

The Criminal Policy after the Communism – between Liberal Reform and Communitarian Fundamentals

Mădălina Cristina PUTINEI

University of Craiova

madalinaputinei@yahoo.com

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Abstract:

One of the domains in which the transition from the totalitarian regime to the liberal democratic one had a deep impact, is the domain pertaining to the criminal policy of the state. The criminal policy measures represented, together with other measures taken by the state, one of the most effective mechanisms that the state could make use of. The decomposition of the civil society and the creation of an amorphous mass of citizens were also accomplished by means of preventive measures, rehabilitation and coercion measures under criminal law.

The establishment of the liberal state had and still has to face socialist mentalities and methods regarding society. Thus, the change in the perspective on the objectives of criminal policy should take into account the purpose of the state established after the Revolution of 1989, i.e. the freedom of the individual. Although the field of criminal policy has been subject to numerous legislative and institutional changes meant to make it adapt to the new state framework, there are reminiscences from the former regime, more precisely the institutions referred to in the Criminal Code of 1969, which have survived on the transition way to democracy.

Keywords: criminal policy, communism, liberalism, social danger, new criminal code

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The establishment of the liberal state had and still has to face socialist mentalities and methods regarding society. Thus, the change in the perspective on the objectives of criminal policy should take into account the purpose of the state established after the Revolution of 1989, i.e. the freedom of the individual. Although the field of criminal policy has been subject to numerous legislative and institutional changes meant to make it adapt to the new state framework, there are reminiscences from the former regime, more precisely the institutions referred to in the Criminal Code of 1969, which have survived on the transition way to democracy.

One of the major challenges that criminal policy has to confront with is that of criminal conducts, considering that the juridical institution of "social danger", specific to the socialist state, still represents the basis of the criminal liability structure. From this standpoint, this paper is an attempt to answer the question whether the Romanian state has managed, after the communism, to find a balance between individual freedom and the coercive power of the state, especially from the perspective of the adoption of the new Criminal Code which is intended to be the first liberal alternative to the communist code.

I. The new Criminal Code¹: between liberalism, communitarianism and lack of philosophy

a. On the necessity to adopt a new Criminal Code from the philosophical standpoint

The reality of adopting a new code² at the criminal substantial level determines the necessity to analyze the consequences of the proposed amendments with regard to the criminal policy of the state. The new Criminal Code, which cannot be analyzed without making reference to the new Code of Criminal Procedure, represents a restructuring and rethinking of the position of the state in relation to the criminal and criminal procedure aspects, from the standpoint of the philosophy guiding these amendments. The deep impact on certain institutions involving the monopoly of the state in the field of criminal coercion renders vital the philosophical research lying at the basis of these changes. Therefore, it is important to see whether those involved in the work of reconfiguration of the criminal policy were urged by certain ideas, whether these ideas belong to a distinct philosophical sphere and especially whether and to what extent the former view on the role of the state in this domain has been abandoned or not.

1 Law no. 286/2009 on the Criminal Code, M. Of. (Official Gazette of Romania) no. 510 of 24 July 2009.

2 George Antoniu, "Noul Cod penal si Codul penal anterior, privire comparativa. Partea generala", RDP n° 4/2004.

The Criminal Code and the Code of Criminal Procedure still in force are permeated with a certain philosophy extracting its fundamentals from the epoch when they were adopted and the political interests that they served. From this perspective, the adoption of new codes is fully justified, since the action of the state in a field involving the highest degree of coercion must be reconsidered on new political desiderata, instituted along with the new democratic and liberal state.

It is important to notice from what perspective the communitarian philosophy still influences the criminal policy of the state and if, with the adoption of the new code, one can talk about the primacy of liberal philosophy in the criminal field. It is first necessary to analyze these two philosophies, considering the impact they have on criminal policy and later tackle the issue of the philosophical basis of the changes brought by the new Criminal Code.

b. The abandonment of communitarian philosophy

The social purpose that the new Criminal Code assumes is similar to the one considered by the Criminal Code in force, i.e. the protection of certain social values against the commission of criminal acts. Despite this fact, it is obvious that there is a change of philosophical perspective, since it is no more about 'rescuing' certain social values for their own sake. One can notice the abandonment of a communitarian perspective in favour of a liberal one, due to the fact that the protection of certain social values is no longer an aim, but the means by which one can attain the actual objective of criminal policy, the protection of a sphere characterizing the individual, his rights and freedoms.

