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THE CRIME OF ABUSE OF SERVICE - ABROGATED BY NOT ELIMINATING UNCONSTITUTIONALITIES

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ABSTRACT
CONSTITUTIONAL COURT DECISIONS ARE NOT DIRECTLY APPLICABLE IN PRACTICE BECAUSE THEY CAN NOT MAKE A MANDATORY LEGAL INTERPRETATION FOR THE JUDICIAL BODIES OR DIRECTLY ALTER THE CONTENT OF CRIMINAL LAWS. THEY ARE ADDRESSED TO THE LEGISLATIVE BODIES, WHICH MUST REMOVE THE NON-CONSTITUTIONALITY ASPECTS OF THE LEGAL CONTENT OF SOME CRIMES; OTHERWISE, THE RESPECTIVE INCRIMINATIONS ARE DISCRIMINATED.

KEY WORDS: ABUSE OF SERVICE, CONSTITUTIONAL COURT DECISION, UNALTERED LEGAL CONTENT, ABROGATION.

INTRODUCTION

It is clear from the content of Article 146 of the Constitution of Romania that the Constitutional Court's powers do not include *the adoption, modification or authentic interpretation* of the law, which only has the role of deciding whether the legal provisions are constitutional or not.

As expressly emerges from the content of Article 2 (3) of Law No. 47/1992, on the organization and functioning of the Constitutional Court, completed by Law No. 138/1997: "The Constitutional Court rules only on the problems of law, without being able to amend or complete the legal provision subject to control. The Constitutional Court also cannot rule on how to interpret and apply the law, but only on its meaning contrary to the Constitution".

As a result, the decisions of the Constitutional Court are addressed directly only to the legislative bodies, which have to remove the unconstitutional aspects from some of the judicial norms, the Court being unable to adopt laws, to amend them directly, or to issue decisions on the interpretation of the law.

Thus, the Constitutional Court, not being a legislative body, cannot modify the legal content of Article 297 paragraph 1 of the Criminal Code (restricting the scope) and has no legal

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capacity to impose a certain interpretation for the judicial bodies of the provisions of these rules of incrimination.

Article 297 (1) of the Criminal Code cannot be applied because it was abrogated

The content of the offense referred to in Article 297 (1), as formulated in the new Criminal Code, is of a very general[2] nature, allowing criminal sanctions to be imposed for any of the many violations of service duties, in the various fields of activity.

Since the legal content of this crime is vague and can be interpreted in a discriminatory way, one of the rules of the principle of criminality (nullum crimen itself) is violated, namely the requirement that the rules of criminality be well determined and predictable so as to ensure good knowledge and respect for them, both by recipients and by judicial bodies[3].

In the absence of clear conditions of criminal offense, which should have been expressly provided for in the rule of incrimination, it was left to the discretion of each judicial body to choose- like a true lawmaker - which, out of the multitude of facts, would make the legal content of the offense of abuse of service, according to personal concepts and criteria, so many serious violations remained unchecked, while for others, with a reduced social danger even non-specific to the crime, there were punishments, sometimes quite severe.

By decision no. 405/2016 of the Constitutional Court it was stated that the provisions of Article 297 (1) of the Criminal Code are constitutional as far as, by the word "faulty" from their content, they are understood to be "performed by breaking the law"; also, for the existence of the offense it would be necessary to set a minimum value threshold of the created prejudice and the gravity of the prejudice to the rights or legitimate interests of the injured persons.

Given the way in which the Decision is drafted (it is not stated directly for what reasons the content of the offense is unconstitutional, but how it should look to be constitutional) it was issued the theory that this decision would interpret the norm of incrimination, and that it is no longer imposed the intervention of the legislator for the removal of the aspects of unconstitutionality, Article 297 (1) of the Criminal Code and can still be enforced by the judicial bodies, which must however take into account the "amendments" and / or "interpretation" of the Constitutional Court.

If it is subjected to a careful analysis through the constitutional provisions and the fundamental regulations and principles of law, this opinion is submissed to critic, being hard to find relevant arguments within the limits of the law to support it.

Thus, the legal interpretation is carried out only by the body that has adhered to the interpreted norm[4] and the norm of interpretation is common to the interpreted norm, being applied retroactively for all the acts committed from the date of adoption of the initial normative act (as opposed to any decision of the Constitutional Court, which applies only for the future - Article 147 (4) of the Constitution); it follows that the formal legal interpretation of criminal laws can not be achieved in any case by the Constitutional Court, which is not a legislative authority.

