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ENSURING THE RIGHT TO A FAIR TRIAL WITHIN THE DOCUMENTATION OF THE CONTRAVENTION THROUGH THE LENS OF THE PROVISIONS OF THE ECHR

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Indisputably the right to a fair trial is one of the basic rights enjoyed by any person involved in a contravention process. Even if it is not directly enshrined in the contravention law, it is still found in the content of the law, its application being an obligation of the state authorities involved in carrying out the contravention process. Both the national jurisprudence and the ECtHR jurisprudence denote the role that this principle has in the administration of justice, its non-compliance having the consequence of harming the principles and fundamental rights guaranteed. Although the contravention presents a social danger that is reduced in relation to the crime, that fact must not influence the smooth progress of the contravention process, so that the investigating agent ignores the observance of all the principles established by law in the process of examining the contravention.

Keywords: *misdemeanor, finding agent, principles, misdemeanor process, fair trial, penalty.*

ASIGURAREA DREPTULUI LA UN PROCES ECHITABIL ÎN CADRUL DOCUMENTĂRII CONTRAVENȚIEI PRIN PRISMA PREVEDERILOR CEDO

Indiscutabil, dreptul la un proces echitabil este unul din drepturile de bază de care beneficiază orice persoană implicată într-un proces contravențional. Chiar dacă nu este consfințit direct în legea contravențională, totuși el se regăsește în conținutul legii, aplicarea acestuia fiind o obligație a autorităților statului implicate în realizarea procesului contravențional. Atât jurisprudența națională, cât și jurisprudența CtEDO, denotă rolul pe care îl are acest principiu în efectuarea justiției, nerespectarea acestuia având ca consecință lezarea principiilor și drepturilor fundamentale garantate. Cu toate că contravenția prezintă un pericol social redus în coraport cu infracțiunea, faptul respectiv însă nu trebuie să influențeze asupra bunei desfășurări al procesului contravențional, astfel încât agentul constatator să ignore respectarea tuturor principiilor stabilite de lege în procesul de examinare al contravenției.

Cuvinte-cheie*: contravenție, agent constatator, principii, proces contravențional, proces echitabil, sancțiune.*

GARANTIR LE DROIT À UN PROCÈS ÉQUITABLE DANS LE CADRE DE LA DOCUMENTATION DE LA CONTRAVENTION AU REGARD DES DISPOSITIONS DE LA CEDH

Incontestablement, le droit à un procès équitable fait partie des droits fondamentaux dont jouit toute personne impliquée dans une procédure de contravention. Même si elle n'est pas directement inscrite dans le droit de la contravention, elle se retrouve tout de même dans le contenu de la loi, son application étant une obligation des autorités étatiques impliquées dans la conduite de la procédure de contravention. Tant la jurisprudence nationale que la jurisprudence de la Cour européenne des droits de l'homme témoignent du rôle que ce principe a dans l'administration de la justice, son non-respect ayant pour conséquence de porter atteinte aux principes et droits fondamentaux garantis. Bien que la contravention présente un danger social réduit par rapport au crime, ce fait ne doit pas influencer le bon déroulement du processus de contravention, de sorte que l'enquêteur méconnaît le respect de tous les principes établis par la loi dans le processus d'examen de la violation.

Mots-clés. *délit, agent de recherche, principes, procédure de délit, procédure équitable, peine.*

ОБЕСПЕЧЕНИЕ ПРАВА НА СПРАВЕДЛИВОЕ СУДЕБНОЕ РАЗБИРАТЕЛЬСТВО В РАМКАХ ДОКУМЕНТИРОВАНИЯ ПРАВОНАРУШЕНИЯ СКВОЗЬ ПРИЗМУ ПОЛОЖЕНИЙ ЕСПЧ

