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THE IMPLICATION OF REPLACING THE SANCTION OF THE ADMINISTRATIVE FINE WITH THE SANCTION OF PROVIDING AN ACTIVITY FOR THE BENEFIT OF THE COMMUNITY FROM THE PERSPECTIVE OF THE CCR AND ECHR JURISPRUDENCE

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Abstract: *With regard to the sanction of community service, which is regulated in domestic law by Article 9 of G.O. no. 2/2001, the legislator has recently attempted, by means of a draft law, to clearly establish the legal regime of the procedure for replacing the sanction of a administrative fine with the sanction of community service. However, in the light of the case law of the CCR and the ECHR, this can only be achieved if the qualitative requirements are met, particularly those of accessibility and predictability of the law, in order to ensure the security of legal relations and greater legislative stability and efficiency.*

Key words: *administrative fine, community service, case law, legislative initiative, misdemeanors.*

1. Introduction

In Romania, in the matter of the legal regime of misdemeanors, art. 9 of Government Ordinance no. 2/2001 constitutes the general regulatory framework for the provision of an activity for the benefit of the community being introduced by Article 1(4) of Government Emergency Ordinance No 108/2003 for the abolition of the contraventional prison, whereby community service replaced the administrative fine, as regulated by Article 5(d) of Government Ordinance No 2/2001. The latter was considered an institution incompatible with the rules of the European Convention on Human Rights, as it established a particularly harsh penalty, depriving of freedom, through a rule of contraventional law, without the assurance of sufficient procedural guarantees.

However, as it results from the rich ECHR case law in this field, the misdemeanor falls within the scope of criminal charges, so that the person sanctioned is also recognized

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the guarantees provided for in Article 6 of the European Convention on Human Rights, which is part of domestic law and has priority, according to Articles 11(2) and 20(2) of the Romanian Constitution.

Performing an activity for the benefit of the community or work for the benefit of the community has a special character, which is not identified with forced labor, but represents an alternative main sanction to the administrative fine, provided for in domestic law by Article 5(2) of Government Ordinance No. 2/2001 on the legal regime of misdemeanors (Article 5(2)(c)), along with the warning (Article 5(2)(a)) and a administrative fine (Article 5(2)(b)). According to the Article 9 of the same Government Ordinance, community service may be established only by law, only for a certain duration and alternatively with an administrative fine.

2. Relevant case law

The jurisprudence of the Constitutional Court of Romania has been consistent in its practice in showing that (for example, Decision No 641 of 17 May 2011, published in the Official Gazette No 575 of 12 August 2011, and Decision No 697 of 27 November 2014, published in the Official Gazette No 48 of 21 January 2015), this sanction is applied following a finding of violation of legal provisions, in order to punish and contribute to the education and rehabilitation of the offender who does not have sufficient financial resources to pay an administrative fine.

The fact that the work carried out as part of this penalty is free of charge does not determine its classification as forced labour, but constitutes the coercive element of the penalty in question, by means of which the correction and re-education of the offender is sought. Similarly, the absence of the offender's consent to the imposition of this penalty cannot be interpreted as determining that the conduct imposed by the sanctioning act constitutes forced labour.

Given the legal nature and purpose of the measure in question, requiring consent for its application would have the effect, as the Constitutional Court has held in its case-law, of rendering ineffective the sanction imposed for committing an anti-social act, with the consequence of violating the provisions of Article 1 para. (5) of the Constitution, according to which "In Romania, respect for the Constitution, its supremacy and the laws is mandatory" (Decision No. 1.354 of 10 December 2008, published in Official Gazette No 887 of 29 December 2008).

Moreover, it was considered that this is the only possibility to punish a person who lacks material resources, but who commits acts of misdemeanour, being the only punishment that does not have a negative impact on the material situation of the penalised person.

In the opinion of the Constitutional Court, the fact that the legislator has established that the court may replace, during the enforcement phase, the penalty of a administrative fine with that of an obligation to perform community service, only means that it has regulated an alternative way of enforcing a misdemeanor, which, of course, can only be ordered under the conditions provided by law (see, in this regard, also Decision No 572 of 29 May 2012, published in Official Gazette No 513 of 25 July 2012).

