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Legal Sciences

LEGAL CONTENT ON THE ABBUSE OF OFFICE OFFENCE – WITH NO PREDICTABILITY

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ABSTRACT
AS THE LEGAL CONTENT ON THE ABBUSE OF OFFICE OFFENCE, PROVIDED IN ART. 297 ALIN. (1) OF THE CRIMINAL CODE, IS DESCRIBED IN VERY GENERAL TERMS, ANY ACT OF JOB DUTY MISCONDUCT MAY FALL WITHIN IT, REGARDLESS OF ITS SERIOUSNESS OR THE CIRCUMSTANCES UNDER WHICH IT WAS COMMITTED. AS A RESULT, UNTIL AN ADEQUATE LEGISLATIVE MODIFICATION, IT IS THE JUDICIAL BODIES' RESPONSABILITY TO DECREE WHAT TYPE OF VIOLATIONS ARE IN THE SCOPE OF THIS INDICTMENT – WHICH IS SOLELY THE LIABILITY OF THE LEGISLATURE, ACCORDING TO THE SEPARATION OF POWERS PRINCIPLE.

KEYWORDS*:* ABBUSE OF OFFICE, LEGAL CONTENT, UNPREDICTABLE, NON-UNITARY ENFORCEMENT, AMENDMENT MOTIONS.

INTRODUCTION

In order to procure the legal knowledge and law enforcement, the indictment rules must have an assignable content (*nullum crimen sine legea certa*), meaning to accurately and completely define the sanctioned acts, hence ensuring the compliance with the principle of the lawfulness of indictment, provided in art. 1 of the Criminal Code, art. 5 of the Constitution of Romania and art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[2]

By this procedure, the excessive involvement and the subjectiveness of the legal bodies in *finding the field of the facts* that could be charged by enforcing the indictment rules, are avoided – which is solely the liability of the legislative power. Also, the unitary law enforcement could be applied for all the defendants.

Accurately defining the limitations of law enforcement, in relation to certain facts, prevents the courts from sanctioning facts that are not the object of the indictment rules – which guarantees the compliance with the principle of legal identity between citizens, as well as with the principle of non-discrimination. Therewith, being acquainted with the prohibited acts, each individual may

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[2] G. Antoniu, *Notes on the New Criminal Code Vol. I (co. G. Antoniu/T. Toader)*, (Bucharest:Universal Law Publishing, 2015), 39 and fol.

act consciously and trust the protection of his rights and freedoms, free from the risk to be sanctioned for actions unconsidered by the legislator.

REVIEW OF THE LEGAL CONTENT ON THE ABUSE OF OFFICE OFFENCE

The Content of the offence provided in art. 297 alin. (1) of the Criminal Code, within the statement of the new Criminal Code, has a very general character, inaccurate and unpredictable, contrary to the principle of lawfulness of indictment, so that any act of job duty misconduct or misfeasance may fall within it, if any consequences resulted according to the indictment rule, respectively any prejudice or violation of the rights or the rightful interests of any natural or legal person, regardless of the severity of the resulted prejudice or the importance of the violated rights or the resulted consequences.

As a result, in the activity of law enforcement, every judicial body has came into the „responsabilities" of a legislator, distinctly deciding – adapted to his vocational training, ideas, etc. – on the facts that should be sanctioned as abuse of office, from the dozens of offences that formally fall within the relative definition, for it almost doesn't exist any branch or official violating (for various reasons) more than once his job duties, more significant or less critical – hence enforcing the non-unitary and discriminating law.

Within the legal content on the reviewed indictment, are not provided enough conditions that should be complied neither with the certain facts (neither marks or limits, nor any relation to the fields of activity, the severity of violations nor the resulted consequences), nor any subjective element (like: dishonesty, motive, intention, fraudulent intent or the intent of turning to profit, etc), so that, in practical terms, it has been created the possibility of a distinct approach of the judicial bodies, who determined the activities representing the social threat specific to the offence – and the approach resulted to be criminally liable only for some individuals and facts (more or less severe), while more other thousands of violations (even more severe and commited with bad faith), that shall fall within the same indictment rule, have remained *uninvestigated*.

As a matter of fact, for the similar *investigated* facts has been created a non-unitary practice, and some judicial bodies considered the abuse of office offence, while others decided the closure (the exoneration), just because the enunciation with the very general character of the indictment rule allows the uncoherent and non-unitary interpretation.

In default of the preciseness of the indictment rule and on the strenght of some distinct interpretations, unguided by strict existence conditions, that should have been provided in the legal content of the offence, were sanctioned - as abuse of office offences –some other facts that, according to other regulations (undetermined or disregarded by the judicial bodies), are the object of disciplinary offence, contraventions, or for which are provided other resources (ex. The cancellation of the illegal contract, making appeal to the superior body, the administrative legal department, etc.).

The Order no. 405/2016 of the Constitutional Court of Romania, stated for the motion to challenge the constitutionality of the enuntiation with a very general character of the offence legal content provided in art. 297 par. (1) of the Criminal Code, was not provided to fully solve the problems concerning the exact approach and enforcement of this indictment rule, because a simple replacement of the term „defective duty performance" with the expression „law-breaking duty performance", or setting up a minium threshold of the prejudice, could not result in the removal of the reviewed aspects.

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Therefore, we can meet situations where the abuse of office offence could not be cconsidered, even if the officials ungracefully violate (for example, for the purpose of wreaking damages, by way of turning to their advantage) some assigned duties or directives of the management, or job duties provided in the service instructions, etc, without their express and precise specification in the initial regulations.

