**a)** Moldova / **b)** [Constitutional Court](http://www.codices.coe.int/NXT/gateway.dll/CODICES/Descriptions/ENG/EUR/MDA?f=templates$fn=document-frameset.htm$q=$uq=$x=$up=1#0-0-0-40057) / **c)** Plenary / **d)** 23-06-2020 / **e)** 18 / **f)** On the constitutional review of Article 761 para. (1) of the Contravention Code (non-compliance with measures for the prophylaxis, prevention and/or control of epidemic diseases, if this endangered public health) / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 24.07.2020, 188-192 / **h)** CODICES ([Romanian](http://www.codices.coe.int/NXT/gateway.dll/CODICES/Full/EUR/MDA/ROM/MDA-2019-3-011?f=templates$fn=document-frameset.htm$q=$uq=$x=$up=1#0-0-0-40059)).

Keywords of the systematic thesaurus:

03.04 General Principle – ***Nullum crimen, nulla poena sine lege***

05.01.04 Fundamental Rights – General Questions – Limits and restrictions

05.03.13 Fundamental Rights – Civil and political rights **– Procedural safeguards, rights of the defense and fair trial**

05.03.39 Fundamental Rights – Civil and political– **Rights to property**

Keywords of the alphabetical index:

Fair hearing, fair balance, principle of individualization, rules for epidemic diseases, legislation by reference.

Headnotes:

A relatively small difference between the minimum and maximum of a penalty’s limits does not give the court the opportunity to assess the proportionality of the penalty applied in relation to the offence and the circumstances of the case and, therefore, infringes the person’s right to a fair hearing enshrined in Article 20 of the Constitution.

Summary:

I. The case originated in several applications lodged with the Court by two MPs and two lawyers, on the constitutional review of Article 761 para. (1) of the Contravention Code. The applicants argued before the Court that the contested provisions are unforeseeable. They also alleged that the imposed penalty for breaching these provisions is disproportionate compared the pursued aim.

II. The Court analyzed the present applications in the light of Articles 20, 22 and 46, in conjunction with Articles 1 para. (3), 23 para. (2) and 54 para. (2) of the Constitution.

In order to assess whether the contested provisions comply with the constitutional standards, the Court examined them under two aspects: a) the compliance with the requirements of the law and b) the compliance with the principle of individualization of the penalty.

 *a) On the compliance with the requirements of the law*

The quality of law requirements, according to Article 23 of the Constitution in its interpretation by the Court, supposes that the law be both adequately accessible and foreseeable. The Court noted therefore that the impugned provisions were published in the Official Gazette and thus accessible. On the compliance with the foreseeable requirement the Court noted that Article 761 para. (1) of the Contravention Code is a reference rule and it cannot be viewed in isolation, but in conjunction with other applicable normative acts. In this regard, the Court noted that there are several acts establishing measures for the prophylaxis, prevention and/or control of epidemic diseases. Moreover, these measures may be adopted in the case of several epidemic diseases, including the coronavirus pandemic (COVID-19). The Court therefore emphasized that the measures referred to in Article 761 para. (1) of the Contravention Code are established according to the nature and evolution of the epidemic disease, the rules of prophylaxis and the methods of treatment of each epidemic disease.

The Court also considered that the measures in question, adopted by the competent authorities in the form of such provisions, decisions and other acts, correspond to the need to guarantee the possibility of establishing and amending the regime imposed by the appearance and evolution of epidemic diseases.

However, the Court pointed out that, according to the impugned Article, a person to be held liable for committing the contravention, the act must put in danger the public health through the non-compliance with measures for the prophylaxis, prevention and/or control of epidemic diseases.

Therefore, the Court stressed that the contested provisions are accessible and foreseeable, from the perspective of the lawfulness of the substantial criminal law (*nullum crimen, nulla poena sine lege*), guaranteed by Article 22 of the Constitution, in conjunction with Articles 1 para. (3) and 23 para. (2) of the Constitution.

b) On the compliance with the principle of individualization of the penalty.

The Court held that the Parliament cannot regulate a penalty in a way to deprive the court of the possibility of individualizing it effectively and reasonably. By limiting the role of the courts, it lacks the guarantees of the right to a fair trial, guaranteed by Articles 20 of the Constitution and 6 of the European Convention.

In this respect, the Court has ruled that not only a fixed penalty set by the legislator, but also a relatively small difference between the minimum and the maximum limit of the penalty, depending on the harmful act and the multitude of factual means of committing it, are likely to affect the right to a fair trial, by restricting the jurisdiction of the courts to exercise its full jurisdiction over the individualization and opportunity of the penalty. Therefore, the Court stressed out the a relatively small difference between the minimum of 450 conventional units and the maximum of 500 conventional units of a penalty limits does not give the courts the opportunity to assess the proportionality of the penalty applied in relation to the offence and the circumstances of the case, in order to ensure a fair balance between the aim pursued and the means, and that the means used do not restrict the rights of the person more than necessary to achieve these aims.

Moreover, the Court pointed out that in the case of a legal person the fine can be set from 1000 conventional units to 1500 conventional units. Therefore, the Court noted that the margin between the minimum and maximum limit is 500 conventional units, which allows the courts to individualize the penalty according to the committed offense. The Court also held that factual means to commit the harmful act by a legal entity are not so varied as for individuals.

Therefore, the Court found that the text "from 450" of Article 761 para. (1) of the Contravention Code is unconstitutional. The Court mentioned that until the modifications of the Contravention Code are made, the minimum limit of the penalty for this offence will be the minimum limit from the general part of the Contravention Code, *i.e.* one conventional unit.

However, the Court has emphasized that the police and the courts must take into account, when examining a specific case, including the fact that the margin of discretion granted cannot be used in an abusive manner and contrary to the preventive purpose of this penalty.

Cross-references:

European Court of Human Rights:

*Parmak and Bakir v. Turkey*, nos. 22429/07, 25195/07, 3 December 2019;

*Jidic v. Romania*, no. 45776/16 ,18 February 2020:

*S.C. Complex Herta Import Export S.R.L. Lipova v. Romania*, no. 17118/04, 18 June 2013;

*Mamidakis v. Greece*, no. 35533/04, 11 January 2007;

*Gestur Jónsson and Ragnar Halldór Hall v. Island*, nos. 68273/14, 68271/14, 30 October 2018;

 *Berardi and Mularoni v. San Marino*, nos. 24705/16 24818/16, 10 January 2019;

*Khlyustov v. Russia*, no. 28975/05, 11 July 2013;

*Chevrol v. France*, no. 49636/99, 13 February 2003;

Languages:

Romanian, Russian (translation by the Court).