

CLARIFICATIONS ON THE LEGAL TERMINOLOGY IN THE CONSTITUTIONAL COURT JURISPRUDENCE

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Abstract: The legal terminology represents a specialised language by which both the law-maker and the person implementing the law focus on a pre-established communication channel which guarantee for the stability, the accessibility and the predictability of the law, as well as on the juridical security. In the situations when the law moves away from various reasons from the unanimously agreed meaning, imbalances are triggered in practice. In order to re-establish the balance of the law, the Constitutional Court intervenes in decisive situations. Thus, our instance of constitutional contentious has been seized on the exception of non-Constitutionality of the provisions of the art. 249 par. (1) of the Criminal Law in 1969 and of the art. 298 of the Criminal Law. The authors of the exception asked the Court to notice that the provisions of the art. 298 of the Criminal Law are constitutional only in the measure when the phrase “*it fails to accomplish it*” from their contents mean “*it accomplishes it by breaking the law*”.

Keywords: Criminal law, Ombudsman, Constitutional Court.

1. Introduction

In the justification of the non-Constitutionality exception, the authors claim that the criticised provisions comprise an ambiguous regulation which breaches the constitutional principle of lawfulness, according to which justice is done in the name of law. They consider the provisions of the art. 298 of the Criminal Law as lacking predictability and accessibility as, by the way of defining the offence of negligence in the service, there could not be established the meaning of the phrase “*by not achieving it or by faulty achieving it*”. In other words, the conduct defining the material element of the offence is not emphasised. According to the notification authors’ opinion, the scope of the situations which could go under the incidence of the provisions of the art 298 of the Criminal Law cannot be delimited objectively, as the law wording refers to the accomplishment of the activity duties which, for the employees, are generically specified in the job description. It is shown correlatively that the document comprises only the tasks which the employee has to fulfil, but not the way how such tasks are performed, so that, objectively, it cannot

be estimated if the tasks accomplishment was faulty or not. In addition, the authors' opinion is that the art 298 of the Criminal Law provisions *do not fulfil the requirement of clarity* as the phrase "*faulty accomplishment*" has ambiguous character. Practically, the criticised criminal norm does not have general impersonal character, therefore the norm interpreting and implementation draws in the personal and subjective evaluation from the person subject to compliance with it, and from the competent body for the putting into practice of the law. In this regard, there might be situations according to which same deed may be evaluated differently by the different courts of law, by this, the art. 21 par. (3) of the Constitution being breached. In addition, it is considered that the criticised criminal norm *is not certain*. Basically, the certainty of the law must prevent the arbitrary in it being interpreted and applied by the judge.

2. Legal terminology

The predictability, the clarity and the accessible character of the law are consecrated at the level of the European Court of Human Rights and they have to be applied according to the norms of legislative technique - art. 7 par. (4), art. 24 and art. 34 par. (1) of the Law no. 24/2000. The Constitutional Court has retained in its jurisprudence that the breach of the requirements for accessibility and predictability of the examined texts of law may be accomplished both during the *a priori* [1], and *a posteriori* [2] controls.

The Public Ministry representative shows that the phrase "*accomplishes in a faulty manner*" was even before subject of the constitutionality control, in this regard reminding the decisions nos. 405 of June 15, 2016 and 392 of June 6, 2017. Thus, it has been retained that the phrase "*accomplishes faulty*" means "accomplishes by breaking the law".

The Government considered that the provisions of the art. 249 of the Criminal Law of 1969 and art. 298 of the Criminal Law are constitutional in the measure how by "*faulty achieving*" it is understood "*achieving by breaching the law*". In agreement with the jurisprudence of the constitutional control court and with that of the Court in Strasbourg, the Government retains that the constitutional tests invoked by the authors of the exception consecrate the principle of mandatory compliance of the law, but, in order to be complied with by its consignees, the law must fulfil certain requirements for clarity and predictability, so that these consignees may adjust their conduct accordingly. It also notes that the provisions of the art. 297 and art. 298 of the Criminal Law incriminate the faulty accomplishment of a professional duty and refers to the Decision of the Constitutional Court no 405 of June 15, 2016, paragraphs 60 — 80, where the finding was that the provisions of the art. 246 of the 1969 Criminal Law and of the art. 297 par. (1) of the Criminal Law are constitution in the measure how by

"*accomplishes it in a faulty manner*" from their contents it is understood "*accomplishes it by breach of the law*".

