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Evading Removal Measures on the Romanian Territory according to the Romanian Law

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Abstract: Motivated by the lack of this incrimination in the 1969 Criminal Code, in this paper we have proceeded in examining the offense of evading removal measures in the country. In the paper we have considered the examination of the pre-existing elements of the offense, of its constitutive content, as well as of the legislative precedents. We also considered the examination of the similarities and differences between the two texts, which are absolutely necessary in the application of the more favorable criminal law in transitory situations. The novelties concern both the examination of the constitutive content of the offense and the comparative examination of the two crimes. The work may be useful to the university environment as well as practitioners in this field.

Keywords: the objective side; the subjective side; the legislative precedents

1. Introduction

The offense of evading removal measures on the Romanian territory is part of the group of offenses related to state authority and border, a group mentioned separately under Title III of the Special Part of the Criminal Code.

Provided in art. 265 of the Criminal Code, the offense consists in the act of a foreign citizen against whom the measure of the removal from the territory of Romania was ordered, or the prohibition of the right of residence was ordered, to avoid the fulfillment of the obligations established by the competent authorities.

According to the recent doctrine, “After the entry into force of the Criminal Code, in 2014, by G.O. no. 25/2014 regarding the employment and detachment of foreigners on the territory of Romania and for the modification and completion of some normative acts regarding the aliens' regime in Romania, the normative framework for fulfilling the criminal norm of art. 265 Criminal Code has been consistently modified in a manner that influences the very content of the offense. For example, the notion of removal from Romania was replaced by three notions of return, expulsion and removal under escort” (Gorunescu et al., 2016, p. 387).

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2. The Criminal Code in Force in Relation to the Previous Law

Although in the Criminal Code of 1969 it was not provided for, the previous law provides for such an offense referred to in the provisions of art. 138 from E.G.O no. 194/2002, on the regime of aliens in Romania, in a similar wording.

The text in question was repealed by art. 120 point 1 of the Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code.

The comparative analysis of the two incriminations allows us to observe elements of resemblance and difference, which are of major importance in the process of identifying and applying the more favorable criminal law in the transient situation in which we are.

Among the elements of resemblance we mention:

- maintaining the same marginal title of the offense;
- maintaining in the legal content of the offense of the phrase “prohibition of the right of residence”;
- maintaining the term for avoiding the execution of the obligations established by the Romanian judicial authorities.

Among the elements of difference, we mention:

- replacing the terms “expulsion”, “return” with the term “removal measure”;
- renouncing the words “temporary domicile or residence”;
- Substantial reduction of the special limits of punishment (imprisonment from 6 months to 5 years and respectively 3 months to 2 years imprisonment or fine).

3. Preexisting Elements

3.1. Legal Object

The special legal object of the crime consists the social relations regarding the assurance of respecting the established legal regime regarding the right of residence of the foreign citizens on the territory of Romania (Gorunescu et al., 2016, p. 38).

3.2. The Material Object

The examined offense does not have a material object, because the action of the active subject is not directed against a particular determined object.

3.3. The Subjects of the Offense

The active subject of the offense can only be a foreign citizen against whom the measure of removal from the territory of Romania has been ordered, or the right to stay on Romanian territory has been forbidden.

The passive subject is the Romanian state in its capacity as the holder of the social value protected by the norm of incrimination, represented this time by the General Inspectorate for Immigration within the Ministry of Internal Affairs.

4. Structure and Legal Content of the Offense

4.1. The Premise Situation

In the case of the offense under consideration the *premise situation* presupposes “the existence of obligations established by law by the competent state authorities in connection with the removal of foreign citizens from the country or with regard to which the measure of removal from the territory of the country was ordered” (Griga et al., 2016, p. 69).

4.2. The Constitutive Content

4.2.1. The Objective Side

The material element of the objective side consists of an action or inaction of evading a foreign citizen from the execution of the obligations established by the competent Romanian authorities regarding the measure of removal from the territory of Romania or the prohibition of the right of residence in Romania.

Essential requirement. In order to complete the objective aspect of the examined offense, it is necessary to fulfill an essential requirement consisting in the existence of a decision of the competent Romanian judicial authority ordering the removal from Romania or the prohibition of the right of residence of a foreign citizen in Romania.

Both of these measures are ordered as a result of non-observance by the foreign citizen of conditions imposed by the Romanian law in this field.

We consider that the examination of this essential requirement requires understanding of the words “removal from Romania” and “prohibition of the right of residence”, in the light of the normative acts regulating the activity in the field, namely G.E.O. no. 194/2002 on the regime of aliens in Romania, modified and completed successively by several normative acts, with emphasis on G.O no. 25/2014 regarding the employment and detachment of foreigners on the territory of Romania and for the modification and completion of some normative acts regarding the regime of aliens in Romania.¹

Thus, these two terms must be interpreted in terms of the notions of return, expulsion and escorting, notions referred to in G.E.O. no. 194/2002.

Return is understood as the “voluntary return or escorting process of a foreigner in a third country, namely the country of origin, the transit country established according to the agreements to which Romania or the European Union are parties or another third country in which the alien decides to return and to accept it” (Gorunescu et al., 2016, p. 388).

