

PRACTICAL CONTROVERSIES AND POSSIBLE ELEMENTS OF THE UNCONSTITUTIONALITY OF THE VIOLATION OF GUARD AND SECURITY DUTY THROUGH ALCOHOL CONSUMPTION BY MILITARY FIREFIGHTERS DURING THE INTERVENTION SERVICE

DOI:10.47743/rdc-2020-1-0003

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Abstract

This paper aims to present the controversies in the judicial practice related to the meaning of intervention service as an element of the criminal offence of the violation of guard and security duty provided for by art. 415 of the Criminal Code, committed by the military within the Romanian General Inspectorate for Emergency Situations through alcohol consumption in the exercise of the specific tasks of the intervention service and possible elements of unconstitutionality in this matter.

Keywords: *intervention service; violation of guard and security duty; control of constitutionality; the exception of unconstitutionality; alcohol consumption; military firefighters*

1. General considerations

The military firefighters from the Romanian General Inspectorate for Emergency Situations and the subordinated had enjoyed, ever since 1835, when the first unit of this kind in the country was established at Iași, a special consideration among the civilian population, their vocation and mission of saviors inspiring such sentiments. In the context of the pandemics generated by the SARS-CoV-2 coronavirus, their significant role for society has acquired new nuances, military firefighters and medical staff being the spearhead of efforts to manage this extraordinary phenomenon that humanity has not faced in the past 100 years.

In the current social context, this kind of military responsibility must increase by strengthening the rigor regarding the observance of military law and regulations, any

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deviation from the rules leading to loss of human lives and property. To strengthen the discipline and prevent such unfortunate events, a set of rules was implemented for the military, and part of these rules refer to guard and security duty. The consumption of alcohol during the exercise of duties flagrantly violates the guard and security duty, reducing the combat capability of the military regardless of their specialization, especially by the following harmful effects: decreased ability to react and handle the objects they work with, the difficulty of multitasking, the disorder or lack of response to optical and auditory stimuli, decreased activity of the central nervous system, decreased concentration, attention, reflexes and speed of movement.

From the necessity to protect the social relations regarding military order and discipline, to combat capability of the armed forces and those regarding the capacity of defending the country, that involves compliance with the violation of guard and security duty offence as provided for by art. 415 of the Criminal Code has corresponded in the provisions of the Criminal Code of 1969 in the offence provided for in art. 333, the violation of guard and security duty (which incriminated the violation of the rules of guard, escort or security service). The marginal title and the incriminating provision of the new regulation provide an update of the terminology in the term "infringement".

Just as in the previous legal provision, the violation of guard and security duty is an offence aimed at social relations regarding military order and discipline, requiring the military to perform the guard properly, intervention, escort, or security service¹, relations that require the timely performance by the military of duties of the service, orders regarding the observance by the military of the rules of guard service, of intervention, of escort, or security.

The legislator relinquished the guard service's mention both in the standard form and in the aggravating forms, being replaced with the service of intervention.

The standard form provided for in art. 415 para. (1) The Criminal Code refers to the violation of the rules of guard, intervention, escort or security service.

The aggravating form is provided for in art. 415 para. (2) of The Criminal Code and consists in the violation of guard and security duty by a sentinel on station at arms, ammunition or explosive depots, or in other stations of particular military or State interest.

The common aggravating form provided for in art. 415 para. (3) of the Criminal Code is formed by the acts stipulated in para. (1) and para. (2) committed in wartime, during a state of siege or a state of emergency.

¹ A. Crișu-Ciocântă, in T. Toader (coord.), *Noul Cod penal comentat*, Hamangiu Publishing House, Bucharest, 2014, p. 618.

The *security service* is organized and executed to ensure the security of the military objective, classified information, goods and material values held in any capacity existing within it. The security service is performed by the security system dispatcher and/or the security unit personnel.

The *technical security systems* are an integral part of the objective security system. They must ensure the prevention, warning, acoustic and/or visual signalling of violations of restrictions in areas where there are military units, protection of areas and deterrence of unauthorized access, general perimeter surveillance, access control and the movement of persons, including in areas with the special regime, selective access of persons, detection and alerting of intrusion, delaying/preventing the advance of the aggressor, detection, alerting and control of fires, mobilization of forces of intervention. The technical security systems consist of the subsystem of prevention, alerting, signalling, protection, perimeter detection, access control, burglary detection/alert, detection and alerting of hazardous materials, fire control detection and alerting, communications and informatics, surveillance with closed-circuit cameras.

