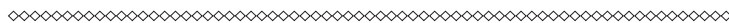


SESIUNEA ÎN PLEN



CZU 343.1

**EXECUTION OF JUSTICE - EXCLUSIVE ATTRIBUTION OF THE COURTS,
FUNDAMENTAL PRINCIPLE OF THE CRIMINAL PROCESS**

**ÎNFĂPTUIREA JUSTIȚIEI - ATRIBUȚIE EXCLUSIVĂ A INSTANȚELOR JUDECĂTOREȘTI,
PRINCIPIU FUNDAMENTAL AL PROCESULUI PENAL**

Dinu OSTAVCIUC,
PhD, associate professor
Rector, Academy Ștefan cel Mare of the MIA,
Chișinău, Republic of Moldova,
ORCID: 0000-0001-5317-3296

Tudor OSOIANU,
PhD, university professor,
Chair of Criminal Procedure, Forensics and Information Security,
Academy Ștefan cel Mare of the MIA
Chișinău, Republic of Moldova,
ORCID: 0000-0003-1506-4501

The respective article is dedicated to the fundamental principle of the criminal process – the execution of justice – the exclusive attribution of the courts. That principle is guaranteed by the Constitution of the Republic of Moldova, as well as by the ECHR. Failure to comply with this principle leads not only to the nullity of all actions and procedural acts, but also to the subjugation of the rule of law and democracy.

The subject under discussion is a guarantee for a human and the entire legal system when we refer to the separation of powers in the state. The execution of justice is the basic attribute of the courts, which, being empowered by law, establish the truth when there is a legal relationship or a conflict in criminal matters.

Thus, the execution of justice is an attribute of the rule of law, due to which various disputes are resolved, and litigants can fully realize their rights, interests and freedoms, if they consider that they have been harmed in one way or another.

Keywords: *justice, court of law, judge, exclusive attribution, principle, criminal trial.*

Articolul în referință este dedicat principiului fundamental al procesului penal – înfăptuirea justiției – atribuție exclusivă a instanțelor judecătorești. Principiul respectiv este garantat de Constituția Republicii Moldova, precum și de CEDO. Nerespectarea acestui principiu duce nu doar la nulitatea tuturor acțiunilor și a actelor procedurale, dar și la subjugarea statului de drept și a democrației.

Subiectul în discuție este o garanție a omului și a întregului sistem juridic atunci când ne referim la separarea puterilor în stat. Efectuarea justiției este atributul de bază a instanțelor de judecată, care fiind împuterniciți prin lege stabilesc adevărul atunci când există un raport juridic sau un conflict în materie penală.

Astfel, înfăptuirea justiției este un atribut al statului de drept, grație căreia se soluționează diferite litigii, iar justițiabilii își pot realiza pe deplin drepturile, interesele și libertățile, dacă consideră că acestea le-au fost lezate acestea într-un mod sau altul.

Cuvinte cheie: *justiție, instanță de judecată, judecător, atribuție exclusivă, principiu, proces penal.*

Introduction. Any form of criminality undermines the rule of law. Crime prevention involves the adoption of measures aimed at reducing the risk of committing crimes and reducing their potential harmful consequences for the individual and society, including the fear of crime, by influencing its multiple causes.

The criminal justice system deals with the consequences of criminal behavior in society and aims to protect the right to security and the exercise of human rights. These include, *inter alia*, the work of the police, prosecution, prosecutors and the criminal justice system, as well as access to legal aid, prisons, probation, restorative justice and victim protection, including against abuse, as well as the right to reparations.

“In order for criminal prosecution to materialize in the sanction provided for by law, there is a need for both a state activity and a specialized body that implements the conflict resolution mechanism between society (respectively the state) and the criminal. Therefore, in any state organization, and even more within a state of law, there is a judicial power or authority whose fundamental task is the execution of justice” [2, p. 7].

The essence of the execution of justice (its main feature) is the consideration of various legal cases and issues under the jurisdiction of the court, based on the application of the rule of law in order to resolve social and legal conflicts (disputes) and protects the law in the broadest sense of the word. Moreover, the trial of cases and the settlement of disputes, like any other intentional and orderly activity, must end with a fairly certain result - an act of justice, that is, a court decision, in which the case under discussion is resolved on the merits and which is mandatory, provided by the coercive power of the state.

