

THE REFLECTION OF ARTICLE 7 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE ROMANIAN CRIMINAL LEGISLATION

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Abstract

This study highlights the principle of the legality of incrimination and penalty, as well as the principle of the retroactivity of the more lenient criminal law, as stipulated in Art. 7 of the European Convention on Human Rights. In order to clarify and highlight these principles, some cases of the practice of the Convention on Human Rights are presented. Furthermore, the material shows the way these fundamental principles are reflected in the Romanian legislation, namely the Constitution of Romania, the Criminal Code in force and the stipulations of the new Criminal Code. Understanding these principles at an European normative level and in the Romanian penal legislation, in order to apply them correctly in jurisdictional activity, is of particular importance in the current period of reform and adaptation of the Romanian Criminal Legislation.

Keywords: *The principle of the legality of incrimination and penalty; the principle of the retroactivity of the more lenient criminal law; the European Convention on Human Rights; The Constitution of Romania; The Romanian Criminal Code.*

Introduction

The European Convention on Human Rights, signed in Rome on 4 November 1950, entered into force on 3 September 1953 (ratified by Romania by Law No 30/1994) is the most important document drafted by the Council of Europe (founded in 1949 which gradually enlarged after 1980, having nowadays 47 Member States) for the protection and development of human rights and fundamental freedoms.

The Convention states a series of principles of humanistic inspiration, in order to create a legal framework appropriate for the development of human personality and its protection against abuses from authorities.

These principles have a decisive influence over the legislation of the European countries, Member States of the Council of Europe (Romania was accepted with full rights in the Council of Europe on 4 November 1993) laying efforts to modify their civil administrative, family, labor and criminal legislation in relation to these humanistic principles fully in accordance with the actual stage of the evolution of social relations.

This process of harmonizing national legislation with the principles of the Convention also takes place in Romania.

Thus, starting with the Constitution (in force since 1991), which stated many of the European Convention's principles; all important normative acts are inspired from the solutions stated by the Convention. Also in the criminal doctrine were published studies dedicated to the European Convention¹.

Content of the paper:

1. The European Convention states the principle of the legality of incrimination and punishment, as well as the principle of the retroactivity of the more favorable criminal law.

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¹ G. Antoniu, *Implicații asupra legii penale române a Convenției Europene a Drepturilor Omului* in „Studii de drept românesc” Review, Volume 4 (37), 1992, no. 1, p. 5-13.

According to Art 7 Para 1 “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier criminality be imposed than the one that was applicable at the time the criminal offence was committed”.

Para 2 of the same article states that “this article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations”.

2. The European Court of Justice’s jurisprudence clarified and shaped these provisions.

Thus, in the case *Welch v United Kingdom*, the European Court, noting that the Ordinance of 1986 stated as criminality the measure of special seizure (resulting from the provisions of the mentioned Ordinance, according to which it is presumed that the assets gathered by a person convicted for drug trafficking for 6 years, are the product of the offence, outside the case where the defendant could prove otherwise; from the fact that it is seized not only the effective profit, but the entire product of the drug trafficking; from the fact that the judge has discretionary power regarding the sum of money that are seized, considering also the degree of guilt of the defendant when this sum, as well as the fact that it is stated the possibility of imprisonment as a mean of paying the money), has decided that in these conditions, special seizure has a repressive feature and must be applied only by respecting the principle of retroactivity of the more favorable criminal law.

In the mentioned case, these measures, though it were not a more favorable solution, were taken by the British court, though it were not stated by the law at the moment of the offence, offering them a retroactive feature and thus violating Art 7 of the Convention².

In the case *V. v Estonia* the plaintiff was convicted for fiscal offences committed during 1993-1995. The court established that it was about a continuous offence and applied the new Criminal Code entered into force in January 2005. Before the entrance into force of the new provisions, the offence committed by the plaintiff was considered to be offence only if the person had previously received an administrative sanction for a tax evasion, which was not the case here. By the new provisions in the area of tax evasion, the condition of a previous administrative sanction was removed.

