

## CRIMINAL LEGAL PROTECTION OF CULTURAL HERITAGE IN THE REPUBLIC OF MOLDOVA

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***Abstract:** Just as we cannot conceive a future without knowledge of the past, we cannot appreciate the past without protecting cultural heritage. Legislative interventions, including criminal measures, aimed at protecting cultural heritage, are essential and welcome. In addition to the importance attributed by the legislature to cultural heritage, the legal and penal mechanism for its protection is more effective than other forms of state intervention. It is crucial for the response of authorities to be efficient, both in normative terms and in law enforcement. Otherwise, criminal charges risk becoming merely declarative and ineffective. This is the theme we have proposed to analyze in this endeavor, identifying both deficiencies and solutions for their remedy.*

***Keywords:** cultural heritage, crime, criminal proceedings, evidentiary process.*

### 1. Introduction

From the start, we must admit that the notion of cultural heritage is a recent one for the criminal legislation of the Republic of Moldova, although the subject itself has not been absent from the public agenda. In the initial version of the Criminal Code, cultural heritage as a value protected by criminal law was practically absent. However, according to the provisions of art. 133 Criminal Code of the Republic of Moldova (Criminal Code, Law of the Republic of Moldova no. 985/18.04.2002 Official Gazette 128-129/1012, 13.09.2002), the notion of cultural values was given, as being values of a religious or secular nature, meaning the indicated values in the United Nations Educational, Scientific and Cultural Organization Convention of 14 November 1970 on measures aimed at prohibiting and preventing the illegal introduction, removal and transmission of ownership rights over cultural values. But the only rule from the special part of the Criminal Code that referred to cultural heritage was contained in art. 248 CP RM – Contraband. In accordance with the provisions of para. (4) of this article, it was sanctioned the passage of cultural values across the customs border of the Republic of Moldova, evading customs control or hiding them from him by hiding them in places specially prepared or adapted for this purpose, as well as not returning to the customs territory of of the Republic of Moldova of cultural values taken out of the country, if their return is mandatory.

The legislator's attention returned to the cultural heritage through the legislative changes made by Law no. 75 of 21.04.2016. Law by which several articles of the Criminal Code were modified, especially those related to embezzlement, but not only. In particular, the legislator introduced as an aggravating factor to art. Art. 186 (theft), 187 (robbery), 188 (robbery), 190 (embezzlement), 191 (embezzlement of foreign property) provisions regarding goods that constitute cultural heritage. At the same time, by the same normative act, several new components of crime aimed at protecting cultural heritage were introduced.

## **2. General considerations regarding the legislation for the protection of cultural heritage in the Republic of Moldova**

The analysis of statistical data related to the detection and investigation of crimes in the category of those mentioned above since the entry into force of Law no. 75/21.04.2016, indicates that in fact both the information regarding the investigation and the information regarding the detection of such crimes are missing. Thus, a first impression would be that the legislator's interventions aimed at the legal-criminal protection of the cultural heritage remained more of a declarative one, oriented towards legal compliance reports.

In another order of ideas from the Informative Note to Law no. 75/21.04.2016, it follows that the purpose of the Law was to "improve the legislation in force regarding the protection of historical and cultural monuments and the return of cultural heritage to the legal space, in accordance with the provisions of the nominated laws, the Ministry of Culture has developed and proposes for approval the project of Government Decision on the approval of the draft Law on the amendment and completion of some legislative acts.

The draft law aims to complete and amend the Criminal Code of the Republic of Moldova and the Contravention Code of the Republic of Moldova, in order to protect the national cultural heritage" (Informative note, to Law no. 75 of 21.04.2016).

At the same time, it follows from the content of the mentioned law that, in addition to the special components of crimes aimed at protecting cultural heritage, the legislator criminalized as aggravating factors for all forms of evasion the crimes whose material object is cultural heritage goods from archaeological sites or areas with potential archaeological. Approach that seems to be criticizable at least from the perspective in which the material object of the crime was formulated in the law. However, most likely not all cultural heritage assets are necessarily also cultural heritage, just as certainly not all assets from archaeological sites or areas with archaeological potential as they are mentioned in the rules mentioned above are also necessarily assets that are part of the heritage cultural. In this sense, according to us, the criminal law to be interpreted restrictively, problems may arise in the opposite sense, or according to the provisions of art. 3 paragraph (2) Criminal Code of the Republic of Moldova, the extensive unfavorable interpretation and the application by analogy of the criminal law are prohibited.

