Administrative Sanctions and the Concept of "Criminal Charge". Romanian Perspective in a Comparative Law Study

Elena-Mihaela FODOR[1]

Abstract: Objectives: The research tries to point out the principles that should apply to administrative sanctions so that the requirements from the autonomous notion of "criminal charge" created by the European Court of Human Rights should be fulfilled. **Prior Work**: In the national jurisprudence not many authors have referred to this subject. Comments on the dispositions of Government Ordinance No. 2/2002 regarding the juridical frame for contravention have been made. In the jurisprudence of some European countries where no specific legal dispositions refer to principles that protect against public power abuse in enforcing administrative sanctions, comments have been made on this subject. **Approach**: A search has been conducted in the legislation of several European countries, searching for Constitutional or Administrative Acts dispositions on the matter. Also the jurisprudence approach on the matter in these countries was observed. **Implications**: The study should be useful for administrative bodies in their investigative and sanctioning activity and for the courts in appreciating the consequences of valuing a certain administrative sanction as a "criminal charge". **Value**: This paper is summarizing the principles of criminal law that apply to administrative law and points out to what extent the Romanian legal norms express those principles.

Keywords: legal principles; punitive sanctions; human rights

1. Introduction

In the Romanian law there is no Administrative Procedure Code or a similar act to contain general norms regarding the issuing and enforcing of administrative law. This can be a problem when administrative sanctions are concerned. If in criminal law there are sufficient provisions protecting against abuse from public authorities, the lack of general provisions in the administrative law results in a lack of general principles that should be applied when administrative sanctions are enforced. In the Government Ordinance No. 2/2001 regarding the juridical frame for contravention some protection is ensured by dispositions similar to those in the criminal law. However, for administrative sanctions inflicted for administrative infringements

[1]Associate Professor, PhD, Cristian University "Dimitrie Cantemir", Cluj-Napoca, 2 Burebista Street, Cluj-Napoca, Romania. Tel.: +40.364.401.057; +40.264.432.211; fax: +40.264.432.265. Corresponding author: mihaelafodor@yahoo.co.uk.

that are not defined as being contraventions, such protection is not ensured. In our opinion, there is need for a better understanding, in Romanian jurisprudence and case-law, of the principles that ensure protection against possible abuse from the public authorities. As the European Court for Human Rights has created the autonomous notion of "criminal charge" that, in certain conditions, extends to administrative sanctions, there is need for internal regulations that clearly specify the principles, their applicability and the situations concerned. The legislation of some European countries shows that, regardless the decisions of the European Court for Human Rights, it is clear that some of the principles of the criminal law are considered necessary in the administrative law.

2. The Origin of Administrative Infringements

In the Romanian law, crime and contravention have a common origin in the Criminal code of 1865. This Code was structured like the French Criminal Code from 1810, dividing the offences in felonies, misdemeanours or petty offences (crimes, délits et contraventions). If the French Code has maintained this structure up to this day, according to article 111-1 of the present Criminal Code, in the Romanian law the petty offences, named "contravenţii" (referred as *contraventions* from now on in this work) were subtracted from the sphere of criminal offences. The Decree No. 184/1954 has repealed the dispositions from the Criminal Code or particulate laws that defined contraventions and determined corresponding penalties. It has established that these infringements have an administrative nature, maintained their name as contraventions and determined as sanctions the fine and warning. Later, through Law No. 32/1968 concerning defining and sanctioning contraventions, the general principles of law regarding contraventional responsibility were laid down. Government ordinance No. 2/2001 regarding the juridical frame for contravention repealed Law No. 32/1968, being in force today. But, in the Romanian law, contraventional sanctions are not the only administrative sanctions.

The transfer of some illicit conduct from the area of criminal offences into the area of administrative infringements is common to the legal systems of other European countries. One reason for this process was the evolution of moral concepts with consequences in the hierarchy of important social values. In Portugal, a new Criminal Code was enforced in 1982, at the same time with a new branch of sanctionatory law named *Direito de Mera Ordenação Social.* The purpose was to

clean the criminal system from the so-called *contravenções* representing offences against administrative interests (José, 1991, p. 37). Those offences were either considered criminal infringements or administrative infringements, the so-called *contra – ordenanções*. In particular laws enforced before 1989 some *contravenções* remained and they are going through a conversion process since the enforcement of the new Criminal Code, as jurisprudence has constantly criticized the remaining of such infringements in the criminal system (Pizarro Beleza, 1985, p. 130).