The technical security dispatcher is the integrating element of all subsystems and performs the functions of command, control, communication, computers and information for all elements of the technical security system. The technical security dispatcher staff is usually made of the chief-dispatcher, shift leader, operators for the workstations and the control desk of closed-circuit cameras, technical team.

The intervention service is organized for its objective or, according to the provisions of the upper echelon, and for other military objectives to strengthen the security service and intervene in a short time to block, capture, or repel forces/elements that endanger the security of the military objective, as well as to limit or eliminate the effects of disasters, fires and other critical situations. Depending on the threats and dangers that may have consequences on the security of military objectives, the intervention is carried out with the soldiers in the composition of the patrols, when the guard is executed in shifts or with the soldiers in the shift at rest, when the guard is organized in shifts and executed on the duration of at least 24 hours, with structures consisting of staff intended for this service, where they are provided, or of own staff organized in teams, trained and trained for this purpose or with staff belonging to specialized security and protection companies, only for military objectives where these companies provide security².

² V. Dobrinou (coord.), I. Pascu, M.A. Hotca, I. Chiş, M. Gorunescu, C. Păun, N. Neagu, M. Dobrinou, M.C. Sinescu, *Noul Cod penal comentat, Partea specială*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2014.

2. Service of intervention. Violation of guard and security duty through alcohol consumption during the exercise of the service

By violation of guard and security duty, we understand the action against these provisions or the acts of ignoring or not fulfilling them; the offence is determined on a case-by-case basis, being either commissive or omissive.

The intervention service is the form of the internal service as defined by the Regulation of the Internal Service, approved by Order M.97/2014 of the Minister of National Defense, or the service for intervention in emergencies as defined by the normative acts specific to the county inspectorates of gendarmes and emergencies³.

Per art. 5 of the Order M.97/2014 of the Ministry of National Defense, the internal service exercise is an attribution of the military personnel, except for the military for which the relevant normative acts provide exceptions.

Per art. 12 of the Order mentioned above, the intervention service is organized for its objective or, according to the upper echelon, and for other military objectives, with the purpose to support the guard service, to intervene for blocking, capturing or driving back the forces or elements that endanger the security of the military objective, as well as to limit or eliminate the consequences of disasters, fires and other critical situations.

Also, per art. 68 para. (2) of the Garrison Regulation of 15 July 2010⁴, in all garrisons, the following are to be exercised:

- a) Service of permanence;
- b) Service of control;
- c) Intervention service;
- d) Public relation service.

Per art 73 of the Order M97/2014 of the Minister of National Defense, the intervention service is organized to support the personnel for control and re-establish the discipline within the garrison. Interventional patrols exercise this.

The interventional patrol consists of commanding petty officer and several soldiers and ranked volunteers, depending on the importance of the mission and the possibilities of insurance, usually among the military police units in the garrison. The

³ The Regulation of the Internal Service, approved by Order M.97/2014 of the Minister of National Defense, was published, in the extract, in the Official Journal of Romania, part I, No. 745 of October 13 2014. In the same sense, the Order of the Inspectorate for Emergencies No. 13/IG of October 29, 2019 refers to the organization and the exercising of the service of permanence in the General Inspectorate for Emergencies (IGSU) and its subordinated units, and the Order of the Inspectorate for Emergencies No. 1515/IG of June 21, 2018, refers to guard and access in the units under the General Inspectorate for Emergencies.

⁴ Published in the Official Journal of Romania, part I, No. 554 of August 6, 2010, approved through Order M.6 of January 7, 2010, of the Ministry of National Defense, Order No. 18 of January 26, 2010, of the Ministry of Administration and Internal Affairs, Order No. 1.675/C of June 24, 2010, of the Ministry for Justice, Order No. 350 of July 23, 2010, of the Special Telecommunications Service, Order No. 10.088 of July 2010 of the Romanian Intelligence Service.

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interventional patrol possesses arms, ammunition, mobile liaison equipment and travels by means of transport.

In the areas where there are military units of the Ministry of Internal Affairs, the interventional patrol is mixt; in this case, the highest in rank is the patrol commander⁵.

In the judiciary practice after February 2, 2014, of the Military Prosecutor's Office attached to the Military Tribunal of Iasi, several court referrals (indictments and plea agreements) were identified for committing the offence of violation of guard and security duty by the military of the Ministry of Internal Affairs by violating the provisions prohibiting the consumption and presence under the influence of alcohol during the intervention service, the vast majority confirmed through convictions.