“Justice has imposed itself since ancient times as a function of adjudicating lawsuits stemming from the violation of laws. The rule of law has become inconceivable without justice, the lack of such an authority meaning arbitrariness and injustice. If social life must be carried out according to the constitution and laws, it is necessary to have a power that knows them and can interpret and apply them concretely when they are violated, when the rights and freedoms of citizens are endangered or neglected” [2, p. 8].

The mentioned power in a state of law, according to the principle of separation of powers [8, art. 6], rests with the judicial authority, which is the only competent authority in resolving disputes. Justice must always be available to the litigant.

Applied methods and materials. Theoretical, normative and empirical material was used in the development of this publication. In addition, the research of the respective subject was possible by applying several scientific investigation methods specific to the criminal procedural theory and doctrine: logical method, method of comparative analysis, systemic analysis, etc.

The purpose of the research: the research and analysis of the internal normative framework, the doctrine and the jurisprudence regarding the administration of justice as the exclusive attribution of the courts, as well as the assurance of the rights and freedoms of litigants through the prism of this guarantee.

Results obtained and discussions. Execution of justice is the exclusive responsibility of the courts. Justice in criminal cases involves activities carried out by the court competent to examine and resolve criminal cases with exact and unwavering compliance with the requirements of the law and the procedure established by it, ensuring the legality, validity and reasoning of court decisions.

The exclusive authority of the courts to execute justice is regulated by both national and international acts.

According to art. 8 of the UDHR, “Every person has the right to effective satisfaction performed by the competent national legal courts against acts that violate the fundamental rights recognized by the constitution or the law.” At the same time, art. 10 of the UDHR, provides that, “Every person has the right in full equality to be heard in a fair and public manner **by an independent and**

impartial tribunal (and so on and so forth) which will decide either on his rights and obligations, or on the merits of any criminal charge against him."

The International Covenant on Civil and Political Rights contains several rules about courts (tribunals), such as: art. 6, 8, 9. In all the respective rules, the term "competent tribunal" (competent court) is found, but without specifying its notion. The most obvious and clear regulation can be found in art. 14 paragraph 1 of the respective Covenant: "*All people are equal before **the tribunals and courts of justice** (so on and so forth). Every person has the right to have the dispute in which he is involved and further to be examined in a fair and public manner by **a competent, independent and impartial tribunal, established by law** (so on and so forth), which will decide on disputes regarding his rights and obligations (...).*" Similarly, art. 14 paragraph 5 of the mentioned Covenant provides that, "*Any person convicted of a crime has the right to have his guilty plea and sentence reviewed by **a superior court**, in accordance with law.*"

"The right to equality before courts and tribunals and to a fair trial is an essential element in the protection of human rights and is one of the procedural means of ensuring the rule of law. Article 14 of the Covenant seeks to ensure the proper execution of justice and, to this end, guarantees a series of specific rights" [4].

In accordance with the provisions of point 18) of the General Comment of the UN Human Rights Committee no. 32 of 23.08.2007 [4], "*As it was used in Article 14, paragraph 1, the term "court" (so on and so forth) means, regardless of its title, **a body which is established by law, is independent of the executive and legislative branches or enjoys, in specific cases, judicial independence** (so on and so forth) in the decision on questions of law in proceedings of a judicial nature. (...) **the conviction of any person by any body other than a court is inconsistent with this provision** (...) (so on and so forth).*"

"The requirement regarding **the competence, independence and impartiality of the judiciary**, (so on and so forth) within the meaning of article 14, paragraph 1, **is an absolute right** (...) (so on and so forth)" [4].

Art. 6 of the ECHR also ensures the effective guarantees regarding the administration of justice only by the courts.

Based on the jurisprudence of the ECHR, "a court is described as such in terms of its judicial functions, namely to rule on issues that are within its competence based on the rules of law and after a properly conducted procedure. At the same time, it must meet a number of other requirements: independence, especially in relation to the executive power; impartiality; the duration of the mandate of its members; guarantees offered by the procedure, some of which appear even in the text of art. 6 § 1" [3].

