

Critical Observations on the Contravention Normative Framework in Romania. Perfecting Proposals

Tache Bocaniala

*Danubius University of Galati, Faculty of Administrative Sciences, tache.bocaniala @ univ-
danubius.ro*

Abstract: The legal regime of contraventions, along with the penal normative framework represents for the law enforcement agencies, the main tools for ensuring, maintaining and restoring law and order. The law framework in contravention matters in Romania, the Government Ordinance No. 2. July 12th 2001 on the legal regime of contraventions, with all subsequent amendments, are now in a situation where they are not longer able to cover the practical needs of the domain, lacking the activity efficiency of different asserting agents. Thus, on the one hand, the asserting and punishing activities of contraventions lead to spending important human and financial resources, and it does not have the purpose provided by law, on the other hand, this situation determines an unduly large load on the court with complaints against the contravention report and the multiplication of cases solved by the courts through admission judgments of complaints and the annulment of contravention asserting reports and the appliance of contravention sanctions. Also, in cases when the contravention sanctions remain final and enforceable, their simply record "in flow" is not likely to correct the offender, the standing evidence being the increasing number of imposed fines, which are marked on local public administration records as unfulfilled. Replacing the laws relating to contravention imprisonment with the provision of community service activities were not likely to lead offenders to refrain from committing such acts, or to pay voluntarily the imposed fines, whereas according to the current regulatory provision of an activity of community service cannot be put into repossession. In conclusion, we consider necessary the intervention as urgent as possible of the legislator to correct, supplement and improve the contravention normative framework which leads us to several proposals.

Keywords: legal regime of contraventions; lack of efficiency; critical remarks; improving proposals

1. Preliminary Considerations

According to the standard regulatory framework¹, *the fault committed out of guilt is a contravention, determined and sanctioned by the law, ordinance of the Government or, where appropriate, by decision of the local council of the village, town, municipality or the sector of Bucharest, the Board county or the General Council of Bucharest County.*

The appropriate social danger off the contravention, unlike the crime that has a specific regulation, is not defined by Government Ordinance no. 2/2001.

¹ Government Ordinance No. 2. 12 July 2001 on the legal regime of contraventions, with subsequent amendments, the latest being the Law 293 of September 28, 2009.

However, in the ordinance-framework there are references to the social danger (article 5, paragraph 5: "the established penalty should be commensurate with the degree of social danger of the committed crime", article 7 paragraph 1: "the warning is a verbal or written warning of the offender on the social danger of the committed act ...", article 21 paragraph 3: "the sanction is applied in the limits given by the legislator's act and it must be proportionate to the degree of social danger of the committed crime").

The social danger specific to the contravention exists and it represents that essential feature which indicates the extent to which a minor contravention affects the social values or relations protected by a legislative rule and for which is required the appliance of a contravention sanction. Although it is a socially dangerous offense the contravention being applied in practice, in most of the cases, a tolerant treatment, for its perpetration and also for the moment of effective applying or execution of targeted sanctions. The fact that, no database does centralize a person's contravention background, regarding in particular the unpaid fines, deprives this measure of its educational feature, becoming a mere formality, a symbolic act, issued by a public authority.

As evidence of this reality there are the scenes, more common and widely publicized, with offenders who tear the reports before the cameras and the asserting agents; this is only a small part of the cases where the police or other officials with the exercise of public authority, are treated with contempt or indifference; the legal documents have no effect in eliminating the situation for which they were asked to intervene. While witnessing an alarming increase of convention complaints which would consequently lead to the multiplication of cases decided by court's ruling on total or partial admission or annulment of the complaints and the appliance of contravention sanctions.

The reasons of the annulment of reports by the courts refer frequently to the illegality of the report or the lack of evidence established by proves contrary to the ones noted by the assessment agent. The illegality or relative or absolute nullity of the report is assessed in cases in which assessment agent does not meet the form of reports, according the article 16 and 19 of G.O. no. 2 / 2001 on legal regime of contraventions, with subsequent amendments, that is article 180 and 181 of G.D. no. 1391/2006 for the approval of the Application Government Emergency Ordinance no. 195/2002 on public road traffic.

The admission of partial solutions of complaints and the cut back of fines, fine replacement with a warning, the cancellation or replacement of additional sanctions are imposed by the courts especially when they view differently the social danger of the committed contravention, or for social reasons regarding the poor financial possibilities of the offenders. Finally, when contraventions remain final and enforceable sanctions, their mere record "in flow" is not likely to correct the offender, having as evidence the increasing number of fines imposed, whose value is directly proportional to the unrecovered flow, from fines existing in the city hall record.