The Ombudsman thinks that the provisions of the art. 298 of the Criminal Law are constitutional in the measure how by "*accomplishes it in a faulty manner*" from their contents it is understood as "*accomplishes it by breaching the law*". It invokes the Decision of the Constitutional Court no. 405 of June 15, 2016, in the substantiation of its opinions, the Court recitals being kept *mutatis mutandis* by it. Consequently, the Constitutional Court of Romania analysed in its Decision no. 518/2017 [3] the provisions of the art. 249 par. (1) of the 1969 Criminal Law and of the art. 298 of the Criminal Law:

- Art. 249 par. (1) of the 1969 Criminal Law: "*A civil servant's transgression, out of negligence, of a service duty by its non-accomplishment or by its faulty accomplishment, if it has caused significant disturbance in the proper operation of a body or an institution of the State or of another unit referred to in Art. 145 or caused prejudice to its property or major prejudice to the legal interests of a person, shall be punished by imprisonment from one month to 2 years or by a fine*".

- Art. 298 of the Criminal Law: "*The culpable breach by a public official of a professional duty by failing to carrying it out or by faultily carrying it out, if it results in damage or violation of the legitimate rights or interests of a natural or legal entity shall be punishable by no less than 3 months and no more than 3 years of imprisonment, or by a fine*".

The constitutional provisions which the claim considers to be breached are art. 1 paragraphs (4) and (5) – the principle of power separation and balance in the constitutional democracy, according to which the compliance with the Constitution, with its supremacy and its laws, is mandatory in Romania, art. 16 – Citizens' equality in front of the law and of the public authorities, art. 21 par. (3) – parties' right for a fair trial and solving the cases within a reasonable delay, art. 74 – the legislative initiative, art. 124 par. (1) and par. (3) – justice is performed in the name of law, and the judges are independent and submitted only to the law, and of the constitutional provisions of art.11 par. (1) and par. (2) — "*International and Internal Law*" and art. 20 — "*International Treaties on Human's Rights*" related to art. 6 on the right for a fair trial of the Convention on Human Rights and Fundamental Freedoms. In addition, it is also taken under consideration the United Nations Convention against Corruption, adopted at New York on October 31, 2003.

The Constitutional Court retained that the Romanian Criminal Law of 1969 [4] incriminated the negligence at work in the art. 249, according to which "*A civil servant's transgression, out of negligence, of a service duty by its non-accomplishment or by its faulty accomplishment, if it has caused significant*

disturbance in the proper operation of a body or an institution of the State or of another unit referred to in Art. 145 or caused prejudice to its property or major prejudice to the legal interests of a person, shall be punished by imprisonment from one month to 2 years or by a fine. 2. The deed stipulated at para.1, if having particularly serious consequences, it is punished by imprisonment from 2 to 10 years". In addition, the constitution contentious court take note that the art. 298 of the Criminal Law in force establishes partially similarly the material element of the objective side and consequences of the crime of negligence in duty, namely *"The culpable breach by a public official of a professional duty by failing to carrying it out or by faultily carrying it out, if it results in damage or violation of the legitimate rights or interests of a natural or legal entity shall be punishable by no less than 3 months and no more than 3 years of imprisonment, or by a fine"*.

With regard to these regulations, the Court retains that the reason for incrimination of the deed of negligence of duty is similar to that which incriminates the abuse in duty, the difference between the two crimes being at the subjective level – the intention for the abuse of duty, respectively the wilful misconduct (the ease)/ the actionable negligence (the negligence) for the crime of negligence of duty. The objective side of the crime of negligence of duty is formed, just as at the crime of abuse of duty, by the material element, accompanied by a basic requirement, the immediate consequence and the causal link between the illicit activity and the produced result. In addition, the Court retains that the material element of the objective side of the crime of negligence of duty supposing the faulty breach of a duty task by a civil servant or by any other employed person (for the mitigated option stipulated by art. 308 of the Criminal Law) by the two normative paths, respectively *"non-accomplishment"* or *"faulty accomplishment"* of it.

