

JURISPRUDENTIAL EXAMINATION REGARDING BIOLOGICAL SAMPLING IN THE CASE OF CONVICTED PERSONS

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Abstract:

Objectives: The research devotes particular attention to the timing of biological sampling in the case of convicted persons. The main idea of the research is the factual situation regarding the criminal case law, which is not unified; problematic that prevents the formation of the National System of Judicial Genetic Data. Materials and Methods: The study focuses on evaluating the two opinions of jurisprudence on the implementation of the text of the law (Law no. 76/2008). Results: The carried research on different cases has shown that legal text is not mandatory, but its application is arbitrary, at the discretion of the court, but, nevertheless, the biological sampling in the case of convicted persons disregards the form for penalty. Conclusions: In the context of the creation of the National System of Judicial Genetic Data is a control condition on the typology of criminal profiling, we believe that biological sampling should be a priority to ensure safety of the individual.

Key words: National System for Judicial Genetic Data, profile of criminal typology, biological sampling

JEL clasification: K14, K20, K31

INTRODUCTION

Creating S.N.D.G.J. will contribute to the exchange of information with other countries and fighting cross-border crime. The aim of the S.N.D.G.J. is to prevent and combat crimes that may seriously damage fundamental human rights and freedoms, particularly the right to life and to physical and mental integrity.

National System for Judicial Genetic Data will contain genetic profiles and personal data of suspects and persons sentenced to imprisonment, case information and biological evidence taken at crime places. This information will be verified and compared, in order to identify the perpetrators of crime for excluding certain people from the circle of suspects, and to establish the identity of victims of natural disasters, accidents and terrorist table.

Biological samples and the data contained in SNDGJ cannot be used for purposes other than those provided in the law approved by the Government.

Biological sampling will be made through non-invasive harvesting of epithelial cells lining the mouth by brushing, or where this method cannot be used by epithelial cells harvested from facial region. [1]

Among the offenses for which the law allows biological sampling in introducing genetic profiles in SNDGJ, we identify: murder, manslaughter, aggravated murder, grievous bodily harm, slavery, torture, rape, sexual intercourse with a minor, maltreatment of a minor, sexual perversion, sexual corruption, incest, genocide, destruction, looting or acquisition of cultural stock and terror Law No.76 / 2008 on the organization and functioning of the National System for Judicial Genetic Data ensures the international compatibility of the National System for Judicial Genetic Data with similar databases existing in the EU, taking into account the provisions of the Convention between the Kingdom of Belgium, Germany, Kingdom of Spain, the French Republic, Luxembourg, the Netherlands and Austria, in order to improve cross-border cooperation, particularly in combating terrorism, cross border crime and illegal migration, signed in Prüm on 27 May 2005, by setting up a database with genetic profiles compatible with those existing in the EU states.

MATERIAL AND METHODS

Although there is a legal framework, the practice of the courts is not uniform to art. 7 of Law no. 76/2008. Thus, by the decision no.18 /13.11.2013 of the High Court of Cassation and Justice is concerned the interpretation and application of the provisions of art. 7 of Law no. 76/2008 on the organization and functioning of the National System for Judicial Genetic Data, ie the possibility of the court to order the collection of biological samples from persons sentenced to imprisonment for offenses set out in Annex Law no. 76/2008 if the execution is conditionally suspended or under supervision.

In discussing the case, the prosecutor has evident the view that there is jurisprudence on this issue, in the sense that some courts have held that the collection of biological samples can be ordered for persons sentenced to imprisonment the execution of which has been conditionally suspended or under supervision, and, by contrast, others have found that taking biological samples cannot be ordered for persons sentenced to imprisonment, which execution has been conditionally suspended or under supervision.

In the context of the legal text, have been issued several opinions: a first opinion, the courts have acknowledged that biological sampling can be arranged, for persons sentenced to imprisonment, which execution has been conditionally suspended or supervised, motivated by the article 7 paragraph 1 of Law No.76 / 2008 makes no distinction on the individualization of the sentence of imprisonment.

To be consistent with this opinion must be considered as integral the complete legislative texture through art. 1., that was shown that the will of the legislator was to categories that bring serious violations of establish a database - the National System for Judicial Genetic Data - in order to serve the prevention and combating of crime fundamental individual rights and freedoms.

In relation to this end, to limit the scope of the law to persons sentenced to imprisonment with detention is unjustified because the legal text does not refer to the position of sentencing the offender.

Another opinion specifies that the provisions of Article 7 paragraph 1 of Law No.76 / 2008 are incidents unless the penalty imposed is imprisonment with effective execution in detention.

