

TOWARDS A DES-INCRIMINATION OF DRUG POSSESSION FOR OWN USE IN ROMANIA

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Abstract

In 2000, Law no. 143 for prevention and fight against drug use and illegal drug trafficking entered into force in Romania. This law represented an operative instrument to fight against the drug mafia and generally against organized crime in the field of the Romanian judicial organisations.

Pursuant to the provisions of Law 143(4)/2000, the deed of illicit drug possession for own use has firstly been incriminated, as a reaction of the Romanian society against illicit use of drugs dramatically increasing since 1990. According to the statistic data released by the National Anti-Drug Agency, illicit drug use has been increasing after 2000 although such incrimination was already introduced in the criminal law.

Almost eight years after the prohibition of drug possession for own use that has not produced any effects in reducing the number of drug users, the question of changing the criminal philosophy of the Romanian legislator, who leads an extremely harsh repressive politics in the field, may be raised. One proposes in this respect, to remove the drug possession for own use from the illicit criminal sphere and to solve such cases by imposing certain administrative sanctions altogether with some medical procedures/medical care services, the sole able to solve complex drug addiction related problems.

Taking into account the reduced social danger of drug possession for own use, as well as for giving higher efficiency to medical standards in the field, with a more substantial preventing effect, the Romanian legislator needs to review its criminal politics of illicit drug use, by re-evaluating the gravity and dangerous effects of drugs possess for own use by its des-incrimination.

Key words: *drugs, consumption, possession, trafficking, des-incrimination*

Introduction

The existing law in Romania prior to the entrance into force of the current legislation considered the illicit drug self-administration to be a minor offence. Thanks to the use and illicit drug trafficking boom / increase in our country since 1990, pursuant to the socio-economic and political changes in the Romanian society structure and the birth of the rule of law, the unlawful drug possession for own use was raised to the rank of criminal offence¹ through the provisions of Law no. 143/2000 for prevention and fight against drug use and illicit drug trafficking².

Therefore, the society has responded throughout the criminal law against the danger of unlawful drug possession for own use, a very dangerous growing phenomenon for both the young generation and the entire society. In order to fight illicit drug use, the criminal legislator adopted on the date Law no. 143/2000 was drawn up, the repressive thesis not paying attention enough to the harmonization of the criminal legislation with the medical standards, the sole in charge to solve the drug addiction related problems, considering that prohibition of drug use by incriminating the

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¹ Therefore, art. 4 of Law no. 143/2000 provides as follows: (1) The unlawful cultivation, production, manufacture, experimentation, extraction, preparation, transformation, purchase or possession of dangerous drugs for own use is punished with imprisonment of 6 months to 2 years or fine; (2) If the deeds provided in paragraph (1) concern high-risk drugs the punishment is imprisonment of 2 years to five years.

² Law no. 143/2000 for the prevention and fight against drug use and illegal drug trafficking amended by Law no. 522/2004 has been published in the Official Gazette of Romania, Part I no. 362 of 03/08/2000;

illegal drug possession for own use under criminal sanctions, could stop the increasing drug abuse in Romania.

It seems that, the Romanian legislator found more accessible the use of criminal law means in preventing illicit drug use than the medical strategies in the field, considering that our sanitary system after the 1990's, was lacking in the necessary financial funds and qualified medical staff able to solve the increasing problems related to the widespread drug addiction in Romania.

It is less true that the criminal law is used to persuade the drug users to leave their common world,³ in other countries' doctrine as well.

Even if the Romanian legislator used and still uses the criminal law "instruments" for fighting illicit drug use, life has shown us that after Law no 143/2000 entered into force this phenomenon failed to diminish, but has increased according to the statistics released by the National Anti-Drug Agency.

Although almost eight years passed since the entering into force of Law no. 143/2000, several times amended, the Romanian legislator still makes use of the same criminal sentence philosophy of the consumers unlawfully possessing drugs for own use. The Romanian legislator's lack of response in the matter, allows us to conclude that it still preserves the same harsh politics in preventing and fighting the abusive drug consumption similar to those used in 2000 that, according to us no longer acts in the benefit of both the individual and the society.