Thus, the conduct of the person to whom the penalty of community service is applied does not restrict the right to work, the choice of profession, trade or occupation, or the right to work, in the light of the fundamental rights and freedoms guaranteed by the ECHR.

Nowadays, more and more offenders are ignoring the final decisions of the courts, by which they have ordered the replacement of the penalty of a administrative fine by an obligation to perform community service, considering, including by the legislator, that there is a legislative vacuum regarding the possibility of their enforcement.

The explanatory memorandum of a recent draft law in this regard is based on the fact that, in Romania, more and more people who are sanctioned with an administrative fine evade the rigours of the law, and local budgets are affected by the existence of claims assimilated to tax claims, claims consisting of sums of money that should be collected by way of fines, but more often than not, the representatives of the administrative territorial units find themselves in the situation of being unable to enforce them.

The aim of this legislative initiative is to establish the legal framework that can be applied to categories of offenders who have not complied with the provisions of Article 39^1 of the General Order No 2/2001, taking advantage of the fact that court judgments are given without any time limit for the execution of the obligations, and the offenders do not comply with their execution, even when the court replaces the administrative fine with a sanction of community service.

By the Law for the amendment of the G.O. no.2/2001 on the legal regime of misdemeanors and of the Law no.289/2009 on the Criminal Code, it was intended both to amend Article 287 of the Criminal Code on the non-enforcement of court decisions by introducing provisions on the sanction applicable in case of non-enforcement of the court decision by which the offender was obliged to perform community service, and to amend certain legal texts of the G.O. no.2 /2001 or the introduction of new ones concerning the legal regime of the sanction for failure to perform community service, as well as the completion of the procedure for replacing the administrative fine with the sanction of the obligation of the offender to perform community service.

Being subject to the constitutionality review of the Constitutional Court of Romania, through the objection formulated by the Ombudsman, the Constitutional court found, on the one hand, that there is a lack of correlation within the same normative act in terms of legislative solutions/procedure regulated, with the consequence of a confusing regulatory framework, which is liable to make it difficult for the addressees of the legal rules, and, second, that the contested legislation makes it difficult to determine whether an offender who fails to comply with the decision imposing the penalty of community service is criminally liable.

With regard to the drafting and quality requirements of a law as a guarantee of the principle of legality, the European Court of Human Rights has held that it is obligatory to ensure the quality standards of the law as a guarantee of the principle of legality, provided for in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Romania having suffered several convictions on this ground in cases such as Rotaru v. Romania (paragraph 52), Sissanis v. Romania (paragraph 66), Dragotoniu and Militaru-Pidhorni v. Romania (paragraph 34).

Thus, in its judgment of 25 January 2007 in Sissanis v Romania (paragraph 66), the European Court of Human Rights considered the following qualities of the law: accessibility to the person subject to the law and foreseeability of its effects. It also held that, for the law to satisfy the requirement of foreseeability, it must specify with sufficient clarity the scope and manner of exercise of the authorities' discretion in the area in question, having regard to the legitimate aim pursued, in order to allow the individual adequate protection against arbitrariness. Moreover, in the same judgment, it was held that only a rule which is sufficiently precise to enable the citizen to control his conduct can be regarded as 'law'; he must be able to foresee, to a reasonable extent in the circumstances of the case, the consequences which might result from a particular act, if necessary by seeking expert advice on the matter.

And according to the regulations of domestic law, i.e. Art. 8 para. (4) first sentence of Law No. 24/2000, "the legislative text must be formulated clearly, fluently and intelligibly, without syntactical difficulties and obscure or equivocal passages", and according to Art. 36 para. (1) of the same law, "legislative acts must be drafted in a specific normative legal language and style, concise, sober, clear and precise, excluding any ambiguity, with strict compliance with grammatical and spelling rules".

Also, according to Art.6(1) of the same normative act: "(1) The draft normative act must establish necessary, sufficient and possible rules leading to the greatest possible legislative stability and efficiency.