The same phenomena exists in the Italian law, where in the 20th century the number of offences sanctioned by the criminal law showed a substantial increase, and resulted in a blockage of the judiciary system and poor efficiency of criminal law. Besides new alternative criminal procedures and new criminal law competences given to the peace judge, the process of "depenalisation" was an alternative measure. Two directions were followed: one of considering as being licit a group of conducts that were considered infringements prior to depenalisation, and the other of replacing criminal sanctions with administrative ones. The first law in the process of replacing prison with fine was Italian Law No. 317/1967 regarding the depenalisation of traffic law violations. The only sanction stipulated by this law was the fine (*ammenda*). Other laws followed, such as Law No. 950/1967 regarding depenalization of infringements against environmental and forest laws and Law No. 706/1975 regarding general depenalization of contraventions (*contravvenzioni*) by determining the fine, *„ammenda", as the only penalty*.

The Government Order No. 19/ December 1983 established some criteria for the incidence of criminal or administrative sanctions. Such criteria are: the principle of proportionality – according to this principle applying criminal sanctions has to be limited to infringements that damage seriously the most important values of society, and the principle of subsidiarity – according to this principle applying criminal sanctions has to be limited to situations where no alternative with equivalent efficiency is to be found.

3. The Administrative Sanction

In each system of law, the administrative sanctions have a distinct place along the criminal and civil sanctions. Administrative sanctions are inflicted by administrative bodies. Definitions of administrative sanctions are not generally

accepted and in many European countries jurisprudence is discussing whether only the punitive sanctions should be considered, the preventing and reparatory actions being regarded as administrative measures, or all the consequences of the infringement should be considered sanctions. For instance in Germany, although at first the opinion that only punitive, repressive penalties should be regarded as administrative sanctions, lately the opinion that measures meant to ensure the fulfillment of certain obligations or restoring some legal conditions, such as withdrawing, suspending or denial of an advantage or facility provided by law have to be included in the notion. In Sweden the content of the notion is broad, any measure or penalty applied for breaching the administrative law being considered an administrative sanction. In the French law, among the penalties that can be applied, even to a criminal offence, the reparatory sanction - *la peine de sanction-réparation* – is mentioned, consisting in the obligation of the condemned person to pay the victim for the damage he produced, according to conditions imposed by the court (article 131-8 par. 2). A different situation is presented by Spanish law, where the administrative sanction is only the penalty with a character that mirrors the criminal sanction, but is inflicted by administrative bodies.

Despite such differences, a certain similarity is to be observed between the European countries in regulating the administrative infringements. The punitive character of some penalties determined the applicability of some law principles from the criminal law into the administrative law, form the very beginning.

4. The Concept of "Criminal Charge" and Consequences

The European Court of Human Rights, in several decisions, has defined the "criminal charge" concept, extending it to the sphere of administrative sanctions, in the process of creating the autonomous concept (Letsas, 2004, pp. 282-284). The underlying idea is that proceedings do not lie within the criminal sphere for the purposes of article 6 of the European Convention of Human Rights unless they are capable of resulting in the imposition of a penalty by way of punishment. In the cause of *Oztürk vs. Germany (1984)*, the Court showed that in the internal law of several of the member states there is a distinction between felonies, misdemeanors or petty offences and it would be contrary to the object and scope of article 6, that guarantees for each person the right to a fair trial, the possibility of a state to exclude from the field of article 6 a whole category of conducts, on the ground that they are administrative infringements (par. 50). The criteria established by the

Court to define a "criminal charge", were set in the case of *Engel a.o. vs. Netherlands* (1976) (par. 82): a) the definition of the offence charged belongs, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently; b) the very nature of the offence; c) the degree of severity of the penalty that the person concerned risks incurring. These criteria must not be necessarily met together, one of them being sufficient in considering the existence of a "criminal charge".

The immediate consequence of the inclusion of administrative sanctioning into the concept of "criminal charge" is the need to ensure the protection against abuse in inflicting a punitive sanction. This can be done by extending the criminal law principles to administrative law, if there are not already expressed by administrative law norms. This extension can be made through new legal norms or through jurisprudence and case law that takes into account the specifics of administrative law.