This is exactly the problem we want to debate upon, to observe and bring arguments on the legislator's fault in carrying out sanctions for illicit drug possession for own use.

As stated in the European specialized literature, the drug use as attitude of a natural person against the use of a certain substance under national control lies in the "ethical, medical and criminal" sphere.⁴ Morally, Romanian citizens disagree with the drug use, considering it to be harmful for both individual and society. Even the church disagrees with drug use considering it a Cardinal Sin⁵.

Medically speaking, the abusive drug use is beyond question a mental health issue that can bring into discussion the responsibility and guiltiness of such substances consumer, when he commits deeds punishable by the criminal law.

Since alcohol and tobacco consumption is no less dangerous for individual and society than drug consumption, one wonders which are the units of measurements used by the criminal legislator when deciding that the simple drug possession for own use should be held for criminal offence? Through this incrimination, the legislator transformed the individual from a simple occasional drug consumer into an offender, expelled the drug addicted from society and made him face the public disdain.

Therefore, we may ask ourselves whether it is legal for the State to intervene by force and actually conduct a public control over the individual's private life for its own good, on the grounds that the society refuses it's members self-destruction by drug consumption.

It's no wonder that the incrimination of the unlawful drug possession in Law no. 143/2000 made in Romania as well as in other countries, the object of unconstitutionality exception. In arguing the unconstitutionality exception, the accused consumer sustained, through its solicitor, that the provisions of art. 4 of Law no. 143/2000, punishing by imprisonment the purchase or drug

³ Yves Cartuyveles, "Loi pénale, usage de drogues et politique", article in the paper "L'usage pénal des drogues", edition De Boeck & Larcier, Bruxelles, 2003, pp. 41-56.

⁴ *Idem, op. cit.*

⁵ Pope Benedict XVI considers drugs and pedophilia unforgivable sins, irrespective of a person's tolerance. The Catholic Church amended the already known list of the seven mortal sins, by adding another seven sins. The list of the mortal sins was published in the Vatican's official newspaper "L'observatore Romano", on March 2007. According to such list, the drug use is labeled as a mortal sin (source: Libertatea no. 5690 of 11 March 2008);

possession of own use breach an aspect of private life, i.e. that of disposing of himself, therefore it infringes the provisions of art. 26 (paragraph 2) of the Constitution, concerning the intimate, family and private life.⁶

Judging this unconstitutionality exception, the Romanian Constitutional Court decided that “the provisions of art 4 of Law no. 143/2000 are completely in accordance with the provisions of article 8, paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Liberties, since the incrimination of drug possession for own use is provided by law, representing a necessary measure in a democratic society for morality and health protection, thus being a mechanism of preventing criminal offences capable to endanger the public security.”⁷

In our opinion, considering the drug possession for own use a criminal offence, the Romanian legislator of the 2000’s adopted the thesis of penal repression of drug users that does not speak in the European or national medical standards favour that govern the drug addiction related problems, leaving thus behind fair solving of this matter.

By his goodwill, the criminal legislator of the 2000’s also offered the criminal investigating departments the chance to duly investigate the offender drug user, providing in art. 16 of Law no. 143/ 2000 a clause of incrimination reduction. Such a provision is completely (null and) void.⁸ As underlined in the European non-fiction books “the change of the drug user’s behaviour a reprehensible one to an intelligent one in the service of law is the result of a technique applied by the legislator.”⁹

This technique used by the legislator has been criticised in the Romanian doctrine as well, because creating this clause of punishment reduction he leaves behind the objective reality.¹⁰ Which would be the best social and legal answers in solving the problems raised by the incrimination of drug possession for own use and which would be the society’s best answer over the drug abuse?

