THE LIMITATION OF THE JUDGE'S DISCRETION IN ROAD TRAFFIC CONTRAVENTION COMPLAINTS – POSSIBLE UNCONSTITUTIONALITY ISSUES WITH DECISION NO. 5 OF 12.04.2021 PRONOUNCED BY THE HIGH COURT OF CASSATION AND JUSTICE IN A RECOURSE IN THE INTEREST OF THE LAW

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ABSTRACT

The article analyses the limitation of the judge's discretion in resolving road traffic contravention complaints, imposed by Decision No. 5 of 12 April 2021 of the High Court of Cassation and Justice (HCCJ), issued in a recourse in the interest of the law. This decision prevents courts from examining the proportionality of the complementary sanction of temporarily suspending the right to drive. In light of this ruling, judges are compelled to reject requests concerning the proportionality of the sanction, thereby limiting offenders' access to a comprehensive review of the imposed sanctions.

The paper explores the implications of this limitation in relation to constitutional and European principles regarding access to justice and the right to a fair trial. It also discusses potential criticisms of unconstitutionality raised against the HCCJ's decision, invoking articles from the Romanian Constitution and the case law of the European Court of Human Rights. The focus is placed on the principle of proportionality in contravention sanctions, which is essential to ensuring a balance between the gravity of the offence and the measures applied.

Finally, the conditions of admissibility for referring the case to the Constitutional Court of Romania to challenge the mandatory interpretation established by the HCCJ are evaluated. The article emphasises the need for an effective resolution of this issue, considering its impact on the administration of justice and the fundamental rights of petitioners.

KEYWORDS: *appeal, legal discretion, traffic-related, unconstitutionality in decisions*

J.E.L CLASSIFICATION: K14, K41, D63

1. INTRODUCTION

The practice of Romanian courts in handling contravention complaints has undergone significant limitations in their power to analyse and resolve road traffic-related contravention complaints following the issuance of Decision No. 5 of 12 April 2021, pronounced by the High Court of Cassation and Justice in a recourse in the interest of the law (Official Gazette No. 608, 2021).

In this context, it is noted that under the judicial decision to be issued in response to such an action, the judicial panel can no longer assess the proportionality of the complementary sanction of temporarily suspending the right to drive a motor vehicle, agricultural or forestry tractor, or tram, imposed under the provisions of Government Emergency Ordinance No. 195/2002 on traffic on public roads, republished, as subsequently amended and supplemented.

Such a limitation on the judge's discretion, as it pertains to the scope of their mandate in resolving a contravention complaint, raises practical interest in light of the effects of this decision on the resolution of traffic-related contravention complaints with this specific object.

Given the applicability of the provisions of Article 517(4) of the Civil Procedure Code concerning the binding effect of such an interpretative decision in resolving this type of claim, the sole judicial alternative may be to subject the interpretation underpinning the decision to a constitutional review.

2. THE LEGAL BASIS

We note that under Article 96 paragraphs (1) and (2)(b) of Government Emergency Ordinance No. 195/2002 on traffic on public roads, republished, as subsequently amended and supplemented, there is a complementary contravention sanction established: the temporary suspension of the right to drive. This sanction is imposed by the enforcing authority in relation to a principal sanction, provided that it is stipulated as such in the contravention's incriminating provisions.

Setting aside the necessity of applying this sanction, which is not the focus of the present analysis, a common issue in judicial practice arises when a court is seized with a contravention complaint, filed under the provisions of Government Ordinance No. 2/2001. Such complaints often challenge the legality, justification, and proportionality of the contravention report through which the sanction was established, seeking the "re-individualization/removal" of the complementary sanction.

Thus, the limits of the court’s jurisdiction also include a distinct claim that exclusively critiques the complementary sanction imposed by such a contravention report.

In such cases, the provisions of Article 9 paragraph (2) of the Civil Procedure Code come into play, which essentially establishes the principle of party disposition in civil actions, stating

that "The subject and scope of the case are determined by the parties' claims and defences" (Boroi, G., Stancu, M., 2020, p.16).

A correlative effect of this principle is stipulated under Article 22 paragraph (6) of the Civil Procedure Code, which specifies that the judge must rule on all that has been requested, without exceeding the limits of their jurisdiction, except where otherwise provided by law.

It should also be noted that the provisions of the Civil Procedure Code serve as supplementary general norms to the special provisions governing the legal regime of contraventions, as provided in Article 47 of Government Ordinance No. 2/2001. Consequently, such a claim necessitates mandatory consideration and an adjacent ruling.