In this respect, the recent modifications of Government Emergency Ordinance No. 195/2002 (The Traffic Code), where the new paragraph 3^1 of article 118 denies the right of appeal against the court decision that solves the complaint against the sanctioning act for traffic violation, are infringing in our opinion the right of review by a higher tribunal established by article 2 of the 7^{th} Protocol to the European Convention of Human Rights, attached to the notion of "criminal charge. In the case of *Oztürk vs. Germany* the sanction discussed was applied for a traffic violation and the Court decided that "The fact that it was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of article 6" (par. 53).

Also, the Decision of the Constitutional Court of Romania No. 1354/2008, that generated Law No. 293/2009, stating that the sanction of community service can be inflicted without the perpetrator's consent, infringes article 4 of the European Convention of Human Rights that prohibits forced or compulsory labor. The Convention is listing the exceptions, but the administrative sanction is not among them and "any work or service which forms part of normal civic obligations" is perceived as labor with traditional or customary character, such as fighting fire, acting as a juror, or acting in an emergency situation, other than a natural calamity (Bîrsan, 2005, pp. 270-271). In the French Criminal Code, community service (*l'obligation d'accomplir un travail d'intérêt general*) is a sanction for both felonies

and misdemeanors (contraventions); according to article 132-54 it cannot be inflicted if the perpetrator refuses or is not present before the court.

5. Criminal Law Principles Applied to Administrative Sanctions

5.1. The Principle of Legality

The principle of legality is recognized to rule in the field of administrative sanctions in all legal systems. It is the principle that offers, like in the criminal law, the best protection against abuse from the public power, when a punitive sanction is inflicted. It refers both at infringements and penalties. Regarding the infringement, a conduct may be considered an infringement only if a legal norm is defining it as such – *nullum crimen sine lege*. Regarding the penalty it means that an infringement may be sanctioned only with the sanction provided by a legal norm – *nulla poena sine lege.* Also the principle means that the text incriminating the conduct should be very clear - *nulla poena sine lege certa.* Some other sub-principles such as prohibition of retroactivity - *nulla poena sine lege praevia* and exclusion of customary law - *nulla poena sine lege scripta* also derive from the principle of legality.The protection of freedom against abuse and arbitrary, as well as a guarantee that the law that incriminates *ex novo* will not apply to actions developed prior to its enforcement, was proclaimed by important acts such as the French *Declaration des droits de l'homme et du citoyen of 1789*, where article 8 states that "no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense". The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948 in article 11 and The International Covenant on Civil and Political Rights adopted in 1966, in article 15 have similar provisions.

In the Romanian criminal law, the *nullum crimen sine lege* principle is expressed by two articles of the Criminal Code. Article 2 states that "The law stipulates the conducts that are crimes". Article 17 states that "A crime is a conduct that presents social danger, committed with guilt and described by the criminal law" and that "The crime is the only reason for criminal responsibility". Dispositions similar with the ones in the international acts mentioned above are to be found in the Criminal Code in article 10: "*The criminal law shall apply to offences committed while it is in force" and article 11: "Criminal law does not apply to acts that were not provided as offences by the law at the moment of their perpetration*".

Because administrative infringements may result in punitive sanctions, the principle of legality should also protect against abuse in this field of law. The Constitution, of Sweden, Chapter 1, Section 1 states that "All public power shall be exercised under the law". The term "law" is to be interpreted in an extensive way, including not only legislative statute enacted by the Riksdag (Parliament) but also ordinances enacted by the Government or regulation enacted by central or local authorities. The Finnish Constitution states that "The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed (Section2, subsection 3). From this statement, several principles were deducted, one of them being *the requirement of precision and definition* (Viljanen, 2001, p. 37), meaning that any enabling act must be written out with precision and definition. This requirement is at strongest when exercising sanctioning powers against individuals, because any person should foresee, with sufficient confidence, the consequences of one's conduct.

In the Portuguese legislation there is no explicit constitutional basis for the principle of legality of administrative sanctioning law, but authors tend to consider that the constitutional guarantees implied in the principle of legality of criminal law: "No one shall be sentenced under the criminal law unless the action or omission in question is punishable under the terms of a pre-existing law, nor shall any person be the object of a security measure unless the prerequisites therefore are laid down by a pre-existing law, as far as the criminal law is concerned" (article 29 pargraph 1), are applicable, by analogy, to *Direito de mera Ordenação Social*[1] (Canotilho & Moreira, 1993, p. 195). Article 165 paragraph 1 states that only Parliament, or the Government authorized by Parliament, may legislate on the definition of crimes, penalties and criminal procedure (letter c) as well as on the general rules for punishing disciplinary infractions, and those governing administrative offences and the applicable proceedings (letter d). As in criminal law, the principle of legality implies the prohibition of unfavorable retroactivity, according to article 3 paragraph 1 of the *Regime General das Contra-ordenações*[2] the law creating a new *contra-ordenação*[3] or heavier sanctions or determining heavier sanctions does not apply, as a rule, to acts committed prior to its enactment. But, regarding the clarity of the legal norm, Portuguese jurisprudence agrees that where administrative law is concerned this is not as strict as in criminal law. For

