Abstract: The expungement is characterized in Criminal Law by its consequences. These consequences, institutionally representing the essence and the specific character of expungement, are common to both expungement by law and judicial one. Expungement acts purposely to abate the consequences of punishment, either these are criminal (such as some complementary sentences), or these are non criminal (civil or administrative consequences). These consequences meet the case to the reason which necessitated the regulation of expungement – criminal law is not meant to irredeemably affect offenders – as well as the purpose of this institution: the offender’s social reintegration due to good conduct. As it is, once the main punishment ceased, the offender also has to serve complementary noncustodial sentences, when pronounced.

Key words: expungement, justice, Criminal Law, punishments, terms

JEL Classification: K 14

General characterization

According to the article 133, first paragraph, Criminal Law, expungement, irrespective of its form, causes to cease the terminations of rights and interdictions, as well as the incapacities following a conviction.

Once the punishment ceased – in some cases when special laws provide it- the offender is subject to some non criminal consequences which proceed from the mere sentence pronounced.

In both cases, the offender’s judicial capacity is affected, diminished by reason of these consequences.

Therefore, expungement determines the sentence to cease the criminal status of the punishment; this punishment is not taken into account when establishing the relapse status, the offender is judged as if he was a primary offender.

The sentence, expungement interfered at, is no longer considered a criminal status when it comes to conditional remission of sentence (article 8, division b, Criminal Law).

When there are successive sentences, expungement cannot be partial, it acts compulsorily on all concurrent sentences and it is considered indivisible.

Limits

Under article 133 Criminal Law, expungement has limited effects on the terminations of rights and interdictions, as well as on the incapacities following a conviction.

a) The exceptions to these restricted consequences are precisely stipulated under the same 133 article.

Thus, expungement is not compulsorily followed by the investment in the same position the offender lost when he was convicted, or by recalling up to military service of permanent effectives, or by giving back the lost rank.
Under article 133, last paragraph the expungement has no longer effects on safety measures, except those under article 122, division d (the interdiction to be in some cities).

b) The exception to the lack of compulsory investment the offender has lost, does not mean at all that the expunged will not be able to ordinarily regain the issue he had lost due to his conviction.

The expunged one could be reinvested and actually could hold the position he had had before his conviction or a similar position. This exception is justified by the necessity of any efficient activity; under any circumstances, the employees who came to hold the vacancies due to conviction of previous employees cannot lose their current positions as a solution to the reintegraion of expunged ex-offenders.

c) As for the exception to safety measures, this one is legitimated by the nature of the measures taken as long as there may be a social jeopardy which cannot be taken away throughout expungement.

Following some infringements of the law and in some conditions, we can take safety measures towards offenders. They are taken in order to remove the social jeopardy in case of acts of infringement by some offenders who are socially dangerous, given their way of life or their psychological condition. The court can interdict the offender to be present where the infringement took place or other areas named through sentence, if his presence is considered a grievous jeopardy.

This measure in order to prevent any danger as a consequence of the offender’s conduct can be taken into account when expungement is intended, because a good conduct of ex-offenders implies the removal of social jeopardy.

d) Regarding the expungement in a foreign country, this will have the same effects as the expungement in our own country, in fact the sentence that has been previously recognized in our country based on the acknowledgment rules of a verdict in a criminal trial.

In addition to judicial consequences, we may also pay attention to moral consequences; the satisfaction the ex-offender has when he is fully reintegrated by the society, the trust and appreciation of the others definitely need a mention.

The object of expungement

As under article 133, Criminal Law, expungement acts on the terminations of rights and interdictions, as well as the incapacities following a conviction. The terminations of rights or other restrictions regarding the offender’s rights are consequences of the sentence pronounced by the court. Consequently, this sentence becomes object to expungement.

Whether willing or unwilling, the sentence must be considered a precondition for expungement and its object is given by the consequences that proceed from the sentence.

For example, Criminal Law does not expel from expungement any sentence, no matter the conviction, even the case of a fine. The sentence has to concern a punishment that has been served in any way stipulated by law.

The effects that the consequences of expungement have had before the intervention of expungement, cannot be considered object to expungement.

The law, through its stipulations regarding the consequences of expungement, the terminations of rights and restrictions, even more certain in reality, acts so that disposition of expungement should not have future effects (for example, it cannot create the relapse condition or prevent from granting conditional remission of sentence).

