CZU: 343.3/.7 DOI: 10.5281/zenodo.3875095

INTERACTION OF PRINCIPLES APPLICABLE TO CRIMINAL PENALTY IN THE CASE-LAW OF THE CONSTITUTIONAL COURT OF REPUBLIC OF MOLDOVA

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In its case-law, the Constitutional Court of the Republic of Moldova has ruled on the clarity of the criminal law and the principles applicable to criminal sanction. The Court has ruled that, in criminal matters, the rule of law implies the assurance of the principles of the legality of offenses and criminal sanctions; the impossibility to interpret extensively the criminal law, against the accused, in particular, by analogy; the non-retroactivity of the criminal law, except for the more favorable criminal law. In this article the following aspects of the principles applicable to criminal sanction in the case-law of the Constitutional Court, such as: the legality of incrimination and punishment, the equal treatment under criminal law, the individualization of the sentence, ne bis in idem principle etc. have been analyzed.
Keywords: *Constitution, Constitutional Court, criminal law, criminal liability, criminal offense, legality of offenses and criminal sanctions, the individualization of the sentence.*

Principiile aplicabile pedepsei penale în jurisprudența Curții Constituționale a Republicii Moldova
În jurisprudența sa Curtea Constituțională a Republicii Moldova s-a pronunțat asupra clarității legii penale și principiilor aplicabile pedepsei penale. Curtea a statuat că în materie penală, preeminența dreptului generează asigurarea principiilor legalității infracțiunilor și pedepselor; inadmisibilității aplicării extensive a legii penale, în detrimentul persoanei, în special, prin analogie; neretroactivitatea legii penale, cu excepția legii penale mai favorabile. În lucrarea prezentată sunt analizate următoarele aspecte ale principiilor aplicabile pedepsei penale din perspectiva jurisprudenței Curții Constituționale, cum ar fi: legalitatea incriminării și pedepsei, egalitatea în fața legii penale, individualizarea pedepsei, principiul ne bis in idem etc.
Cuvinte cheie: *Constituție, Curtea Constituțională, lege penală, răspundere penală, infracțiune, legalitatea incriminării și pedepsei, egalitatea în fața legii penale, individualizarea pedepsei.*

Under the principle of separation and collaboration of powers enshrined in Article 6 of the Constitution of the Republic of Moldova[1], the legal implementation

* *Raportul a fost prezentat în cadrul Conferinței științifice internaționale "Criminalisation — Ideas and Restrictions. Conference to Commemorate the 100th Anniversary of Establishing the Criminal-Law Division of the Polish Law Codification Commission", organizată de Tribunalul Constituțional al Republicii Polone în Varșovia, în perioada 21-22 noiembrie 2019.*

1 The Constitution of the Republic of Moldova, adopted on 29 July 1994, in force from 27 August 1994, provides at Article 6 that: "In the Republic of Moldova, the legislative, exe-

of criminal policy falls within the exclusive competence of the Parliament. Therefore, under Article 72 paragraph (3) let. n) of the Constitution, the Parliament regulates by organic law offenses, sanctions and the regime of their execution. In its case-law, the Constitutional Court had mentioned that the legislature has the right to appreciate the situations that need to be regulated through legal norms. This right gives the possibility to decide on the opportunity to adopt a law in accordance with the criminal policy promoted in the general interest. At the same time, any incrimination of the facts by criminal laws and determining the sanctions, as well as other regulations, are based on criminal policy reasons, which must remain within the limits of the principles set out in the law order and respect the rule of law principle[2].

At the same time, in its case-law, the Constitutional Court of the Republic of Moldova has ruled on several aspects regarding the clarity of the criminal law and the principles applicable to criminal sanction. Thus, the Court has ruled that, in criminal matters, the rule of law implies the assurance of the principles of the legality of offenses and criminal sanctions; the impossibility to interpret extensively the criminal law, against the accused, in particular, by analogy; the non-retroactivity of the criminal law, except for the more favorable criminal law[3]. In this article I will analyze the following aspects of the principles applicable to criminal sanction in the case-law of the Constitutional Court, such as:

1. Principle *nulla poena sine lege* or establishing by a clear, precise and foreseeable law the criteria of criminal sanction. The Constitutional Court had ruled that the legality of incrimination and sanction is the main guarantee of the legal security of the person in criminal matters[4].

Under Article 23 of the Constitution, the State assures the right of every person to know his/her rights and duties, making, in this sense, all the laws accessible. The Constitutional Court reaffirmed the requirements of the **foreseeability** and sufficient clarity of the criminal law. These requirements are considered fulfilled when the person has the opportunity to know, from the text of the relevant legal norm itself, and, if necessary, with the help of its interpretation by the courts, which are the acts and omissions that may engage his/her criminal liability and which it is the sanction he/she risks[5].