Considering that paragraph 2 of the cited legal text states that taking biological samples from persons referred to in article 4 paragraph 1 letter b, is made to release from prison the medical staff, with the assistance of security and the presence of a police officer, without any further notice from the court, in case of sentences to imprisonment which execution has been conditionally suspended or under supervision, instead of having actual or implicit execution release from prison, the measure provided for in art. 7 paragraph 1 of the bill would not be incidental.

So unitary consensus of court solutions regarding acceptance of request application on biological sampling of convicted persons may vary from those two circulated opinions.

Thus, HCCJ Decision no. 18 from 18 November 2013 (Decision 18/2013) [2] concerning the examination of appeal made by the College Board of Brasov Court of Appeal, covering the interpretation and application of the provisions of art. 7 of Law no. 76/2008 on the organization and functioning of the National System for Judicial Genetic Data, respective the possibility of the court to order the collection of biological samples from persons sentenced to imprisonment for offenses set out in Annex of the Law no. 76/2008, if the execution is conditionally suspended or under supervision is the case law that consolidates the two opinions stating an express and clear idea about these issues. Admission of the appeal on points of law will generalize the view that biological sampling in the case of convicted persons can be achieved regardless of the sanctioning formula, in which they work condemnation by execution or supervision.

The finding that in art. 7 paragraph. (2) of Law no. 76/2008 is regulated the procedure for carrying out this measure only in cases where execution of the sentence occurs in detention, cannot draw conclusion to the provisions of art. 7 only in cases where there are procedural provisions which provide for the method of harvest.

In this regard, we believe that, unlike the rules of criminal law, for which the analogy is not permissible, having into consideration to the principles *nullum crimen sine lege* and *nulla poena sine lege*, in the matter of criminal proceedings is supported using analog supplement, consisting in compensation of legislative fill gaps by recourse to the rules governing similar cases, the silence of the law couldn't be an obstacle in achieving the purpose of criminal proceedings.

Law no. 76/2008 expressly provides that it aim is setting up the National System for Judicial Genetic Data for the prevention and combating of crime categories.

In order to achieve this national database, art. 3 of Law no. 76/2008 establishes offenses for which biological samples can be taken and in art. 4 are shown the categories of persons from whom such evidence may be taken, including: "a) suspects - those about which exist data and information that they could be perpetrators, instigators or offenses listed in the Annex; b) persons sentenced to imprisonment for crimes contained in the annex. (...)".

The legal text does not only define the persons who may be subject to sampling but extends its scope on various criteria aimed at biological samples recorded in the National System for Judicial Genetic Data.

The law regulates the length by which biological samples are kept. For the suspect case (art. 13), the genetic profiles entered in the National System for Judicial Genetic Data are preserved until when criminal prosecution bodies or courts order their deletion from the database.

According to art. 14 of Law no. 76/2008, the genetic profiles obtained from convicted persons, introduced in the National System for Judicial Genetic Data, are retained until the person reaches the age of 60 years and if it dies before that age are preserved another 5 years after death, after which they are deleted.

It is noted that, for the assumption that biological sampling occurs before or during the criminal prosecution, the situation of detention the text law regarding deleting the genetic profiles automatically intervenes, but only if the prosecutor or the court has expressly.

Courts jurisprudence constantly were in a position to address the view that sampling is applied to unravel the principle to the law regarding interpretation and application of art. 336 para. (1) of the Criminal Code.

In this sense, the Decision I.C.C.J. no. 3 / 2014 [3] that seeks a judgment prior to unravelling by principle of the law problem regarding interpretation and application of art. 336 para. (1) of the Criminal Code, for the purposes of determining the alcohol level with criminal relevance in the event to a double levy of biological samples. It should be noted, that to the defendant were taken two biological samples, following the action of driving a motor vehicle without a license, was found to be drunk, which led to the testing at 2.21, resulting in the 0.47 mg / l alcohol in exhaled air, and the yielding two samples of blood, the first at 2.45, with the result 0.90 g / l of pure alcohol in the blood, the second at 3.50, with result of 0.70 g / l of pure alcohol in the blood. We note that the defendant was in a state of postexecution relapse, so had a conviction.

Biological sampling in this case resulted in establishing the gravity of the offense and the recording of evidence in the National System for Judicial Genetic Data confirms the offender relapse profile.

