CZU 342.9:343.1

THE SCOPE AND LIMITS OF APPLYING ANALOGY IN THE CONTRAVENTIONAL PROCESS

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Summary

In the proposed study, the author addresses the issue concerning the possibility of applying analogy of law in the contravention process.

The question is discussed whether the legislator did not prohibit analogy in the procedure for examining and sanctioning a contravention. Moreover, it was expressly provided for in the application by analogy of the provisions of the Code of Criminal Procedure.

This leads to the conclusion that it is necessary to apply the procedural rules of the Code of Criminal Procedure by analogy, not only because the procedural law does not prohibit it, but also because of the necessity of applying such an approach.

In perspective, the issue of a body of rules on the application of analogy, combined with rules of an interpretative nature, will be discussed in parallel with the subject referred at issue.

Keywords: contravention process, legal rule, analogy, law, criminal process, legislation, law.

Introduction. Throughout the centuries, humans have managed to invent many things. Over time, some of them remain forgotten, others become outdated, and only a remarkably small number of things retain their relevance regardless of the passage of time.

One of those things that represents a perpetual necessity and is in an uninterrupted process of improvement is the law.

Often, we find the need for a different way to regulate a social relationship. This happens as soon as a norm begins to become inconvenient or insufficient.

At the same time, the entire process of adopting legal norms is conditioned by certain rules, which themselves have the character of a legal norm.

This once again speaks to the fact that inevitably law comes to regulate social relationships „following” necessity.

Therefore, to avoid the vicious circle, we have become accustomed to attributing an axiomatic character to some rules, so that both their necessity and authority are often unquestioned. Moreover, these rules often represent a „taboo” for discussions.

In addressing such a subject today, which has been under the „indisputable” label for a long time, we want to refer to the issue related to the „analogous application of the contravention law”.

We start addressing the subject from the hypothesis that Article 5 of the Contravention Code establishes axiomatically that the application by analogy of the contravention law is prohibited [2, art.5].

At the same time, the explanatory dictionary of the Romanian language indicates that analogy represents a method of solving a case unforeseen by law but similar [3]. By deduction, we should understand that for the situation in which the Contravention Code does not establish any

norm that would regulate a certain situation, this case should not be subject to resolution or at least addressed through the prism of the Contravention Law.

And we must understand that the legislator establishes such a rule imperatively, a matter that does not admit exceptions.

We all understand that „The Law" is enacted not for a particular case but for a multitude of cases, including those for the future, still unknown in their variety of manifestations at the time of adopting the legal norm.

At the same time, to conclude that the Law „does not cover" a social relationship through its text and meaning, we must resort to a series of interpretative actions. From here, we come up with the rules that dictate the character of the legal norm, which tell us that the legal norm must be perceived not only through the prism of its text but above all through the prism of its spirit, where the spirit or soul of the law is only reflected through its text, and often only partially.

Therefore, in applying the law, we should not limit ourselves only to identifying the semantic content of the text but also to identify the purpose pursued by the legislator, namely for the moment when a legal norm was adopted. And this is because it is not the text of the law that determines its purpose, but the purpose of its enactment that determined the text of the law.

Therefore, we deduce with simplicity the fact that the text of the law, however successful it may be, still admits the probability that it may not perfectly reflect the purpose pursued by the legislator in adopting this law. A text of law can have the effect of an interpretation that exceeds the limits of the purpose pursued by the legislator (extension), but it can also restrict the limits of the purpose pursued by the legislator (restriction).

However, we must not forget that the will of the legislator is law and not the text laid down on paper. Therefore, the non-coincidence between the text of the law and the will of the lawgiver generates the need to admit exercises of interpretation but also the application of analogy.

Although in specialized literature, especially in public law, it is customary to consider, but also to argue, that when a rule from a text of law refers to the rules established by another law, this is not an analogy, but we are facing the existence of a blanket rule.

We consider that such an approach would be one with a loophole because the blanket rule, or as the term „reference" is more commonly used, represents only a mechanism for realizing analogy, and moreover, only one type of analogy. In doctrine, this is called „regulated analogy" or „analogy by law" or „analogy of the law". In this sense, the Civil Code, in Article 6, establishes that in the case of non-regulation by law or by agreement of the parties and the lack of usage, to the relations provided by the Civil Code, if this does not contravene their essence, the norm of the civil legislation regulating similar relations shall apply (analogy of the law) [1, art.6].

At the same time, there may also be „unregulated analogy" or „pure analogy", which most often is present in private law, is subject to the situation where the application of the analogy of the law is impossible, where the rights and obligations of the parties are determined according to the principles of civil legislation and equity (analogy of law) [1, art.6].