The condition imposed by international acts, implicitly the ECHR, is that the court should be established by law. The ECHR jurisprudence is rich in this regard. For example, in the ECHR case, *Richert v. Poland* [15, § 43], the Court found that, "*The phrase "established by law" covers not only the legal basis for the very existence of a "tribunal", but also the composition of the court in each case (see *Buscarini v. San Marino (decision)*, no. 31657/96, 4 May 2000, and *Posokhov versus Russia*, no. 63486/00, § 39, ECHR 2003-IV). A tribunal established by law must meet a number of conditions such as the independence of its members and the duration of their mandate, impartiality and the existence of procedural guarantees (see *Coëme and Others*, cited above, § 99).*"

ECHR jurisprudence, in some cases, establishes additional conditions (criteria) for the courts, as established according to the law. For example, in the case *Findlay v. the United Kingdom* [16, § 77], the Court held that, "*(...) **the power to give a binding decision that cannot be modified by a non-judicial authority is inherent in the very notion of "tribunal"** (so on and so forth) and can also be seen as a component of "independence", a condition required by Article 6 paragraph 1 (art. 6-1) (see, mutatis mutandis, *Decision Van de Hurk versus the Netherlands from April 19, 1994, Series A no. 288, p. 16, paragraph 45*).*"

As observed, the courts must be independent and impartial. In the ECHR case, *Findlay v. the United Kingdom* [16, § 73], the Court “recalls from the outset that, in order to determine whether a tribunal can be considered “independent”, account must be taken of, among other things, the way in which its members are appointed and the duration of their mandate, the existence of guarantees against pressure and the question of whether the body presents a semblance of independence. *On the issue of “impartiality”, this requirement has two aspects. First, the tribunal must be subjectively free of personal bias or prejudice. Secondly, it must be objectively impartial, i.e. it must provide sufficient guarantees to exclude any legitimate doubt in this respect (...).*”

“The Court, in the case *Zand v. Austria*, noted that the case that the court must be established by law aims to avoid the organization of the judicial system in a democratic society on the basis of executive discretion and that this matter is to be regulated by law of parliament” [1, p. 124].

In accordance with art. 114 of the Constitution, “*Justice is administered in the name of the law only by the courts.*”

“*Justice is a special type of legal activity. Its meaning is revealed in systematic connection with the norms of art. 6, 20, 21, 22, 115, 116, 117, 119, 120 from the Constitution. The notion of “justice” and the notion of “judicial power”, enshrined in the Constitution, are not identical (...)*” [13, art. 114].

According to art. 115 of the Constitution, “*Justice is executed through the Supreme Court of Justice, through the appeal courts and through the judges. According to the law, specialized courts can function for certain categories of cases. The establishment of extraordinary courts is prohibited. The organization of the courts, their competence and the court procedure are established by organic law.*”

According to art. 1 of the Law on Judicial Organization [11], “*The judicial power is independent, separate from the legislative power and the executive power, it has its own attributions, exercised through the courts, in accordance with the principles and provisions provided by the Constitution and other laws. Justice is administered in the name of the law.*”

Therefore, the courts “*have the following characteristics:*

- *legal origin;*
- *permanency;*
- *are bodies with compulsory jurisdiction;*
- *applies the principle of contradictory nature and the rules of law.*

The forms of administration of justice are the trial by the courts of all cases regarding legal, civil, administrative and criminal relations, as well as any other cases for which the law does not establish another competence (art. 4 paragraph (2) of the Law on Judicial Organization). These courts have different powers and administer justice in different procedural forms” [13, art. 114].

According to art. 1 of the Law on the Supreme Court of Justice [10], “*Justice in the Republic of Moldova is administered by the Supreme Court of Justice and other courts in accordance with the Constitution, the Law on Judicial Organization, the Law on the Status of Judges and other legislative acts. The Supreme Court of Justice is the supreme judicial court that ensures the correct and uniform application of legislation by all courts, the settlement of disputes arising within the framework of the application of laws, guarantees the responsibility of the state towards the citizen and the citizen towards the state. The Supreme Court of Justice ensures compliance with the principle of the presumption of innocence and the principle of the rule of law, contributes to the establishment of a state of law through its activity. The Supreme Court of Justice is the only supreme judicial court. The headquarters of the Supreme Court of Justice is in the municipality of Chișinău.*”

