

REFLECTIONS UPON THE LEGAL NORM INCLUDED IN ARTICLE 215(2) LETTER D IN THE CODE OF CRIMINAL PROCEDURE, IN THE CONTEXT OF THE IMPLICATIONS GENERATED BY ITS EQUIVOCAL CHARACTER

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Abstract

Starting from a practical case, the article aims at submitting to examination the way, debatable in our opinion, in which the lawmaker has understood to regulate, in the context of legal supervision, the defendant's obligation of non-communicating either directly or indirectly, by any means, with certain persons. More exactly, the purpose of our initiative is to underline the fact that the legal norm should have a predictable character, because, otherwise, it may generate consequences of a considerable gravity for the person it is addressed to.

Keywords: *legal supervision, unconstitutionality, prohibition of communicating, predictability, legal norms.*

The legal norm we intend to examine in the following lines is regulated by the lawmaker in the context of preventive measures within legal supervision. Thus, it is already known that the measure we refer to can be disposed by the prosecutor during the criminal investigation, or the Pre-Trial Chamber judge in the pre-trial chamber procedure, or by the Court during the trial, if its establishment is justified by the ensuring of the criminal trial proper development, of preventing the suspect's or defendant's circumvention from prosecution or trial, or the prevention of committing another crime.¹ As soon as such a preventive measure is established, he who is submitted to legal supervision must obey a series of obligations, having his very supervision as an aim.² At the same time, according to the dispositions of art. 215(2),

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¹ Article 202 in the Code of Criminal Procedure regulates the aim, general conditions of enforcement and categories of preventive measures, underlining the fact that (1) Preventive measures can be disposed if there is evidence or solid clues from which the reasonable suspicion results that a person committed an offence and if they are necessary in order to ensure the proper development of the criminal trial, of preventing the suspect's or defendant's circumvention from prosecution or trial, or from committing other crimes.

² Art.215(1) *While under legal supervision, the defendant must respect the following obligations :*

- a) *to report to the criminal investigation body, to the Pre-Trial Chamber judge or the instance whenever he is asked to;*
- b) *to inform as soon as the legal organ who disposed the measure or who deals with the change of home;*
- c) *to report to the police body who is designed with his supervision by the legal organ who disposed the measure, according o the supervision program made by the police body whenever asked to.*

the legal organ who disposed the measure may impose upon the defendant the obligation to respect one or more of the particularly mentioned obligations in the cited legal text. It is worth mentioning that, as far as the aim is concerned, the obligations listed by the lawmaker in art. 215 (2) do not have a homogenous character. Thus, if those listed at letter a-d³ are somehow closer to supervision measures, the enforcement of the others, regulated by letter e-k⁴ should be motivated by the nature of the offence supposed to have been committed or by its author's peculiarities. In fact, the situation is as follows.⁵ As far as defendant B.N. is concerned, investigated for complicity in blackmail crime, the preventive measure of legal supervision was disposed, establishing the prevention of communicating directly or indirectly, by no means, with a determined number of persons, defendants, the injured part, respectively witnesses in the cause. It is worth mentioning the fact that, in the conditions in which the defendant was not forbidden to exercise his profession, he may meet daily two of the persons he was forbidden to communicate with. In order to clarify the situation, the defendant talked to the case prosecutor, who told him over the phone he may meet the two witnesses, but drawing his attention towards the fact that he was not allowed to discuss about the file in which he is investigated. The problem that arises in this context is generated by the way in which the legal norm was edited. Thus, one may say that the text of art. 215 (2) letter d Code of Criminal Procedure, the way in which it is worded, is against the dispositions of art.53 in the Romanian Constitution, referring to the restriction of certain rights and liberties, should be precisely delimited, both regarding the duration, and content. The phrase **not communicate directly and indirectly, by any means**, is interpretable and, because of its too general character, might determine in practice various interpretations having as a consequence violations of human rights and liberties. Thus, first of all we should mention the lawmaker's reason the obligation not to communicate either directly or indirectly, by no means with any person. It is obvious that the finality of this restriction implies the prevention of the person under legal supervision to influence in any way the approach of criminal liability. But, the very

³ Art. 215 (2) *The legal organ who has disposed the measure may impose upon the defendant that, during the legal supervision, to respect one or more of the following obligations :*

- a) *not surpass a certain territorial limit, established by the legal organ, without his prior approval;*
- b) *not go to places established by the legal organ or only to the places established by him;*
- c) *to permanently carry upon himself an electronic supervision system;*
- d) *not to approach the injured person or members of his family, other participants in committing the offence, witnesses or experts or any persons designated by the legal organ and not communicate, directly or indirectly, by any means.*