Another feature of the Criminal Code in force is the affirmation of certain values privileged by society, that the criminal law serves, i.e. the values enumerated under art. 1 of this Code, which reveals a criminal policy based on the supremacy of the good over the just. In the new Code, such an *a priori* consecration of values is abandoned, these values making the object of criminal protection for a much more liberal approach of the way in which certain conducts will be included in the criminal sphere.

Renouncing the attempt to define the purpose of the criminal law may be considered as translating the attachment that the present society shows to liberal values. Unfortunately, the members of the commission drafting the new Criminal Code do not seem to be totally aware of this change in the philosophical perspective, trying to prove that this change meets the requirements of a democratic state. This priority that the democratic character of our state acquires is valuable, but it would be better that any alteration should rely on the affinity with liberal philosophy, since the mechanisms characterising a democratic society are not fully capable of protecting society from totalitarian practices. Only by understanding democracy as being completed by liberal philosophy, can persons be protected, by way of a democratic majority, against the constraint of a moral view concerning a certain type of good, which should prevail when criminal conducts are incriminated.

Philosophical indecision, or negligence with regard to the selection of a philosophy, which would find itself throughout all the changes proposed by the new Criminal Code, may lead to a lack of coherence of the proposed changes.

c. The indecision regarding liberal philosophy

Although a certain philosophical indecision can be noticed sometimes, one should appreciate the fact that, in certain respects, the new Criminal Code is full of liberal precepts. Such a consecration is visible with regard to the much more detailed regulation as compared to the one contained in the Criminal Code in force, of an essentially liberal principle, that of legality of incrimination and punishments³.

The concern of the legislature for this liberal principle can also be noticed in the express consecration of the prohibition to retroactively enforce the criminal law, for acts that it did not govern in the past.

Another amendment introduced by the new Criminal Code comes to support the predilection of the initiators of this Code for liberal philosophy, thus renouncing the communitarian one. It is about the reconfiguration of the concept of "offence", by creating a new definition. The definition stipulated in the Criminal Code in force provides that an offence is the act which implies a social danger, act committed with intent and provided under criminal law⁴. In accordance with the new Criminal Code, an offence is the act provided under criminal law, committed with intent and imputable to the person who committed it⁵.

The change in the priority within the hierarchy of values protected by the criminal law is obvious in the special part of the new Criminal Code as well, supposing another manner of systemizing the offences. Thus, considering the primary role of the individual in relation to the state, the choice aims at the original regulation of offences against individual rights and freedoms, in order to consecrate in the end the acts prejudicing the functions of the state. Such a systematisation was absolutely necessary for the new objectives of the criminal policy of the state.

The purpose of redefining an offence consists of a new view on this legal institution, and the philosophical grounds leading to this change of perspective should not be overlooked. One should appreciate that they abandoned the definition of the offence by means of the social danger that the committed acts imply, but it is regrettable that the only arguments supporting this amendment are of a historical nature, also making reference to comparative law. In the presentation of the arguments regarding the new Criminal Code⁶, a point of discussion tackles the tradition of the Romanian criminal law between the two world wars and the European regulations defining an offence. The return to tradition is a strong argument favouring a criminal policy measure, especially since it concerns a period of the history of the Romanian state characterised as democratic and liberal. Such an option is strengthened by the adoption of a similar solution regarding the definition of the offence by other European states. But these relations are not enough to justify the new view on this important criminal law institution. They must be accompanied by a reliable philosophical basis, otherwise what remains is the nostalgia for a historical period which was perfect for the promotion of human rights and the eternal local need to import tendencies and functional institutions from other legal systems.

³ For a more detailed argumentation of this principle, see George Antoniu, "Comentariul Capitolului I. Principii generale" of the new Criminal Code, pp. 19-39, in G. Antoniu (coord.), "Explicatii preliminare ale noului Cod penal. Vol. I Articolele 1-52", Universul Juridic, Bucuresti, 2010.

⁴ Pursuant to art. 17 par. (1) of the Criminal Code in force.

⁵ Art. 15 par. (1) of the Criminal Code.

⁶ For the presentation of arguments, see www.just.ro.

It is true that the aspiration for a legal system similar to those in other European countries can be nothing but beneficial. But the concrete way of reaching certain aims is different from one spatial-temporal plan to another, there are numerous variables, from one type of structure of social relations, to the capacity of a society to assimilate and to put into practice certain measures. The experience acquired by other states is not to be overlooked, especially those which did not know, or knew to a lesser extent the totalitarian phenomenon. But these very differences must be taken into account when importing certain legal institutions or ways of normative circumscription of reality, because, besides the criminological phenomena that it has to manage, the state has to deal with the political and juridical specifics of its own society.

