UNCONSTITUTIONALITY OF LEGAL RULES ON BIOLOGICAL SAMPLING OF DRIVERS

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Abstract

Objectives: The aim of this study is the evaluation of the legal framework that defines biological sampling of drivers. It was considered that lately legislative changes of Criminal Code and implementation of its methodological norms are in a contradictory position with judicial practice of Constitutional Court decisions.

Materials and Methods: The study includes a series of Constitutional Court decisions that are motivated and successively constitutes a confirmation of the lack of clarity on the issue of legislative texts on biological sampling of drivers. Constitutional Court decisions are presented in comparison in order to identify key changes, they were imposed to setting time sampling of blood alcohol driver while intoxicated and final stage with the connection to the crime which represents the legal classification and type of sanction.

Results: Application of comparative method has shown that biological sampling of drivers suggests two situations First, decriminalizing crime by lack of constituents and the second most favourable criminal law enforcement.

Conclusions: This opinion is intended as a signal of question that lawyers and forensic experts should and put it in the correct measurement expertise aimed alcohol test for drivers.

Keywords: comparative method, decriminalization norm, alcohol test, sampling biological law unconstitutional.

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Romanian legislation, by the Order of Minister of Health no. 376/2006, provides the Methodological Norms regarding biological sampling in order to determine the state of alcoholic intoxication and the influence of narcotics or drugs with similar effects on behavior of auto drivers and trams, and establishes the legal support regarding the interpretation of certain phrases that refer to the collection of biological samples when driving while intoxicated.

This legal framework requires a number of conventional measures that allow police to conduct, in collaboration with health agencies, the collection of biological samples from individuals, involved in events or circumstances related to traffic, in order to determine the alcohol or the presence in organism of the products or narcotic substances or drugs with similar effects.

The way and the term that occurs biological sampling in the case of drivers’ alcohol intoxication, was a true topic for Constitutional Court, decisions that produced effects, were very controversial, both before the entry into force of the new criminal code and after.

Driving the vehicle being drunk on public roads is a serious crime that is punishable under criminal matter. However, to prove the offense it must be primarily taken into account the object of the crime that will be sampled – the reality of intoxication evoking lesions characteristic to toxins.

In this sense, we will refer to a legal perspective, to address this aspect of biological sampling moment, in the case of drivers that offense by driving under the influence of alcohol.

**Material and Methods**

The action of biological sampling must be performed in the conjunction of enforcement of GEO no. 195/2002, which through art.87 para.1 now repealed states: “Driving a vehicle or a tram on public roads by a person with alcoholic intoxication over 0.80 g / l of pure alcohol in the blood, is punished with imprisonment of one to five years”. The repeal of this article was due to the entry into force of the new Penal Code, which pointed to the appearance, imposed a number of changes, such as "concept of vehicle" instead of "motor vehicle "or the phrase "at the time of sampling biological samples", the novelty that has sparked some criticism from the outset, but nevertheless, was maintained and has produced its effects for almost a year.
The authors of the new Code did not widely motivated the chosen variant, being limited at specifying that the concentration of alcohol in blood, withholding relevant offense in art.340 (336, after renumbering) is done at the time of biological sampling without the possibility of subsequent recalculations (Dobrinoiu, et. al., 2014).

In this sense, we emphasize that the intention of the legislator was to eliminate the inconveniences of recalculations, which is a frequently requested objection by drivers, the recalculation that entail some degree of uncertainty on the value of alcohol, especially when it is located near the value of criminal relevance, but the former legislation was required the double levy.

Important in the proposed analysis is the decision no.3 of May 12, 2014 concerning the examination of a request made by the Alba Iulia Court of Appeal, on a prior judgment to unravelling the principle to the law regarding interpretation and application of art. 336 para. (1) of the Criminal Code for the purposes of determining the alcohol outcome with criminal relevance in the event of a double levy of biological samples.

Compared to this issue, discussed in updated by High Court of Cassation and Justice legislation, has established that in the event of a double levy of biological samples, the outcome of criminal law alcohol is given by the first sampling.

The situation, if is considered uphold the permissible blood alcohol result with criminal relevance, was given only by the first time of sampling biological samples, and in this respect the Court observes that the provisions of art.102 para.(3) of Government Emergency Ordinance no.195/2002 regarding driving on public roads, still remain relevant, to the liability offenses, when driving a car on public roads by a driver who has an alcoholic intoxication more than 0.80 gr. / L pure alcohol in the blood, is something that requires taking two biological samples in order to perform a possible retroactive calculation of alcohol. The motivation of Supreme Court proves that the offense was committed in this context, which may constitute, at the same time, and crime and misdemeanour.

We recall in this regard that, according to art. 10 para. 1 of Methodological Norms from 2013, from Order no. 1512/2013, "for

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2 Published in the Official Gazette number 392 dated May 28, 2014.
3 Rules concerning the collection, storage and transport of biological samples to judicial probation by establishing the presence of alcohol or substances or products narcotic drug

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determining the alcohol, will be yield two blood samples at an interval for one hour from each other, each sample being represented by an amount of 10 ml of blood," and by the Order no. 1192 of 15 October 2014⁵, the above mentioned rules were amended in order to remove from the art. 10 para. 1 of the requirement of sampling of the second sample, "for determining the alcohol is needed a single blood sample collected in an amount of 10 ml."

However, it could not be established by the expertise the actually amount of alcohol in drivers blood, if the legislature has conditioned existence of the crime of the amount of time levy.

Returning to the sequence of Constitutional Court decisions on this framework by introducing the new Penal Code, the legislator has actually sought mandating the removal of the two samples, the Constitutional Court will overturn the legal framework by Decision no. 732 of 12/16/2014.