The Constitutional Court is not a law enforcement body, so that it does not have the power to perform the formal causal interpretation, but neither the general-mandatory judicial

[2] G. Paraschiv, *The explanations of the New Criminal Code, Vol. IV (coord. G.Antoniu/T. Toader),* (Bucharest:Universul Juridic Publishing, 2015), 323-324.
[3] G. Antoniu, *The explanations of the New Criminal Code, Vol. I (coord. G.Antoniu/T. Toader),* 35 and seq.

interpretation for all courts, with a view to the unitary application of the criminal law in the future – task that is exclusively attributed to the High Court of Cassation and Justice, in accordance with Article 126 (3) of the Constitution and Article 471 et seq. of the Criminal Code.

From the content of Article 147 (1) of the Constitution, stipulating: "The provisions of the laws and ordinances in force, as well as those of the regulations found to be unconstitutional, cease their legal effects 45 days after the publication of the Constitutional Court's decision if, within this interval, the Parliament or the Government, as the case may be, do not agree on the unconstitutional provisions with the provisions of the Constitution. During this period, provisions found to be unconstitutional are legally suspended.", it follows that the reality can only be that Article 197 (1) of the Criminal Code has been *abrogated*.

Under this norm, for 45 days from the publication of Decision no. 405/2014 the application of Article 297 (1) of the Criminal Code was *suspended* on August 22, 2016, this offense *ceased its*[4]

legal effects, being abrogated because the legislature did not agree unconstitutional regulations with the provisions of the Constitution[5].

If this reality is accepted, it results that the abrogation would have the effect of removing the criminal liability for all the acts committed before and after, until the adoption of possible new crime, except for the facts that may be included in other subsidiary inculpations in force.

During the 45 day period when the provisions of Article 297 (1) of the Criminal Code were suspended, this incrimination was still in force, so that, if within this period a legislative act was adopted by the legislator, by which were removed aspects of unconstitutionality , then the abrogation of the first regulation took place on the date of entry into force of the second one, and the more favorable law would be applied - which would have the effect of removing criminal liability only for facts that were no longer in line with the new regulation.

CONCLUSIONS

Even if we abstain from the fundamental principles of law, the provisions of Article 1 (5) of the Constitution and all other specific legal provisions, and we were to accept that by Decision no. 405/20016, the Constitutional Court amended, instead of the legislator, the content of Article 297 (1) of the Criminal Code, in the sense of restricting the scope (or made a general and mandatory interpretation of that incrimination, instead of the HCCJ), the court can still not solve the cases having such an object, because they not only cannot legislate, but also substitute (themselves) to the legislator regarding the setting of the minimum threshold of damage or the gravity of the damage to the rights or interests of injured persons, but even if the possibility of such substitution would be accepted, it would be impossible to form a unified practice in the matter, creating a judicial chaos, discriminations - generated by the multiple "legal contents" of the abuse of service, prefigured by each of the judicial bodies, who will be able to set their own "thresholds".

Whether or not it is accepted that the provisions of Article 297 (1) of the Criminal Code are already abrogated, it is imperative to act urgently for the adoption of new, complete regulations that fully respect the principle of the lawfulness of incrimination, by making the delimitation - by

the legislator - of the criminal offense, of the acts that may be within the competence of other organs, so that they can act with good results against serious violations of service duties.

[4] Costică Bulai, *Manual of Criminal Law*, (Bucharest:All Publishing, 1997), 83.
[5] Constantin Mitrache, *The explanations of the new Criminal Code, Vol. I*, page 60

A new incrimination of a general nature would fail to determine precisely what facts can be penalized (and which not), even if the decision of the Constitutional Court is fully respected - mainly because it is practically impossible to build a clear definition, well-defined and (at the same time) containing all aspects of the offense of abuse of service, applicable to all spheres of activity and to all categories of civil servants or other employees, since in society there are a multitude of institutions, economic entities, organs etc., which carry out various activities, distinct from one domain to another.

Investigating and sanctioning only the facts that violate any primary law is not a flawless solution, as some of these violations do not present the specific social danger of the offense, because it acted in good faith through a different or misinterpretation from that of the judiciary organs of some unclear administrative regulations etc. On the other hand, the violation of secondary regulations, which are enforced in accordance with primary law and for their application, without exaggerating them - cannot always be removed from the criminal offense, as often the violation in bad faith of a registered duty for example, in an internal regulation, may result in particularly serious consequences, the resulting social danger being specific to the offense.

The solution that would ensure the clarity and predictability of regulations, removing the possibility of arbitrariness, subjectivism, and implicitly non-unitary practice, would be the incrimination of dangerous facts, separate for each field of activity (where no such criminalizations exists), following the pattern of already approved rules of incrimination, would be, for example, Article 295, Article 296 or Article 321 of the Criminal Code or Article 264, etc.

It would be preferable for these regulations to be included in special laws, so that a better understanding and respect would be possible- by civil servants and other employees, in the performance of their duties – of the rules of incrimination by correlating them with the other provisions contained in those normative acts.