The court stated that the plaintiff was also sanctioned for the offences committed previous of the entrance into force of the new criminal provisions, as elements of a continuous offence. However, the court decided that at the moment of the offence it could not fall under the incidence of the criminal law, because one the conditions of the offence – the existence of a previous administrative sanction for tax evasion – was not met. As a consequence, the Court decided that the Estonian courts retroactively applied a criminal law violating Art 7³.

In another case, *G v France*, the European Court stated that the offences were integrated according to the law, which was more favorable than the law in force at the moment of the offence (the new law states a correctional punishment with more reduced limits than the previous law), the court has correctly applied this law, thus Art 7 of the Convention was not violated⁴.

In the case *S.W. v Great Britain*, the Court considered that the existence of a new interpretation of the British courts more unfavorable for the offender (in the meaning that the husband could be considered as the rapist of his spouse), unlike the interpretation existing at the moment of the offence (at that moment the jurisprudence considered that the husband is not liable for the rape against his spouse, because by marriage she accepted sexual intercourse with her spouse, in any circumstances) is not a violation of Art 7. The Court argues that at the moment of the offence there were debates expressing different advised opinions regarding the consent of the wife for all

² Romanian Criminal Law Review, II, 1995, No. 2, p. 157.

³<http://sim.law.uu.nl/sim/caselaw/Hof.nsf/2422ec00f1ace923c1256681002b47f1/5f67e53e55417bc441256c6a005b6945?OpenDocument>.

⁴ Romanian Criminal Law Review, III, 1997, p. 149-150.

intercourse with her husband during marriage. This evolution of the interpretation began before the offence was committed by the offender, thus Art 7 of the Convention was not violated. In Court's opinion, the idea of the lack of immunity for the husband in case of the rape of his wife is consistent not only with the nature of marriage in a civilized state, but also with the basic principles of the Convention, which promotes the idea of dignity and human freedom⁵.

3. The Romanian legislation comprises provisions which largely correspond to the exigencies imposed by the European Convention. Thus, the principle of non-retroactivity of the criminal law, except the more favorable law, is also stated by the Romanian Constitution, in its Art 15 Para 2 stating that "the law shall only act for the future, except for the more favorable criminal or administrative law".

From the comparison of the Convention with the Romanian Constitution we can state, as a first notice, that the exception regarding the application of the more favorable criminal law is wider in the Constitution than in the Convention. Thus, while the European Convention prohibits only the application of a more severe punishment than the one existing at the moment of the offence, the Constitution refers in general to the more favorable criminal law, with the possibility of including in this concept not only the more favorable criminal law in relation to the moment of the offence, but also the more favorable law in relation to the moment of the execution of the penalty.

The wording stated in the Constitution is the base for the Romanian criminal law, which states among the principle of non-retroactivity of the criminal law (Art 11 of the Criminal Code), but also the principle of the more favorable criminal law, both in relation with the moment of the perpetration of the offence (Art 13 Criminal Code), as well as in relation with the execution of the penalty (Art 14-15 Criminal Code). As emphasized by the literature, Art 14 and 15 expand the principle of the more favorable law, the new more favorable law being applied also after the conviction decision remains final to the complete service of a penalty of imprisonment⁶.

Second of all, it can be noticed that the European Convention refers to the more serious penalty which cannot be retroactive, which *per a contrario* means that only the more favourable penalty can be retroactive and not other criminal penalties, such as educational or safety measures. In accordance with these provisions, the Romanian law in force states that only provisions regarding the penalty can be retroactive if are more favourable for the defendant, while the provisions stating safety or educational measures are always retroactive, regardless if are more favourable or more serious (Art 12 Para 2 Criminal Code).

Regarding the economy of the Convention, the quoted text though it refers to penalty, considers all criminal sanctions, concept including the penalties, as well as safety and educational measures. It could be incomprehensible that a law stating a bigger fine does not apply retroactively, while the provision of safety or educational measures, sometimes custodial to always be retroactive. The theoretical justification referring to the fact that these measures are for protection, being preventive and not repressive, in the interest of society and of the offender, seems to be overcome by the fact that these measures can represent serious restrictions of freedom, which would not justify the retroactivity of such provisions, limitations which the Convention is aiming to combat. It seems rational the solution that the principle of the more favorable law be applied, in the case of succession of criminal laws, and regarding the safety and educational measures, especially when represent serious limitations of freedom.