It is important to emphasize that, by renouncing the criterion of the social danger degree for the incrimination of criminal conducts, they discussed the need for the existence of a juridical instrument used to filter, *in concreto*, the antisocial behaviour, by placing only those bearing this feature within the scope of criminal law. The members of the Commission for drafting the new Criminal Code and Code of Criminal Procedure concretely accomplished a correlation between the offence, as an institution of substantial law, and the procedural law provision, also amended, which regulates the principles governing the competence of prosecutors with regard to the criminal action. Thus, they are given the possibility of expressing their opinion on the opportunity⁷ of the prosecution, as the means by which they establish the criminal character of a certain conduct.

In concreto, the prosecutor has an alternative solution, to cease the prosecution⁸, which can be used when, ” in relation to the conduct of the defendant, to his conduct previous to the commission of the offence, to the content of the action, to the way and means of committing the offence, to the purpose of the act and the concrete circumstances regarding the commission of the offence, to the efforts of the defendant to remove or diminish the consequences of the offence, he finds out that there is no public interest in the prosecution of the defendant”⁹.

The consecration of the opportunity of the prosecution as a principle of the criminal trial is in conformity with the aim of the state: to perform a criminal policy in accordance with liberal principles. This change represents the meeting of the practical requirements, more than the assumed application of the liberal philosophy. The inconveniences caused by the use of some concepts supporting a communitarian ideology have been noticed in practice. Therefore, since not all actions which *in abstracto* put in jeopardy the society, as far as the values protected under criminal law are concerned, can be considered as offences, a normative disposition was introduced to regulate the way in which the degree of social danger of the act and doer can be established in a concrete form, as contained in art. 18¹ of the Criminal Code in force.

By adopting the principle of opportunity of the prosecution, the legislature actually understood how to respond *a priori* to the constraint of certain social and moral values by means of criminal law.

7 Art. 285 par. (1) of the new Code of Criminal Procedure.

8 Art. 318 of the new Code of Criminal Procedure.

9 The presentation of arguments with regard to the bill on the Code of Criminal Procedure, p. 17, www.just.ro.

d. A clear consecration of liberal philosophy – penalties under criminal law

The tendency arising out of the analysis of the criminal policy carried out by the state in the last years, as far as penalties are concerned, reveals a constant increase in the proportion of these penalties. In this way, the criminal policy has become an instrument the main purpose of which is the neutralisation of the persons who commit offences.

On the contrary, liberal philosophy welcomes the low involvement of the state within the sphere of individual liberty, which cannot be translated as a total failure to get involved. The new orientation of the Criminal Code with regard to the rethinking and readjustment of penalties represents one of the most important changes. The necessity to reconsider the role of penalties in the present society has often been emphasized in the doctrine¹⁰ and it has constantly been demanded by practical reality¹¹.

Along with the new amendments of the Criminal Code, the role of the penalty is reconsidered as well. Therefore, the component referring to the neutralisation of offenders is no longer insisted on, on the contrary the focus is on prevention, rehabilitation and social reintegration. A neutralisation policy will result into the decrease of the criminal law addressees' trust in its capacity to control criminality.

The decrease in the penalty limits for certain offences, as well as the elimination, from the special part of the new Criminal Code, of certain circumstances in the presence of which the penalty was aggravated, are accompanied by a corresponding alteration of the provisions in the general part of this code, referring to the plurality of offences¹².

It is worth mentioning the care, in the new Criminal Code, arising out of the argumentation, for a clearer and more coherent systematisation of the provisions referring to the aggravating or mitigating circumstances. In this respect, the option was for the compliance of the dispositions of the special part of the code concerning these circumstances with those of the general part, in order to avoid overlapping and difficult wording. Consequently, a general circumstance will not be resumed in the special content of the offence, another desideratum of the state governed by the rule of law being thus fulfilled, that of clarity and concision of legal provisions.

The new Criminal Code does not alter the hierarchy of punishments, therefore the first place within main penalties still belongs to the liberty depriving punishment, either life detention or imprisonment. This constant attitude is the fair one in the evolution of society at this moment, due to the fact that a prevalent fine punishment¹³ would not be effective in our legal system¹⁴.