Бесспорно, право на справедливое судебное разбирательство является одним из основных прав, которым обладает любое лицо, участвующее в процессе о правонарушении. Даже если это прямо не закреплено в законе о правонарушениях, оно все же включено в содержании закона, его применение является обязанностью государственных органов, участвующих в осуществлении процесса о правонарушениях. Как национальная судебная практика, так и судебная практика ЕСПЧ указывают на роль, которую этот принцип играет в отправлении правосудия, а его несоблюдение приводит к нарушению гарантированных основных принципов и прав. Несмотря на то, что правонарушение представляет собой уменьшенную по отношению к преступлению общественную опасность, этот факт не должен влиять на беспрепятственное течение процесса о правонарушении, чтобы следственный деятель игнорировал соблюдение всех установленных законом принципов в процессе рассмотрения дела.

Ключевые слова: *правонарушение, фиксирующий правонарушение агент, принципы, процесс по правонарушению, справедливый процесс, наказание.*

Introduction

In its essence, the right to a fair trial is a fundamental right of the individual, to which corresponds the correlative obligation of the state, which consists in refraining from any means or forms of restricting the exercise of this right. The specific ways of manifesting the state's general obligation to abstain are multiple, but they are not equivalent to the measures that the state must undertake in order to achieve fair justice [1 p.35].

Ideas and discussions

Art. 20 of the Constitution of the Republic of Moldova establishes: " *Every person has the right to effective satisfaction from the competent courts against acts that violate rights and freedoms and his/her legitimate interests. No law can limit access to justice* ", followed by art. 21 which states: " *Any person accused of a crime is presumed innocent until his/her guilt is legally proven, in the course of a public judicial process, during which he/she was provided with all the necessary guarantees for his/her defense* " [2] , generally enshrines the right of all citizens to a fair procedure in a trial.

However, as in the Constitution of Romania, the Constitution of the Republic of Moldova does not expressly define the right to a fair trial, nor does it provide in detail its guarantees, making express reference only to the guarantee of access to justice [3].

According to art. 7 of the Contraventional

Code: " *the person can be sanctioned only for the contravention in respect of which his/her guilt is proven , in compliance with the rules of this code*", and art. 375 of the aforementioned code states: "*the person accused of committing a misdemeanor is considered innocent as long as his/her guilt is not proven in the manner provided by this code* " [4].

As the main procedural guarantee of the right to defense, the presumption of innocence, initially enshrined internationally in art. 9 of *the Universal Declaration of the Rights of Man and of the Citizen* of 1789 and later in art. 6 par. 2 of *the European Convention on Human Rights*, essentially regulates a person's right to be presumed innocent until proven guilty.

It is important to remember that, in principle, compliance with it requires the meeting of 3 cumulative conditions, respectively - the authorities must not start from the prejudice of the guilt of the beneficiary of this presumption, - the burden of proof must fall on the accuser, i.e. the state bodies, so it always rests with the authorities the obligation to establish guilt, the accused not having the duty to provide evidence to prove his own innocence, as well as that - *any* doubt or reasonable doubt benefits the passive subject of the prosecution procedure [5].

The presumption of innocence is the central element of the right to a fair trial, only under the conditions of its observance can effectively ensure the respect of the other components of the right to a fair trial [6 p.36].

In the light of the jurisprudence of the European Court of Human Rights, it was ruled, at the level of principle, that the contraventional acts can be assimilated to some " *accusations in criminal matters"*, (*Ziliberberg v. Moldova, judgment of 01.02.2005, §35 and Anghel v. Romania, judgment of 04.10.2007, §52*) [7], the European Court of Human Rights noted that in these cases the elements that suggest that there were criminal charges prevail. Thus, in contraventional matters, the procedural guarantees specific to criminal matters were recognized.

In this sense, the criteria constantly used by the ECtHR to establish the criminal or non-criminal nature of a contravention are represented by the classification of the deed in domestic law, the nature of the illegal deed and the nature of the domestic norm that sanctions it, respectively the nature and severity of the sanction to which the active subject of the offense is exposed. It must be specified that the three criteria should not be analyzed cumulatively except in the situation where a distinct analysis of them would not be useful in order to establish the concrete nature of the fact [8].