2. The Reasons for the Courts' Admission of Offenders' Complaints

After the very rich judicial practice in the field, we may mention the following main reasons for which the courts have set aside the assessment reports of the contraventions and the appliance of the contravention sanctions (Severin, 2007) (Hotca, 2008):

- Removing the relative legal presumption of the assessment reports prepared by the asserting agent followed by changing the proof, that is proving that it was necessary to prove the assessment reports, with evidence, by the in charged agent, the courts refer to the practice ECHR – in the Anghel case

against Romania, it was noted that in contravention matters accusation is similar to the penal matters, for which the agent must prove with evidence the findings described in the assessment report;

- the lack of the picture, in the cases of contraventions found by technical means (speeding, disregard of the red traffic light, the priority refusal for the pedestrian crossing, overtaking in prohibited areas, stopping or parking in unauthorized locations, etc.). In such cases the photo is the only evidence and the impossibility of submitting it leads to the cancellation of reports. As a result, *whenever the assessment person, in such contraventions, does not prove the crime by certified technical means, that is it does not present the photo radar, video or other technical means, or the evidence is not clear, the court accepts the petitioner's complaint and it annuls the assessment report;*

Under the current regulations, the radar images can be stored for 6 months, after which the data is reused, the images are deleted, but actually there are many situations where the lack of the necessary number of image storage units, they are deleted before the stated time, and when there are requested by the courts, the institution is unable to prove the commission of the offense. There were also cases where the picture quality was very poor and it could not be observed the vehicle registration number, for various reasons related to performance of the technical used means, the quality of consumables or the external recording conditions.

- finding violations with new technical means whose metrological check expired;
- not describing the complete and detailed committed act by the contravention, by playing the text of the law that incriminates the act. This situation was due to some computer program (in the case of the fixed radar), that at this category it inserts the legal text, without conferring to the agent the opportunity to make changes or additions, or in the case where the agent is confined to reproduce in the assessment report the normative act which provides the contravention, without detailing of what it consisted, in what circumstances it has occurred, place, manner and means used for committing it, and other data to prove the guilt of the offender and the social danger of the committed act. The courts have held in the circumstances of the judgments the insufficient description of the act in order to determine its contravention feature;
- not mentioning or the faulty mentioning of the date of the committed act. There have been situations where the date was wrong embedded software, for assessed contraventions of the processed assessment reports by technical means (fixed radar systems);
- not mentioning the quality of assessment agent or not signing the protocol by the assessment agent;
- not mentioning the place where the offense was committed, a circumstance which leads to the impossibility of establishing the court jurisdiction to solve the complaint, or a generic indication of the place, a situation which it does not allow the assessment of the circumstances of the offense (e.g. the range of the road signs);
- not mentioning the full civil status data of the contravention or incorrectly mentioned;
- not filling in "the other claims/objections";
- not indicating the witness assistant and not having signed the assessment report, in the situation in which the offender's refusal to sign the protocol or when the protocol is filled in without the presence of the offender or the circumstances that made it impossible to mention the presence of a witness assistant;
- penalties offenses (speeding, irregular stopping, etc.) committed by physical entity, legal entities, owners of the vehicle;
- faulty identification of the vehicle's registration number at the contraventions established by technical means;
- the lack of communication evidence of the assessment report;
- inconsistency between the statement of the facts and legal classification set;

- wrong indication of the legislative act establishing the offense found and punished;
- non-individualization by asserting agent of the fine imposed for each contravention, when asserting multiple violations by the same assessment report;
- not indicating the possibility of paying half the minimum fine prescribed by law, within 48 hours;
- inconsistencies between the time stated in the assessment report and the prevailing photos;
- the administration of evidence in front of the courts showing a different factual situation than the one adopted by the official noted. Such evidences are expertise, documents or witnesses (sometimes there are persons that were not on the spot, but claim it in court, even in situations where the agent mentioned in the assessment report that the offender was alone).

3. Proposals for Improving the Current Legal Framework

Considering the low level of efficiency in matters applying the contravention of sanctions and also the admission complaints offenses by courts invested with the resolution of such cases, it requires the adoption of some urgent measures in order to correct the activity in this area.