According to art. 7 of Law no. 76/2008 regarding the organization and functioning of the National System for Judicial Genetic Data, taking biological samples from persons sentenced to imprisonment for offenses set out in Annex law for the crime of aggravated murder [4] in introducing the genetic profiles in National System for Judicial Genetic Data, is ranged by the court, by the judgment of conviction and is achieved when is released from prison, without any notice from the court, not necessary, that the court which ordered the biological sampling for introduction of genetic profiles in the National System for Judicial Genetic Data, to mention in the judgment of conviction and the date at which the biological sampling is made. [5].

The judicial practice issues even solutions, which challenges art. 7 of Law no. 76/2008, so the decision no. 84 / R / February 5, 2013, for the offense of negligent killing, the court decides that, applying the measures referred to in art. 7 para 1 of the Law no.76 / 2008, represents by nature an infringement of the right to physical integrity guaranteed by constitutional requirements.

Accordingly, any interference with this fundamental right must be justified in relation to the requirements of Article 53 of the Constitution. In the present case, these requirements are not met, because there is not in concrete (rather abstract) a legitimate reason to be considered necessary in a democratic society for the defendant to be ordered to the collection of biological samples. Not being satisfied the requirements of the principle of proportionality referred to in Article 53 of the Constitution, the first instance properly did not apply art.7 para 1 of the Law no.76 / 2008.

Defendant obligation to the collection of biological samples, in accordance with Article 7 para 1 of the Law no.76 / 2008, does not apply mandatory and unconditional, the action must be reflected in judgments if exist any criminal offenses to which legal text refers.

So indirectly said, it joins the discretion of the courts recognized by the legislature, will be available on the application of these normative regulations in relation to the concrete circumstances of each case.

The interpretation of this imperative text law, would undermine the article 22 para 1 sentence II of the Constitution which guarantees the right to physical integrity, but also article 53 of the Constitution, which regulates the criteria to restrict the exercise of a right.

RESULTS

Analysing the provisions of art. 7 in the context of the entire law, the conclusion that emerges is that, to have biological sampling of persons sentenced to imprisonment, does not represent legal relevance the individualization of execution method of punishment, contrary interpretation, leading to a decrease of the amount of information contained in the National System of Genetic Data Judicial, which does not reflect the whole purpose of the law, to constitute a database of nature of serving to prevent and combat crime categories that bring serious harm to rights and fundamental freedoms of individuals.

In consideration of that exposed, results that biological sampling from people sentenced to imprisonment for offenses set out in Annex Law no. 76/2008, on the organization and functioning of the National System of Genetic Data Judicial can also be ordered in cases where execution is conditioning suspended or under supervision.

Also the National System of Genetic Data Judicial, is not just a database outlining the profile of an offender, but is the source of processing biological samples from persons referred to in art. 4 para. a, b, of the Law, identification of missing persons. [6]

CONCLUSIONS

The study envisages the legislative text placement in criminal judicature in the context, that this practice does not have a uniform look to the implementation of the legal text.

From its context, article 1 "this law aims at setting up the National System for Judicial Genetic Data, hereinafter SNDGJ, for the prevention and combating of crime categories that bring serious harm to the fundamental human rights and freedoms, particularly the right to life and to physical and mental integrity, and identifying corpses with unknown identity, missing persons or persons killed in natural disasters, accidents mass murder crimes or acts of terrorism ". [7]

The aim of the legal text is to establish and identify after biological sampling the offender profile and its retention in an informal system for identification purposes.

The implementation of this legal text in judicial practice has shown that the admission of enforcement action if biological sampling, in case of suspects is made only in concrete situations specified by law, but even in these circumstances, the court considers that can be brought touches on the dignity of the accused.[8]

REFERENCES

- [1] Gafița Aida Ionela, Nichita Dănuț, *Considerații privind schimbul de date ADN la nivel European, Forum Criminalistin*, nr. 2/2012,
- [2] Published in the Official Gazette of Romania, Part I, no. 7 of 7 January 2014
- [3] Published in the Official Gazette of Romania, Part I, no. 392 of May 28, 2014
- [4] Decision no. 30 of 10 January 2011, pronounced by the criminal section of the High Court of Cassation and Justice covering the crime of aggravated murder.
- [5] C. Bulai „*Curs de drept partea specială* „, vol. I București 1975
- [6] Mihai Udrioiu, *Drept penal. Parte generală. Noul Cod Penal*, ed.C.H. Beck, 2015
- [7] Law no. 76/2008 published in the Official Gazette, Part I, no. 289 of 14.04.2008
- [8] Viorescu Răzvan, *EU Constitutional Law*, course universitaire, Suceava University Publishing House, 2008