We reiterate that respect for the principle of innocence is an essential factor in the process of documenting a contravention, a principle that is inextricably linked with the right to a fair trial. Although the text of art. 6, point 1, states that any person has the right to have his/her case examined fairly, publicly and within a reasonable time, by an independent tribunal and impartial, established by law, which will decide either on the violation of rights and obligations of a civil nature, or on the merits of any accusation in criminal matters directed against him/her, a rule that must be respected both in the process of examining the case by a court and throughout the documentation process (in our case) of the contravention.

The condition of "fairness" is different from all other elements of Article 6 mainly because it covers proceedings as a whole, and the question of whether a person has had a "fair" trial is examined by looking cumulatively at all stages, not just one incident particular or of a single procedural defect; consequently, errors at one level can be corrected at later stages (*Monnell and Morris v. the United Kingdom, §§ 55-70*).

The notion of "fairness" is also autonomous from how the domestic procedure interprets a violation of the relevant norms and codes

(*Khan, §§ 34-40*), so that a procedural error that constitutes a violation of the domestic procedure, even and a flagrant one, cannot lead, in itself, to an “unfair” trial (*Gäfgen v. Germanyiei [MC], §§ 162-188*); and, conversely, a violation under Article 6 may be found even where domestic law has been observed.

On the other hand, in the rather exceptional case of *Barberà, Messegué and Jabardo v. Spain (§§ 67-89*), domestic proceedings were held to be unfair because of the cumulative effect of various procedural errors, despite the fact that each error, taken separately, would not have convinced the Court that the proceedings were “unfair”.

In accordance with the principle of subsidiarity, Article 6 does not allow the European Court of Human Rights to act as a fourth instance, namely to re-examine the case in fact or to re-evaluate alleged violations of national law (Bernard, §§ *37-41*), or to rule on the admissibility of the evidence (*Schenk, §§ 45-49*). At the same time, the manner in which the evidence was obtained and used by the national authorities could be relevant to the conclusion regarding the overall fairness of a trial, in particular, when a violation of Article 3 is involved (Jalloh v. Germany*, Othman v. the United Kingdom*) [9 p.63].

In turn, art. 47 of the Charter of Fundamental Rights of the EU, guarantees the right to a fair trial and an effective remedy, according to the interpretation given by the European Court of Human Rights (ECHR) and, respectively, by the Court of Justice of the European Union (CJEU).

As mentioned above, these rights are also provided for in international instruments, such as articles 2 (3) and 14 of the International Covenant on Civil and Political Rights (ICCPR) [10] of the United Nations (UN) and Articles 8 and 10 of the Universal Declaration of Human Rights (UDHR) [11] of the UN. The core elements of these rights include effective access to a dispute resolution body, the right to a fair trial and timely resolution of disputes, the right to adequate compensation, as well as the general application of principles relating to the efficiency and effectiveness of the performance of the act of justice.

Although according to the social danger of the committed illegal act classified as a misdemeanor is lower than the illegal act classified as a crime, this should not condition the competent authority to ascertain and document a contravention to ignore the full compliance with the requirements of the legal framework.

It is necessary to mention the fact that by respecting the right to a fair trial within the contravention process, we must not only refer to the examination stage of the case in the court of law, but primarily to the entire process of accumulating evidence by the ascertaining agent regarding the fact of committing the contravention. Ignoring by the ascertaining agent the respect of the right to a fair trial only on the grounds that in relation to the crime, the contravention has a lower social danger, and the violator in most cases does not dispute the decision applied by the ascertaining agent, essentially affects the quality of justice, a circumstance that it does not have to be agreed.