10 Valerian Cioclei, "*Despre nevoia de echilibru în justitia penală*", *op. cit.*, p. 3-13.

11 In accordance with the presentation of arguments with regard to the bill on the new Criminal Code, it is noted that the offences of theft and qualified theft best reflect the excessive rise of the punishment limits, therefore judges inflicted liberty depriving penalties, most of which do not amount to 5 years, which proves that the practice does not need increased liberty depriving penalties in order to reach the aims of criminal penalties.

12 In this respect, see art. 37-44 of the new Criminal Code, regulating joint offences, repeated offences and intermediate plurality of offences.

13 The financial punishment is the first on the list of main punishments under Swiss criminal law, along with the amendment of the general part of the Criminal Code, in 2007.

14 In order to understand the premises and consequences of such a hierarchy of punishments, see P Nicolas Queloz, "*A quoi servent les peines pécuniaires? Prix du crime ou nouvelles taxes publiques?*", in J.L. Bacher, N. Capus, F. Vogler, "*Justice pénale: des prétentions aux résultats*", Stämpfli, Berne, 2010.

The progress accomplished by the new regulatory framework is emphasized with regard to fines, the scope of which has been significantly enlarged, as well as with regard to the method for calculating this punishment, implying the system of fine-days. These amendments prove the change in the perspective on the purpose of the punishment, which is mostly intended for the limitation of the harmful effects of the liberty depriving penalty, for the reintegration of the offender in society, and less for the wish to punish and neutralise. From this standpoint, the fine sanction is provided for a higher number of offences, either as a single punishment, or as an alternative to the liberty depriving penalty.

The main advantage of the calculation system of fine-days is obvious when the punishment is individualised. This calculation allows to obtain a strict proportionality relation between the act committed and the punishment inflicted, as well as a materialisation of the punishment in accordance with the patrimonial situation of the convicted person.

The risk of the substitution of the financial sanction for failure of execution is always present and depends on the material status of the person committing the offence. Traditionally, the failure to pay the fine entails its transformation into a liberty depriving punishment. But this cannot reduce the damaging, sometimes irreversible consequences of liberty deprivation, as is the case of repeated offences or loss of contact with the society, consequences which were pursued from the very beginning by establishing the sanction of the fine. In order to avoid this result, which would render the financial punishment inefficient, the new Criminal Code stipulates the possibility of paying the fine by providing some work for the benefit of society, by the person for whom it is impossible to actually pay the fine. The substitution of the fine sanction by the imprisonment penalty is a last measure, in the case of the insolvable convict in bad faith.

II. The new criminal policy of the legislature – a security drift?

A constant element of this policy is the danger that offences generate on society as a whole. The measures rely on the individuals' fear of the lack of morality of their fellows and the institutionalised reaction to the jeopardy residing in the breach of conduct norms.

The adoption of the new criminal substantial and procedural codes announce an important change in the perspective, at least at the declarative level, regarding the relation between criminal liability and the social danger of the action and of the doer.

1. The philosophical inconsistency of the new Romanian Criminal Code

After the analysis of the amendments proposed by the Criminal Code, a conclusion arises, i.e. the philosophical inconsistency lying at the basis of the distinction between offences and contraventions. One of the vital amendments refers to the elimination, from the legal definition of the offence, of the degree of social danger which determines, in accordance with the Criminal Code in force, the qualification of an act or action as offence¹⁵. This change is welcome, since the use of social danger as a standard for incrimination under criminal law, does not meet any longer the requirements of a liberal and democratic state, the actions of which should be mainly headed towards the protection and promotion of individual rights and freedoms, and in subsidiary, as a normal consequence, towards the protection of abstract social values.

¹⁵ For an analysis of the features of the offence, see Costel Niculeanu, "*Definiția și trăsăturile esențiale ale infracțiunii în reglementările noului Cod penal*", Dreptul, no. 7/2010, Uniunea Juristilor.

a. A change in the perspective on the definition of the offence¹⁶?

The elimination of the notions of “social danger” and “degree of social danger” from the legal definition of the offence stands for only one of the stages that the Romanian legislature has to complete, if they want, as the initiators of the new Criminal Code express, to overcome the aims specific to a totalitarian state.

The first step is absolutely necessary for the envisaged process, but this reconfiguration of the very position of the state towards the criminal sphere cannot be completed without a coordination of all legislative activities coming within the scope of criminal policy. Thus, although formally the degree of social danger was abandoned as an element determining the introduction of certain actions into the criminal sphere, in reality the distinction between contraventions¹⁷ and offences has been maintained, based on this very concept of social danger. Art. 15 of the new Criminal Code stipulates that the offence is the act provided under criminal law, committed with fault, unjustified and imputable to the person who committed it, representing the only ground for criminal liability. In accordance with the logical thought adopted in this domain, the offence is a criminal act, whereas the contravention is and remains an act of an administrative nature.