As it has been previously mentioned, the civil stipulations of the sentence are not served throughout the consequences of expungement, because the duty to repair the moral side of a criminal act should not fall under the provisions of those termination aspects of the criminal side of an action.

Expungement removes the consequences of the conviction, we mean judicial effects either criminal or non criminal, either permanent or long lasting, all of them following a penal conviction. These consequences cause judicial disadvantages to the offender (such as the incapacity or the interdiction to hold certain positions or to exercise certain rights). These consequences concerning the benefit or the exercise of certain rights are stipulated by penal law, either through regulations belonging to different branches of the Law (for example, civil law, administrative law).
Non criminal consequences laid down in order to achieve safety for mutual interests are different from those criminal consequences which have features of punishment or may have detrimental effects when it comes to individualize the punishment.

Judicial expungement

Notions, Specific Features

The specific feature of judicial expungement arises from the fact that – in comparison to the expungement by law, which is automatically given (ope legis) – is acquired following judicial procedure (ope judis), thus expungement becomes applicable. Otherwise stated, the specific feature comes from the fact that there is not enough for the offender to meet the expungement conditions, but these conditions must be ascertained by the court. The sentence that stipulates the expungement form is eventually pronounced by the court. Due to the fact the judicial expungement sphere includes grievous punishments, so that the presumption of rehabilitation of ex-offender cannot be accepted unless it was seriously examined; to meet conditions the law stipulates is not equal to attaining expungement. On these grounds, the waiting periods, when it comes to judicial expungement, are longer and changeable according to the offender's amount of penalty who requested expungement.

The sphere of application

Virtually, judicial expungement can be requested and obtained by any convict for any sentence. This possibility issues from the law, from the series of dispositions mentioned in article 133, Criminal Law.

Therefore, any offender can request for expungement even if the sentence, that makes object of his request, does not imply any termination of rights, interdiction or incapacity.

In order to take into account the request for expungement, the convict can be either Romanian or foreigner, but the punishments he was convicted for are enough if pronounced by a judicial court in Romania.

The first category includes sentences to prison of more than one year and up to five years for any offence. Therefore, according to article 134, here are included sentences that can’t receive expungement by law.

The second category includes sentences to prison of more than five years and up to ten years.

The third category includes sentences to prison for more than ten years.

The fourth category includes life sentence; life sentence replaces sentence to death. We can see that the area of application for judicial expungement is larger than the area for expungement by law.

As it has been shown before, judicial expungement is applicable to all offenders, no matter the type or the period of the sentence the judicial court has pronounced.

The waiting periods for judicial expungement

Criteria for distinction

In order to make distinction among waiting periods for expungement, Criminal Law makes use of two criteria: one waiting period is given by a determined period of time and the other by a fraction of the sentence period that makes the object of conviction.

The first criterion is determined by the conviction category, according to all four categories under article 135 and the second criterion is determined by half reduction of the sentence the offender received. Therefore, one side of the waiting period for judicial expungement is exclusively determined by all four categories under article 135 and the other side of the term is relatively determined in accordance to the duration of the sentence pronounced by a judicial court.

Thus, each sentence has its own waiting period for expungement, which is exactly established. Of course this is a reasonable regulation.
As the grievous aspect makes the deeds distinctive – thus the punishments could be individualized due to their grievousness – so there has to be the possibility of individualization for the waiting period for expungement depending upon the sentence pronounced. Thus the determined waiting period for the expungement could be: four years for the first category (article 135 division a “in case of imprisonment for more than one year and up to five years, after a period of four years, half of the sentence pronounced is added”); five years for the second category (article 135 division b “incase of imprisonment for more than five years, half duration of the sentence pronounced is added”); seven years for the third category (article 135 division c “in case of imprisonment for more than ten years, after a period of seven years, half duration of the sentence pronounced is added”); seven years for the fourth category (article 135 division d ‘in case of life sentence replaced by imprisonment, after seven years half duration of the sentence to prison is added”);

To each of this invariable side of the waiting period for expungement, we add the relatively determined side as under law; it is equal to the half duration of the sentence pronounced by the court. Through the first invariable side issues the individualization in accordance to the sentence category, through the second side, in accordance to the duration of the sentence. Thus there can be obtained a differentiated rational term for each convict; this term gives him the opportunity to correct and readopt an honest living and to obtain at its end the expungement.