3.1. Regarding the Offender Identification and Transmission of the Assessment Report

The current procedure stipulates the police's obligation to identify, through correspondence with the owner or keeper of the vehicle, the person who actually drove the vehicle at the time of committing the contravention established by technical certified or approved means (fixed radar systems, surveillance cameras), which increase the costs of contravention enforcement and not being able to finish the act in various situations. Image processing involves the use of additional staff, store them on magnetic media (damaged due to prolonged use), the issuing of requesting application of the driver's identity data, mailing, return after completing the data, returning after the completion of data, drawing up the assessment document and its expedition to the driver, it is a costly and very long procedure whose costs are not recovered. All the above transactions must be carried within 6 months. The owners of the vehicles do not communicate the data to drivers or they communicate incorrect, false or fictitious information, or they no longer reside at the presented residence, refuses the incoming mail or the transfer documents of the vehicle owner have not been perfected.

One of the current conditions for the assessment report of the contravention to be enforceable is to be served or communicated so that it would offer the opportunity of the offender to defend before a court by disputing it. Currently, the offender is entitled to his own behavior (his own dishonesty) to prevent or delay the handing in/ communication of assessment report and its enforcement. Thus, by refusing to sign the protocol and to receive a copy, his refusal to present himself at postal service in order to receive the legal process or not obeying the legal rules on the establishment of domicile and residence, the offender determine the state, by the institution or authority which includes assessment agent, to perform additional costs for the communication of the assessment report, without being recovered. There were also numerous cases where it was exceeded more than one month for the communication of the assessment report¹, provided by art. 14 of Government Ordinance no. 2/2001 on legal regime of contraventions, with subsequent amendments, a situation that led to prescription of the executor penalty of contraventions fine. According to the ones mentioned above, we propose the following:

¹ According to article 14 of Government Ordinance no. 2 / 2001 on legal regime of contraventions.

a) *the assessment report should be concluded in the presence of a witness assistant, closed which the offender, though the offender refused to receive it, it is regarded by law as handed in without the fulfillment of other formalities.*

Offender's refusal to receive the assessment report, confirmed by at least one witness assistant, equals to its right to renounce at the statutory benefit of handing in the report or to dispose of it according to their will (there have been many cases, when, after handing in, the offender destroyed the report). According to the proposed rule it is applied the principle of law "*nemo auditor propriam turpitudinem allegnas*"

b) *increasing the communication time from one month to 60 working days, thus ensuring time to fulfil these obligations.*

c) *eliminating the provisions on notification of payment, for the sake of simplifying the procedure and reduce costs, since this document in practice has proved its uselessness. The offender is aware of the obligation of paying the fine, following the principle of knowing the law related to the awareness of the content of the report due to its presence when it is concluded, handing in or communicated.*

d) *the display operation does not require confirmation by witnesses, similar to the provisions of Civil Procedure according to which, the display operation of the provided documents must not be confirmed by witnesses, the report representing the proof as it concluded by the assessment agent according to the found data.*

3.2. Regarding the Involvement of the Body which Includes the Assessment Agent in the Enforcement Procedure

The current regulation involves the body to which the asserting agent belongs to, the enforcement of repossession proceeding by pursuing the payment of the fine within the period given by law or his obligation to cease the court for replacing the fine with community service activities. Involving only the enforcement bodies, after the assessment report became enforceable, it would lead to an increase in the percentage of cashing fines. They are directly interested in recovering those amounts of money by specialized personnel in repossession, by local public administration bodies which will take all necessary steps, following then the stage of performing penalties. The abolition of the involvement of the authority or institution to which the agent belongs in this procedure, it will lead to a reduction of some specific tasks for which its performance is not specialized.

The proposed solution relates to the transfer of existing obligations to enforcement, from the task of body that the agent is part of in the task performance bodies, namely:

- the abolishment of the obligation raised from the offender task of sending a copy of the receipt with which the fine was paid to the assessment or to the unite to which it belongs¹ (article 28 paragraph 2 of G.E.O. 2/2001), these documents may be submitted directly to the Financial Administration.
- referral to the court by the enforcement body in order to replace the fine with a penalty provision of community service activities, where the offender accumulates more debt (penalties imposed by different assessment agents), the court thus having a full picture of the whole behavior and financial circumstances of the offender.

¹ See the provisions of article 28 paragraph 2 of this GO2/2001.

