was abandoned, did not constitute an offense of illegally depriving a minor who was 6 months old with the intention to present him orphanage. By document executed juvenile defendant prevented to act and move according to the will of legal representatives, but to meet all the constituent elements of the crime of illegal deprivation of liberty, act of the defendant must have been committed intentionally.

In another case it was decided that correctly prosecutors who investigated the cause, and the trial court verified the legality of the solution, they decided not to prosecute holding that in terms of the offense of deprivation of liberty unlawfully are not met Since the applicant was released on 19 December 2005, when the Bucharest Tribunal requested his release, on the basis of the decision of 12 December 2005, which was final on 16 December 2005. The High Court, The solution not to initiate criminal prosecution against the workers of Rahova Penitentiary, a solution maintained by the court of law, finds its merits. In the absence of evidence showing that the release of the petitioner was done intentionally over legal deadline to deprive the liberty illegally PRP act complained of by the petitioner, legally and thorough trial court dismissed the complaint And maintained the solution not to initiate prosecution by prosecutors. For the existence of this crime, it is necessary for the perpetrators to act with intent, knowing that illegally a person is deprived of liberty. In the present case, although the petitioner was not released according to the conclusion of the Bucharest Tribunal, the communications sent by the court were not sufficiently clear, giving the possibility of erroneous interpretation of the date when the petitioner should be released (at the time of communication - 12 December 2005, on the date of the final closure of the agreement - 16 December 2005 or the date of

the second communication - 19 December 2005). The penitentiary workers had the impression that they had acted legally, not intending to impose illegitimate freedom on the petitioner. Obligation of the Ministry of Finance to pay the amount of 1800 lei with the title of moral damages to P.R.P., through civil sentence no. 350 of 6 March 2007 of the Bucharest Tribunal, the Civil Division 4, which is final (the case being suspended by the Bucharest Court of Appeal, the 9th Civil Division and for the Intellectual Property cases, by the closing of 15 June 2007); Makes evidence of the criminal intention of Rahova Penitentiary workers, but acknowledges the right to petitioner's moral damages for the period in which he stayed in the penitentiary over the legal term due to material errors. Even with the petitioner's decision, it is acknowledged that "the damage was due to a material error produced in the course of time of judicial activity, which implies an objective responsibility of the state."

3. Forms, Modalities, Sanctions

3.1. Forms

Although they are possible, preparatory papers are not sanctioned by law.

According to the provisions of art. 205 para. (5) C. pen., Attempted the offenses provided in para. (1) - (3) shall be punished.

The crime occurs when one of the consequences provided occurs in the text of the indictment or deprivation of freedom to move the injured person, bodily injury or health or death of the victim.

Since it is an offense continues, we will have a moment of exhaustion that identifies when the victim no longer is interfered with the right to freedom of movement or due to intervention in law enforcement or because Cancellation perpetrator be other causes that concern Other people's intervention, other factors, or the victim frees himself.

The offense can also be committed in a continuing form, in which case the exhaustion occurs after the last act of execution.

Given the circumstances of the offense, it may be absorbed into the content of other offenses, or may enter into real competition with other offenses.

Among the offenses in which the crime of imprisonment is absorbed illegally, we list simple murder, qualified murder, rape and robbery.

3.2. Modalities

The offense examined has two types of way, and four aggravated ways.

Types are provided in the provisions of paragraph (1) and (2) of art. 205 C. pen., And consist in the illegal deprivation of liberty of a person, as well as in the abduction of a person who is unable to express his will or to defend himself.

Also, the offense presents, as we mentioned four worsened normative modalities, which are stipulated in the provisions of art. 205 para. (3) and (4) C. pen.

As each of the four aggravated modes presents some particularities, we will proceed to examine them, in the order of the criminalization text, with examples of recent judicial practice.

A) The act of the act of an armed person (art. 205 para. (3) lit. A) C. pen.]

In order to keep this aggravated way, it is necessary for the perpetrator to have a weapon on him, which he must wear in such a way that the victim can observe it; The offense will subsist, even if the perpetrator does not threaten the victim with the weapon, it is sufficient for the victim to observe it, or for the offender to be intimidated by the offender in order to intimidate her (we mean the victim).

As the legislator does not make any further clarification in the text of the criminality, the notion of weapon is assimilated to all categories of weapons provided by Law no. 295/2004 on the regime of arms and ammunition, republished.

Thus, according to the normative act to which I refer, a weapon (as a general definition) means any object or device the operation of which causes the throwing of one or more projectiles, explosive substances, ignited or luminous, incendiary mixtures or the dispersal of gases harmful, irritating or neutralizing, as far as can be found in one of the categories listed in Annex (art. 2 pt. I.1. of law no. 295/2004, republished).

On the other hand, as regards the classification of weapons from a constructive point of view, the special law provides for the following classification:

- Compressed air or pressure guns;
- short firearms;
- long firearms;
- automatic firearms;
- semi-automatic firearms;
- Repeated firearms;
- one-shot firearms, and
- white weapons with blade (Article 2, points IV.1 to 8 of Law No 295/2004, republished).