Therefore, when the court is seized with such a claim, it is obligated to rule accordingly. However, this obligation, within the limits of the court's jurisdiction, has been significantly restricted by Decision No. 5 of 12 April 2021, issued by the High Court of Cassation and Justice in a recourse in the interest of the law, which established the following:

"In interpreting the provisions of Article 96 paragraphs (1) and (2)(b), Article 100 paragraph (3), Article 101 paragraph (3), Article 102 paragraph (3), and Article 109 paragraph (9) of Government Emergency Ordinance No. 195/2002 on traffic on public roads, republished, as subsequently amended and supplemented, correlated with the provisions of Article 5 paragraph (5), Article 21 paragraph (3), and Article 34 paragraph (1) of Government Ordinance No. 2/2001 on the legal regime of contraventions, approved with amendments and supplements by Law No. 180/2002, as subsequently amended and supplemented, the court, when seized with resolving a contravention complaint against a contravention report imposing the complementary sanction of temporarily suspending the right to drive a motor vehicle, agricultural or forestry tractor, or tram, does not have the authority to examine the proportionality of this complementary sanction."

In light of the binding effects (Chiș, A.A., Zidaru, Gh.-L., 2015, p.309) of Article 517 paragraph (4) of the Civil Procedure Code, the judicial solution currently required for a claim such as that described above is a mandatory analysis in the court's reasoning, followed by rejection in accordance with the ruling issued by Decision No. 5 of 12 April 2021.

On the other hand, we believe that this interpretative solution may be subject to certain constitutional challenges, which will be subsequently analysed.

3. POSSIBLE CRITICISMS OF UNCONSTITUTIONALITY REGARDING DECISION NO. 5 OF 12.04.2021 PRONOUNCED BY THE HIGH COURT OF CASSATION AND JUSTICE IN A RECOURSE IN THE INTEREST OF THE LAW

As previously mentioned, this Decision was issued in response to differing judicial practices regarding the resolution of contravention complaints concerning the complementary sanction of suspension of the right to drive for a specified period.

By analysing constitutional and relevant European norms, it becomes evident that the provisions relevant to this matter include Article 21 paragraphs (1) and (3) of the Romanian Constitution, in conjunction with Article 6, paragraph 1 of the European Convention on Human Rights. These provisions protect the right of access to a court and may affect the offender's right to have their complaint—and implicitly the contravention report—examined in all aspects submitted for judicial review.

Thus, in theory, offenders can no longer rely on judicial recourse to challenge and potentially remove the complementary sanction applied separately. This is because the legality of the sanction imposed by the enforcing officer is absolutely presumed. The only avenue for challenging the complementary sanction is to argue for the nullity of the contravention report, which, if successful, would annul both the principal and complementary sanctions.

Consequently, the offender can only hope for the removal of the complementary sanction if the contravention report is declared invalid due to procedural or legal errors.

On the other hand, a fundamental principle of contravention liability is the proportionality of sanctions. This principle is derived from Article 5 paragraphs (5) and (6) of Government Ordinance No. 2/2001, which state that:

"(5) The imposed sanction must be proportionate to the degree of social danger posed by the offence committed."

"(6) Complementary sanctions are applied depending on the nature and gravity of the offence and may be cumulative."

This principle is further reinforced by Article 21 paragraph (3) of the same ordinance, which stipulates that:

"The sanction shall be applied within the limits set by the normative act and must be proportionate to the degree of social danger posed by the offence, taking into account the circumstances of its commission, the means and manner of its perpetration, the intended purpose, the outcome produced, as well as the personal circumstances of the offender and other data recorded in the contravention report."

Regarding the possibility for the court to analyse the proportionality of the complementary sanction, such authority could potentially derive from Article 34 paragraph (1) (final clause) of Government Ordinance No. 2/2001, which states:

"The court shall rule on the sanction, the damages established, as well as the measure of confiscation."

Nevertheless, under the interpretive solution provided by Decision No. 5 of 12 April 2021, the court can re-individualise the principal sanction imposed by the enforcing officer—for

instance, substituting the fine with a warning—but cannot in any way assess the proportionality of the complementary sanction.

The European Court of Human Rights (ECHR), in its judgment in Osturk v. Germany (21 February 1984), ruled that the distinction between contraventions and offences in the domestic legislation of certain signatory states cannot result in excluding a category of acts from the guarantees provided by Article 6 of the Convention concerning criminal charges. Similarly, in Anghel v. Romania, the Court ruled that the notion of contravention falls under the concept of a criminal charge, thus granting the petitioner the presumption of innocence and placing the burden of proof primarily on the enforcing authority, not the petitioner.