Another aspect to which we would like to draw attention in relation to the changes to the criminal law in the part related to the protection of cultural heritage refers to the fact that although initially by Law no. 75/21.04.2016, several components of crimes were amended, including 190 CC "fraud", and cultural heritage goods from archaeological sites or areas with archaeological potential were provided as the material object of the crime, subsequently the mentioned norm of has been modified, so that currently only the movable national cultural heritage goods from archaeological sites or areas with archaeological potential constitute the material object of the fraud. The respective amendment was introduced into the criminal law by Law no. 247/29.07.2022, which in fact concerned several changes in the Criminal Code, mainly focused on the legal classification of embezzlement depending on the value of the stolen goods and only art. 190 CC of the Republic of Moldova has also undergone changes regarding cultural heritage assets.

Moreover, according to the informative note to Law no. 247/29.07.2022, it follows that in the operation of the mentioned amendment, the authors were guided by certain existing deficiencies in their opinion in the current wording of the respective article. Thus, it is

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mentioned that "the current provision from art. 2 (Informative note, to Law no. 247 of 29.07.2022) art. 190 of the Criminal Code of the Republic of Moldova provides for criminal liability only for the fraudulent acquisition of national cultural heritage assets from archaeological sites or areas with archaeological potential.

The archaeological site is the land that contains archaeological remains. Area with archaeological potential — is the land where the existence of archaeological remains is scientifically documented or is assumed based on indirect data (see art. 1 of the Law on the Protection of Archaeological Heritage). Thus the provision of this article is vague and unclear. In the situation where a fraud would be committed with the appropriation of assets that are part of the movable national cultural heritage, but are not located either in archaeological sites or in areas with archaeological potential, for example in a museum, it follows that it would not be applicable provision of 2 (Informative note, to Law no. 247 of 29.07.2022) art. 190 CP RM".

Beyond the detailed analysis of the criminal rules aimed at the protection of cultural heritage, which certainly go beyond the subject of this approach, the ones we would like to highlight actually relate, on the one hand, to the value protected by the respective criminal rules, and on the other hand of how this can be achieved taking into account the current legal system. At the same time, several objections regarding the legislator's interventions are requested to be made. However, according to the legislator's logic, the previous provision of the norm was "vague and unclear. In the situation where a fraud would be committed with the appropriation of assets that are part of the movable national cultural heritage, but are not located either in archaeological sites or in areas with archaeological potential, for example in a museum, it follows that it would not be applicable provision of 2 art. 190 CC".

But then the question arises, but if the goods from the museum are stolen by another method, for example robbery or theft, or if it was decided that in the previous wording of art. 190 para. ((Informative note, to Law no. 247 of 29.07.2022) CC RM, these assets were not protected then, why were they not offered protection against other forms of embezzlement. In the same register, if in the previous edition they were protected all the cultural heritage goods, then through the mentioned interventions their spectrum was limited only to the national movable ones informative both in the draft law and in the final version, the commission of extortion is provided for the purpose of acquiring movable national cultural heritage assets from archaeological sites or areas with archaeological potential. However, following the logic of the authors, it is not clear how the cultural heritage assets could be protected located in places other than archaeological sites or areas with archaeological potential, if in fact the modification has been reduced from the change of the notion of cultural heritage goods to cultural heritage goods national mobile.

In fact, the answer to the inadvertences mentioned above become clear from the content of the informative note, but also from the initial draft of Law no. 75/21.04.2016. Thus, according to the mentioned act, it was proposed to include in the Criminal Code a new article 200/3, with the following content: "the theft of cultural heritage assets from archaeological sites or from lands with archaeological potential [...]" (Informative Note, at Law no. 75 of 21.04.2016). But in the final version, the law was adopted without the respective article, which was actually included in the aggravating versions of the evasions. Consequently, beyond the mentioned inadvertences and the legislator's less successful attempt to fix them, a no less

important problem in our opinion concerns the determination of the value of stolen cultural heritage assets. Or, if the legislator had adopted the law in the originally proposed version, most likely the respective problem would not have arisen, but once included as aggravating crimes of embezzlement, especially in the situation where the delimitation of some forms of criminal embezzlement from contraventional ones depends on the value of the goods evaded that problem is to be solved.

Consequently, from the perspective of the object of the criminal procedural evidence, those that outline the specifics of the criminal acts whose material object is cultural heritage highlight at least two aspects: the first related to the determination of the asset's belonging to the cultural heritage; and the second to determine the value of this good.