The criminal procedural legislation regulates the administration of justice - the exclusive attribution of the courts as a fundamental principle. Thus, art. 25 paragraphs (1) and (2) of the Code of Criminal Procedure stipulates that, “*Justice in criminal cases is administered in the name of the law only by the courts. Setting up of illegitimate courts is prohibited. No one can be declared guilty of committing a crime, as well as subject to a criminal penalty, except on the basis of the final*

decision of the court, adopted under the conditions of this code.” From the analysis of the procedural rule, it is found that the respective provision corresponds to the international quality standards, as well as the constitutional one. At the same time, the analyzed norms do not allow the transfer of the stated function to another state body, except only to legally established, independent and impartial courts, ensuring effective guarantees for the parties in the process.

The mentioned provisions indicate a special form in which a criminal case can be resolved - the judiciary, as well as a special body that implements it - the court. Criminal justice is an activity strictly regulated by law, which manifests itself in the entire procedure of the judicial process and is most clearly expressed in the general conditions of the process: the immediacy, orality and adversarial nature of the judgment of the case (art. 314 of the Code of Criminal Procedure), equality of rights of the parties before the court (art. 315 of the Code of Criminal Procedure), publicity of court hearings (art. 316 of the Code of Criminal Procedure).

No one can administer criminal justice except the court, which occupies the constitutional and legal position of the judicial authority in the country. The courts are only those bodies that are specifically established by the state to exercise judicial power.

According to art. 6 point 16) of the Code of Criminal Procedure, by court is understood “*any court, a component part of the judicial system of the Republic of Moldova, which judges the criminal case in the first instance, in the order of appeal or recourse, or on the extraordinary appeals, as well as which resolves complaints against the actions and acts of the criminal investigation bodies and of bodies for the execution of court decisions and sanctions the performance of procedural actions.*”

Therefore, the principle of execution of justice only by the court extends not only to the trial of the case in the substantive court, but also to all judicial stages of the criminal process: ordinary and extraordinary means of attack. This means that annulment or modification of court decisions is allowed only by the competent higher court and only within criminal proceedings. The same rules also apply to judicial review during the criminal investigation phase.

It should be noted that only the court has the right to apply preventive detention, coercive measures of a medical nature, authorize and legalize criminal prosecution actions or special investigative measures that infringe the fundamental rights of the parties in the process.

Art. 25 paragraph (3) of the Code of Criminal Procedure, regulates that, “*The competence of the court and the limits of its jurisdiction, the manner of carrying out the criminal process cannot be changed arbitrarily for certain categories of cases or persons, as well as for a certain situation or for a certain period of time.*” This provision constitutes an effective guarantee for the parties in the process, which ensures the equality of all before the law. The respective norm provides for both the organizational and the procedural aspect of the courts in relation to a specific case and referring to a specific person.

In this regard, there are other guarantees provided for in special laws. The provisions of art. 6/1 of the Law on Judicial Organization can serve as an example. This rule states that, “*The activity of judging cases is carried out in compliance with the principle of random distribution of files through the Integrated Program for the Management of Files. (...) The formation of the court panels and the appointment of their presidents are made at the beginning of the year by order of the court president. The cases assigned to one court panel cannot be transferred to another panel except under the conditions provided by law.*” That regulation provides effective guarantees to the litigants by ensuring that the courts are impartial, and that the judges do not have any bias on the examination of a specific case or on a specific person. Such organization of the activity of judging criminal cases is beneficial for the entire democratic society, in order to reduce the acts of corruption or other illegal activities.

“*The Court reiterates, first of all, that in a democratic society it is of fundamental importance that the courts should inspire confidence to the population and, first of all, to the accused, in the case of criminal proceedings*” [17, § 28].

In accordance with art. 25 paragraph (4) of the Code of Criminal Procedure, “*No one can be deprived of the right to have his case judged by that court and that judge in whose jurisdiction it is given by law.*” That regulation reflects the need to ensure the defendant’s right to a court and a judge, not only generally but also specifically. This guarantees the management of the judicial system (which is important from the point of view of the legality of justice) and the direct connection of justice with the population (which is important from the point of view of the democratic nature of justice). Thus, the principle of administration of justice only by the court objectively determines the position of the court in the criminal process.