The solutions it contains must be well-founded, taking into account the social interest, the legislative policy of the Romanian State and the requirements of correlation with all domestic regulations and harmonisation of national legislation with Community legislation and international treaties to which Romania is a party, as well as with the case law of the European Court of Human Rights."

Although the rules of legislative technique do not have constitutional value, the Constitutional Court of Romania ruled in its Decision no.681 of 2012 that by regulating them the legislator has imposed a series of mandatory criteria for the adoption of any normative act, whose observance is necessary to ensure the systematization, unification and coordination of legislation, as well as the appropriate content and legal form for each normative act. Compliance with these rules thus helps to ensure that legislation complies with the principle of the certainty of legal relations, with the necessary clarity and predictability.

In view of the fact that the draft law, through the new provisions that were intended to be introduced both in the Criminal Code in force and in the content of the G.O. No. 2/2001, created difficulties in establishing the possible criminal liability of an offender who has not complied with the final judgment imposing the sanction of community service, it should be noted that the provisions of Article 7 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrines the principle of the lawfulness of criminal offences and penalties (nullum crimen, nulla poena sine lege) - in addition to prohibiting, in particular, the extension of the content of existing offences to acts which did not previously constitute offences - also establishes the requirement that the law must clearly define the offences and penalties applicable.

As regards the 60-day term proposed by the draft law to be inserted in Article 287, letter h of the Criminal Code - failure to enforce the court decision by which the offender was obliged to perform an activity under Article 39^1 of the G.O. no.2/2001 within 60 days of the final decision of the sanction - we consider that it is too short. Given that the penalty for community service may be set by the court up to a maximum of 300 hours, and given that this activity must be carried out every day, within the maximum working hours of 8 hours per day, without any other paid work, 38 days are needed, not including days off.

3. Conclusions

It is desirable for the Romanian legislator to be concerned with filling the so-called "legislative vacuums", but the normative acts to be adopted in the field of misdemeanors must comply with the qualitative requirements, particularly those of accessibility and predictability, not in order to avoid possible convictions of Romania at the ECHR, but to ensure the security of legal relations, as well as greater legislative stability and efficiency.

Certainly, in this area it is necessary for the legislator to intervene in order to clearly establish the legal regime of the procedure for replacing the penalty of an administrative fine with the penalty of community service, as well as to introduce the liability of the offender in case of culpable non-fulfilment, while complying with the ultimate purpose of any intervention by the state, namely the preservation and guarantee of human rights and freedoms.

As regards the amendment of Article 287 of the Criminal Code, in the sense of introducing a new subparagraph penalising the non-enforcement of court decisions by which the offender has been obliged to perform community service, we do not consider it utterly necessary. In the current regulation of the offence of non-compliance with judgments, it can be seen that in the case of the first type of offence - point a) - provided for in Article 287 para. (1), the active subject is general, and may be any person against whom a judgment is enforced. In view of the specific nature of the offence, i.e. resisting, we can hardly consider that a legal person could be the perpetrator.

Moreover, even the provisions of Article 9(3) of G.O. no. 2/2001 refer to the possibility of replacing the administrative fine with the sanction of community service for individuals who have not paid the administrative fine within 30 days from the date of the final decision and for whom there is no possibility of enforcement.

It is true that in the case of the modification of this crime by introducing a new way of committing the crime, as the legislator intended through the aforementioned draft law, we would have a qualified active subject, namely the offender who did not perform the community service activity established as his task by a final decision, and the passive subject of the crime would be the community, more precisely, the territorial administrative unit that is the beneficiary of the activity whose performance the offender is obliged to perform.

We consider that at present, even in the absence of the amendment of Article 287 of the Criminal Code, the necessary levers exist to enforce the final judgments by which the

courts have replaced the administrative fine with community service, including the provisions of paragraph 4 of Article 39^1 of the G.O. no. 2/2001, which stipulate that the enforcement of sentences is monitored by the civil enforcement service of the court in whose district the offence was committed, in collaboration with the specialized services of the municipalities.

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