The distinction between the two categories is made starting from the seriousness or gravity that the action can have against certain social values, which makes social danger remain a constant element of legal liability, under both criminal and contraventional law¹⁸. In order to respect the philosophy they proclaim, the initiators of the new Criminal Code should go on and reconfigure criminal liability on a different basis. In this respect, the liberal philosophy imposes that the distinction between contraventions and offences should no longer rely on the degree of social danger of the act. A really liberal criterion implies the distinction between actions in conformity with the type of sanction attached to them. Thus, if the social danger of the act was abandoned due to the fact that, in the view of the former criminal policy, it based criminal liability on the degree of involvement of certain abstract social values by antisocial behaviour, the new liberal orientation of the criminal policy should move criminal liability from the protection of the society to the protection of the individual.

16 George Antoniu, “*Unele reflectii asupra conceptului de incriminare si conceptului de infractiune*”, RDP no. 4/2010.

17 One of the aspects making the distinction between these two categories of acts is related to the regulation level. Regarding the competence of the executive power to regulate the contraventional matter, see *Ch. crim.*, 26 February 1974, *Schiavon*, obs. A. Varinard, in Jean Pradel, André Varinard, “*Les grands arrêts du droit pénal général*”, 3rd ed., Dalloz Paris, 2001, pp. 34-43.

18 For the meaning of the notion of legal liability, see Antonie Iorgovan, “*Tratat de drept administrativ*”, Vol. 2, ed. 4, Ed. All Beck, Bucuresti, 2005, p. 329-345.

b. Criminal or contraventional, according to the nature of the sanction

The nature of the sanction is a criterion for the distinction between acts, by means of which certain conducts will be considered as coming within the criminal domain, and others, on the contrary, will exceed this sphere¹⁹. The proposed criterion is much closer to the pursued purpose, due to the fact that it makes out of criminal liability an issue decided on by reference to the person. In this way, a certain conduct will trigger a criminal penalty only if a strict proportionality relation is thus established between the prejudice suffered by the victim and the liability²⁰ of the doer as a consequence of this prejudice. Criminal liability is the link element between the rights or freedoms of the injured party and the limitation of the freedom and rights of the doer. The core of the analysis moves towards this proportionality relation which transforms the punishing activity from a subjective, potentially arbitrary decision of the bodies meant to perform it into a procedural rule, able to objectively attain the aims of a rational criminal policy. Going beyond the socialist philosophy implies the substitution of some abstract concepts the meta-judicial content of which is hard to determine and which depends to a great extent on the one making the determination, under a procedure that does not make use of such notions any longer, because it is not dependent on the philosophical and moral affinities of the interpreter.

The aforesaid relation of proportionality implies a value judgment of the act committed and of the prejudice suffered by the victim, but it brings a considerable contribution to this analysis, since criminal liability is determined by relating it to the victim and to the doer of the action, the society becoming a subsidiary element.

c. The autonomous notion of “criminal charge” – between offence and contravention

The criterion regarding the nature of the sanction cannot annul the distinction between offences and contraventions²¹, but on the contrary, it implies maintaining it on a different basis. The delimitation will be made by considering the nature of the sanction attached to the actions triggering legal liability. From this standpoint, the sanction may, according to its purpose, be either a remedy or a repressing and dissuasive measure. These features are analyzed and detailed by the European Court of Human Rights in its jurisprudence, which decides, according to this nature, on the terms of “criminal charge”. “The European Court adjudicated in the sense that the eminent place that the right to a fair trial occupies in a democratic society imposes to consider a “material”, not “formal” meaning of the notion of “charge”. This is due to the fact that judicial decisions are always applicable to persons (...)”²². The meaning of the syntagm was determined by the jurisprudence, as it has often happened in the case of the instrumental notions used by the Court, which showed that the criminal charge represents the official notification issued by a competent authority of the fact that the commission of a criminal act is imputable to a person, with important

¹⁹ In the doctrine, the sanction is considered the only distinctive criterion, de lege lata, between contraventions and offences. See Mircea Ursuta, “*Procedura contraventională*”, 2nd edition, Universul Juridic, Bucuresti, 2009, pp. 73-76.

²⁰ For an analysis of the theories on fault, see Mioara-Ketty Guiu, “*Criza dogmaticii penale si teoria vinovăției*”, Revista de Drept Penal no. 2/2010, Asociația Română de Științe Penale, pp. 48-60.