Thus, by the decision no. 732 from 16.12.2014 to levy duty envisaged a single sample of blood from offense suspect provided by art. 336 of the Criminal Code.

We believe that this was the natural solution to the situation, having double sampling at that time had no sense. Changing the methodology at shown date was probably the result of an oversight-authorized institution, which maintained the old system with no correlation with standard criminal code.

Introduced in October 23, 2014 sole levy system currently used in the Methodological Norms, gains weight by admitting the constitutional contentious of Decision No. 16 of December 2014, criticizing the Criminal Code option, returning to GEO 195/2002 art. 78 para 1, just considering legal text that allowed the determination of alcohol value at the time of driving. The solution thus enabled the retroactive calculation of alcohol, which consists in determining alcohol intoxication and individual elimination rate.

Reason of criticizing art. 78 para 1 is actually the phrase "when biological samples levy" because there is a clear representation of constitution elements of the offense, in which case the legal standard of criminality of the act, lacks predictability.

with similar effects in the body, to those people involved in events or circumstances related to traffic.

⁴ Published in the Official Gazette number 812 dated 20 December 2013.
⁵ Published in the Official Gazette number 769 dated October 23, 2014.
The presence of continuous danger crimes, which involves driving under the given conditions, is performed when the movement on public road began and is consumed at the same time, of the full implementation of the material element.

Thus, according to this presumption, the Court stated that the timing of sampling as being the one of consuming, constitutes an offense, and is an external and random criterion of offenders’ conduit, contrary to conventional standards.

The hazard status of any car driving action ends when it stopped, so sampling will not be done during the action. More, when stationary there was no founded a criminal liability, therefore may be issued also the idea that criminal liability for a subsequent alcohol level is arbitrary and not justified.

Problematic in this respect, is maintaining in force the Methodological Norms from 23 October 2014 requiring the prevalence of a single biological sample, in this case recalculation is not possible. In the same situation are people who were legally prevailed between 23 October 2014 and 27 January 2015, a single blood sample, which would require retroactive calculation.

It is quite difficult to decide which situation is required, whether we are facing decriminalization, or we are facing a more lenient penal law enforcement.

According to the doctrinal opinions, law is exculpatory decriminalized only when the act has no counterpart in the new law, or when conditions of criminality are changed.

Thus, it was shown in doctrine that criminalize conditions change or the registration of offense, different incriminated in the content of another crime, constitutes decriminalization because, by applying the new criminal law, the crime cannot be qualified as a crime or offense or factual certain ways of the crime escapes beyond the scope of criminal law (Hotca, 2007, p. 195).

This view fits the situation, because when driving by returning to the relevant moment for deed consumption, committed deed deemed when the sampling cannot be qualified as a crime. Moreover, it would be a fair solution as, in the circumstances referred, it cannot be determined the amount of alcohol at the time of driving through retroactive calculation.

The second situation that comes down to the principle of applying the more favorable criminal law to the final judgment of the case, provides that the principle applies to those normative acts or provisions declared
unconstitutional and to emergency ordinances passed by Parliament with amendments or additions, or rejected if, at the time when they were in force, included more lenient penal provisions.

Obviously, if we admit that we are in a transitional situation provided by art. 5 from Criminal Code, there can be no more favorable nature of the term at sampling time by its very essence, the law decriminalizing criminal law is more favourable.

Results

Unconstitutional declaration of the phrase at the time of sampling biological samples, makes, by returning to criminal relevance at the time of driving and not at the time of levy, the need of alcohol recalculation to be required again, especially if the harvest is located at some distant time from the consuming scene.

Admission the variant regarding unconstitutional declaring to a party of the criminalization norm, which defines a temporal element, that is essential for determining when the offense was relevant, regarding the existence of crime, lack the deed committed by a constituent.

In this fair, the only just and real solution, which the prosecutor and the courts can deliver in case of referral, would be the filing of those acquittals. The two solutions, the decriminalization of legal rules and the more favourable criminal law, would be based on the art. 16 lit. b thesis I C, Criminal Procedure, and not on point a, because the act it is in its materiality.

In the new procedural system, lack of constituents was taken over by the thesis I of art. 16 lit. b of Criminal Procedure, the scope being more wider. It was revealed that this will be an incident, not only in the case on in abstract decriminalization of an act, but also in the case of in concreto decriminalization, when the offense continues to be criminalized as a crime, but the incidence was restricted, so concrete facts no longer meet criminal typicality trait (Neagu, 2008, p. 289).

In general, all this, in our view, it attracts the incidence cases of incapacity to exercise criminal action. However, their effect is due to the legal texts that have been established in conjunction with the general standard of reasonable doubt in taking any sentencing decisions (Nemtoi, 2009).

In this case, we stand under Art. 4 para. 2 of the Code of Criminal Procedure, "any doubt in the belief formation of judicial bodies, shall be construed in favor of the suspect or defendant" or, according to art. 103
para. 2 "in deciding on the existence of the crime and of the defendant's guilt, the court motivated decides, with reference to all the evidence evaluated. Sentencing is imposed if the court is convinced that the charge has been proved beyond reasonable doubt".

Also, according to art. 396 para. 2, "the conviction is pronounced if the court finds beyond reasonable doubt that the act is an offense committed by the defendant".

Conclusions

Concluding we certificate the theory that allows free referee to interpret a legal provision, and we believe that this judicial practice will justify in concrete, the solution followed by the courts.

This opinion is intended to be a signal of question, which lawyers and forensic experts should put in the correct measurement expertise aiming alcohol test for drivers.

Reference


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Biodata

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