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cutive and judicial powers are separate and cooperate in the exercise of their prerogatives, according to the provisions of the Constitution".

2 Judgment No. 6 of 16.04.2015 on constitutional review of some provisions of the Criminal Code and Criminal Procedure Code (extended confiscation and illicit enrichment), §§ 87-88.

3 Judgment No. 6 of 16.04.2015, § 95.

4 Judgment No. 12 of 14.05.2018 regarding the exception of unconstitutionality of the article 361 paragraph (2) letter c) of the Criminal Code (making, holding, selling or using false documents of particularly importance), § 34.

5 Judgment No. 33 of 07.12.2017 regarding the exception of unconstitutionality of some provisions of the articles 327 paragraph (1) and 361 paragraph (2) letter d) of the Criminal Code (abuse of power or abuse of service), § 59; Judgment No. 6 of 16.04.2015, § 94.

In its case-law, the Court ruled that a norm is accessible and foreseeable only when it is drafted with sufficient precision, so as to enable any person to correct his/her conduct and to be able, with appropriate advice, to foresee, in a reasonable measure, the consequences that may arise under that law. Once the state adopts a solution, it must be implemented with clarity and coherence to avoid as far as possible the legal uncertainty for the legal issues covered by the measures implementing this solution[6]. The Court emphasized that the law must regulate in a unitary way, to ensure a logical connection between the provisions contained therein and to avoid the legislative parallelism, which generates legal uncertainty and insecurity. However, in the legislative process it is forbidden to establish the same regulations in several articles or paragraphs of the same normative act or in two or more normative acts.

Therefore, the Court held that foreseeability and clarity are *sine qua non* elements of the constitutionality of a criminal law and in the legislative activity they cannot be omitted[7]. The quality requirements of the law need to be fulfilled in terms of both the definition of an offense and the sanction provided for that offense, and the quality of the criminal law is a vital condition for maintaining the security of the legal relationships and the effective ordering of social relations[8].

In its case-law, the Constitutional Court also ruled on the ***prohibition of the extensive interpretation of the criminal law***. The principle of the legality of incrimination and punishment (*nullum crime, nulla poena sine lege*), besides the prohibition, in particular, of the extension of the content of the existing offences on facts that, previously, were not considered offences, also provides that the criminal law should not be interpreted and applied extensively against the accused, for example, by analogy. Because of the principle of legality of sanctions, the provisions of criminal law are subject to the principle of strict interpretation. The person must be able to determine unequivocally the behavior that may have a criminal character. Thus, the principle that a provision of criminal law cannot be interpreted extensively to the detriment of the accused, a corollary of the principle of legality of criminality and of punishment and, in general, of the principle of legal certainty, prevents the initiation of criminal proceedings regarding acts that are not clearly defined as offences by law[9].

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6 Judgment No. 19 of 18.12.2012 on constitutional review of some provisions of the article 18 of Law No. 113 of 17.06.2010 on judicial executors (suspension of the judicial executor's license), §§ 96-97.

7 Judgment No. 2 of 30.01.2018 regarding the exception of unconstitutionality of some provisions of the article 10 point 4 of Law no. 845-XII of 03.01.1992 on entrepreneurship and enterprises, §45.

8 Judgment No. 33 of 07.12.2017, § 61.

9 Judgment No. 33 of 07.12.2017, §§ 55-57; Judgment No. 21 of 22.07.2016 regarding the exception of unconstitutionality of article 125 letter b) of the Criminal Code, of the articles 7 paragraph (7), 39 pt. 5), 313 paragraph (6) of the Code of Criminal Procedure and of some provisions of articles 2 letter d) and 16 letter c) of the Law on the Supreme Court of Justice, §§ 62, 70-73.

The Court ruled that ordinary judges are not entitled to resort to an extensive unfavorable interpretation of criminal law or to an application by analogy. Such an approach is prohibited by Article 22 of the Constitution[10] and Article 7 of the European Convention on Human Rights. Consequently, the requirement of strict interpretation of the criminal law, as well as the prohibition of making analogy when interpreting criminal law, protects the person against the arbitrary[11].

2. The principle of equal treatment under criminal law. The Constitutional Court emphasized that the different treatments applicable to people in similar situations are discriminatory if they are not based on an objective and reasonable justification, that is, if they do not pursue a legitimate purpose or if there is no reasonable relation of proportionality between the means used and the purpose pursued[12]. Thus, for example, in Judgment no. 7/2018 the Court has established that the different regulation compared to the criminal law of the right to pay half of the fine established in case of committing a contravention (from the moment when the sanction is established in the contravention cases, but not from the moment when the sentence in enforceable as in the criminal field), violates the principle of equal treatment of people under the law. In the Court's view, the legislator had set "double standards" of protection in case of exercising the right to pay half of the fine set for offenders. The standard of protection offered by the law on contraventions is lower in comparison with the one offered by the criminal law, being a differentiated treatment that is not objectively and reasonably justified. The European Court held in its case-law that, although the states have the possibility of not sanctioning some crimes or they may punish them like contraventions and not like criminal offences, the accused should not be in an unfavorable situation because the regime of contravention cases is different from the one applicable in criminal matters[13]. As a solution, the Constitutional Court decided that "Until the law is amended by the Parliament, the term of 72 hours of payment of half a fine will start from the moment when the offender is noticed about the act imposing the fine"[14].