²¹ Alexandru Ticlea, “*Reglementarea contravențiilor*”, 4th edition, Lumina Lex București, 2006, pp. 18-20.

²² Corneliu Bîrsan, “*Convenția Europeană a Drepturilor Omului. Comentariu pe articole*”, 2nd edition, C. H. Beck, Bucuresti, 2010, p. 410, no. 130.

consequences regarding the person thus suspected²³. In order to establish whether a person is “charged” with the commission of a criminal act, the Court has established three criteria in its jurisprudence: the qualification of the act as an offence in internal law; the nature of the offence; the nature and seriousness of the applicable sanction²⁴.

The Court in Strasbourg established as a sanction resulting from a criminal charge in the sense of art. 6 §1 of the Convention, “the measure (...) which also embraces a sanctioning and dissuasive character and therefore represents a punishment (...)”²⁵. This happens regardless of the qualification of this act as an administrative one in internal law. Thus, if the sanction has a dissuasive purpose and aims to repress a conduct, exceeding the preventive purpose and the simple request for a remedy against the prejudice caused by the doer, it is “a criminal charge” beyond any doubt. Consequently, all the limits imposed to the legislature by art. 6 of the Convention are applicable.

There is a need for reconsidering the delimitation of actions, by placing them within the administrative scope of contraventions or within the scope of offences. Starting from the new premise, both offences and contraventions will be part of the criminal sphere, if the type of sanction involves the punishment and repression of a conduct. The European Court is not opposed to this delimitation, specifying that “the dispositions of the Convention undoubtedly allow the states, in the exercise of their public order protection function, to maintain or establish a distinction between criminal law and disciplinary law and fix their delimitations, but only with the observance of certain terms”²⁶ (translation from Romanian). The sovereign action of the states is confined, since if they could, by their own appreciation, qualify a certain action as a “disciplinary offence”, not a criminal offence, the fundamentals of the texts of the Convention would be subject to their sovereign will, which would risk leading to results incompatible with the purpose and object of the Convention²⁷; “the Court has the competence to make sure, on the basis of art. 6, that the *disciplinary* does not unjustly deprive the domain of the *criminal*”²⁸.

As for the classification involving contraventions and offences, it survives in the consideration of the rights and freedoms of individuals, as well as of the social values that they have to protect, not because the former would be less serious and less dangerous than offences with regard to these rights. Actually, such a distinction is typical for other legal systems too, for instance the French legal system. Art. III-1 of the French Criminal Code disposes that: “Criminal offences are classified in accordance with their seriousness, into crimes, delicts and contraventions”. It is true that the criterion of gravity is introduced so as to make the distinction between the three subcategories of actions, but only after characterizing them as criminal acts, so within one and the same category, that of criminal offences.

23 ECHR, 20 October 1997, *Serves c/France*, § 42 ; 16 December 1997, *Tejedor Garcia c/Espagne*, § 27 ; *Deweere c. Belgique*, 27 February 1980, series A no. 35, p. 22, § 42, et p. 24, § 46; *Eckle c. Allemagne*, 15 July 1982, series A no. 51, p. 33, § 73; <http://www.echr.coe.int/>

24 ECHR, 23 October 1995, *Grandinger c/Autriche*, § 35 ; 29 August 1997, *A.P., M.P., et T. P. c/Suisse*, § 39, 23 September 1998, *Malige c./France*, § 35; 21 October 1997, *Pierre-Bloch c./France*, <http://www.echr.coe.int/>.

25 *Malige c France*, § 39, <http://www.echr.coe.int/>

26 ECHR, 21 February 1984, *Öztürk c/Allemagne*, § 49, <http://www.echr.coe.int/>

27 ECHR, 21 February 1984, *Öztürk c/Allemagne*, § 49, <http://www.echr.coe.int/>

28 C. Bîrsan, *op. cit.*, p. 411.

The abovementioned distinction is also found in the Swiss legal system, subject to the same classification of crimes, delicts and contraventions within the legal category of offences. Art. 10(1) CPS (Swiss Criminal Code) makes the distinction between crimes and delicts according to the seriousness of the punishment applicable in the case of offences, only to establish as crimes, in the next two paragraphs, the offences for which a liberty depriving punishment of more than 3 years is applicable, and as delicts, the offences for which a liberty depriving punishment of less than 3 years or a financial sanction is applicable. The third category of criminal acts is regulated under art. 103-109 CPS, and as far as the definition is concerned, art. 103 establishes that contraventions are the offences for which a fine sanction is applicable²⁹. The gravity of the act and of the applicable sanction is relevant only after the criminal nature of an act was established, thus including it in this category.