Obviously, both problems involve some specialist knowledge. In this sense, although the legislation of the Republic of Moldova does not provide for the mandatory performance of expertise to establish the belonging of goods to the cultural heritage, the necessity results from the very nature of expertise in the criminal process. In this sense according to art. 142 para. (1) CPP RM (hereafter, the Code of Criminal Procedure, Law of the Republic of Moldova no. 122/14.03.2003 Official Gazette 248-251/447, 07.06.2003), results that the judicial expertise is ordered in cases where for ascertaining, clarifying or evaluating circumstances that may have evidentiary importance for the criminal case, specialized knowledge in the field of science, technology, art, craft or other fields. And the possession of such specialized knowledge by the person conducting the criminal investigation or by the judge does not exclude the need to order judicial expertise. However, it is indisputable that clarifying the possible belonging of the asset to the cultural heritage requires specialized knowledge.

Thus, according to the provisions of art. 2 lit. "a", Law no. 280/27.12.2011 Law on the protection of movable national cultural heritage on the protection of movable national cultural heritage, Law on the protection of movable national cultural heritage - movable cultural assets of special or exceptional historical, archaeological, documentary, ethnographic, artistic, scientific value and technical, literary, cinematographic, numismatic, philatelic, heraldic, bibliophile, cartographic, epigraphic, aesthetic, ethnological and anthropological, representing material evidence of the evolution of the natural environment and of man's relationship with this environment, of the potential human creator. According to the provisions of letter "c" of the same article, by the classification of movable cultural assets, is meant the procedure for establishing the category of movable cultural assets and registering them in the Register of movable national cultural heritage. And according to the provisions of art. 8 para. (2)-(5) from Law no. 280/27.12.2011, the classification of movable cultural assets is carried out on the basis of an expert report drawn up by experts accredited by the Ministry of Culture.

The competent scientific body to decide the classification of movable cultural assets is the National Commission of Museums and Collections. The classification decision, compulsorily accompanied by the expert report drawn up by experts of movable cultural assets accredited by the Ministry of Culture, will be signed by the president of the National Commission of Museums and Collections and will be approved by order of the Minister of Culture within 3 months from the moment the classification procedure is triggered. The conclusions from the expert report, the standard sheet of the classified cultural asset and the black-and-white or color photo, as appropriate, will be attached to the classification decision.

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Law 68/14.04.2016, regarding the judicial expertise and the status of the judicial expert in art. 2 provides that a judicial expert is a person qualified and authorized, according to the law, to carry out expert examinations and formulate conclusions in the specialty in which he is authorized, regarding certain facts, circumstances, material objects, phenomena and processes, the human body and psyche, and which is included in the State Register of Judicial Experts.

According to art. 43 para. (1) from Law no. 68/14.04.2016, the quality of judicial expert is acquired by the person who has passed the qualification exam, held before the Commission for Qualification and Evaluation of Judicial Experts (hereinafter referred to as the Commission for Qualification and Evaluation), formed by the Ministry of Justice, entity which according to the provisions of art. 49 para. (1) of the law, also keeps the register of judicial experts.

### **3. Conclusions**

In conclusion, from the mentioned, it follows that the experts in the respective field, from the Ministry of Culture in the case of procedures for the identification and management of the respective goods, have decision-making power over the goods that are part of the cultural heritage, and respectively licensed by the Ministry of Justice in the case criminal proceedings.

At the same time, at the moment in the state register of judicial experts there are no persons qualified to carry out the expertise of goods in the cultural field (State Register of judicial experts). Moreover, such an expertise is not even found in the list of Forensic Expertise Services provided by the National Center for Judicial Expertise (Forensic Expertise Services provided by the National Center for Judicial Expertise), which is currently the main public institution in the field of judicial expertise.

The mentioned, related to the provisions of art. 2 para. (4) CPP RM, according to which the procedural legal norms from other national laws can be applied only on the condition that they are included in the Code of Criminal Procedure. But also the provisions of art. 6 para. (1) point 12), from which it follows that a judicial expert is a qualified person who is authorized, according to the law, to carry out expert examinations and formulate conclusions in the specialty in which he is authorized, with regard to certain facts, circumstances, material objects, phenomena and processes, the body and the human psyche, and which is included in the State Register of Judicial Experts. It indicates that we are actually in the presence of a legislative inadvertence, on the one hand within the Ministry of Culture there are certain experts in the field of cultural heritage, and on the other hand their skills cannot be used in the criminal process, as long as they do not correspond formalities required by law.

In conclusion, although the legislator's initiative to offer protection including through criminal instruments to cultural heritage is a beneficial step, it cannot have a finality as long as it is not followed by other actions, including organizational ones, which would be of a nature to ensure effective enforcement of the law.

Moreover, the simple criminalization of certain acts, the creation of a corresponding mechanism for the application of the criminal law, seems to be more of a declaration of intentions than a proper legal protection of certain social values.

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