10 Article 22 of the Constitution provides that: "No one shall be convicted for actions or omissions which, at the time of their committal, were not criminal offences. Also, no harsher punishment will be applied than that which was applicable at the time of committing the criminal offence."

11 Judgment No. 12 of 14.05.2018, § 62; Decision No. 36 of 19.04.2018 on inadmissibility of the appeals no. 173g/2017 and no. 37g/2018 regarding the exception of unconstitutionality of article 220 of the Criminal Code and of article 89 of the Contraventional Code (pimping and practicing prostitution), §30.

12 Judgment No. 11 of 08.05.2018 regarding the exception of unconstitutionality of some provisions of the article 233 paragraphs (1), (2) and (3) of the Contraventional Code (sanctioning the drunk driving of vehicles for which it is not necessary to hold the driving license), §§ 47-48; Judgment No.11 of 01.11.2012 on constitutional review of some provisions of the article 32 paragraph (4) letter j) of Law no. 162-XVI of 22.07.2005 on the status of the military, § 54.

13 Judgment Anghel v. Romania, 4 October 2007, § 67

14 Judgment No. 7 of 26.04.2018 regarding the exception of unconstitutionality of article 34 paragraph (3) of the Contraventional Code (payment of the fine in half), §§ 55, 62-63.

At the same time, the Court noted that equality under the criminal law does not imply uniformity. In this context, the differentiation of criminal sanctions is a problem of criminal policy established by the legislator, which has a margin of discretion, and according to the prejudicial degree of the facts.

Thus, for example, the Court considered constitutional the provisions of an amnesty law applicable only to mothers who have children up to eight years old, but not to fathers[15]. The Court noted that the amnesty of some categories of detainees supposes, inevitably, a differentiated treatment. The Court noted several international covenants for the protection of women against violence based on sex, abuse and sexual harassment in the penitentiary environment, as well as the need to protect pregnant women and mothers. The Court examined statistical data indicating a considerable difference between the total number of male detainees and the total number of female detainees[16]. In these circumstances, the Court found that it would be very difficult, perhaps impossible, for Parliament to release fathers on the same grounds invoked in the case of mothers. If it had sought to ensure equal treatment, Parliament would probably not have adopted this amnesty law and therefore neither parent would have been released. Thus, the contested provisions of the amnesty law were only applicable to women who had children up to the age of eight the possibility of being released from prison, a possibility that was not granted to men who had children up to eight years old. The Court concluded that granting this possibility only to women is based on an objective and reasonable justification[17].

3. The principle of the individualization of the sentence — The Court held that the constitutional principle of legality requires the differentiation of the sanctions established for the violation of the law. In this sense, legislative individualization is not sufficient to achieve the purpose of the law, as long as it is not possible to achieve judicial individualization. By legal individualization, the legislator must give the judge the power to establish the sentence within certain predetermined limits — the special minimum and the maximum of the sentence, as well as to provide, for the same judge, the tools that will allow him/her to choose and determine a concrete sanction, depending on the circumstances of the deed and on the person who committed a contravention or a crime. Thus, the sanction, being a consequence of the legal liability, must be strictly individualized, and quantitatively and qualitatively adapted to the gravity of the deed and to the perpetrator.

15 Article 5 of the Law on amnesty given the declaration of the 2008 year as the Youth Year establishes that women sentenced to a term of up to seven years inclusive, who have children up to 8 years old and were not deprived of parental rights at the time of entry In effect of the law must be released from prison sentence.

16 At the date of adoption of the law on amnesty, the female detainees constituted 5.2% of the total number of persons sentenced to prison in the Republic of Moldova.

17 Judgment No. 10 of 08.04.2019 regarding the exception of unconstitutionality of some provisions of the article 5 of the Law no. 188 of 10.07.2008 regarding the amnesty in connection with the declaration of the year 2008 Year of the Youth (alleged discrimination of men sentenced to prison with children up to 8 years), §§ 41-44, 48-49.

The legislator cannot determine the sanction for every possible *de facto* situation in the future. He/she sets only certain criteria, within which the courts establish and apply the concrete sanction. However, the application of the sanction by the courts will be a deficient one, if the elaboration of the law and the establishment of the sanction by the legislator do not take into account the possibility of determining the sanction according to the individualization criteria mentioned above. Judicial individualization can be achieved only based on assessment mechanisms established by law, thus being an expression of the principle of legality[18].