There was observed in the recent jurisprudence of the Constitutional Court that the provisions of the art. 246 of the 1969 Criminal Law and of the art. 297 par. (1) of the Criminal Law are constitutional in the measure how the phrase *"faulty accomplishes"* from their wording is understood as *"accomplishes by breaching the law"* [5]. In such situation, the lawmaker's duty has to prove for increase attention in complying with the principle of law clarity and predictability when exercising this constitutional competency, regardless on the field where it is used. On the other hand, when performing the mission of law interpreting and of deciding upon the erroneous accomplishment of the job duties, the judicial bodies have to apply the objective standard such as this was established by the normative limitation. In this regard, the accomplishment of a duty attribution implies the expression of will from the respective person which it is concretised in the effective actions of the respective person, aiming to successfully accomplish/ achieve the assigned obligation. Performing such an endeavour relates both the subjective/ internal standard of the person exercising the duty attribution and to an

objective standard. *The subjective standard* is related to the internal for of the respective person, and the measure how this is accomplished is related to the self-evaluation of the performed actions. *The objective standard* has as main reference the normative of the act regulation the respective duty attribution. Though, the standards coexist, the subjective standard cannot exceed the objective standard in analysing the modality of execution of a duty attribution, the latest being of priority. In addition, the Court retained that, as the objective standard is determined and circumscribed to the normative prescription, the regulating of the job duties and of the way of exercising them sets the scope for this standard. Unless breaching the principle of predictability, it cannot have a wider scope than the normative limitation in the field. Consequently, a person cannot be imputed for breaching the objective standard by finding that the person did not accomplish some implicit prescriptions, which are undetectable at normative level. In the situation when certain actions, accompanying the exercise of a duty attribution, may rely on a certain practice/ custom, it cannot be circumscribed without breaching the principle of the lawfulness of the incrimination to the objective standard which has to be considered in establishing the criminal act.

Meanwhile, with regard to the abuse in duty against the public interest, incriminated in the previous criminal law, the Constitutional Court has found out that the dispositions of the art. 248 of the 1969 Criminal Law are constitutional in the measure how by "*accomplishes in a faulty way*" from their wording has the meaning "accomplished by breaching the law" [6].

In addition, the Court considered that the term "*faulty*" cannot be treated as a proper term to be used in the criminal field, as long as the law-maker did not circumscribe the existence of this element to the constitutive content of the crime of abuse in duty to the accomplishment of certain criteria. In other words, the law-maker did not operate an express circumstantiation in the meaning of mentioning the elements towards which we have to analyse the faultiness.

The Court noticed that the doctrine appreciated by the "*accomplishes in a faulty way*" as being the accomplishment carried on in another way than the proper one, the faultiness in accomplishment could be seen on the contents, shape or extent of the accomplishment, the time for performance, the terms for performance etc.

In addition, the Court has noticed that the jurisprudence received the aspects highlighted in the doctrine, however, not establishing the criteria to be under consideration when establishing the faultiness in achieving the duty attribution, in general, they limiting themselves just to show that the active subject of the crime has erroneously performed duty attributions, either related to the law provisions, or being relating them to the mentions of in Government decisions, ministers' dispositions, regulations of organization and functioning, deontological codes or job descriptions.

After the performed analyse, the Court noticed that the term "*faulty*" was not defined by the Criminal Law and the same was for the linking element with which the faultiness is presented, which caused the lack of clarity and predictability of the term. This lack of clarity, precision and predictability of "*accomplishes faulty*" of the criticised dispositions create the premises for their implementation as result of some interpretations or arbitrary appreciations.

We notice that both the crime for abuse in duty and the crime of negligence in duty, they provide for "*faulty accomplishment*" of a duty task.