According to art. 440 para. (1) from the Criminal Code, the detection of the criminal act means the activity, carried out by the detecting agent, of collecting and administering the evidence regarding the existence of the contravention, of concluding the minutes regarding the contravention, of applying the sanction contravention or referral, of the file, as the case may be, to the official authorized to examine the contravention case, within the authority of which the ascertaining agent is a part, in the court or in another body for resolution. In accordance with art. 442 para. (1) of the Contravention Code, the minutes regarding the contravention is an act by

which the illegal act is individualized and the perpetrator is identified. The report is concluded by the ascertaining agent based on personal findings and accumulated evidence, in the presence of the perpetrator or in his absence.

The importance of ensuring respect for the right to a fair trial in the process of documenting a contravention carried out by the investigating agent, is motivated by the fact that out of the total number of contraventions committed and recorded, less than half of them were contested in court.

Thus, according to NBS (National Bureau of Statistics) data, in 2021 in the Republic of Moldova, 629.2 thousand contraventions were found, or 221.4 thousand contraventions more compared to 2020. Of the total number of decisions taken on contravention cases, in most cases decisions were adopted to apply the contraventional sanction (97.2% or in 610.6 thousand cases). In 4.9 thousand cases (0.8%) decisions were taken to submit to preliminary (criminal) investigation bodies, given the fact that in the actions contraventions contained the indication of the crime, and in 12.4 thousand cases the contravention process was terminated for other reasons (2.0%). On average, 235 decisions to apply the contraventional sanction were returned to 1000 inhabitants [12].

In the Report on the examination of files in the courts during 2021, we find that 24,391 contravention cases were registered in the country's courts and 21,881 contravention cases were resolved [13].

We agree with the statement of the authors Tofimov Ig. and Crețu A., according to which the issue related to the examination of the contravention case by the investigating agent is a particularly controversial subject. This is related to the fact that article 114 of the Constitution of the Republic of Moldova [2] establishes that justice is administered in the name of the law only by the courts judicial. Justice is to be understood as one of the fundamental forms of the state's activity, which consists in judging civil, contraventional, criminal and other causes in the application of the penalties provided by law. In this way, once the Contraventional Code identifies specific powers for the authorities provided by articles 400 - 423 [10] of the Contraventional Code [4], namely powers of examination and application of the sanction, it should be noted that, in fact, the act of justice is carried out not only by the courts, but also by other authorities [14, p. 216].

However, regarding this statement, the Constitutional Court of the Republic of Moldova rules that, unlike criminal cases, in contravention cases the person accused of committing a contravention can be sanctioned even by the authority that has the competence to investigate the imputed act. Depending on the competence of the authority, the sanction can be imposed through an administrative act that takes the form of a decision, a report, etc. The contraventional decisions (decisions), including those issued by the ascertaining agents within the limits of the competence assigned by law, constitute enforceable documents [article 11 letter. c) from the Enforcement Code].

In the light of the above and we want to emphasize the importance of respecting the right to a fair trial in the documentation of contraventions, because first of all in the vast majority of cases the decision received by the investigating officer as a result of the examination of a contravention is not contested by any of the parties, and secondly, analyzing the judicial practice, we establish the fact that in the appeals filed by the violators it is stipulated that the contravention process took place without ensuring a fair trial [15].

From the mentioned it follows that, although the administrative act by which the contraventional act is established and a contraventional sanction is applied is an enforceable document, it cannot be considered

definitive from the moment it is drawn up, considering the fact that the feature of “definitiveness” is characteristic only for jurisdictional decisions [16].

In turn, the ascertaining agent has the role of administering evidence in the order provided by law, necessary in order to verify the legality and validity of the minutes. Therefore, the simple finding *ex propriis sensibus* of the ascertaining agent is not sufficient for the court to establish the guilt of a person on whose name a contravention report was drawn up. Respectively, as long as the facts described in the content of the act are unconfirmed by other means of proof, in the given sense, a series of doubts can be raised, being applicable the principle of law *in dubio pro reo* [17].