⁴ Art.215 (2) *The legal organ who disposed the measure may impose upon the defendant that, during the legal supervision, to respect one or more of the following obligations: (...)*

- e) *not exercise his profession, job or carry out the activity where he committed the act;*
- f) *to periodically report relevant information about his means of existence;*
- g) *to submit to some control measures, attendance or medical treatment, especially implying disintoxication;*
- h) *not take part in sport festivities or cultural ones or or public meetings;*
- i) *not drive vehicles particularly established by the legal organ;*
- j) *not possess or use weapons;*
- k) *not issue checks.*

⁵ File 1081/62/2015, Braşov Court.

presence of a person under legal supervision in the same room with him who is preventing from communication, in the context of office/job relationships, in the presence of more witnesses, is not likely to affect the proper course of the legal procedure he is implied in. Second, the lawmaker's utterance leaves room to interpretations. On the one hand, a representative of legal organs admits the possibility of him under legal supervision to talk to the persons upon whom a prevention is established, but not to talk about the investigated file. On the other hand, another representative of legal organs does not approve of it, but replacing legal supervision with the preventive measure of house arrest, because the person under legal supervision breached his obligations (simply being in the same room with the person he is prevented to communicate, in front of other persons, in the context in which the former has particularly expressed the intention of not talking anything related to the investigated file). Taking into consideration the above-mentioned reasons, we wonder to what an extent a control of constitutionality should be proper regarding the discussed legal norm. We consider advisable the interference of the Constitutional Court that, in its quality of negative legislator,⁶ to intervene by declaring to be unconstitutional the legal norm under discussion, following that, as a consequence, the lawmaker modify the text. Thus, the legal norm could be rephrased by introducing the prevention to directly or indirectly communicate, by no means, regarding the criminal case in which he under legal supervision is indicted.

The similar idea is to be found in the disposition of art.18 in the Convention for the Protection of Human Rights and Fundamental Freedoms that underlines the fact that **the restrictions which, according to the present Convention, are brought upon those rights and freedoms, cannot be applied but according to the scope they were made for.**

Another argument that can be brought in order to support the modification of the dispositions in the the criticized text, is that, unanimously accepted, is the necessity of the **predictable character** of a legal disposition, especially in criminal matters, so that the citizens may act accordingly. However, there are instances when the accurateness in editing a legal text is not absolute in the sense mentioned before. This is why in the doctrine and jurisprudence of the European Court on Human Rights the intention of predictability was mentioned to be fulfilled also when persons ask for the opinion of experts to get the right meaning.⁷

At the same time, according to the dispositions of art.8 (4), under Law nb. 24/2000 regarding the norms of legal technique for drafting laws, **the legislative text should be clearly, fluently and intelligibly formulated without syntactical difficulties or obscure, equivocal passages.** But, as in two similar contexts, the text has been interpreted in completely different ways, having considerable serious consequences, demonstrates the obvious equivocal character of this provision. It is known that the elaboration of normative acts is a complex process, lead by a series of pre-established principles. One of them is the principle of accesibility of acts in normative elaboration and means that legal norms should transmit a clear, concise

⁶ D.Valea, *Sistemul de control al constituționalității din România*, Universul Juridic, București, 2010, p. 304 și urm.

⁷ Also see: C.Bârsan, *Convenția europeană a drepturilor omului*, C.H. Beck, București, 2010.

message, so as to be understood, so as to avoid as much as possible confusions and controversies generated by a normative text formulated in the contempt of this rule. But, in the present situation, this can be reproached regarding this legal norm, namely that, because of its equivocal character, it can cause completely opposed interpretations, with serious consequences for those interested in it.

The predictability of a criminal law is also a consequence of Art.7 in the European Convention on Human Rights.⁸ In this respect, it was mentioned that in the doctrine⁹ the principle in the mentioned article is part of the hard core of law, from which no derogation is admitted, as it has as finality the removal of the arbitrary from the legal system. We consider that the mentioned principle is totally applicable, because in its activity, the Court operates with autonomous notions, related to the significance they have in law.¹⁰

⁸ According to Art.7 in the European Convention on Human Rights (I) *No one can be convicted for an action or omission which, at the moment when done, was not considered to be an offense, according to the national or international law. At the same time, there cannot be applied a more severe penalty than the one existing in the moment when the offense was committed.*

⁹ See: C.Bârsan, op.cit., p. 571.

¹⁰ Idem, p. 573.