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The Legal Regime of Contraventions Between the European Criminal Interpretation and the National Approach

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ABSTRACT: In an interdisciplinary manner, through this study we aim to highlight the outlook attributed by the European Court of Human Rights to the contravention area as a species of criminal law, the deeds characterized in the Romanian legislative system as contraventions enjoying the same treatment as any other criminal offence. We also capture the effects of the contraventional liability removal of certain deeds sanctioned by national law, in contrast to the operable decriminalization in penal law. Last but not least, having as research object, the comparative analysis of the particularities that characterize the Romanian contraventional law, we propose to debate some inadvertences for which the contraventional spectrum must be held to adapt to the accuracy imposed by the criminal law.

KEYWORDS: criminal charge, contraventional law, decriminalization, mental incapacity.

Reflections on the notion of *criminal charge* in national contraventional law

In relation to the autonomous nature of the notion of criminal prosecution found in European legislation (Article 6 paragraph (1) of the European Convention on Human Rights), meaning *the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence* (ECHR 1982, paragraph 52), to the point that the situation of the individual has been substantially affected (ECHR 1980, paragraph 46), the human rights forum classifies the field of contravention as a kind of criminal matter from the point of view of human rights, with all the consequences arising from it (Constanța Court 2020).

In this respect, although the European Court finds it appropriate to decriminalize certain offenses under national law (ECHR 2006, paragraph 58), the states cannot use the legal classification in the field of administrative law of certain categories of deeds, in order to evade the application of the European Convention on Human Rights article 6's protective guarantees (ECHR 1984, paragraph 49), having a criminal feature, both infractions and contraventions (Romanian Constitutional Court 2003).

Therefore, within the meaning of article 6 of the Convention, the concept of criminal charging is governed by what has come to be known in judicial practice in the form of the *Engel criteria* (ECHR 2019, paragraph 54), through which it is pursued the legal classification of the coercive measure in national law, the actual nature of the measure, as well as the severity of the sanction (ECHR 1976, paragraph 82). Even if these criteria can be analyzed individually, the actual nature of the contravention, considered also in relation to the nature of the corresponding sanction, constituting an appreciative basis with a higher caliber (ECHR 2008, paragraph 18), a cumulative assessment is rather recommended when we are faced with the uncertainty of the existence of a real criminal charge (ECHR 2009, paragraph 53).

From this perspective, even if the contraventional field is positioned in the external sphere of the criminal law (Iași Court 2020), to the penal illicit being specific a punishment, whilst the external-penal illicit being characterized by the reconstructive sanction (Romanian Supreme Court 2011), the purpose of the contraventional fine is not that of pecuniary compensation for damages, but of preventive punishment of contraventional recidivism (Suceava Court 2018), the reduced severity of the contravention sanctioning, as well as the lack of its important consequences in relation to the sanctioned individual cannot deprive the contravention of its

inherent criminal feature (Satu Mare Court 2020), reaching a unanimously accepted position by the national courts, according to which, the deeds characterized in the Romanian legislative system as contraventions enjoy an undifferentiated treatment in relation to crimes (ECHR 2008, paragraph 67), provided that the contraventional sanctions have an accentuated punitive nature (Sfântu Gheorghe Court 2020).

Considering the fact that there are criminal cases whose gravity is reduced, and consequently the criminal charge carrying a proportional attenuated weight (ECHR 2006, paragraph 43), the protective guarantees of article 6 of the Convention in respect to criminal charges may be applied in relation to the weight of the cause (Council of Europe 2014, paragraph 166), this also being the case of the contraventional law.

Even if, unlike the wide range attributed to the concept of criminal charge in the field of human rights litigation, the Court of Justice of the European Union uses a restrictive interpretation (Broek, Hazelhorst, Zanger 2010), excluding the criminal nature of administrative sanctions (CJEU 1992, paragraph 25), arguing that although the purpose of criminal sanctioning is to discourage, to suppress certain forms of conduct in relation to which it expresses social and ethical disapproval, it does not follow that every dissuasive sanction is also of a criminal nature (CJEU 2002, paragraph 18).

