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THE RIGHT TO A FAIR TRIAL IN PROCEEDINGS CHALLENGING THE MINUTES OF DISPUTING CONTRAVENTIONS

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Abstract

The offenses field is assimilated to the criminal one from the perspective of the European Court of Human Rights, in the sense of article 6 of the Convention, the person accused of committing an act regarded in national law as an offense must benefit from the guarantees specific to criminal proceedings.

Keywords: *the right to a fair trial, contravention, access to justice.*

Introduction

The legal regime of contraventions is regulated by Romanian Government Ordinance no. 2/2001. This regulation represents common law on the matter and is supplemented by various other regulations: of the public acquisitions field – Romanian Government Emergency Ordinance no. 34/2006, of traffic on public roads – Romanian Government Emergency Ordinance 195/2002, of accounting – Law no. 82/1991, of companies – Law no. 31/1990, of the fiscal field – The fiscal code and fiscal procedure, of labor contracts – Labor Code, of urban planning – Romanian Government Emergency Ordinance no. 7/2011 which modifies and supplements Law no. 350/2001 regarding land use and urban planning.

An action may be identified as an offense only if the following conditions apply simultaneously: 1. there is an action; 2. there is a willful violation of the law; 3. the offense is set and punishable by legal rule; 4. the legal norm is enforced by a public authority empowered by law.

Common law procedure to challenge the minutes of the offense by contravention complaint is made under the provisions of art. 31 of the Romanian Government Ordinance.

The deadline to introduce the complaint is 15 days from the date of the minutes (if the offender is present at the time of drawing up the minutes and receives a copy) or from the date of its communication (if the offender was not present during the drawing up of the minutes or being present, the offender has not received a copy of the minutes). The term shall be calculated on days off, without taking into account the first and last day of the period.

The persons who can file complaints are: the offender, the victim and the owner of the seized goods, other than the offender.

The complaint of the plaintiff may relate to just the compensation, and the owner of the seized goods, other than the offender, may appeal only in respect of the seizure.

The constitutional provision that must be mentioned is article 15, paragraph (2), by which it is disposed that the law is not retroactive, except for the more favorable criminal or contravention law. The association of the two (criminal and contravention) serves as starting point for the circumscription of the contravention matter in the area protected by article 6 of

the European Convention of Human Rights regarding the right to a fair trial. The lawmaker must regulate the contravention material according to the guarantees provisioned by the Convention to be applicable in "criminal law", because the European Court does not interpret the provisions of the Conventions in abstract, but by relating them to a concrete situation[13]. Therefore, if the penalty provided in the new law is lighter, it will be one that applies. This would be a rather simple variant as the means to determine the more favorable criminal or contravention law is more complicated. "The criminal or contravention law may comprise of exclusively more favorable or unfavorable dispositions to the offender or may comprise some more favorable and some more unfavorable dispositions"[14]. In short, firstly, the distinction between "more favorable" and "more unfavorable" is made in relation to the offense, and secondly, in relation to the punishments[15], considering the particulars regarding the prescription and execution of the punishment and solving a possible conflict between the used criteria[16].

Art. 32 paragraph (1) of the Romanian Government Ordinance no. 2/2001 provisions that "the complaint accompanied by a copy of the minutes is submitted to the body to which the traffic officer belongs, the latter having the obligation to receive it and hand the depositor evidence in this regard". By Decision no. 953/2006[17] of the Romanian Constitutional Court, the constitutional challenge of dispositions of article 32 paragraph (1) of the Romanian Government Ordinance no. 2/2001 was admitted. In its motivation it was shown that by the provisions of article 21 paragraphs (1) and (2) of the Romanian Constitution, article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as article 10 of the Universal Declaration of Human Rights because, providing the deposition of the complaint to the body to which the traffic officer belongs, the latter is given the opportunity to not submit the complaint to the court. Also, such a conduct of the administrative authorities concerned would have been encouraged by the fact that the legal text under analysis provides no penalty for failure to fulfill said obligation under the law.