As per article 135, the last paragraph, the waiting period which is different in accordance to the conviction category and the grievousness of the punishment that makes the object of the sentence given by the judicial court, can be reduced. This disposition takes into account the omission of the same invariable solutions in order to solve some issues when the person who requested expungement had an exceptional conduct, acted heroically; so the waiting period for expungement the law established seems to be too long. In such cases – so called “specials” in Criminal Law, Attorney General has the possibility to reduce waiting periods for expungement.

**The calculation of waiting periods for expungement**

As any waiting period, the waiting periods for expungement have a starting and an ending point. These two define the time period on which account the convict’s conduct becomes relevant and is submitted to verification. According to this conduct the expungement by law cannot be requested but for judicial expungement.

Having a start (a quo) and an end (ad quo), there is a must for some rules in order to count the expungement term.

a) As per article 136, paragraph 1, Criminal Law, the waiting period under article 135 Criminal Law, regarding judicial expungement, started when the punishment was served or when the punishment was extinguished. When the offender received a custodial sentence equal to the penal safe-keeping that finished before the final judgment, the waiting period for expungement began when the final judgment was pronounced and not when the penal safekeeping came to an end; in order to consider a punishment served, this has to be qualified for execution and this fact is not possible before the final judgment.

b) The same method is applied in order to count the fulfillment of the waiting period for expungement, so then as per article 38, last paragraph, Criminal Law, the relapse is going to be ascertained.

When the punishment the offender had served, was the result of the amassment of two punishments – one for the offence committed during a conditioned pardon attempt and the other for a previous penalty that revoked the benefit of pardon – the waiting period for expungement is not reckoned according to the duration of both punishments, summed up, as they had been served, but according to the duration of the longest punishment.

To establish the beginning (dies quo) is important for the determination of the end (dies ad quem) namely the date when the waiting period for expungement is considered as fulfilled in order to apply expungement by law or to request for judicial expungement.
The beginning of the waiting period for expungement is important for the ex-offender who is going to benefit from expungement because he has to be aware since when his conduct becomes relevant, in order to obtain expungement by law or judicial expungement, also because the court, empowered to verify the condition covered by law, has to take into consideration this initial moment.

The waiting periods for expungement, stipulating the incidence of a penal court, have the features of substantial periods. So these periods are reckoned according to the disposition under article 154, which establishes that the month and the year are considered fulfilled, a day before these periods started.

As it has been shown before, the disposition under article 136, Criminal Law, establishes the initial moment (dies a que) when the main punishment to be served comes to an end.

Logically, this should be the starting point for the waiting period for expungement, because as long as the punishment is not served, the offender still has the obligation to serve his sentence. So, it is not possible for the waiting period for expungement to start on, as long as the punishment could still be served.

To serve a punishment could be done in different ways; this aspect has an influence on the differentiated decision over the starting point for the waiting period for expungement.

To serve a punishment, as per article 136, Criminal Law, is the main way of extinguishment. For custodial punishments, the end of the punishment coincides with the beginning of the waiting period for expungement. The punishment is entirely served, the day the offender is out of prison.

Therefore, the day the punishment is served, coincides with the first day of the waiting period for expungement. When the punishment is served at the workplace, the first day the punishment has ceased is the first day of the waiting period for expungement. The law refers to the main punishment, except for the complementary punishments, which execution starts since the extinguishment of the main custodial punishment.

The main punishment, which extinguishment marks the beginning of the waiting period for expungement is applicable for a unique offence or a conjunction of penalties. As for successive penalties, the offender can be expunged after the term of the sentence for the grievous punishment has come to an end; this term is stipulated by law and begins after the last punishment has been served. If for the last of these sentences conditional remission has been pronounced, the waiting period for expungement for the previous sentences starts when the probation period has come to an end, because, even if the expungement by law interferes for the last sentence, this become applicable at the end of the probation period; till then the petitioner is considered as having conditional remission of sentence and the waiting period for expungement and this begins when the punishment is served.

When the offender is released on probation, the waiting period for expungement has not the same staring point as the probation period, but it will begin the moment the punishment is served.