Thus, it is shown that the purpose of a criminal sanction goes beyond that of a simple deterrence and will normally involve aspects such as public disgrace or attribution of moral guilt, the amount of the punishment also reflecting society's disapproval of the behavior in question (Attorney General 1992, paragraph 11), an administrative sanction being independent of personal guilt (Attorney General 2001, paragraph 35).

Congruence between criminal law and contraventional law. Comparative elements between decriminalization and *decontraventionalization*

Starting from the legislative evolution of the national sanctioning provisions in connection with the state of emergency established on the Romanian territory, we are required to make a parallel analysis on the implications of decriminalizing provisions, both in criminal and contraventional matters.

Therefore, are convenient the findings of the Romanian Constitutional Court according to which, the legislative solution contained in article 4 of the Penal Code, *which does not assimilate the effects of a decision of the Constitutional Court by which it was found the unconstitutionality of an incrimination norm with those of a decriminalization law, is unconstitutional* (Romanian Constitutional Court 2018, paragraph 2), considering that *the effects of an admission decision, issued by the Constitutional Court, on a rule of incrimination must be immediate, applicable in both pending and final cases, and independently of the passivity of the legislator* (Romanian Constitutional Court 2018, paragraph 59).

In this respect, the national courts, supplementing the contraventional law with the provisions of the Penal Code, find that although the contraventional legislation is deficient in terms of regulating the more favorable law or of decriminalization (Ploiești Court 2020), the Constitutional Court decision establishing the unconstitutionality of sanctioning provisions in the field of contraventions generates similar effects to the abolishment of the law (Arad Court 2020), having the nature of a *decontraventionalization* law (Oradea Court 2020), pointing that the sanctioning papers concluded in compliance with the legal forms applicable at the date of finding the illicit deeds, prior to the declaration of contraventional decriminalization, are struck by total nullity (Arad Court 2020).

In this regard, the Constitutional Court has ruled in the past, establishing that the application of the more favorable contraventional law must be analyzed by reference to the time of its entry into force and the stage of the case, distinguishing whether sanctions were applied or not, in case of sanctions at the time of the entry into force of the new law, if this law no longer

provides for them, they can no longer be executed (Romanian Constitutional Court 2007, paragraph 8-9), which is equivalent to the retroactivation of the contraventional law which no longer sanctions the misdemeanor (Oradea Court 2020).

Therefore, the recent constitutional jurisprudence establishing as unconstitutional the entire sanctioning normative framework applicable for the period of the state of emergency (Romanian Constitutional Court 2020, paragraph 2-3), the effect of the legislative solution sanctioned by the Constitutional Court is that the guilty individuals can no longer be held accountable for these misdemeanors (Arad Court 2020), this reasoning being operable to the contravention sanctions applied and not executed until the date of its entry into force (Romanian Constitutional Court 2007, paragraph 10), hence for the decontraventionalization law that entered into force after the moment of the sanctioning, until the date of its full execution, the applied sanction will no longer be able to be executed (Ploiești Court 2020).

Consequently, there is a dilemma regarding the legal status of the sanctions applied, but also executed until the date of entry into force of the more favorable law, respectively, the differentiated legal treatment of *bona fide* citizens who have taken the necessary steps to pay the fine, until the date of entry into force of the Romanian Constitutional Court Decision no. 152 / 06.05.2020, but which did not litigated the misdemeanor by a court complaint.

It also arouses interest the cases in which the national courts have been vested, having as object a misdemeanor complaint, settled in the sense of rejecting the action for reasons of lateness, of nullity or obsolescence, the court no longer being able to rule on the impact of the Constitutional Court Decision in question (Oradea Court 2020), solution that has the effect of maintaining the provisions contained in the sanctioning act, so in contradiction with the constitutional solution of decontraventionalization.

To the fact that the Constitutional Court Decision no. 152 / 06.05.2020 empties of content the incriminating norm (Vișeu de Sus Court 2020), two currents of opinion are outlined in the national jurisprudence. On the one hand, there is an obligation on the notified court to extinguish the litigated sanctioning act (Brăila Court 2020), and on the other hand, it is considered that the decontraventionalization of the deeds cannot have the effect of annulling the sanctioning papers written prior to its entry into force, but only the impossibility to execute the fines established and consequential, the maintenance of the sanctioning acts as thorough and legal, with the impossibility of executing the contraventional sanctions (Ploiești Court 2020).