The Romanian Constitutional Court considered the plea of unconstitutionality and decided that the existence of any administrative obstacle which does not have any objective or rational justification and which could eventually deny said right of the person flagrantly infringes the provisions of article 21 paragraphs (1)-(3) of the Constitution, and implicitly the right to a fair trial, and thus the conventional provisions of article 6.

The Court also held that the text of law under scrutiny allows that abuses be committed by agents of the administrative bodies, which eventually, even if leading to their criminal or disciplinary liability, would impair or even deny the appellant's right to free access to justice.

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[13] Mircea Ursuța, *Can the Romanian contravention procedure be considered as belonging to the autonomous notion of "criminal matter" from the perspective of jurisprudence of the European Court of Human Rights?* Judicial Courtier, no. 2/2008, p. 82: "Thus, it is possible that the ruling of a fine in a certain amount to constitute for a person of low economic means a „criminal charge", whereas for a person of means, the Court to consider that the notion is exceeded.

[14] Dan Claudiu Dănișor, *The principle of retroactivity of the more favorable criminal or contravention law,* Caiete de Drept Penal, nr. 4/2009, p. 26.

[15] It should be noted that in relation to how to apply the sanction, a law is the more favorable as the one that can enforce it has a more prominent level of independence and impartiality. Also, the more favorable laws are the ones that give judges better opportunities to rule in favor of the person who bears the penalty, in contradiction with those that suppress or reduce the possibility of a more favorable arrangement of execution of the punishment.

[16] "The criteria for determining the milder nature of the punishment are usually the following: legal hierarchy of punishments, the accumulation of sentences, and the limitation of decision left to the judge and the means of accumulation of sentences". For details, please consult Dan Claudiu Dănișor, *op.cit.*, pp. 26-41.

[17] Published in the Official Gazette no. 53 from the 23rd of January 2007.

In conclusion, the obligation to submit the complaint to the body to which the agent belongs, as a condition of access to justice, cannot be objectively and reasonably justified not even in that the administrative bodies, in receipt of the complaint, would take cognizance of it and would not proceed to the execution of the applicable fine.

According to article 16 of the Ordinance, the minutes of finding of the offense must contain certain information and statements. If it fails to find any of these items, the minutes is annulled and the complaint, admitted. In some cases, the nullity of the minutes can be found on ground basis (art. 17 of the Ordinance).

The court ruling by which the contravention offense is solved is submitted to a 15-day appeal term from it communication, except for the one laid in the case of traffic offenses and that regarding the disturbance of public order. By Law no. 202/2010 regarding certain measures for the acceleration of case solving[18], also known as the "little reform" of justice, these categories of contravention complaints become final and irrevocable by the law court. Judging the appeal belongs to the department of administrative and fiscal contentious of the Court, during the trial the execution of the ruling being suspended.

Contravention complaints and appeals are exempt from stamp duty, as expressly disposed in article 36 of the Ordinance.

Under the provisions of article 13 of Romanian Government Ordinance 2/2001, the penalty with contravention fine is prescribed within 6 months from the date of the deed or from the date of its finding, for ongoing contraventions, or within 1 year from the above-mentioned dates if the deed was initially considered a crime and it was subsequently determined that it is a contravention, if no other terms are provisioned by special laws in force.

The painstaking issue represented by the suspension of fines and of contravention sanctions, under article 118 of the Romanian Government Emergency Ordinance 195/2002 on the circulation on public roads, until the ruling of a final and irrevocable court decision, considered to be a judicial artifice by which the offender obtains an "adjournment" of the sanction applied, led to the inadequate decision to deny the possibility to exercise the remedy of appeal in relation to traffic offenses.