Consequently, the Court found out that "*accomplishes faulty*" may be interpreted only in the way that the accomplishment of the duty attribution is performed by "breaching the law" and that the relation to the normative limitation has also to be accomplished in the hypothesis of the analysis of "*non-achieving*" an act.

Practically, the Court appreciated that "*accomplishes faulty*" *does not provide expressly the relation element with which the faultiness is analysed*.

The Court found out that the reporting of the judicial bodies to a wide normative scope influences the objective side of the crime of abuse on duty by their extension to shares or non-shares defining the material element of the objective side of the crime, but which are not stipulated in normative acts of primary regulation. In this case, the judicial practice relied on the provisions using a general phrasing which do not identify limitedly the actions or omission by which this crime is performed.

The Court retained that the limitative enumeration is not possible for the incrimination of the abuse on duty, by the non-fulfilment or the faulty fulfilment of an act must be analysed only by reporting to specifically duty attributions regulated by the primary legislation – Government laws and ordinances.

The Court concluded that the *criminal illicit is the most serious form of violation of some social values*, and the consequences for the putting into practice of the criminal law are the most severe ones. The law-maker has to establish guarantees against the arbitrary by clear and predictable norms. Precisely for that, we understand by law both a formal act adopted by the Parliament, and a material one, with power of law, issued by the Government based on the legislative delegation. The law is not deducted from the interpretation given by a judge to some legal dispositions, as, in the opposite direction, the judge would turn into law-maker [7].

As for the Government ordinances, the Court retained that the administrative body exerts a competency by attribution which enters in the legislative competency of the Parliament.

Under such terms, the Court found out that, in the case for non-fulfilment or faultiness in accomplishing an act would not relate to duty attributions stipulated by a normative act with power of law, it would reach the situation that, in case of the crime of abuse on duty, its material element would be configured by the law-maker, the Parliament or the Government, and also by other bodies, including legal

persons of private law, for job descriptions, which is not to be accepted in the legal system of criminal law.

3. Conclusions

The Court retained that, despite the fact that primary legislation may be detailed through the adoption of some acts of secondary regulation, as stipulate by art. 4 par. (3) of the Law no. 24/2000 on the norms of legal technique for drafting the normative acts, the normative acts issued for the execution of the laws and Government ordinances are issued only within the limits and according to the norms which they command. To conclude, in the criminal matter, the principle of the incrimination lawfulness, "*nullum crimen sine lege, nulla poena sine lege*", requires that only the primary lawmaker may establish the conduct which the law consignee has to comply with, otherwise it being subject to the criminal sanction.

The Court also found out that the criticised dispositions breach the provisions of art. 1 par. (4) and (5) of the Constitution by the fact that they allowed for the configuration of the material elements of the objective side of the crime of abuse on duty through the activity of other bodies, others than the Parliament – by the adoption of the law according to art. 73 par. (1) of the Constitution —, or than the Government — by passing ordinances or emergency ordinance within the legislative delegation stipulated by the art. 115 of the Constitution.

Thus, the Court decided that the dispositions of the art. 246 of the 1969 Criminal Law and of the art. 297 par. (1) of the Criminal Law are constitutional as long as the phrase "*accomplishes faulty*" in their contents is understood as "*accomplishes by breaching the law*".

References:

1. To see Decision no. 453 of April 16, 2008, published in the Official Journal, Part I, no. 374 of May 16, 2008.
2. To see Decision no.189 of March 2, 2006, published in the Official Journal, Part I, no. 307 of April 5, 2006.
3. Published in the Official Journal, Part I, no. 765 of September 26, 2017.
4. Republished in the Official Journal of Romania, Part I, no. 65 of April 16, 1997.
5. Decision no. 405 of June 15, 2016, published in the Official Journal of Romania, Part I, no. 517 of July 8, 2016.
6. Decision no. 392 of June 6, 2017, published in the Official Journal of Romania, Part I, no. 504 of June 30, 2017.
7. To see Decision no. 23 of January 20, 2016, published in the Official Journal of Romania, Part I, no. 240 of March 31, 2016, paragraph 16.