The decline of the contraventional legal regime in relation to the righteousness of criminal law

We note the need to define in the contraventional law the effects that the causes of impunity produce on the participants, respectively *in rem* or *in personam*, as well as the obligation to update them in relation to the evolution of connotations in criminal law.

In criminal matters the deed of the individual who at the time of the commission, could not realize his actions or could not control them due to a mental illness, is not imputable to him (Article 28 of the Romanian Penal Code). As such, irresponsibility can be defined as a state of mental incapacity that involves altering the subject's ability to understand the meaning of his actions and consequences of his deeds, as well as altering the process of self-determination and directing his will (Pașca 2014, 250). In contraventional area, it is retained as a characteristic of the absence of discernment, the lack of psychic faculty caused by mental illnesses such as schizophrenia, cretinism, mental weakness, early dementia, epilepsy, psychosis, which do not allow the perpetrator to understand the nature and significance of his deeds (Vaslui Tribunal 2017).

Taking into account the theoretical aspects presented, we highlight the case on a misdemeanor complaint filed by the petitioner against the report of finding and sanctioning the misdemeanor, by which he was sanctioned for insulting the pedestrians and for providing false informations for establishing his identity (Iași Court 2020).

Thus, in resolving the case in the sense of admitting the complaint and annulling the sanctioning act, the court held that the petitioner was not guilty in the sense given by the existence of the contraventional liability removal ground of irresponsibility, noting that the petitioner suffers from paranoid schizophrenia, lacking the discernment determined by the psychophysical state of the person to have the representation of his dangerous conduct and its consequences, voluntarily orienting his physical energy in relation to this conduct.

This reasoning of the court is ill-founded, as the petitioner being an adult, is presumed responsible for his actions, so having discernment and legal responsibility (Târgu Neamț Court 2018), and since the petitioner has been found to be mentally ill but has not been verified if he was placed under interdiction, the presumption of his capacity to exercise his rights still operates, in the sense of responsibility (Bucharest Tribunal 2017) and can only be removed by proving to the contrary (Afrăsinei 2012, 81), the literature stating that insanity or mental weakness cannot in themselves constitute a case of impunity if the person concerned has not been placed under interdiction (Ungureanu 2013, 288).

The presumption of discernment existence, being relative, can be overturned by proving that the person in question suffers from a mental illness likely to abolish this discernment, considering that until the ban, even the mentally ill has the ability to exercise his rights (Constanța Tribunal 2020), in the present case, the petitioner was not subject to a forensic examination stating that at the time of the deed he lacked the ability to control his actions (Bucharest Tribunal 2019).

Similar to criminal cases, in the contraventional law operates the principle according to which the existence of mental illness is only an indication of irresponsibility, to prove the lack of discernment requiring a forensic psychiatric expertise (Pașca 2014, 246), considering that not all people with mental disorders lack discernment (Ungureanu 2013, 365) ant that retainment of irresponsibility could be possible only by proving the total lack of discernment by concluding on the non-existence or abolition of the volitional aspect (Romanian Supreme Court 2019).

Therefore, in order for a person's mental state to determine the removal of the contraventional nature of the deed, it is imperative that the lack of discernment to be total, both intellectually and volitionally, as well as that the mental incapacity be ascertained by a specialized expertise (Piatra-Neamț Court 2014).

In this sense, we point out that, in the contraventional are, the finding of the cause of impunity for irresponsibility, involves the analysis by the court of the existence or lack of discernment of the perpetrator, ordered only by a medical expertise.

Conclusions

Noticing the inherently criminal nature that the supranational forums, but also the national courts attribute to the Romanian contraventional law, we find opportune the comparative analysis realized on some of the legal institutions that are found in both criminal and contraventional matters. In this respect, taking into account the legislative developments at national level, we find to be relevant the problems faced by the courts required to formulate solutions on the application of decriminalization rules, and on the particularities of contraventional liability removal cases regarding deeds, of either criminal or contraventional nature, committed by mentally insane individuals.

By presenting some of the problems facing national contraventional law, we pointed that there is an urgent need to reform the foundation of this branch of law, based on an interdisciplinary approach that captures the accuracy of criminal law.

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