Such a solution violates the principle of attending at least two levels of jurisdiction throughout the proceedings and finding the truth, because the offenses field is assimilated to the criminal one from the perspective of the European Court of Human Rights, in the sense of article 6 of the Convention. However, it clearly and consistently[19] holds that whatever distinctions are made in national law between offenses and crimes, the person accused of committing an act regarded in national law as an offense must benefit from the guarantees specific to criminal proceedings. Thus, the European Court of Human Rights could find the violation of article 2, paragraph 1 of Protocol no. 7 of the Convention regarding the right to two levels of jurisdiction in criminal law.

The Constitutional Court of Romania gave a similar ruling by its Decision no. 500 from the 15th of May 2012[20], when it admitted the constitutional challenge raised and found the dispositions of article 118 paragraph (3^1) of the Government Emergency Ordinance no. 195/2002 regarding traffic on public roads to be unconstitutional (the court ruling by which the court resolves the complaint is final and irrevocable).

The arguments of the Romanian Constitutional Court are extremely important and will be presented below, as will be detailed some gaps in its reasoning as well, but undoubtedly, the decision must be upheld and enforced by the ordinary courts. These tend to "forget" two decisive aspects of their activity. The first is that, under art. 20 of the Constitution, the

[18] Published in the Official Gazette no. 714 from the 26th of October 2010.
[19] Starting with the Ruling from the 21st of February 1984, given in the case *Oztürk against Germany*.
[20] Published in the Official Gazette no. 492 from the 18th of July 2012.

conventionality control is an "obligation, not a faculty of ordinary courts"[21], but involving more knowledge of procedural and substantive law, so an adequate legal training in human rights. The second aspect is related to the effects of the decisions of the Constitutional Court.

Three situations are identified[22]. Art. 147 of the Constitution requires that the provisions of laws and ordinances in effect found to be unconstitutional should be brought into line with the provisions of the Constitution within 45 days of the publication of the decision of the Court, otherwise ceasing its effects on expiry of said term. Therefore, the first situation is when the Parliament or the Government did not fulfill its obligation to harmonize any unconstitutional provisions with the Constitution within 45 days, in which case the ordinary courts are obliged to declare cessation of the effects of the unconstitutional law[23]. A second possible situation is one in which the said obligation is only mimed, not an actual compliance with the constitutional provisions, which reverts the decisive role in implementing the decisions of the Constitutional Court in order to produce effects *erga omnes* also to ordinary courts. The operation of the latter to verify the act of congruence of provisions is not a substitute of the Constitutional Court, rather, is a simple logical expression of finding the elimination, or lack of it thereof, of the grounds of unconstitutionality from the controlled provisions, already shown by the Constitutional Court in its decision. A third identified situation is the one referring to conducting the compliance of unconstitutional dispositions with the provisions of the Constitution after the expiry of the 45 days. In such a case the rule-making procedure is not dully followed, which equals to the invalidity of a legal act adopted under such conditions, i.e., extrinsically unconstitutional. In this situation also, the competence to find such invalidities lies on ordinary courts as well[24].

These specifications are intended to highlight the important role of ordinary courts to actually impose constitutional court decisions, a side effect being that of relieving the constitutional court by not notifying it regarding norms whose unconstitutionality has already been ruled. Moreover, the assumption by ordinary courts of the performance of each shown control, despite attacks against them from the political class and the media, would also be a method to combat the tendency to overuse the procedure of constitutional challenge.

Considering all the above, law courts must enforce the application of Decision no. 500/ 2012, especially considering that one of the argument to admit the constitutional challenge was that some law courts, in the absence of a way of attack against their rulings, generalize the presumption of legality and rationality of the minutes of the findings and sanctioning offences in traffic on public road.

These courts no longer exercise their active role in the management of all relevant, pertinent and conclusive evidence in question, thus rejecting complaints of offences, without researching the case.

The Constitutional Court of Romania held that such conduct may constitute the prerequisite of future convictions of the Romanian state by the European Court of Human Rights considering the jurisprudence of the European law court, the Ruling from the 4th of October 2007 respectively, given in the *Anghel against Romania* case.