[1]Administrative Offences Law.
[2]Decreto-lei No. 43/1982 (General Legal Framework of Contra- ordenações).
[3]Administrative infringement.

example, article 68 of the Law Decree No. 28/1984 punishes those who produce, sell etc., goods or services not complying with the rules set by the law for the undertaking of the respective activities. On one hand, possibility for analogy regarding the type of activity is introduced by the "etc.", and on the other hand, there is no specification of the exact disposition that has to be breached in order to have a punishable infringement. German jurisprudence considers that the principle of legality expressed by article 103 of the German Constitution (*Grundgesetz*) also applies within the scope of administrative sanctions that have a repressive, punitive nature (Umbach & Clemens, 2002, art. 103). The Constitutional text referring to criminal law implies four sub-principles: *nulla poena sine lege certa* (requirement of clarity and definiteness), *nulla poena sine lege stricta* (the prohibition of analogy), *nulla poena sine lege praevia* (prohibition of retroactivity) and *nulla poena sine lege scripta* (exclusion of customary law) (Jarass & Pieroth, 2011, art. 103), all considered to apply to administrative sanctions too. The Spanish Constitution is explicitly referring to the applicability of the principle of legality to administrative sanctions. Thus, article 25 paragraph 1 states that "No one may be convicted or sentenced for actions or omissions which when committed did not constitute a crime, misdemeanour, or administrative infringement as established by legislation in force at that moment". Also, Law No. 30/1992, The Act regulating Public Administration, Authorities and Procedures (*Régimen Juridico de las Administraciones Públicas y del Procedimento Administrativo Común*) establishes in article 129 paragraph 1 that "Infringement of the legal system will be considered an administrative offence only if a law has established it as such..." and in paragraph 2 that "Only if an administrative offence has been committed can sanctions be imposed, and of necessity these will be established by the law".

It is clear that in the law of the countries mentioned, the principle of legality from the criminal law is considered to apply in the administrative law in its full meaning, with little exceptions.

The only category of administrative infringements that benefit of a frame-regulation, in the Romanian law, is the one of contraventions. The principle of legality, for contraventions, is deduced from article 2 that states in paragraph 1 that "Laws, Government Ordinances or Decisions can define and sanction contraventions in all fields of activity", and in paragraph 2 that "Decisions of local or regional public administration bodies define and sanction contraventions in all field of activity where they have legally established competence, and if no law, Government Ordinance or Decision is regulating". The sanction for disregarding

the competence thus established is the nullity of such decisions of local or regional councils, according to paragraph 5.

The competence to establish the nullity belongs to the contentious administrative courts, at the request of any interested party. Article 3 of the same Ordinance states that the acts that define contraventions will contain a description of the conduct defined as such, as well as of the corresponding sanction. Referring to the compulsory content of the sanctioning act, article 16 mentions the description of the conduct and the normative act that defines the contravention. This indicates that it has to be proven the concordance of the specific conduct with the definition of the contravention as it is presented by the text of law. Article 17 states that omitting to mention the conduct results in the absolute nullity of the sanctioning act, thus emphasizing the importance of the principle. Because article 17 mentions only the description of conduct, without the legal act that defines it as contravention, is there a case of absolute nullity when the description of the conduct, or when the indication of legal definition is missing, or both cases?

Our opinion is that both omissions will be sanctioned with the absolute nullity of the sanctioning act. If the conduct is not fully described, there is no possibility to observe if the correlation with the legal definition exists. If the legal norm defining the contravention is not mentioned, the substance of the principle of legality is hurt. Some opinions argued that the court is competent to find if the conduct is defined as a contravention and to find the legal norm that does it. Some court decisions considered that omitting to mention the legal norm that defines the conduct as a contravention results in the absolute nullity of the sanctioning act, the court not being competent to substitute this kind of omission (Neamț Court, 2008). We agree with the latest opinion, considering that the competence of the court is limited to the control of the sanctioning act. Completing the sanctioning act would result in a violation of the principle of separation of state powers by the court.