Per one such conviction pronounced by the Military Court of Appeal of Bucharest⁶, it was found that such an act of non-commissioned officer within an Inspectorate for Emergencies concerning the provisions of O.M.A.I. No. 119/2016 (currently repealed) and the Order of the Inspector General of I.G.S.U. No. 155/I.G. of March 3, 2015, which establish the rules of the service of the permanence of which the operative service is part, meets all the elements of the objective and subjective typicality of the offence as provided for by art. 415 para. (1) of the Criminal Code.

At the time of the offence, the military firefighter was scheduled for the operative/day service, his purpose being to monitor, manage and report data and information of operational interest. Alcohol consumption is prohibited during the performance of duties, the duties of the activity being incompatible with alcohol consumption or intoxication.

Given that the unit of which the military was a part is a unit that is subject to military rules, the Order of the Minister of National Defense (M.Ap.N.) No. 158/2018 is applicable, which provides for in art. 8 that the service of permanence is organized and exercised to ensure the coordination and monitoring of activities, maintain the operational capacity of military structures in any situation, day and night, and comply with military discipline and internal order rules.

On the occasion of judging the appeal declared by the military, the Military Court of Appeal of Bucharest began its analysis from the fact that the performance of the guard, intervention, escort or security service requires from the military strictly to fulfil their duties, duties that are usually specified in a record. In the literature, starting from the special regulatory provisions regarding the organization of guard, intervention, escort or security services, the notion of guard and security duty is defined as the totality of general or special duties, provided by these provisions, which fall to the military with on the occasion of the exercising of a mission, which relates to these services, as well as

⁵ I. Rotariu, *Infrafracțiunile contra capacității de luptă a forțelor armate*, Ed. Militară, Bucharest, 2020, p. 91.

⁶ Decision No. 68/18.11.2019 of the Military Court of Appeal of Bucharest, in criminal case No. 91/739/2018 of the Military Tribunal Iasi, unlisted.

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any other written or verbal provision transmitted for the performance of these missions.

Simultaneously, a distinction is made between the general record, which refers to all the permanent general duties provided by the special regulatory provisions and the particular record, which means all the particular duties determined by superiors.

Compared to the significance of guard, intervention, escort or security services, non-compliance with the rules represents a violation of military order and discipline, leading to severe consequences.

Applying these theoretical considerations in the referenced case, the court of judicial control held that the military firefighter's violation of his duties, provided in the provisions governing the intervention service, falls within the scope of application of art. 415 of the Criminal Code.

Per art. 1 para. (1) of the Order of the Minister of Internal Affairs (O.M.A.I.) No. S108/2011, in the units of the Minister of Internal Affairs, two categories of services are organized: the operative/day service and the guard and protection service. At art. 29, the same Order establishes the operative/intervention structures' attributions, specifying that they are destined for the intervention in the first urgency to fulfil the specific missions given in the competence of the unit/structure.

According to the Order of the Inspector General of the I.G.S.U. No. 155/I.G. of 13.03.2015 regarding the organization and execution of the service of permanence in the General Inspectorate for Emergencies and the assigned units, the permanence service includes the operative service, the day service and the guard and protection service. According to art. 20 of the same act, the operative service is ensured through the following structures: dispatcher, operative group and service shift.

The Order of the Minister of Internal Affairs No. 119/2016 published in the Official Journal of Romania No. 634/18.08.2016 stipulates in art. 3 that the provisions of chapters I-IV and VII of the annex to the Order of the Minister of National Defense No. M.64/2013 for the approval of the Regulation of military discipline, published in the Official Journal of Romania, Part I, No. 399 and 399 bis of July 3, 2013, also apply to the military of the Ministry of Internal Affairs, except for the provisions governing the matters covered by this Order.

The non-commissioned officer found under the influence of alcohol during the intervention service was obliged to comply with military laws and regulations by military oath.

According to the provisions of art. 8 (b) of Law No. 80/1995 on the status of military personnel, with subsequent amendments, military personnel is obliged to comply with the military oath and military regulations, which also include the Regulation of military discipline, Order of the Minister of National Defense (M.Ap.N.) No. M.64/2013, where

at art. 47 para. (1)(g) stipulates that the presentation at the program or the entry into service under the influence of alcoholic beverages or their consumption during the program, service, exercises and missions constitute violations that compromise military honor and dignity.

Additionally, art. 50 of the same Order states that military discipline deviations are disciplinarily sanctioned only if they do not constitute criminal offences.