Expulsion “is defined as the enforcement of the complementary punishments for the prohibition of the exercise of the alien's right to be on the territory of Romania, applied according to the provisions of art. 65 par. (2) or art. 66 par. (1) lit. c) Criminal Code” (Gorunescu et al., 2016, p. 388).

Removal under escort “is highlighted by the same normative act as the execution of the removal measures, namely the return or expulsion, by accompanying the foreigners outside Romania” (Gorunescu et al., 2016, p. 388).

We also appreciate that “the three definitions are not likely to bring clarity to the rule of incrimination in art. 265 Criminal Code, since there are overlapping areas between them” (Gorunescu et al., 2016, p. 388).

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However, the interpretation of the two phrases (*the measure of removal from Romania* and *the prohibition of the right of residence*) must be made in the light of the provisions of the framework law (G.E.O. no 194/2002 on the regime of aliens in Romania).

The immediate consequence is the state of danger for the state authority with attributions in the field, namely the General Inspectorate for Immigration, an institution that has to ensure the enforcement of the legal norms regulating the execution of the measure of removal from the territory of Romania of persons who do not have Romanian citizenship or against whom the measure of prohibition of the right to stay in Romania was ordered.

The causal link results from the materiality of the act (resulting *ex re*).

4.2.2. The Subjective Side

The form of guilt with which the active subject of the offense acts is *direct intention*.

5. Forms, Ways, Sanctions

5.1. Forms

Although possible, both *preparation acts* and *attempts* are not punishable by law.

The consumption of the offense takes place at the moment when the incriminated action or inaction was executed and the immediate consequence occurred, namely the state of danger.

The offense under examination can also present a moment of exhaustion in the case of committing the offense in a continuous form when the act of eviction is prolonged in time until the alien's removal from the fulfillment of the obligations imposed by the Romanian authorities ceases.

In the case of committing the offense “in a continuous form, the moment of exhaustion coincides with the last act of eviction” (Griga et al., 2016, p. 70).

5.2. Ways

The examined offense presents only one normative way.

5.3. Sanctions

The sanction provided by law is imprisonment from 3 months to 2 years or a fine.

6. Complementary Explanations

6.1. Link to other offenses

The offense examined has some elements of resemblance and distinction with offenses that are part of this group.

6.2. Some Procedural Aspects

The criminal prosecution competence belongs to the criminal investigation bodies of the judicial police, and the criminal action is initiated *ex officio*.

Jurisdiction in the first instance belongs to the court.

7. Legislative and Transitional Situations

7.1. Legislative Precedents

In the Criminal Code of 1864 there was no such incrimination, but it was provided in art. 5 of the law on aliens of 7 April 1881, supplemented by the Law of 30 March 1915.

An incrimination close to that examined one was also found in art. 268 of the Carol II Criminal Code, although this concerns the deed of the expelled foreigner who returns in the country without authorization, the offense in question had the title of *unauthorized crossing of the border*.

Analyzing the text, the doctrine of time held that “the Romanian legislator, following the trend of modern laws, to justify the measure of expulsion, passed it among the security measures, giving the courts the right to pass it (article 79); and in order to ensure the respect of the passed safety measure, either by sentence or by authorities, he incriminated the fact of the stranger who, although expelled from the country by expulsion, would, without authorization or revocation of the measure, re-enter the country.

Under the old code, the courts had this right only for aliens declared vagabond (article 220 Criminal Code), but our Court of Cassation decided that the courts cannot rule expulsion even in this case, since this is a administrative measure, the government alone can rule the return to it.

The new code extended this right to the courts as well, for any alien offender.

An identical provision exists in art. 5 of the Law on Aliens of April 7, 1881, amended by that of March 20, 1915, a modification which regulated the control of aliens in the country.

By granting the courts the right to pronounce the expulsion measure, the code did not refute the right that it also has the administrative authorities by the 1881 law to decide to expel foreign non-fraudulent aliens, but whose stay in the country would not seem appropriate” (Ionescu-Dolj et al., 1937, p. 176).

7.2. Transitional Situations. Applying More Favorable Criminal Law

Although the special limits of punishment are lower in the new Criminal Code, however, depending on the concrete circumstances of committing each individual act, the more favorable criminal law will be the old law, given the existence of extenuating circumstances.

If there are no extenuating or aggravating circumstances retained, the more favorable criminal law will be the new law.

8. Conclusions

Although it was not provided for in the 1969 Criminal Code, the offense examined was mentioned, as we have already pointed out in art. 138 from G.E.O. no. 194/2002, regarding the regime of aliens in Romania, in a similar textual formulation.

During the examination we have highlighted the elements of similarity and difference between the two regulations, because their knowledge contributes to the identification and application of more favorable criminal law in transient situations.

At the same time, we have also highlighted the consistency of the Romanian legislator for incriminating this act over time.

We appreciate that, given the development of crime in this area, mentioning this crime in the Romanian Criminal Code is a necessity.

9. Bibliography

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