In other words, courts and judges come to guarantee in a democratic society the adequate protection of human rights and freedoms.

In this sense, recently, the Constitutional Court of the Republic of Moldova held that, “*Common law judges have the role of protectors of the rights guaranteed by the European Convention and, therefore, have the competence to directly apply the guarantees of the right to a fair trial (see, mutatis mutandis, DCC no. 32 from March 22, 2022, § 28)*” [14].

“The jurisdictional act stands out in the center of the criminal judicial activity and as its completion. The jurisdictional act has such social importance that it is invested with the authority of *res judicata* in order to ensure the stability of what is decided by justice. On the contrary, administrative acts do not have such power, there being no legal presumption that they always solve the case correctly and that therefore their unaltered and permanent preservation is something necessary” [2, p. 10-11].

Thus, according to art. 25 paragraphs (5) and (6) of the Code of Criminal Procedure, “*Sentences and other court decisions in criminal cases can only be verified by the respective courts under the conditions of this code. Sentences and other court decisions of illegitimate courts have no legal force and cannot be executed.*”

Conviction of the defendant, as a consequence of proving his guilt, in the name of the law takes place only when the court adopts and pronounces the sentence of conviction, because of which the criminal penalties can be applied. On the contrary, when the prosecution has not presented evidence of guilt, the person should be acquitted. Any decision of the court regarding the defendant must be legally proven, thorough and reasoned.

“*According to art. 114 and 115 of the Constitution of the Republic of Moldova, art. 1 of the Law on the Supreme Court of Justice no. 789 of March 26, 1996, art. 1 of the Law on the Status of Judge no. 544 of July 20, 1995 “Justice in the Republic of Moldova is executed in the name of the law only by the courts - through the Supreme Court of Justice and through other courts in accordance with the Constitution”. Thus, the judicial power, according to the cited legislation, is exercised only through the court in the person of the judge, constitutionally endowed with powers of administration of justice, which he executes on the basis of the law.*”¹

¹ “In this case, the Enlarged Criminal Board notes that, K. I.i was convicted by the “courts” of the “self-proclaimed T.M.R.”, which were not established according to the law and which illegally assumed the duties of administering justice in the Transnistrian region, as a result of which the latter was deprived of the right to a due process provided by law. In the following, the Enlarged Criminal Board reveals that, in accordance with art. 25 paragraph (6) of the Code of Criminal Procedure, sentences and other court decisions of illegitimate courts have no legal force and cannot be executed. According to art. 251 paragraph (1) of the Code of Criminal Procedure, it has been stipulated that the violation of the legal provisions, which regulate the conduct of the criminal process, leads to the nullity of the procedural act if a violation of the criminal procedural norms has been committed, which can only be removed by the act canceling. At the same time, paragraph (2) of the same article stipulates that the violation of the legal provisions during the court composing, attracts the absolute nullity of the procedural act. In addition, the Enlarged Criminal Board reminds that according to art. 25 paragraph (5) of the Code of Criminal Procedure, sentences and other court decisions in criminal cases can no longer be verified by the respective courts under the conditions of this code, and according to paragraph (6) of the same article, sentences and other court decisions of illegitimate courts have no legal force and cannot be executed.” PEPC of the SCJ from 28.02.2021. file no. 1re-10/2021. Available: jurisprudenta.csj.md/search_col_penal.php?id=17690. [accessed: 16.10.2022].

Conclusions. From the analysis of the above, we deduce that the principle of execution of justice - exclusive activity of the courts has the following reasoning:

- no one but the court can or should do justice;
- courts of law must be established by law;
- courts of law must be independent and impartial;
- each defendant has the right to be tried by that court and by that judge in whose jurisdiction the criminal case is assigned;
- only a court can find a person guilty of a crime;
- no one can be found guilty and subject to criminal punishment on grounds other than based on a court decision that has entered into force.

Thus, the special legal status of the court and the procedure for administering justice are strictly regulated by law and are intended to ensure the legal and reasonable resolution of criminal cases in all jurisdictions.