On the other hand, according to the provisions of art. 179 C. Pen, weapons are the instruments, devices or parts so declared by law, and any other objects of a kind which may be used as weapons and which have been used for the attack are also assimilated to weapons.

Undoubtedly, it is clear from the interpretation of the provisions of the special law that the act of the defendant who has a weapon of the kind mentioned above, without actually using it, but which is visible to the victim, the aim being to intimidate it and to cause a fear, Meets the constitutive elements of the aggravated mode examined.

However, in the doctrine it was argued that from the interpretation of the provisions of art. 179 par. (2) C. pen., It appears that the perpetrator must have the assimilated weapon on him and actually use that weapon against the victim (Udroiu, 2013, p. 98).

We disagree with this interpretation, and we appreciate that if the perpetrator has an assimilated weapon on him, as stated in the text of Art. 179 par. (2) C. pen., For the existence of the offense, it is necessary for the perpetrator to carry that weapon (for example, a knife) in sight (to be visible to the victim) or to show its presence in a way Ostentatious (for example, by disconnecting the buttons from the jacket, as the knife is attached to the hip of the perpetrator).

This interpretation results from the provisions of Art. 179 par. (2) where the legislator establishes an obligation for that assimilated weapon to be effectively used for attack. Or, in the case of unlawful deprivation of liberty, the perpetrator does not attack the victim with intent to cause bodily injury or even death, but tries to intimidate her, to provoke a state of fear, which results in the attainment The aim pursued, namely the victim's unlawful deprivation of liberty.

B) The commission of the act against a minor (art. 205 para. (3) lit. B) C. pen.]

The essential conditions that also result from the text of incrimination are that the victim is minor at the time of committing the crime, and that the perpetrator knows his minority status.

If the evidence shows that the perpetrator was unaware that the victim is a minor, we will not be faced with this aggravated way.

This aggravated mode will be retained when the victim is a newborn child or a minor who is abducted from the maternity or other place.

C) The act of the act has the danger of endangering the health or life of the victim (art. 205 para. (3) lit. C) C. pen.]

In order to ensure that the offense is committed in this aggravated way, it is necessary that the act or inaction through which the deprivation of liberty is caused, the health or life of the victim be endangered; It is not necessary for these forms to exist throughout the period of deprivation of liberty, it being sufficient to have only a certain moment when the health or life of the victim is jeopardized.

If the victim's health or bodily integrity has been affected, the offense examined will be dealt with in a real contest with the offenses of harassment or other violence or bodily injury (Art. 193 par. (2) and art. 194 C. pen.).

This interpretation results from the very text of the law, where only the possibility of endangering is envisaged, not the following danger, which may consist in harming the health or injuring the victim's bodily integrity.

Unlike the other two ways examined above, this time the form of guilt is *praterinintentia*.

D) The deed resulted in the death of the victim (art. 205 para. (4) C. pen.)

The offense will be detained in this aggravated way, when the imprisonment of the unlawful is the death of the victim (with the form of guilty verity).

If the victim's death occurs as a result of acts of violence against him (with direct or indirect intent), the commission of the offense of deprivation of liberty illegally, in real contest with the simple murder crime, or qualified.

3.3. Penalties

For the two types of normative norms provided in the content of par. (1) and (2), the penalty provided for by the law is imprisonment from one to seven years.

In the case of the aggravated normative procedures provided in paragraph (3) the punishment provided is imprisonment from 3 to 10 years, and for the aggravated normative mode provided in paragraph (4) the punishment is imprisonment from 7 to 15 years and the prohibition of the exercise of certain rights.

In the case of committing the offense in the imperfect form of the attempt, the limits of the punishment shall be reduced by half, according to the provisions of art. 33 par. (2) C. pen.

Also, "in view of the provisions of Art. 36 par. (3) The PCN in the event of an attempt to commit an offense of imprisonment unlawfully followed by the victim's death shall be punishable by the law for the offense provided for in art. 205 para. (4) NPC: imprisonment from 7 to 15 years and the prohibition of certain rights" (Udroiu, 2014, p. 108).

4. Conclusions

The new regulation of the offense of imprisonment was unlawfully imposed on the background of some dysfunctions in the previous judicial practice and the many critical opinions formulated by some specialists in this field.

The evolution of the Romanian legislative system also envisaged the reformulation of the texts of criminalization of this deed, as well as the elimination of some who had no correspondence in everyday reality.

Examination of this crime was imposed on the background of a fairly high crime rate, which has led to numerous discussions.

In the paper we have made many references to the older judicial practice which corresponds to the current regulations, as well as to the recent judicial practice.

By the way in which the legal content was formulated, which required the maintenance of some provisions of the old regulation or the introduction of others, we appreciate that the current regulation corresponds to the needs of preventing and combating this crime with more efficiency.

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