3.3. Regarding Community Service

After the repeal of legal provisions relating to contravention prison by the Government Emergency Ordinance no. 108/2003 and Romanian constitutional revision in 2003 there was a diminish of the preventive/punitive contravention law, against those who do not voluntarily pay the fine and have no assets which may lead to repossession. Substituting the provisions related to prison contravention with the provision of community service activities were not likely to lead offenders to refrain from committing such acts, or to pay fines imposed voluntarily, whereas in the current provision the performance of community service activity can not be put into repossession. The prohibition of forced labor by the constitutional text does not enable the in charged bodies to determine the offender to execute the penalty.

We believe that not even the disposal of Law no. 293/2009 of *offender's agreement* is not a solution, that is the offender's refusal to implement effective community work, but a continuation of a inefficient practice, consuming resources from state and local budgets (in court proceedings, the activities of the assessing agent, the activities of the bodies for enforcement activities, mayor's activities). We state that according to article 21 and 22 of Government Ordinance no. 55/2002 on the legal status of the penalty of community service activities, "the penalty", if the offender, in bad faith, does not perform community service work, is replacing it with the fine penalty contravention, which cannot be executed¹ (see the provisions of paragraph (3) of article 9 of Ordinance 2/2001).

We would consider necessary the incrimination as the offense of the person who, in bad faith, fails to report to the mayor the registration and enforcement of the penalty of community service activity, it is exempted from enforcing the penalty after the starting of the activity or it fails to fulfill the incumbent duties at the workplace.

We believe that by the detriment to the law's rule, the act of infringement in bad faith of the judgment disposing the sanction of the performed community service work, presents an abstract level of social danger specific for an infringement of a law. We make this assertion according to article 271 of the Criminal Code and the provisions of article 287 of Law no. 286/2009 on the Criminal Code.

3.4. The Provisions Relating to the Destination of the Amounts Collected from Fines

Under the current regulations the sums of money, collected from the fines, applied to individuals and legal persons at the road system and also those imposed by local public administration, are entitled to local budgets. The document makes no distinction between municipal, city, town or sector budget of Bucharest and Bucharest County budget; they do not specify whether the budget amounts belong to the territorial administrative unit from the place of the committed offense, or the place of fine payment.

The Proposed Solution

a) it should provide expressly the destination of the intended amounts;

The amounts that came from the offenders' fines, Romanian or foreign citizens that do not reside in Romania and foreign legal persons, regardless the body that the assessing agent belongs to, it should be founded a full income to the state budget.

¹ *Idem* line (3) of article 9 din G.O. no. 2/2001.

b) in case of fines imposed for failure the road system on the public roads, 50% of the proceeds should be allocated to the assessment agent body (in particular the Romanian Police) in order to be used in improving the road safety (the acquisition of new fixed/mobile radar systems, covering the expenses related to their maintenance, covering the expenses incurred by the appliance of the sanction, the costs of the contravention complaints, prevention activities, etc.).

c) taking into account the limitation of enforcement (5 years according to Tax Procedure Code) it appears as appropriate to increase the period during which the offender can voluntarily pay the minor fines, from 15 days to 60. This deadline is, at the same time, a necessary period for the authorized state bodies to establish the contravention and their enforcement, to communicate with each other documents relating to enforcement. After its expiry, the enforcement bodies should verify if the penalty was made voluntarily by the offender, otherwise it would appeal to repossession.

d) as a measure of publicity, in order to help the offender who wishes to voluntarily pay the penalty fine, it is imposed that the local administrative authorities would be obliged to make public the accounts where these amounts can be found. Thus knowing the offender's account it can pay that amount without having any importance the place of the transaction.

3.5. Register the Executed Offenses Penalties

We believe that in this area, there may be adopted similar regulations to those of the Government Ordinance no. 75/2001 republished, on the structuring and functioning of the fiscal identification record and implementing rules, that it consists of:

a) extending the concept of fiscal identification record and for debts owed to the state/local administration budget as a result of committing offenses;

b) spreading the cases where it is imposed the fiscal identification record and determining the performance of some services of the state/public administration according to the provision of services by state / local government to pay debts.

3.6. The introduction to the general legal framework of ruling the contravention regime of the possibility of assessing them by certified or approved technical means.

3.7. Expanding the legal framework with specific provisions relating to the communication of assessing report and the enforcement of contravention penalties for acts committed by foreigners or Romanian citizens living abroad.

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