The military had been instructed on the legal provisions regarding the exercise of the monthly permanence service, on the balance of the duty shift for the previous month, respectively on the orders received from the upper echelons regarding the alcohol consumption in the unit, as it results from the documents in the case file.

It is true that in art. 2 para. (1)(a) of the O.U.G. No. 21/2004 on the National Emergency Management System that applies to IGSU personnel, the emergency is defined as an exceptional event with a non-military character. However, the intervention mission in case of manifestation of such situations retains its military character.

In this regard, the appellate court took into account the military status of the firefighters within the I.G.S.U., the emergency response mission being organized and operating based on special regulatory provisions that apply to military personnel.

Therefore, per art. 12 of the Annex No. 1 of the Order of Minister of National Defence (M.Ap.N.) No. M97/2014, published in the Official Journal of Romania, part I, No. 745/13.10.2014, the intervention service is organized for its objective, in accordance to the orders of the upper echelon, and for other military objectives, for supporting the guard service, to intervene in a short amount of time for blocking, capturing or repelling the forces/elements that endanger the security of the military objective, as well as limiting or eliminating the consequences of disasters, fires and other critical situations⁷.

At the time of detection, the military firefighter was scheduled to perform the operative service - duty shift as a servant 3 to the fire truck AT9000, which involved participation in rescue actions of people caught in fires well as actions of fire location and liquidation.

However, if such an event had taken place due to the intoxication and the effects of alcohol on the body, the military would not have been able to carry out his duties, a circumstance that could have had generated severe consequences.

For all these reasons, the Military Court of Appeal of Bucharest did not share the same arguments put forward in support, during the first ground of appeal, according to

⁷ Translation from the original Romanian article: "Serviciul de intervenție se organizează pentru obiectivul propriu sau, potrivit ordinelor eșalonului superior, și pentru alte obiective militare, cu scopul de a sprijini serviciul de pază, de a interveni în timp scurt pentru blocarea, capturarea sau respingerea forțelor/elementelor care pun în pericol securitatea obiectivului militar, precum și pentru limitarea sau înlăturarea efectelor dezastrelor, incendiilor și altor situații critice".

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which the act of the military firefighter is not provided by criminal law, but would constitute only a disciplinary offence, and ordered conviction.

In the pronounced decision, there was a separate opinion in the sense of not engaging in criminal liability, but only of the disciplinary one, support that takes the form of a minority opinion from the judicial practice in this matter, as follows:

The offence of violating the guard and security duty as provided for in Title XI of the Criminal Code under the name of offences against the armed forces' fighting capacity and, therefore, the protected social purpose is the combat capacity of the armed forces.

In the indictment, the facts also held by the first court consisted in the fact that the military firefighter violated the rules of the intervention service in which he was to exercise with the unit within the Inspectorate for Emergencies of which he was part, by consuming alcoholic beverages during this service.

The operative intervention is defined by art. 2 (a) of the O.U.G. No. 21/2004 regarding the National Emergency Management System, as the actions carried out, in due time, by the specialized structures to prevent the aggravation of the emergency, limiting and eliminating, as the case may be, its consequences.

The emergency is also defined by the O.U.G. No. 21/2004 in art. 2 (c) as exceptional non-military events. As the intervention is meant to prevent and aggravate a non-military situation, the defendant's actions could not affect the armed forces' fighting capacity.

Besides, crimes and punishments are established only by law, the analogy not being allowed in criminal law. In the absence of an express provision in the primary normative act from which to result in the prohibited conduct, in concrete, and the fact that the operative intervention service of the I.S.U. has a military character, aiming at the fighting capacity of the armed forces, the judge considered that the act of the military, although illegal, has no criminal character, not being provided by the criminal law, the acquittal being based on the provisions of art. 16 para. 1 (b) first part, of the Code of Criminal Procedure.

3. Possible elements of unconstitutionality of the violation of guard and security duty committed through alcohol consumption during the intervention service

Among criminal law practitioners, there are opinions⁸ that state that the legal phrase „rules of intervention service”, representing an element of objective typicality of the crime of violation of guard and security duty, is lacking in clarity and predictability,

⁸ The exception of unconstitutionality invoked in the criminal case No. 91/739/2018 of the Military Tribunal Iasi, is the object of the case No. 2828D/2019 of the Constitutional Court of Romania, in the reporting stage, unlisted.

being contrary to art. 1, art. 21 (referring to the right to a fair trial), art. 16, art. 49 and art. 53 of the Romanian Constitution. These criticisms of unconstitutionality are mainly based on the argument that the rules of the security, intervention, escort or security service are usually provided for by normative acts with less force than the law (order - administrative normative acts) or even decisions of the heads of the respective units concerning the obligatory recitals No. 65, 70 and 85 of the Decision of the Constitutional Court of Romania (C.C.R.) No. 405/2016 of 15.06.2016⁹, where it is specified that the rules whose violation is criminally sanctioned must be provided for by law and not by acts with inferior legal force.