Strongly connected with what was previously mentioned, the new perspective on criminal liability is suitable for the effective protection of human rights. By introducing a contravention in the field of criminal law, the person suspected of having committed it will take advantage of all the rights under any recognized procedural law, guaranteed and ensured by the state, if we consider an act for which the sanction depends on the qualification of “criminal charge”. All the aspects regarding the right of defence shall be guaranteed to the person suspected of having committed an act qualified as a contravention, but whose sanctioning regime denotes the intention to repress a conduct. The consequences are extremely important in the Romanian legal system, since the guarantees provided under art. 6 of the European Convention on Human Rights, concerning the right to a fair trial³⁰, are recognized only in the event of the commission of an act qualified in internal law as a criminal act, with the exclusion of the contraventional ones. Therefore, although sometimes certain administrative sanctions, applicable to contraventions, can entail certain consequences with regard to the freedoms and rights of individuals, consequences more restrictive than a criminal punishment³¹, the persons having committed a contravention are exposed to the action of the state, without appropriate protection. These persons cannot invoke the infringement of the reasonable time for deciding in the case, they do not enjoy, as a matter of legal principle, the presumption of innocence³² and cannot make use of all the aspects involving the right of defence, the right of being informed about the charge against them, to be assisted by a counsel for the defence, the right to lodge claims, defences, to raise exceptions, to contest the decisions of a court.

The European Court, in the abovementioned decision, made this distinction according to the nature of the sanction, overlooking the fact that in internal law, it is of an administrative nature. With a view to the sanction of withdrawing the points for the driving licence, qualified in the French law as an administrative sanction, the Court decided that “the withdrawal of points may entail, at the end of the term, the loss of validity of the driving licence. Or, it is undeniable that the right to drive a motor vehicle is of great use in current life and the exercise of a profession. The Court, in agreement with the Commission, infers

29 With regard to the new law applicable to contraventions, see Yvan Jeanneret, “*Légalité, contravention et nouveau droit: des surprises?*”, RPS 122, 2004, p. 21 and the next.

30 On the coming into being of the fair trial, see Denis Salas, “*Du procès pénal*”, PUF Paris, 1992, pp. 81-97.

31 As an example, the court disposed the conviction for the commission of an offence, but it considered that a liberty depriving sanction was not necessary, awarding the benefit of conditional suspension of the punishment or suspension of the punishment under supervision, which excludes the possibility to deprive that person of liberty.

32 A reliable analysis regarding the presumption of innocence in the jurisprudence of the European Court is made by Mihai Selegean, “*Dreptul la un proces echitabil*”, Institutul National al Magistraturii <http://www.inm-lex.ro/>, pp. 57-63.

that, if the measure of withdrawing the points has a preventive function, it also embraces a punitive and dissuasive form and it so stands for an accessory punishment. The will of the legislature to dissociate the sanction of withdrawing the points from other punishments established by the judge competent in criminal matters will not change its nature”³³. In conclusion, the seriousness and nature of the sanction are the elements determining the Court to find the existence of a “criminal charge” in the case.

D. The legal regime of contraventions in Romanian law

a. The legal situation of contraventions

The legal situation of contraventions³⁴ in Romanian law raises a big question mark with regard to ensuring the conventional guarantees under art. 6 and the constitutional ones contained in art. 24, from the perspective of their qualification as acts of an administrative kind. One of the aspects concerning the right of defence, which is infringed on the occasion of reporting the commission of a contravention, deals with the presumption of innocence. The report on the contravention, the minutes drafted by the competent body, stands for evidence. It is true that the one who committed a contravention has the possibility of bringing an action to court so as to contest this act. But an overturn of the burden of proof intervenes this time, since the findings in the report are considered to be true until this presumption is overturned by the evidence that the author of the contravention has to produce. Thus, in the administrative domain, although the nature of the sanction may belong to a “criminal charge”, the state adopts a passive attitude, not having the obligation to prove the facts imputable to the author of the contravention, whereas the latter has to adopt an active attitude in order to prove his innocence.

b. The legal nature of and the evidence in the report on the contravention

With regard to the juridical nature and the force of the evidence in the reports on contraventions, it was claimed that they represent “real acts of administrative law, since by establishing a state of fact, the administrative body of the state also manifests its will to determine the application of a sanction”³⁵. Moreover, the report is, except for some situations expressly stipulated by law, the only procedural act establishing the commission of a contravention³⁶.