This principle of criminal justice is rightly given the greatest importance, as it excludes the possibility of administration of justice by any body other than the court. In other words, the significance of this principle in the criminal process consists in the fact that it protects a citizen from the possibility of applying criminal punishment to him by any other body of the state, with the exception of the court of law, and therefore guarantees to every citizen the legality, validity, objectivity decision in a criminal case.

It most clearly embodies the real place of justice in the system of separation of powers and proclaims their key role in the resolution of legal conflicts arising in connection with a crime committed or in preparation.

The exclusive right of the court to administer justice is due to the special role and status of judges as representatives of the judiciary, ensuring their independence and subordination only to the law, as well as to the procedural procedure for administering justice, which provides: special guarantees for a legal and fair decision-making.

BIBLIOGRAPHY:

Specialized papers:

1. Dolea Igor și alții, Drept procesual penal, Editura Cartier Juridic, Chișinău, 2005.
2. Volonciu Nicolae, Tratat de procedură penală, Partea generală, Volumul I, Editura Paideia, București, 1996.
3. Guide regarding art. 6 of the Convention – The Right to a Fair Trial (criminal side), Council of Europe, European Court of Human Rights, 2014 (point 44). Available: https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ROM.pdf [accessed: 15.10.2022].
4. General Comment of the UN Human Rights Committee no. 32, CCPR/C/GC/32, from August 23, 2007, at the 90th session, Geneva, July 9-27, 2007 (point 2). Available: <http://hrlibrary.umn.edu/russian/gencomm/Rhrcom32.html> [accessed: 17.10.2022].

Legislation:

5. The Universal Declaration of Human Rights of 10 December 1948, approved in Paris, by the General Assembly of the United Nations.
6. The Convention for the Defense of Human Rights and Fundamental Freedoms, approved in Rome, on November 4, 1950. Available: https://www.echr.coe.int/documents/convention_roman.pdf.
7. International Covenant no. 31 of 16.12.1966 on Civil and Political Rights, adopted and opened for signature by the General Assembly of the United Nations on 16 December 1966. Entered into force on March 23, 1967, cf. art. 49, for the provisions with the exception of those from art.

- 41; on March 28 for the provisions of art. 41.
8. The Constitution of the Republic of Moldova of July 29, 1994. Published on August 12, 1994 in Official Gazette No. 1 art. p. 5.
 9. The Code of Criminal Procedure of the Republic of Moldova No. 122 of March 14, 2003. Published on June 7, 2003 in Official Gazette No. 104-110 art. 447.
 10. Law no. 789 of 26.03.1996 regarding the Supreme Court of Justice. Published on: 30.05.1996 in Official Gazette No. 32-33 art. 323.
 11. Law no. 514 of 06.07.1995 regarding Judicial Organization. Published on: 19.10.1995 in Official Gazette No. 58 art. 641.

National judicial practice:

12. PEPC of the SCJ of 28.02.2021. File no. 1re-10/2021. Source - jurisprudenta.csj.md/search_col_penal.php?id=17690.
13. DCC no. 21 of 23.06.97 regarding the interpretation of art. 114 of the Constitution of the Republic of Moldova (point 2). Official Gazette of the Republic of Moldova no. 45/24 from 10.07.1997.
14. DCC no. 47 of 27.04.2023 of inadmissibility of the notification no. 9g/2023 regarding the exception of unconstitutionality of the phrase "by absolute impossibility to appear in court" in Article 371 paragraph (1) point 2) of the Code of Criminal Procedure (reading the statements of the witness in the court session in his absence) (point 27).

ECHR practice:

15. ECHR Decision, Richert v. Poland, of 25.10.2011 (§ 43). Available: <https://hudoc.echr.coe.int/eng?i=001-107165> [accessed: 16.10.2022].
16. ECHR Decision, Findlay v. the United Kingdom, of 25.02.1997 (§ 77). Available: <https://hudoc.echr.coe.int/eng?i=001-58016> [accessed: 16.10.2022].
17. ECHR Decision, Padovani v. Italy of 26.02.1993 (§ 27). Available: <https://hudoc.echr.coe.int/eng?i=001-57812> [accessed: 16.10.2022].