In judicial practice, it is ruled that although the report on the contravention is an administrative act emanating from a public authority equipped with the competence to ascertain and sanction contraventional facts and enjoys the presumption of legality, authenticity and truthfulness, the contravention sanctioning of the person must be supported by substantial evidence, from which the composition of the contravention would result.

In accordance with the relevant jurisprudence of the European Court of Human Rights, courts are obliged to prove the guilt of the accused by adopting reasoned solutions.

The lack of reasons is a violation of the right to a fair trial, where national courts refrain from giving a specific and explicit answer to the most important questions, without giving the party who formulated them the opportunity to know whether a certain support was neglected or rejected, this fact will be considered a violation of the right to a fair trial (*Ruiz Torija against Spain, 09.12.1994, §29; Papon against France (no.2), dec., 15.12.2001; Boldea against Romania, 15.02.2007, §30*).

Thus, the ascertaining agent has the role of administering evidence in the order provided by law, necessary in order to verify the legality and validity of the minutes. Therefore, the simple finding *ex propriis sensibus* of the ascertaining agent is not sufficient for the court to establish the guilt of a person on whose name a contravention report was drawn up. Respectively, as long as the facts described in the content of the act are unconfirmed by other means of proof, in the given sense, a series of doubts can be raised, being applicable the principle of law *in dubio pro reo* [18].

Using the statements of Romanian doctrinaires and adjusting them to the rules of the contravention process, beforehand for practitioners, the influence the European jurisprudence on the contravention procedure is no longer just a formal guarantee, it has by itself a fundamental importance. Reference procedural norms contained in the contravention procedure continue to guarantee the formal regularity of the procedure, so that the process is carried out in a fair manner. But it is important to state that the contravention procedure has acquired a fundamental importance today, a right that prevails over any other consideration, thus, the right to a fair trial, which is the core of the contravention procedure, becomes a criterion for assessing the respect by the courts of the rights substantial, becoming itself a genuine substantial right [19 p. 535-536].

Returning to art. 6 of the ECHR, in the order of the idea set out above, it involves the examination of the fairness of the procedures taken as a whole - that is, from the perspective of all the procedural stages and the possibilities granted to the applicant - and aims at the evaluation of an isolated procedural error. However, in recent years the Court has begun to give greater importance to certain key moments in the proceedings – in particular, the first questioning of a suspect in criminal proceedings (*Imbrioscia v. Switzerland, §§ 39-44; Salduz v. Turkey [MC], §§ 56-62; Panovits v. Cyprus, §§ 66-77; Dayanan v. Turkey, §§ 31-43; Pishchalnikov v. Russia, §§ 72-91*).

When defining Article 6 as a limited right, the Court stated that what constitutes a fair trial cannot be determined by a single invariable principle, but must depend on the circumstances of a particular case. Consequently, a *sui generis* proportionality test, under Article 6, has been applied on several occasions, also known as the "essence of the right" test for example, when a different degree of protection of the privilege against self-incrimination has been established regarding minor criminal acts (contraventions or so-called "contraventions, administrative offences" in some European legal systems), as opposed to the rules that apply to the investigation of more serious acts (*O'Halloran and Francis v. the United Kingdom [MC], §§ 43-6* 3); or when a reduced degree of the guarantee of equality of arms, applicable in civil cases compared to criminal ones, was confirmed (*Foucher v. France, §§ 29-38; unlike Menet v. France, §§ 43-53*) [9 p. 14-15].

Conclusions

In conclusion, we mention that emerging from the jurisprudence of the ECtHR, in cases including against the Republic of Moldova, contraventional acts, as a type of illegality, belong to the criminal matter, implicitly contraventional cases are assimilated to criminal ones, so for this reason, the representatives of the state in the person of the ascertaining agents are obliged to respect in their activity the rights and guarantees of the persons against whom the contravention process has been initiated, or who have been brought to contraventional liability, including those provided for by the European Convention of Human Rights.

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