The prescription is another way to serve a sentence; that is way the lawmaker stipulates that, in this case, the expungement begins at the end of the prescription period (article 126, 136, Criminal Law) taking into account the possible interruptions during the prescription period (article 127, Criminal Law).

As for a sentence of fee, the waiting period for expungement starts when the fee is fully paid or the sentence is served in any other way.

Pardon is another way to serve the punishment. The starting point for the waiting period is reckoned in accordance to the type of pardon. Thus, for complete pardon or pardon for the remaining punishment period, the waiting period for expungement starts at the issue of the decree of pardon, because this is the end of serving the punishment.

The rule is applicable to the sentences that at the moment of decree of pardon are final sentences.

When pardon concerns sentences pending, the waiting period for expungement begins when the final sentence is given for the pardoned punishment, namely after the act of pardon, because,
since this very moment pardon proceeds its ex-
tinctive effect.

As for partial pardon, when the punishment is
reduced, the waiting period for expungement starts the moment the reduced punishment is
served.

The fulfillment of the expungement period
represents an essential condition, so the request
for expungement cannot be accepted if this condi-
tion is not accomplished. That’s is why, if till the
death of the offender the waiting period for
expungement is not achieved, the expungement
requested by husband/wife or by close relatives
of the ex-offender, cannot be accepted, because
is requested before its legal terms.

The date of pardon is considered the publica-
tion date of the decree of pardon, because the par-
don gives the offender the opportunity to regain
a right that has to be accomplished immediately,
precisely the moment the document giving the
offender this right is issued.

Special situations

As for reckoning the waiting periods for
expungement, there could be some special situ-
a
tions.

a) The first issue could be the interruption of
the waiting period by committing another offence.
The waiting period for expungement is inter-
rupt uped when the offender infringes the disposi-
tions under article 134, Criminal Law, these are
necessary to achieve expungement and any other
offence should not be committed along the
expungement period.

As for expungement by law, the interruption
occurs automatically (ope legis), similarly to the
fulfillment of the waiting period for
expungement.

Regarding judicial expungement, there is a to-
tally different situation, because the court will take
into account any aspect of the offender’s conduct,
so when a new offence is reckoned, the offender’s
request for expungement is denied. The interrup-
tion determines the removal of the duration until
the moment of the offence from the waiting pe-
riod for expungement; this period will not be
taken into account for expungement and conse-
quently the new waiting period will begin the mo-
ment the sentence pronounced for the new of-
face is served.

The new period for expungement is estab-
lished in accordance to the grievous punishment
for previous offence, if this is more grievous one
than the punishment for the previous offence, or
the other way round if the punishment given for
the last offence is the most grievous.

b) A second special issue concerns successive
sentences. For this matter we have to take into
account that each successive sentence stands to
reason the interruption of the waiting period for
expungement (for previous sentences), so a new
period for expungement will begin the moment
the last punishment is served in any way.

When a later sentence concerning an offence
that took place after the waiting period for
expungement had been fulfilled for a previous
sentence, the expungement thus achieved is avail-
able.

As for successive sentences, if the last sen-
tence has been pronounced with conditional re-
mission, the expungement period begins the mo-
ment the probation period is fulfilled.

c) A third specific situation is considered when
the final sentence is equal to the period the of-
fender has spent in custody. For this situation,
the waiting period for judicial expungement starts
the moment the final sentence is pronounced be-
cause this time the reason for serving the sen-
tence is taken into consideration.

If the offender is set free on probation (article
59, Criminal Law), the waiting period for
expungement does not begin the moment the sen-
tence should be served completely.

Conditions for judicial
expungement

The conditions to be satisfied for achieving
expungement stand to reason the presumption that
the ex-offender has readapted himself to freedom
and it is proper for him not to be prejudiced by
any consequence that could occur from the pre-
vious sentence. We can leave aside the worry the
lawmaker, taking into account these conditions
establishes who of those offenders previously
having infringed the law, should benefit in the future from its protection.

As it has been stated before and written in law, judicial expungement concerns severe sentences given to socially dangerous offenders and naturally demands a legal conditioned background.