Also to this interpretation leads the Romanian Constitution, excluding from retroactivity the more serious criminal law and not a certain criminal provision stating a more serious penalty. In this way the Constitution expands the interdiction of retroactivity for all criminal provisions (including

⁵ Romanian Criminal Law Review, III, 1996, p. 137.

⁶ V. Dongoroz et al. *Explicații teoretice ale Codului penal român*, Volume I, Romanian Academy's Publishing-house, Bucharest, 1969, p. 89-90.

those regarding the safety and educational measures), which would aggravate the situation of the offender⁷.

Therefore, for accordance with the Convention, the new Criminal Code, which in Art 1 states the principle of the legality of incrimination (*nullum crimen sine lege*), in Art establishes the principle of the legality of criminal sanctions (*nullum poena sine lege*), explicitly referring to all criminal sanctions, namely penalties, safety and educational measures.

Regarding this aspect, it is also interesting the experience of the German legislation. Thus, Art 2 Para 6 of the Criminal Code, though it states that safety or educational measures are applied in relation with the law in force at the moment when the conviction decision remains final, it is shown that “the law does not provide otherwise” leaving the legislator with the possibility that, case by case, in relation to the gravity of the safety or educational measures, to admit or not their retroactive application. As a result, some serious safety measures, such as the admission into a medical-educatory institute, as well as the prohibition to exercise a certain profession were removed from the possibility of retroactivity⁸.

Another observation aims Art 7 Para 2 of the European Convention, stating the possibility that certain incriminating norms established according to the general law principles and recognized by the civilized states, to be efficient even if the national law does not state them. Therefore, there is the possibility of a decision and application of a penalty for a person, as a consequence of an offence stated by international conventions, regardless if, according to the national legislation, the offence was never stated or was decriminalized or the national legislation would state a more favorable provision.

Usually, international offences (*delicta de juris gentium*), though established by international treaties and conventions are operative if the states incriminate these offences in their national legislation and sanction them in an appropriate way⁹. Such incriminations refer to offences against peace and mankind, international terrorism, piracy, slave commerce, drug trafficking, counterfeiting, dissemination of pornographic materials, women and children commerce etc.

To the extent to which the offences incriminated by international conventions are also states as offences in the national legislations, which is the situation of most the offences incriminated by treaties, are also applied the rules of non-retroactivity and the application of the more favorable law. The issue rising is what happens with the offences which at the moment of their perpetration were not incriminated by the national law; they could subsequently be judged only based on their incrimination in the Convention to which that certain state has not yet adhered to or, even if it has adhered to, has not respected the obligation to incriminate the mentioned offences in the national legislation?

The above question received a positive answer even since the Second World War, by the statute of the Nuremberg and Tokyo courts, considering that the principle “*nullum crimen sine lege*” must be related both to the national and international law, position established also in the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948 (Art II Para 2). Hence, the offences incriminated by international conventions should attract the criminal liability of natural persons, regardless of the national provisions¹⁰.

4. The Romanian criminal law in force offers a framework appropriate for solving cases similar to those submitted to the European Court in this area.

⁷ G.Antoniou et al. „*Reforma legislației penale*”, Romanian Academy’s Publishing-house, Bucharest, 2003, p. 203.

⁸ Hans Heinrich Jescheck, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 3rd Edition, Berlin, Duncker und Humblot, 1978, p.110.

⁹ Grigore Geamănu, *Dreptul internațional contemporan*, Didactic and Pedagogic Publishing-house, Bucharest, 1965, p.826.

¹⁰ George Antoniu, (coord), *Reforma legislației penale*, Romanian Academy Publishing-house, Bucharest, 2003, p.304.