5.2. Other Principles

Finish administrative legislation refers to *the principle of proportionality*, requiring balance between means and ends, the severity of an administrative act having to be adapted to the weight of the ends pursued with it. EC law and decisions of the European Court of Human rights have influenced this principle, shaping a threefold

criterion of proportionality for restriction of human rights (PeVm[1] 25/1994vp, p.5): the administrative act should be due and efficient; the administrative sanction should be imposed only if some other comparably efficient and less-restricting means to achieve ends are not to be found (Übermaßverbot); there must be a weighing between means and ends (the narrow sense of the principle). Also special dispositions regulate *the defense rights*. According to the Administrative Procedure Act (Law 434/2003) the duty of clarification in the exercise of sanctioning powers lies within the authority (Siitari-Vanne, 1998, pp. 482-496). Namely according to Section 31 of the Act, an authority shall see to it that a matter is adequately and appropriately clarified by obtaining the information and accounts necessary for the decision of the matter. A party is only obliged to provide information as to the grounds for party's demands. For the exercise of sanctioning powers nobody is obliged to provide authority information harmful to provider without express obligation to do so enacted in *lex specialis*. Also, investigative powers of administrative authorities to prove administrative infringements are constitutionally limited. According to section 10 of the constitution of Finland everyone's private life, honor and the sanctity of the home are guaranteed. However, according to subsection 3 measures encroaching on the sanctity of home, necessary to guarantee basic rights and liberties or for the investigation of crime, may be laid down by an act. That means that it is not possible – even with an ordinary parliamentary act – to enable administration with investigative powers to commit a house search in the purpose of investigation leading only to administrative sanctions.

German jurisprudence refers to *the principle of guilt* (*nulla poena sine culpa*). According to the prevailing opinion, the ruling of Section 15 of the German Criminal Code (Strafgesetzbch) that the perpetrator can only be punished for an offence committed deliberately or negligently, is to be applied for all repressive sanctions (Appel, 1998, p. 113).

The principle of guilt is also mentioned in Portuguese legislation. According to article 8 of the *Regime General das Contra-ordenações* guilt requires acting with intent or negligence, although punishment of negligent offences requires a specific legal provision. The same Act expresses the principle of double jeopardy (*non bis in idem*), article 79 mentioning that final decisions of the administrative authority concerning *contra–ordenanções* and final judgments by the courts prevent new charges for the same conduct as a *contra–ordenanção* and that the judicial decision

[1]*Perustuslakivaliokunnan lausunto,* meaning Opinion of the Constitutional Law Committee.

or judgment, having the force of *rex judicata,* that tries the case as a *contra–ordenanção* prevents new charges for the same conduct as a crime. *The right of defence* includes the right to legal assistance during administrative investigation (article 53 of the *Regime General das Contra - ordenações*).

The suspect has the right to legal assistance and can choose a lawyer to assist him at any stage of the procedure. The administrative authorities can appoint a designated lawyer to assist the suspect, at his request or *ex officio,* if that appears to be necessary or convenient, according to the circumstances of the case. The right of defence also includes the right to appeal from the final decision of the administrative authorities to a court and the right to appeal from the court's decision to a superior court, if the conditions of article 73 are present: the defendant was convicted to pay a coima higher than 249, 40 euro; the defendant was convicted to accessory sanctions; the defendant was acquitted, or the case was filed, in cases where the administrative authority had applied (or the Public prosecutor had claimed for the application of) a coima higher than 249, 40 euro; the court has rejected the appeal form the administrative decision; the court has decided the case without a formal trial hearing despite the defendant's opposition. *The principle of proportionality* is also mentioned by Portuguese jurisprudence, stating that when the administration exerts discretionary powers, it is not sufficient to pursue the scope of the concession of those powers by the law, the public interest must be pursued by choosing, among the measures that are efficient to fulfill that scope, those who cause the least limitation or harm to the rights and interests of the administered (Canotilho & Moreira, 1993, p. 924).