The answer to this question has been largely debated upon by the supporters of different systems in force in the entire world. Four strategies of drug abuse control are known, as it follows: the prohibition system, the risks reducing system, the des-incriminating system and the controlled drug system.¹¹ According to our criminal law, one can observe that the Romanian legislator adopted the prohibitory system, forbidding under criminal sanctions the drug possession for own use. Such system adopted by the Romanian legislator enjoys the advantage of ethics, but it also has a series of negative effects as underlined in the doctrine, that follows the system.¹²

One may think that the Romanian legislator did not keep in mind the categories of drug users existing in society when incriminating unlawful drug possession for own use. Medically,

⁶ Article 26 of the Romanian Constitution provides the following: (1) The public authorities shall respect and protect the intimate, family and private life. (2) Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals.

⁷ Decision of the Constitutional Court no. 334 of 28/06/2005 published in the Official Gazette of Romania, Part I no. 651 of 22/07/2005.

⁸ Article 16 of Law no. 143/2000 provides : The person who has committed one of the criminal offences provided by articles 2-10, and denounces and facilitates other persons’ identification and criminal for involvement in drugs offences may be reduced to half its punishment as provided by law.

⁹ Marie Sophie Devresse “Construire l’usager: un passage obligé de la destion pénale des drogues ”, article in the paper “L’usage pénal des drogues”, edition De Boeck & Larcier, Bruxelles, 2003, pages 141-148

¹⁰ For more details refer to T. Dima, A. Paun, the article “Un alt mod de abordare a cauzei de reducere a pedepseim prevazute de art. 16 din Legea nr. 143/2000 privind prevenirea si combaterea traficului si consumului ilicit de droguri” in “Dreptul” no. 2/2008, pp. 188-191.

¹¹ For more details feel free to read the analyses of these systems broadly done by professor Francis Caballero and Yann Bisiou in the paper “Droit de la drogue”, 2nd edition, published by Dalloz, Paris, 2000, pp. 95-164.

¹² *Idem, op. cit.*

there is a clear distinction between the occasional drug user, the common drug user, the drug addicted, the sick user and the problem user, in other words the abusive drug user.¹³ Legally we also distinguish two main kind of drug users, who conduct two different activities.

Therefore, the first category includes the consumers who unlawfully possess drugs for their own use whereas the second category includes the consumers who unlawfully possess drugs for their own use but conduct illegal trafficking activities with such substances in order to gain money to further purchase drugs for their own consumption.

Romanian legislation shows a gap with respect to these two categories of drug users in that there is no elucidating provision to explain the exact limits a certain quantity of drug must be included within, in ordered to be classified as unlawfully possessed drug for own use or unlawfully possessed drug for both own use and illicit trafficking. *De lege ferenda*, such provision is needed.

If we refer to these two categories of users, one may observe that the occasional or common user deed of possessing illicit drugs for own use, represents a less dangerous social threat for society in comparison to those users who possess drugs for both own use and trafficking with such substances.

The deed of the consumer who possesses drugs for its own use but conducts trafficking activities with the possessed drugs as well, appears to be a serious and dangerous threat to society, because he maintains the illicit use and drug trafficking in society by selling parts of the possessed drug to other drug consumers, what represents the authorities target in preventing and fighting such incidences. It is obvious that the legislator should have taken into account the social threat in accordance with the deeds deployed by the two of consumers, and should have made a distinction *ab initio* in what concerns the sanctions applicable to the two categories of consumers but he fails to do so.

Therefore, in our opinion, the deed of drug possession for own use should be des-incriminated in Romania as well, carrying out administrative sanctions instead of the criminal ones, associated by case with medical care services in case of drug addiction, because, a drug addicted shall be viewed as a sick person and not be transformed into an offender, following the laws and regulations applicable in other member states of the European Union.

Conclusions

As underlined in literature, the criminal sanction of the drug users transforms them into victims of the criminal law, although in their case, the sanitary ideal should win.

Therefore, the legislator should review its politics related to drug possession for own use, and should des-incriminate it, in Romania as well.

¹³ See Marie Sophie Devresse, citat. Supra 9.