Thus, according to Art 11 Para 1 of the Criminal Code, safety measures (also the special seizure) have the purpose to remove a danger and to foresee the perpetration of the offences stated by the criminal law. This means that safety measures have a special regime, stated by Art 113 and following of the Criminal Code, only if they preserve this feature as preventive measure designed to remove a danger from the perpetrator¹¹. To the extent to which a safety measures receives a repressive feature, it becomes a penalty and is subjected to the regime of penalties (it cannot be retroactively applied unless it represents a more favorable provision).

In the case decided by the European Court, the safety measure of special seizure by receiving a repressive feature, was correctly considered as penalty and subjected to the principle of non-retroactivity of the criminal law (if it is more favorable).

Regarding the offence on the incrimination of rape during marriage, the Romanian jurisprudence and doctrine maintained the opinion that the husband cannot be considered as the active subject of the rape of his wife, because when she consented to the marriage, she also consented to intercourse with her husband during marriage. The husband would be held liable only for injuries caused to his wife during intercourse¹².

The arguments brought by the European Court emphasized the important mutations which took place in the way of interpreting the relationship of the spouses in relation to the basic principles of the European Convention, have determined changes in the Romanian criminal legislation and doctrine (see the modification of Art 197 of the Criminal Code by the Government Emergency Injunction No 89/2001¹³, modified and approved by Law No 61/2002¹⁴).

Conclusions

The analysis of Art 7 of the European Convention on Human Rights obviously emphasizes the fact that the Romanian criminal legislation is in accordance with its exigencies. The examples used in this study of the Romanian Constitution, of the criminal law in force, of the new Criminal Code and of the Romanian jurisprudence and doctrine illustrate the compatibility between the Romanian legislation and the European Convention. This statement justifies the necessity of entering into force, as soon as possible, of the new Criminal Code and of the new Criminal Procedure Code, already approved by the Parliament by Law No 286/2009 and Law No 135/2010.

References

- G. Antoniu, Implicații asupra legii criminale române a Convenției Europene a Drepturilor Omului in „Studii de drept românesc” Review, Volume 4 (37), 1992, no. 1
- Romanian Penal Law Review, II, 1995, No. 2
- Romanian Penal Law Review, III, 1997
- Romanian Penal Law Review, III, 1996
- V. Dongoroz et al., „Explicații teoretice ale Codului penal român”, Volume 3, Romanian Academy Publishing-house, Bucharest, 1971
- G. Antoniu et al. „Reforma legislației penale”, Romanian Academy’s Publishing-house, Bucharest, 2003
- Hans Heinrich Jescheck, Lehrbuch des Strafrechts, Allgemeiner Teil, 3rd Edition, Berlin, Duncker und Humblot, 1978

¹¹ Ion Ristea, *Drept penal, Partea generală* (edition reviewed and modified based on the new Criminal Code), Universul Juridic Publishing-house, Bucharest, 2011, p.339; Ilie Pascu, *Drept penal, Partea generală*, 2nd Edition, Hamangiu Publishing-house, Bucharest, 2009, p.479; Lavinia Vlădilă and Olivian Măstăcan, *Drept penal, Partea generală*, Universul Juridic Publishing-house, Bucharest, 2011, p.171.

¹² V. Dongoroz et al., „Explicații teoretice ale Codului penal român”, Volume 3, Romanian Academy Publishing-house, Bucharest, 1971, p.351-352.

¹³ Published in the Official Gazette No 338/ 26 June 2001.

¹⁴ Published in the Official Gazette No 65/30 January 2002.

- Grigore Geamănu, Dreptul internațional contemporan, Didactic and Pedagogic Publishing-house, Bucharest, 1965
- Ion Ristea, Drept penal, Partea generală (edition reviewed and modified based on the new Criminal Code), Universul Juridic Publishing-house, Bucharest, 2011
- Ilie Pascu, Drept penal, Partea generală, 2nd Edition, Hamangiu Publishing-house, Bucharest, 2009
- Lavinia Vlădila and Olivian Măstăcan, Drept penal, Partea generală, Universul Juridic Publishing-house, Bucharest, 2011
- European Convention of Human Rights
- Romanian Constitution
- Romanian Criminal Law in force
- The new Romanian Criminal Code