The matter of appropriately bringing under regulation the art. par. (1) of the Criminal Code will not be solved neither by setting a ceiling hence the certain facts make the offence effect, just for this condition would be discriminating and the legal content would continue to be relatively defined. As a matter of fact, the value of the prejudice doesn't define overall the generic social threat specific to the offence, so that, it isn't basically the component part of the offence, but could rather be considered for a retrogressed version of the regulation or for the individualization of the sanction; when the court states that there is a minimum violation of the law protected social values (and due to the limited prejudice), it has the opportunity to enforce the art. 80 of the Criminal Code, related to the abnegation of punishment, or the art. 83 of the Criminal Code, related to the suspension of punishment.

Moreover, some acts are serious, even though they result in insignificat prejudices, like the case of overcharging sales, that, at some times, was the object of several cases, considering their frequent occurance.

On the other hand, the violation of certain rules of civil rights or of any other nature, could produce very serious prejudices, however the respective acts cannot fall within the legal content of the abuse of office offence, as the legislator stated any other solutions – since it didn't proceed with measures specific to criminal law, hence excluding the social threat associated with the offence[3].

CONCLUSIONS ȘI RESOLUTIONS

In relation to the evidenced lacks, we consider that it would be reasonable that the art. 297 par. (1) of the Criminal Code to be abrogated (if it is not accepted the fact that this is already abrogated, according to the art. 147 of the Constitution), so that the judicial bodies shall not have any legislative prerogatives, complying with the principle of the separation of powers, as well as excluding the risk to proceed in practice, in a subjective and discriminating manner, according to the different approaches of those making the judicial decisions – and for that matter the abuse of office shall not be indicted as a distinct offence (with a general character), in most of the countries with a developed democracy.

The general indictment would be replaced by special indictments (which provide a definite and ample background), that shall be adopted in certain fields, for the acts considered generic social threats of some offences.

For that matter, the resolution of non-incrimination may be advocated also towards the elimination of the redundance effect, that occasionally floors the practitioners when deciding on the appropriate legal classification for certain facts, since within both the Criminal Code, and many criminal provision laws are indicted several special acts, committed by officials, which could all fall within the actual legal content of the abuse of office offence.

Starting from the sacred principle, according to which *nobody must be unfairly accused* (even for a partial interpretation of an indictment rule, inappropriately defined) and also aiming to

[3] Antoniu, *Notes on the New Criminal Code Vol. I...*,152

achieve that *no serious crime go unpunished* (in response to the abuse of office non-incrimination), the process of adopting new special indictments for the abusive acts in certain fields could persist, as their legal content would be better determined, including an adequate background that shall precisely define their scope (which shall prevent from both unpredictability and misinterpretation with discriminating results).

Concerning the protection of human rights and fundamental freedoms, an individual indictment may be elaborated (potentially within the indictment of abusive behavior), which shall include several elements defining the criminal character of the facts. For that matter, within the art. 297 par. (1) of the Criminal Code, could have fallen (following a possible restatement, on the supposition of keeping this offence) too, the acts provided in par. (2), that stipulate, in addition, for the existence of a certain motive (which hadn't actually a high relevance, as the legislator didn't stated major punishments); by the Government Emergency Ordinance no. /2017, on par. (2) have been provided minor punishments than mentioned on par. (1), but under the legal content haven't been stipulated conditions concerning the seriousness of the repercussions, and, most of all, the circumstance to provide the "restricted right" under an intitial law.

However, as long as the indictment rule stays as it is and is still being enforced (although it was abrogated pursuant to the Decision no. 405/2016 of the Constitutional Court), it falls upon the judicial bodies to approach its content according to the criminal law fundamentals and the general conditions that underlie the criminal illicit acts, so that it shall be enforced only for the serious offences, committed by illicit ways, with a *fraudulent intent* (thus having a high risk of social threat), as the criminal charge is the most severe charge.

Considering anyway that the offence provided by the art. 297 par. (1) of the Criminal Code must be preserved in future and the specification of all the prohibited activities is not possible (out of those already provided within the special indictments), its legal content has to insist upon the subjective element, as the indictment rule is stated in such a way that it shall sanction only the individuals who, in full knowledge and bad faith, defy their statutory job duties, making use of illicit proceedings, with an illicit fraudulent motive and intent.

In the interest to hold the pointed offence, it should have been determined that the self-consciousness reflected upon the author's will, and through its conveyance on the act[4], meaning that the act should have been guiltly committed according to the offences, presenting both the intelligential (featuring the consequences that may occur) and the volitive aspect (following the occurance of the illicit consequences).

Therefore, according to the *ethic-legal* evaluation of the reviewed case – in default of a special indictment, that may sanction even the approach of the enforced law – the author should have been totally aware of the unlawfulness of the act (evidently prohibited by the criminal law) and have been self-conscious of the consequences prejudicial to the organization, in order to be declared culpable.

Most of the above-mentioned arguments may be applied for the misfeasance in office (art. 298 of the Criminal Code), which could hold the incrimination only for high culpabilities, with peculiarly injurious repercussions (a value threshold should rather be denoted for it, to differenciate between the criminal and the material liability).

[4] V. Dongoroz and co., *Theoretical notes on the Romanian Criminal Code, Vol. I*, (București:The Publishing House of Romanian Academy, republished at Al. Beck, 2002), 104.