The condition to be satisfied in order to reach judicial expungement can be found under article 137, Criminal Law and concerns the further situations when the request for judicial expungement is admitted if:

a) he has not been sentenced again during the period mentioned under article 135 Criminal Law;

b) he can make a living working or by any other honest means, as for the case when he has the adequate retirement age or he is disabled to perform work;

c) he has a good conduct;

d) he has fully paid court fees and any civil compensation he was obliged to pay for, except the case when the injured part withdrew the request for compensation, or when the court has found that the offender constantly achieved his obligations concerning the civil dispositions from the sentence;

When the court finds that condition as per division d is not reached, but this fact is not due to the offender’s bad will, the court can order expungement.

The court, on judicial order “admits” – as under article 137, paragraph 1, the request for expungement - the court only pronounces the fulfillment of imperative and imposed conditions. The law does not give the right to the court to appreciate whether the ex-offender deserves or not to be expunged or whether the admission of the request for expungement is or not suitable.

The Content and Mission of these Conditions

The moment when the lawmaker established the conditions to achieve expungement and made them part of the law, he did not take into account any hierarchy; the lawmaker considered that all conditions, from a judicial point of view, were equally important and to miss the fulfillment of any of these conditions could have led to the non-admission of the expungement.

a) The first condition to be satisfied is that the petitioner for judicial expungement should not receive another sentence during the waiting period for expungement.

At first sight, we could say as for this condition, there is a difference between expungement by law and judicial expungement, because expungement by law (disposition under article 134, first paragraph, demands that the offender should not have committed another offence while judicial expungement, disposition under article 137, division 4, demands that the offender should not “receive a new offence”. This so-called distinction is only formal because the conditions under article 137, division a, are completed by article 137, division c, stipulating the fact that the offender should have had during the waiting period for expungement “a good conduct”, and this condition is not satisfied if the court finds that the offender has committed another offence.

If two sentences correspondent to expungement by law but before the fulfillment of the waiting period the law stipulates, the offender commits another offence submitted to judicial expungement, the expungement for all three sentences is ordered according to the legal disposition for judicial expungement.

The adequate characterization of expungement ways and the acknowledgement of the conditions where this could occur, represent an obligation of the judicial court.

When the offender receives a new sentence after the fulfillment of the expungement period, this sentence does not stand for the non-achievement of the condition as per article 137, division a, because the law text makes reference to the sentence during the waiting period for expungement.

A new sentence received during the period stipulated under article 135, Criminal Law, determines the denial of the request for expungement. The request can be renewed after the fulfillment of the new waiting period.

If there are new accusations, the benefit of expungement is not in vain, the request will be
suspended, as per article 500 Criminal Law, that stipulates “if, before solving the request for expungement a new penal action is initiated for a different infringement of the offender, the evaluation of the request is suspended until the final sentence for the new accusation”.

b) The condition under article 137, division b, Criminal Law, has a double purpose, on the one hand the exclusion from the benefit of expungement of those persons who do not live an honest life, who did not earn an honest living, and on the other hand the stimulation of the ex-offenders to get reeducated. Thus, the attitude towards work represents one of the main criteria in order to assess their rehabilitation. To perform work generating social benefits and the means for an honest living are enough for the offender, no matter the area or the working are and conditions.

As humanity is an important feature of the Romanian lawmaker, he has already considered fulfilled the condition regarding the honest living for those persons who reached retirement age or became unable to perform work.

As it has been stated before, the ex-offenders, dealing with their own country farms or handicrafts-wares, have an honest living through their work.

The same situation is for those who perform seasonal work, of course, if their intention is to earn an honest living.

For the regulation the lawmaker stipulated, this condition is an argument of the presumption the ex-offender got reeducated and turned into a trusty honest person for the society.

c) In order to reckon correctly if the condition under article 137, division c, Criminal Law- the petitioner should have had a good conduct- it is necessary to examine the offender’s conduct at work and his social conduct along the waiting period for expungement.

If this request is not adequate, considering the fact that the offender has not readapted himself to the social rules, the condition under article 137, division c, Criminal Law cannot be considered fulfilled even if amnesty expels the penal liability, the offence still has to be taken into account in order to decide expungement as per conditions under article 137, division c, Criminal Law.

In order to establish if the condition under article 137, first paragraph, division c, Criminal Law, the court has to deal with evidence that proves the social, professional and familial conduct of the offender.