Most judicial practice brings arguments that the quality of an administrative act of the report on the contravention makes it enjoy the presumption of legality specific to these juridical acts³⁷. Thus, the Constitutional Court qualifies the report on the contravention as an administrative act establishing the contravention, the effects of which can be removed by the exercise of appeal procedures provided by law. Yet, it is considered that “the report does not enjoy the force of the evidence in an administrative act, which, being assimilated to a

33 *Malige c France*, § 39 <http://www.echr.coe.int/>.

34 The legal situation of contraventions occurs in special laws. For example: Government Ordinance no. 2/2001 on the legal regime of contraventions, M. Of., no. 410 of 25 July 2001, as subsequently amended and completed by Law no. 180/2002, subsequently amended and completed; Government Emergency Ordinance no. 195/2002 on public road traffic, as amended and completed by G.E.O. no. 63/2006, M. Of., no. 729 of 20 September 2006.

35 Tudor Drăganu, “*Actele de drept administrativ*”, Ed. Stiintifică, Bucuresti, 1959, p. 92.

36 Mircea Ursuta, “*Procedura contravențională*”, 2nd edition, Universul Juridic, Bucuresti, 2009, p. 126.

37 *Ibid.*, p. 211.

deed, makes the proof until a false writing is proven, but it only enjoys, with regard to the state of fact, a relative presumption of authenticity and truthfulness until otherwise proven”³⁸. Since it is an act meant to provide evidence, any kind of proof provided by law is admitted before the court³⁹.

As for proving the contravention, the report is “fully reliable about the acts and actions it refers to, no other evidence being necessary”⁴⁰. The applicable procedure comes under civil law, completing that provided by the Code of Civil Procedure. This feature is also valid in the case of the burden of proof, pursuant to art. 1169 of the former Civil Code. Thus, it is asserted that “due to the fact that the initiative for the judicial action belongs to the contesting party who lodged the complaint against the report on the contravention, the burden of proof is incumbent on him, in accordance with the general principle under civil procedure”⁴¹.

Taking into account the fact that the report has the advantage of a relative presumption of truth, proving the state of fact⁴², “the overturn of this presumption is often almost impossible for the claimant, especially in the event of instantaneous contraventions directly noticed by the agent, when there are no eye witnesses”⁴³. It is obvious that this is a violation of the claimant’s right of defence and of the presumption of innocence with regard to which the European Court established the infringement when the person suspected of having committed a contravention is required to prove his innocence.

The solution proposed in the doctrine for the observance of the presumption of innocence is of a normative nature. “Under the procedure regarding the contraventional complaint, the ordinary law in this matter should provide the overturn of the burden of proof, (...) and that the presumption of legality of the report on the contravention or the obligation of the contesting party to prove its nullity should no longer exist, but on the contrary, that the obligation of the administrative body to prove the solidity and legality of the contraventional sanction should be expressly provided by law, which is equal to proving the fault of the contesting party”⁴⁴.

This manner of perceiving things is welcome from the perspective of the author who rightly establishes that the one who files a complaint with a court, so the one having to prove its solidity, is the reporting body, not the one contesting the report. The reporting agent makes a statement regarding the fault of a person, which entails, on his part, the obligation to provide evidence in order to support it. The solution is yet incomplete, since the author remains in the same register, the administrative one. Actually, in order to avoid the problems referring to the infringement of the right to a fair trial from all standpoints, the court before which a report on a contravention is contested should judge in terms of a “criminal charge”, since this is the only domain in which the aforementioned presumptions are recognized to the contesting party. The solution of the burden of proof overturn which exists, according to the author, in the matter of employment litigations, can be adopted in order to prove the legality of the disciplinary sanction in various domains, as a protection for the contesting party, but only after it is found that it exceeds the scope of criminal law.

38 Mircea Ursuta, *op. cit.*, p. 215.

39 *Ibid.*, p. 224.

40 Mihai Adrian Hotca, “*Regimul juridic al contravențiilor. Comentarii și explicații*”, C.H. Beck, București, 2006, p. 216.

41 Corneliu-Liviu Popescu, “*Comentariu la Hotărârea CEDO din 4 octombrie 2007, Anghel c/România*”, *Curierul Judiciar* no. 10/2007, p. 12.

42 Mircea Ursuta, *op. cit.*, p. 227.

43 *Ibid.*, p. 229.

44 Corneliu-Liviu Popescu, *op. cit.*, p. 13.