Most often, analogy aims to exclude the restriction by text of the real will of the legislator. Sometimes, however, it aims to have the opposite effect – restriction.

All these truths allow us to question any rule claimed to have an axiomatic character. And this is because even rules with an axiomatic character were adopted at their time only due to the needs dictated by the circumstances of the moment.

We address all these because although in public law norms are characterized by rigidity, and the rule regarding the inadmissibility of analogy, applied through the text of Article 5 of the Contravention Code, seems natural, we still find that in substantive contravention law, as well as in procedural contravention law, we have a multitude of blanket rules, where in fact we are facing an effective mechanism of intensive application of analogy.

And here we are not referring to the rules that determine the content of the sanctioned act

but to the content of a series of rules that determine the condition of applying a multitude of institutions. As an argument, we start from the hypothesis that, as mentioned, Article 5 of the Contravention Code establishes a rule according to which the analogous application of the contravention law is not allowed. From the text of this rule, but also in correlation with the provisions of Article 1 of the Contravention Code, it clearly results that the analogous application is not allowed for both material and procedural norms.

Article 374 of the Contravention Code establishes that the contravention process is conducted based on the Constitution, international agreements to which the Republic of Moldova is a party, the present Code, and the Code of Criminal Procedure. And if the Constitution is a legislative act with a superior power, as well as the international agreements to which the Republic of Moldova is a party, then the Code of Criminal Procedure does not represent a legislative act superior to the Contravention Code. From here, many of the situations not regulated by the text of the Contravention Code in judicial practice, as well as in the practice of identifying contravention cases by constatation agents, are specifically applied in contravention procedure matters, according to the provisions of the Code of Criminal Procedure.

In this way, both the constatation agents and the courts solve some situations not foreseen by the Contravention Code by resorting to the application of the provisions of the Code of Criminal Procedure for similar situations. An example could be the institution of recusal, the institution of summons, the institution of civil action (for compensation) and for reimbursement of procedural expenses, the institution of hearing the parties, etc.

Each time the court, as well as the constatation agent, resort to the application of the provisions of the Code of Criminal Procedure to resolve a situation not foreseen by the Contravention Code, they resort to the analogy of the law. Therefore, we find that in a multitude of cases, namely in the contravention process, analogy is applicable, and namely through the application of analogy, the finality in the contravention process is actually achievable.

At the same time, the question arises regarding how we should understand the text of Article 5 of the Contravention Code, especially in correlation with the provisions of Article 1 of the Contravention Code, since a multitude of norms impose the application of contravention procedural norms by analogy [2, art.5].

The answer is found in what we started our story with. From the start, the legislator embarked on the wrong path by merging substantive law with procedural law into a single legislative act. But even so, the fundamental mistake was made when, in Article 1 of the Contravention Code [2], the legislator „mixed" substantive law with procedural law, attributing them a single term - the term „contravention law", and as a result, assigning the specific principles only to substantive law and the contravention process.

In our opinion, just as we do not find in the Code of Criminal Procedure the prohibition of applying analogy, a matter that is largely justified especially for acts with a consensual character, correspondingly, analogy should not have reflected in the contravention procedure either.

From here, we will consider that the legislator „erred" by stating in Article 5 of the Contravention Code that the application by analogy of the contravention law is prohibited. Although it used such an expression, but especially since this principle is found only in the general part of substantive law (Book One) and is not found in the general part of procedural law (Book Two), then we should understand that the legislator had in mind (aimed at) prohibiting analogy only regarding „which act is a contravention" and „how a contravention is punished". As for the procedure for examining and sanctioning the contravention, the legislator did not prohibit analogy. Moreover, he even expressly provided for it regarding the application by analogy of the provisions of the Code of Criminal Procedure.

However, the problem series does not stop only at the application of analogy through the provisions of the Code of Criminal Procedure. In the contravention process, there are a multitude

of procedural acts that are not regulated by either the Contravention Code or the Code of Criminal Procedure. I refer to acts that are based on the agreement of the parties to the process. It is about the act of reconciliation, the act of acknowledgment of guilt, the act of amicable establishment of the road accident, and others.

The condition for concluding, as well as a multitude of effects of these acts, are not regulated in the text of the Contravention Code, but also in that of the Criminal Procedure Code. It is evident that both practice and necessity impose neglecting the provisions of Article 5 of the Contravention Code, and applying for these cases the analogy of law, by applying the conditions and rigors provided by the Civil Code.

In conclusion, I want to mention that the revision of the concept of limiting the application of analogy in contravention law is to have as its finality only its application regarding the identification of the act and the applicable sanction concerning the contravention act. This is not only logical but also necessary.

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