Spanish jurisprudence also recognises *the principle of proportionality*, meaning that a sanction must be proportional to the seriousness of the offence. The legislator must take into account this principle when establishes the sanctioning framework: to decide what constitutes a breach and to determine the type or amount of the sanctions. The principle of non-retroactivity of adverse sanctioning and retroactivity of favorable sanctioning (*lex mitior*) is mentioned by Spanish Constitution. Article 25 paragraph 1 forbids retroactivity of both criminal and administrative sanctioning rules. Article 128 of The Act regulating Public Administration, Authorities and Procedures states that sanctioning provisions shall have a retroactive effect provided they are favorable to the presumptive offender, mirroring similar provisions from article 2 of the criminal Code. The principle of *non bis in idem* is mentioned in article 133 of the same Act, which states that acts

resulting in a criminal or administrative sanction cannot bring forth a second sanction when the subject, fact or legal basis are the same.

In the Romanian law, many of the principles of criminal law, besides the principle of legality, are to be found applicable to contraventions. The principle of *lex mitior* is expressed by article 15 paragraph 2 of the Constitution: "The law shall only act for the future, except for the more favorable criminal or administrative law". Article 12 from Government Ordinance no. 2/2001 expresses the same principle and the Constitutional Court of Romania, in Decision no. 228/2007 explained that the principle applies not only to inflicting but also to the enforcing of the sanction. There are no general provisions regarding *the right to defense*, but special provisions can be found in The Fiscal Code (Law no. 571/2003). Article 58 states that the spouse of the taxpayer and the relatives up to the third degree may refuse to provide information, allow expertise or present documents. Inviolability of domicile, expressed by article 27 of the Constitution, as well as the secret of correspondence can be breached in the same legal conditions in criminal or administrative law. *The principle of personal responsibility* is not mentioned by Government Ordinance no.2/2001 or other legal norms with general values. Nevertheless, its applicability in administrative law can be deducted from article 29 of the Fiscal Procedure Code (Government Ordinance no. 92/2003). While paragraph 1 of the article states that the rights and obligations from the fiscal legal relationship are transmitted to the successors of the debtor according to the rules of civil law, paragraph 2 mentions that the previous dispositions do not apply to the sums representing fees applied according to law to the natural person debtor. Unfortunately, no similar provisions exist regarding penalties that have to be paid under the provisions of article 22 of the Fiscal Procedure Code, although the penalties are sanctions of punitive nature, as they are not agreed upon on contractual basis, as in civil or commercial contracts. The *principle of proportionality*, meaning that the sanction has to be established in accordance with the seriousness of the offence, is expressed by article 21 from Government Ordinance no. 2/2001. The same criteria are mentioned like in criminal law: the degree of social danger, the whereabouts, the means of committing the offence, the aim pursued by the perpetrator, the result of the offence, personal circumstances of the perpetrator. *The principle of the existence of guilt* is deducted from article 11 of the Government ordinance no. 2/2001 that enounces the situations when the conduct cannot be considered a contravention. These situations are the same as in criminal law: self-defense, state of necessity, physical coercion and moral coercion,

fortuitous case, irresponsibility, inebriety, error *de facto*, perpetrator's minority, to which another is added: infirmity related to the infringement.

5.3. The Presumption of Innocence

One principle that aroused discussions in the Romanian jurisprudence and case-law was the presumption of innocence. Some authors considered that Ordinance No. 2/2001 does not meet at all the requirements derived from the view of the European Court of Human Rights on the notion of "criminal charge" (Popescu, 2002, pp. 201-206). According to this principle, in court the burden of proof belongs to the administration and any doubt should benefit to the perpetrator as the adagio *in dubio pro reo* indicates. Considering the presumption of innocence in the field of administrative sanctions, the European Court of Human Rights stated in the case of *Salabiaku vs. France (1988)* that "*Presumptions of fact or law operate in every legal system. Clearly, the convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law....[Article 6(2)] requires states to confine [presumptions] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense*" (par. 28)[1]. This statement does not mean that every time an important social value is at stake the burden of proof should belong to the perpetrator. For each particular case all circumstances and evidence should be considered. In our law, as the dispositions of Ordinance no. 2/2001 does not specify to which party the burden of proof belongs, the courts generally admit that the presumption of the truth of the administrative act prevails. However, case law has drawn some limits like: there is no presumption of truth of the sanctioning act if the finding agent has not perceived the infringement with his own senses (Cluj-Napoca Court, 2005); where the infringement is observed by technical means, like in the case of speeding, the proof is recorded by the administration so there belongs the burden of proof [2].

In our opinion, the problem in the Romanian law is that no adversarial procedure and no right of defense exist before the infliction of the sanction, according to

[1]In this case the presumption of the intention to smuggle prohibited substances was discussed, deducted from the fact that the substances were in the plaintiff's luggage, in corroboration with other evidence.