Correctly, in view of the above, the Romanian Constitutional Court ruled that the lack of a means to appeal against the ruling of the first instance court in the matter of traffic on public roads is equivalent to the impossibility to exert an actual court control on main and complementary sanctions, as well as on technical and administrative measures, regulated in

[21] D.C. Dănișor, *Imposition of the Decisions of the Constitutional Court – a problem of ordinary courts,* The Judicial Courier, no. 6/2009, p. 3.
[22] *Ibidem*.
[23] The *lato sensu* understanding of the term "law" is considered in this situation.
[24] *Ibidem.*

art. 95-97 of the Romanian Government Emergency Ordinance no. 195/ 2002, the right of free access to justice thus becoming an illusory and theoretical right[25].

In conclusion, by eliminating judicial control over pronounced decisions of the court the "principle of free access to justice, the right to a fair trial, the right to defence, the uniqueness, fairness and equality of justice" are all affected, thus emptying of any content the principle of exerting the legal means of attack and the right to appeal (art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

Furthermore, eliminating the sole attack remedy in relation to offenses regarding traffic on the public roads would amount to also emptying of content the provisions of art. 129 of the Romanian Constitution, according to which "against law court rules, the interested parties and the Public Ministry may exercise remedies, under the law". *It is undisputed that the legislature may limit the number of appeals, however, by the criticized legal norm, the only possible remedy, which is the appeal, is eliminated altogether.*

Finally, through the arguments previously expressed, the Romanian Constitutional court has ruled that the provisions of article 53, paragraph (2) of the final form of the fundamental act are also infringed. What represents a lack of motivation of the Court is common practice, and by it the Court refuses to make a systematic analysis of the conditions under which the fundamental freedoms are restricted, limiting to pass rulings which are not thoroughly proven. In this case, even if the Court's decision is grounded, its contents does not make it apparent that until the "analysis" of the final thesis of paragraph (2) of the article that draws the coordinates of limiting the freedom to exert certain rights and liberties, a leveled control would have been carried out, a genuine proportional control of the limitations of the right to free access... Such control would have anyway revealed the failure to fulfill the first condition to operate a restriction, that the latter can only be made by law[26], thus making it unnecessary to analyze the subsequent conditions[27].

Conclusions

Regardless of the nature of the offense, the procedure to challenge in court the minutes of the case is the same and is based on the provisions of Romanian Government Ordinance no. 2/2001, if the regulation on the offense does not imply special procedures. In case of such derogatory procedure, it will have priority under the principle "*specialia generalibus derogant'"*. By eliminating judicial control over pronounced decisions of the court in relation to offenses regarding traffic on the public roads is affected the principle of free access to justice from the right to a fair trial.

[25] Corneliu-Liviu Popescu, *Comments. Ruling from the 4th of October 2007, Case Anghel against Romania*, The Judicial Courier, no. 10/2007, p. 16, shows that "the Strasbourg jurisdiction found that, in the contravention judicial proceedings, unlike the criminal proceedings, the presumption of innocence is not met, this important guarantee of the right to a fair trial in "criminal" law being non-existent."

[26] Even though the European Court of Human Rights interprets the term "law" *lato sensu* regarding the limitation of exertion of certain rights provisioned by the Convention, this is due to the desire to protect the sovereignty of states, as well as the diversity of meanings this term bears in the states who have signed the Convention. Nonetheless, in our system an extensive interpretation is inappropriate, the objective of constitutional dispositions being that of limiting the power of the state in order not to abuse human rights and liberties. This objective can only be achieved by a *stricto sensu* understanding of the term "law", as an act issued by the Parliament in order to primarily regulate an activity area. A *lato sensu* understanding of the term would allow the executive that by documents with a legislative character restrictively intervene in the fundamental rights area, which is unacceptable from the perspective of the necessity to have a real protection of said rights.

[27] Restraining certain rights or liberties can only be done by law. At the same time, it can only be done for certain situations expressly detailed in the Constitution and only if necessary, in a democratic society.

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