Also, the violation must be of specific gravity to be sanctioned, in all cases, the military units having at their disposal the disciplinary leverage. Democratic standards of justice and, in particular, the case-law of the European Court of Human Rights (ECHR) have established that the imposition of a criminal sanction is a violation of the right to a fair trial, provided that a disciplinary sanction could be applied. This determines consequences of inequality before the law, in the case of abuse in office, a much more severe crime, the standard of criminal repression is the violation of the law of a certain gravity.

Following the mandatory considerations No. 65, 70 and 85 of the Decision of the Constitutional Court of Romania No. 405/2016 of 15.06.2016 by reference to the legal phrase "rules of the intervention service", we note that, by analogy, art. 415 para. (1) of the Criminal Code is not applicable, for the following reasons:

The Constitutional Court found that the provisions of art. 246 of the Criminal Code of 1969 and art. 297 para. (1) of the Criminal Code are constitutional insofar as the phrase "implements it faultily" in their content means "implementing in violation of the law". Abuse in office is a offence of result, but the violation of guard and security duty is a dangerous offence, simple alcohol consumption or any violation of the rules established and known by the military leading to the existence of the offence in Title XI of the Criminal Code. The military firefighter does not exercise duty in a faulty manner causing damage but does not refrain from such unlawful conduct, the consumption of alcohol with all its harmful effects which may lead to damage or injury to the physical integrity or life of a person whom he is obliged to protect by the nature of his rescue mission of intervention in emergencies.

The mere non-fulfilment of the optimal physical and mental parameters of the military firefighter in the exercise of the intervention service represents a severe violation of the social relations regarding the military order and discipline, as well as those regarding the combat capacity of the armed forces with that degree of intensity to justify the criminal sanction. Decreasing the fighting capacity of military firefighters following alcohol consumption can lead to the possible impairment of other fundamental values such as the life, physical integrity and wealth of a person who

⁹ Decision published in the Official Journal of Romania, No. 517 of 08.07.2016, part I.

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represent the legal values that deserve criminal protection; the rule of law must pay attention to the constitutional principle that criminal law should only be used to protect property and legal values that deserve criminal protection.

4. Conclusions

Alcohol consumption by military firefighters during the intervention service is not only a disciplinary offence but attracts criminal liability in terms of the crime of violation of guard and security duty provided for by art. 415 para. (1) of the Criminal Code, and the phrase “rules of the intervention service” is a precise, predictable and following the constitutional norms, taking into account the provisions of the Order of the Inspector General of the General Inspectorate for Emergencies No. 1527/IG from 09.10.2018. According to art. 1 (e) of IGSU personnel, respectively active military personnel, soldiers/ranked volunteer, civil servants, contract staff, students of the School of Fire and Civil Protection Non-Commissioned Officers “Pavel Zaganescu” of Boldesti and students of the Faculty of Firefighters within the Police Academy “Alexandru Ioan Cuza” (only for the period when they are in practice at the subordinated units of IGSU) they are forbidden to consume alcoholic beverages during the performance of specific missions, especially during the intervention service.

Per art. 2 para. (6) of the same normative act previously mentioned in the situation of consumption or reasonable suspicion of the consumption of beverages during the performance of specific missions and even more so during the intervention service, in the case of military personnel, the competent Military Prosecutor’s Office will be notified in connection with a possible crime of “violation of guard and security duty”, provided for by art. 415 of the Criminal Code.

We can conclude, beyond any doubt, that by this regulation, it is obvious the criminal nature of the consumption of alcoholic beverages during the intervention service, being able to establish a criminal liability in perfect accordance with the provisions of the Fundamental Law of our legal system, thus removing legal interpretations likely to eliminate from the sphere of criminal wrongdoing behaviors that the legislator of 2014 wanted to be criminally sanctioned, thus protecting social relations on military order and discipline, the fighting capacity of the armed forces (including military firefighters within the IGSU) and implicitly, the protection of significant social values such as life, physical integrity and wealth of a person.