[2]The problem was discussed during the meeting of the Committee for Unification of Case Law organised by the Superior Council of the magistracy, on the 19th of November 2008.

Government Ordinance no. 2/2001. The great majority of European states have general legal provisions regarding the right of defense. The Swedish law regarding administrative procedure from 1987 establishes the right of the person to be informed about all the facts that the administration has obtained about the matter that is being investigated, the right to know all the official conclusions regarding the investigation, before the administration makes a decision about a sanction, the right to have access to one's own file, the right to express one's point of view – personally or through representation – before the administration makes a decision, the right to legal assistance even through legal aid, the right to an interpreter. Another Scandinavian country, Finland, also benefits from regulations of the administrative procedure, the most recent normative act being the Law regarding administrative procedure no. 434/2003 which states the right to be heard, meaning the right of a natural person to express its point of view when the application of an administrative measure against him is concerned. According to art. 34 par.1, before the administrative authority reaches a decision against him, the party has the right to express its point of view, to bring forth explanations and information that could be relevant. According to the Spanish Law no. 30/1992 the natural person enjoys the following rights: the right to be informed about what the accusation brought against him is, the right to use any relevant means to prove his innocence, the right to refrain from a self incriminating conduct and from admitting its guilt, the right to benefit from the presumption of innocence. According to Portuguese Law Decree no. 433/1982 the person tried for committing a *contra–ordenanção* has the right to express its point of view. Pursuant the art. 50 of the above mentioned act, infringing this right leads to the illegality of the sanctioning instrument. The right to be listened includes the right to present evidences, including witnesses and the opinion of certain experts, the right to juridical assistance, in any phase of the procedure.

6. References

Appel, I. (1998). *Verfassung und Strafe/Constitution and Punishment*. Berlin: Duncker &Humblot.

Bîrsan, C. (2005). *Convenţia europeană a drepturilor omului. Comentariu pe articole. Vol. I. Drepturi şi libertăţi/The European Convention of Human Rights. Comments on articles. Vol. I. Rights and Liberties*. Bucharest: All Beck.

Gomes Canotilho, J.J. & Moreira, V. (1993). *Constituição da República Portuguesa Anotada/The Annotated Constitution of the Portuguese Republic*. 3rd edition. Coimbra: Coimbra Editora.

Jarass, H.D. & Pieroth, B. (2011). *Grundgesetz für die Bundesrepublik Deutschland (GG). Kommentar/The Basic Law for the Federal Republic of Germany, Comment.* München: C.H. Beck.

José, R. D. (1991). Sanções administrativas/Administrative Sanctions. *Direito Público Journal/ Public Law Journal*, year IV, 37.

Letsas, George (2004). The Truth in Autonomous Concepts: How to Interpret the ECHR in the *European Journal of International Law*. Vol. 15, No. 2, pp. 279-305.

Pizarro Beleza, T. (1985). *Direito Penal/Criminal law*, Vol. I. Lisboa: Associação Académica da Faculda de de Direito de Lisboa.

Popescu, C. L. (2002). Neconvenţialitatea şi neconstituţionalitatea procedurii contravenţionale judiciare de drept comun în raport cu dreptul la respectarea prezumţiei de nevinovăţie/The Unconventionality and Unconstitutionality of the Common Contravention Judiciar Procedure in Relation with the Presumption of Innocence in *The Romanian Pandects/Pandectele române*, pp. 6, 201-206.

Siitari-Vanne, E. (1998). Todistustaakasta hallintolainkäytön eri asiaryhmissä/Burden of Proof in Administrative Use of Different Groups in *Defensor Legis*, no. 3, pp. 482-496.

Umbach, D.C. & Clemens, T. (2002). Grundgesetz. Mitarbeiterkommentar und Handbuch/The Fundamental Law. *Comments and Handbook*. Vol. 2. Heidelbrg: Müller.

Viljanen, V-P. (2001). *Perusoikeuksien rajoitusedellytykset/Restricting Fundamental Rights, the Conditions*. Helsinki: WSOYpro.

*** Court of Justice of Cluj-Napoca, Civil Sentence No. 11251/2005, unpublished.

*** Court of Neamţ, Civil Decision No. 372/R/2008. Web page. Retreived from http://portal.just.ro/JurisprudentaVizualizare.aspx?id_speta=6881.