However, the ECHR also recognised in the same case the right of any legal system to establish factual and legal presumptions, provided they do not exceed reasonable limits in criminal matters. Based on ECHR jurisprudence, the complementary sanction under traffic law aligns with a criminal sanction and could thus fall under judicial review if explicitly raised in the complaint.

Support for this argument is also provided by the Romanian Constitutional Court's Decision No. 732 of 20 November 2018, which rejected the unconstitutionality objection regarding Articles 5 paragraphs (5), (6), and (7) and Article 34 of Government Ordinance No. 2/2001. The Court emphasised the principle of proportionality, noting that all sanctions, whether principal or complementary, must be calibrated according to the gravity of the offence. It further stated that agents enforcing such sanctions must ensure their application aligns with both the repressive and preventive nature of contraventional penalties.

Moreover, the ECHR has consistently held that all administrative acts must be subject to judicial review and cannot be presumed absolutely lawful. Legislators are thus required to provide judicial procedures for such reviews.

For instance, in A. Menarini Diagnostics S.R.L. v. Italy, the Court held that entrusting an administrative authority with prosecuting and penalising minor "criminal" offences is not contrary to the Convention, provided the individual concerned can challenge any decision against them before a court meeting the guarantees of Article 6. The Court ruled that decisions by administrative authorities that fail to meet the requirements of Article 6(1) must be subject to subsequent review by a "judicial body with full jurisdiction." This body must be competent to annul any aspect of the decision, whether factual or legal, as derived from cases such as Schmautzer v. Austria, Gradinger v. Austria, and A. Menarini Diagnostics S.R.L. v. Italy.

In conclusion, Decision No. 5 of 12 April 2021 raises significant concerns regarding the proportionality and judicial review of complementary sanctions, which merit further constitutional and ECHR-based analysis.

4. CONDITIONS FOR ADMISSIBILITY OF A REQUEST TO REFER A CASE TO THE CONSTITUTIONAL COURT OF ROMANIA

Regarding the admissibility of a request to refer an exception of unconstitutionality to the Constitutional Court of Romania, the provisions of Article 29 paragraphs (1), (2), or (3) of Law No. 47/1992, republished, on the organisation and functioning of the Constitutional Court, are applicable.

Thus, as a priority, the exception must be related to the resolution of the case, meaning that the court must have been explicitly seized (emphasis added) with a claim to analyse the complementary contravention sanction of the temporary suspension of the right to drive under traffic law.

Furthermore, the exception must concern the legal provisions of a law currently in force, which have not been previously declared unconstitutional by a decision of the Constitutional Court.

Regarding this latter aspect, in the present case, there may be a potential unconstitutionality in the interpretation expressed in a decision issued in a recourse in the interest of the law. This, however, does not lead to the rejection of such a referral by the court as inadmissible.

In this regard, the consistent practice of the Constitutional Court reveals that legal provisions subject to constitutional review include those whose criticism is related to mandatory interpretations provided by the High Court of Cassation and Justice through decisions rendered by the Panel for the Settlement of Legal Issues or the Panel competent to rule on recourses in the interest of the law. This applies when it is determined that these mandatory interpretative solutions render the provisions unconstitutional (for example, Decision No. 206/2013, Decision No. 51/2020, Decision No. 602/2020).

Finally, to date, no exception of unconstitutionality has been admitted concerning Decision No. 5 of 12.04.2021, issued by the High Court of Cassation and Justice in a recourse in the interest of the law.

5. CONCLUSIONS

Through the issuance of Decision No. 5 of 12.04.2021, pronounced by the High Court of Cassation and Justice in a recourse in the interest of the law, an attempt was made to establish a unified judicial practice regarding the judicial review of the complementary sanction of temporarily suspending the right to drive, specifically the possibility of unilaterally ruling on this matter.

In light of the effects of this decision, namely the mandatory application of this interpretation, which precludes such a possibility, there has been a clear limitation of the court's ability to analyse cases when seized with such claims in the context of a contravention complaint, as per the provisions of Article 9 paragraph (2) of the Civil Procedure Code.

This endeavour aimed to briefly analyse the potential limitation in question through the lens of constitutional norms and the provisions of the Convention. Regardless of the perspective adopted, it must be acknowledged that this issue requires resolution in the near future, given the impact it has on petitioners and the judicial process as a whole.

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