If the petitioner is found guilty and consequently sentenced by the court for robbery, the condition regarding the good conduct is not fulfilled. The opportunity the ex-offender has to regain his social status is based especially on this good conduct evidence, the fact which clearly emphasizes the offender’s will to get rehabilitated, reeducated and socially reintegrated.

As it has been outlined in judicial area, the condition for good conduct cannot be considered fulfilled if only the ex-offender had not a good conduct, determined through work.

a) A fourth condition for judicial expungement concerns the fact that the ex-offender has to fully pay court fees and any other civil compensation he was obliged to pay for (article 137, division d, Criminal Law). This condition too, stands to reason the presumption the ex-offender has re-adapted himself to an honest social life, based on the future support and respect for his fellows. Once the court fees and civil compensations paid, the ex-offender proves his interest to vanish the consequences of his actions to readapt himself and to get socially reintegrated.

We could not isolate this condition, on the contrary, we should reconsider it in close connection to the other conditions and consequently its fulfillment represents a good evidence for the offender’s change of attitude and achievement.

The law stipulates, when the court finds the un-fulfillment of these obligations is not due to the offender’s bad will, the court is empowered to admit his request for expungement (article 137, second paragraph, Criminal Law).

Therefore, the condition under division d, similarly to the other conditions stipulated by law, has to be considered on the background of the
dispositions under article 137, Criminal Law. This condition does not include a rigid request, it is considered un-fulfilled only when the offender is unwilling to pay for his civil compensations. On the contrary, when the offender is willing to pay but unable to pay based on financial grounds, the court can order expungement. When the injured party gave up his request, it goes without saying that is no more necessary to fulfill the condition under article 137, division c, Criminal Law.

This regulation is detailed in article 499 Criminal Law, showing that “during the trial for expungement, the offender proves he was unable to pay civil compensation and court fees, the court, taking into account the context, can decide expungement”. The same article 499, Criminal Law, stipulates another possibility for the court’s decision, regarding the payment of civil compensation and court fees, namely: the court can give the offender time to fully or partly pay his debt. As the law stipulates, this time period cannot be longer than six months.

As for mutual obligation, the court can establish the offender’s share. As for the condition mentioned before, the court has to consider if the offender was really to pay for compensation, the way he accomplished his duties (periodical labor prescriptions) and only finding out his bad will could justify the denial for his expungement.

The effects of expungement

Expungement by law or judicial expungement does not make the sentence disappear. This remains a judicial reality that could be deleted, only if a judicial review were admitted and the offender were found not guilty. The expungement prevent from generating limitation of rights, interdictions and incapacities, such as right restrictions and consequences of final sentences. The effects of expungement are limited to right restrictions as well as eventual penal consequences.

We could say that: “time cures all” is the main premise as for the memory of conviction, and for such cases too, the ex-offender shall be entrusted as long as an important period of time served the sentence, he has a good conduct, a real lesson he has learned from this experience.

Sophocle’s hero refers to the kind of people when says: “all men can make mistakes; but once mistaken, a man is no longer stupid nor accused who, having fallen on ill, tries to cure that ill”.

In the past, expungement was also part of the law. The Romans called it “integrum restitution” and the old French law empowered the king to give “expungement cards” erasing the consequences of the sentence. The laws of French Revolution also stipulated expungement, which was given during a solemn public ceremony. Two officers brought the offender in front of the court and solemnly uttered: “the offender served his punishment, now his conduct is flawless, on country behalf we demand the trace of his guilt to be expunged.

In the past we would say: “honor is like an island, rugged and without a beach; once we have left it, we can never return” (Boileau) or “honor is like youth, once you lost it, you can’t take it back” (Italian proverb).

The expungement does not cease the obligations as for civil compensation and court fees, on the contrary, favors their payment.

The sentence to be expunged cannot represent the first term in case of re-offence and is not an obstacle to put into practice the remission of sentence. The expunged receives a right he had not before this sentence.

He is not reinvested in the professional position he lost as a consequence of his conviction or he is not called up to military service of permanent effective or he does not regain the rank or the succession he was excluded from because of the offence he was sentenced for.

BIBLIOGRAPHY

2. Ion Oancea, Drept Penal, partea generală, Ed.Didactică și Pedagogică, București, 1971
5. Codul Penal al României.