Thus, for example, the Court held that some contested provisions of the Law on entrepreneurship and enterprises established a fine in an absolutely determined form. It turned out that the courts did not have the possibility of individualizing the sanction, their role being reduced to a simple formality of validation of the sanctioning decision. The Constitutional Court held that if the judge has power only to establish the existence or non-existence of the offense or contravention but has no power to determine the opportunity of the fine or sanction, he/she does not exercise full control of the jurisdiction. In this respect, the person concerned is deprived of the right of free access to a court of full jurisdiction[19].

The Court reiterated that the legislature cannot regulate a sanction in such a way as to deprive the ordinary judges of the possibility of individualizing the sanction, taking into account the circumstances of the case. In such a situation, the competences of the judges would be limited, creating preconditions for violating the constitutional rights of the subjects, *inter alia*, of the constitutional right to a fair trial. The exercise of full jurisdiction by a court of law means that it does not relinquish any of the components of the judgment function. It must enjoy the fullness of jurisdiction, both in terms of establishing facts and applying law. The inability to rule independently on certain issues crucial to the settlement of the dispute, with which it was referred, may amount to a violation of the right to a fair trial. Therefore, the Court concluded that limiting the role of the courts in case of individualizing the sentence is essentially lacking the guarantees of the right to a fair trial, enshrined in Articles 20 of the Constitution and 6 of the European Convention[20].

4. Ne bis in idem principle assumes that no person can be prosecuted or sanctioned for committing an offense when a definitive criminal decision has been delivered before in case of that person regarding the same deed, even under another legal framework. The principle in question supposes that the one who by his/her conduct ignored the law order will only answer once for the wrongful act, so for a violation of the law a single legal sanction will be applied. In Judgment no. 62 of 19 June 2018[21], the Court

18 Judgment No. 10 of 10.05.2016 regarding the exception of unconstitutionality of some provisions of the article 345 paragraph (2) of the Contraventional Code (individualization of the sanction) §§ 51-53, 58-59.

19 Judgment No. 2 of 30.01.2018, §55-57.

20 Judgment No. 2 of 30.01.2018, §58-59.

21 Judgment No. 62 of 19.07.2018 regarding the exception of unconstitutionality of the article 275 point 8) of the Criminal Procedure Code, §23.

held that the application of the *ne bis in idem* principle, guaranteed by Article 22 of the Constitution, demands the fulfillment of four conditions: 1) the same identity of the person being prosecuted or sanctioned; 2) the same facts which are object of the judgment (*idem*); 3) double sanctioning proceedings (*bis*); and 4) the definitive character of one of the two judgments. Thus, it is forbidden to prosecute or sanction a person for another crime if it originates essentially from the same facts, resulting from the analysis of the concrete circumstances, involving the same person, all being unquestionably related to each other in time and in space. This principle must be understood as prohibiting criminal prosecution or sanctioning the committal of the second "offense", insofar as it results from substantially identical facts.

The Court noted that the general rule established by element *bis* (double proceedings) of the *ne bis in idem* principle seeks to prohibit the repetition of criminal proceedings which were concluded with a "definitive" decision. The violation occurs when, at the beginning of the new proceedings, the authorities knew about the previous proceedings. In this respect, in order to comply with the *ne bis in idem* principle, the Court held that second proceedings must cease after first proceedings end with a final decision[22].

The court noted that the delivering and entry into force of a court sentence or the issuance of a decision to remove from criminal prosecution or to cease criminal prosecution prevents the resumption of criminal prosecution, the placing of a more serious charge or the establishment of a harsher punishment for the same act committed by the same person[23].

Given that *ne bis in idem* principle imposes on the relevant public authorities not only the prohibition of repeatedly judging a person, but also the prohibition to prosecute the person several times for the same act, the Court held that in case of two parallel proceedings regarding the same deed and the same person, the prosecutor, who finds out this information, is obliged to cease one of these proceedings until the case is sent to the court. Similarly, if there are parallel proceedings at the trial stage, in order to respect the *ne bis in idem* principle, it is necessary to stop the criminal trial[24].

On the basis of the above-mentioned, we consider that the rule of law value in criminal matters may be realized only through the cooperation of all public authorities involved in the exercise of state power, an important role being given to the Constitutional Court, the authority that must ensure the supremacy of the Constitution and protect the supreme values of the state and society.

22 Judgment No. 62 of 19.07.2018, §§28-30.

23 Judgment No. 12 of 14.05.2015 regarding the exception of unconstitutionality of the article 287 paragraph (1) of the Criminal Procedure Code (resumption of criminal prosecution), § 53.

24 Judgment No. 62 of 19.07.2018, § 31.