RAIS RESEARCH ASSOCIATION for INTERDISCIPLINARY STUDIES
October 2021

DOI: 10.5281/zenodo.5701682

Abuse in Service in the Context of Adoption Decision of the Constitutional Court of Romania no. 405 of June 15, 2016

Alexandru Peicea

Lawyer, Bucharest Bar, Romania, alexandru.peicea@gmail.com

ABSTRACT: Abuse in service is, in the current legal system, a topic of interest, especially after the adoption of Decision no. 405 of June 15, 2016, pronounced by the Constitutional Court of Romania. It ruled that an act constitutes the crime of abuse of service only in so far as by the phrase "in a defective manner" we mean "in breach of the law." Through this decision, the Constitutional Court of Romania also ruled that the phrase "in violation of the law" implies that a person (suspect or defendant in a criminal case) violates a primary rule of law. By primary norm we mean Government Ordinance or law adopted by Parliament. No primary rules of law regulations, ministerial orders, duties in the job description in an employment contract.

KEYWORDS: abuse of service, decision, Constitutional Court, primary legislation

Definition of abuse in service

The Romanian legal system is not the only legal system that criminalizes abuse of service. This crime is also criminalized in other states, but it is called abuse of power.

In the regulation of the new Criminal Code (entered into force by adopting Law no. 286/2009, published in the Official Gazette of Romania no. 510 of 24.07.2009), abuse of service presents a series of new aspects compared to the old regulation. Thus, one of those aspects relates to the fact that, according to the new regulation, this offense presupposes the existence of a more special essential requirement. This requirement relates to causing damage.

The New Criminal Code brought together in a single article the crimes of abuse of service against the interests of persons, against public interests and by restricting certain rights (art. 246-248 from the old Criminal Code).

According to the Criminal Code in force, abuse of service is "the action of the public servant who, while carrying out their professional duties, fails to implement an act or implements it faultily, thus causing damage or violating the legitimate rights or interests of a natural or a legal entity, shall be punishable by no less than 2 and no more than 7 years of imprisonment and the ban from exercising the right to hold a public office".

According to art. 297 para. (2) NCP, constitutes an abuse of service the action of a public servant who, while carrying out their professional duties, limits the exercise of a right to a person or creates for the latter a situation of inferiority on grounds of race, nationality, ethnic origin, language, religion, gender, sexual orientation, political membership, wealth, age, disability, chronic non-transmissible disease or HIV/AIDS infection.

Brief analysis of the crime of abuse of service

The legal object is represented by the social relations regarding ensuring the development in optimal conditions of the activity of the public or private legal persons or the protection of the legitimate interests of the persons against the abuses coming from the public servants. As a rule, the crime of abuse of service has no *material object* (Udroiu 2014, 374 and the following).

The active subject of the crime may be a public servant as defined by art. 175 para. (1) the new Criminal Code. *The general passive subject* is the state, while *the special passive subject* is the person who has borne the consequences of committing the crime.

Criminal participation is possible in all forms.

The objective side. The material element of the crime of abuse of service consists in the non-fulfillment of an act or the defective fulfillment by a public servant in the exercise of his/her duties. *The immediate consequence* of the crime of abuse of service is to cause damage or injury to the rights or legitimate interests of a person. *The causal link* between the material element and the immediate consequence must be proved.

The subjective side. The offense of abuse of service in its basic form can be committed with both direct and indirect intent.

In connection with *the forms of the crime,* the following should be noted:

- Preliminary acts and attempt are possible, but not incriminated;
- The consummation of the crime takes place at the moment of accomplishing the action or inaction that constitutes the material element of the objective side;

If it is committed in a continuous form, the deed is exhausted on the date of the last act of execution. The crime of abuse of service is punishable by imprisonment from 2 to 7 years and the prohibition of the right to hold a public office.

Conclusions following the adoption of Decision no. 405 of June 15, 2016

It is not a novelty that, both in the field of judicial practice and in the specialized doctrine, art. 297 para. (1), introduced with the advent of the new Criminal Code, has aroused numerous controversies and disputes among legal practitioners. Thus, in order to ensure the unitary application of the legal provisions, the Constitutional Court was invested with solving the exception of unconstitutionality of the provisions of art. 297 para. (1) of Criminal Code.

In motivating this exception, the authors who promoted it agreed with the opinion that the criticized legal provisions are lacking in predictability and accessibility, and the phrase "does not perform an act or performs it incorrectly" this being precisely the conduct that defines the material element of the crime of abuse of service.

It was considered that the legislator established an incrimination that has a general character, so that the actions or inactions related to the activities carried out by the official may be mentioned in the provisions of other normative acts than criminal law (undetermined), in the job description or may be situations of in fact, unregulated in writing. Therefore, the criticized provisions have an obviously ambiguous character, there is also the possibility of regulation regarding the conduct of the public servant by another authority, besides the legislative one. It is estimated that, in the case of crimes such as robbery or hitting, the legislator has concretely described the conduct he intends to sanction, which is not found in the situation of the crime of abuse of service.

The fact that the legislator did not formulate *expressis verbis* which are the concrete legal provisions whose violation, by an official, has as a consequence the application of a criminal punishment, creates the premises of subjective interpretations and abuses.

Also, among the most important reasons inserted in support of unconstitutionality, the authors of the exception stated that the legal provisions criticized are unpredictable and unpredictable, leading to their impact on some situations that cannot be anticipated by those accused of committing them. The direct consequence of this fact lies in the issuance of abusive indictments, being possible even convictions on non-objective, arbitrary criteria.

Due to their unpredictability and ambiguity, the criticized provisions contradict art. 1 para. (5), art. 21 para. (3) of the Constitution, art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the United Nations Convention against Corruption adopted in New York and, implicitly, art. 11 para. (1) and (2) and art. 20 of the Constitution.

In accordance with the provisions of the European Court of Human Rights (Council of Europe 1950), art. (7) par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrines the principle of legality of incrimination and punishment - *nullum crimen, nulla poena sine lege,* in addition to expressly prohibiting the extension of the content of existing crimes to acts that did not previously constitute offenses, also provides the principle according to which *the criminal law should not be interpreted and applied extensively to the detriment of the accused, for example, by analogy.*

It follows that the law must clearly define the applicable offenses and penalties, this requirement being met when a litigant has the opportunity to know, from the very text of the relevant legal rule, when necessary by interpreting it by the courts and after obtaining adequate legal aid, what are the acts and omissions that can engage his criminal liability and what is the punishment he risks by virtue of them (Scoppola v. Italy, Del Rio Prada v. Spain, Kafkaris v. Cyprus, etc.).

In its case law, the Court has ruled that a legal notion may have a different content and meaning autonomously from one law to another, provided that the law using that term also defines it. Otherwise, it is the recipient of the norm who will establish the meaning of that notion, on a case-by-case basis, through an assessment that can only be subjective and, consequently, discretionary.

In relation to the present case, the Court found that the term *"defective"* is not defined in the Criminal Code and does not specify any element in relation to which the defect is analyzed, which generates its lack of clarity and predictability. This lack of clarity, precision and predictability of the phrase *"fails to comply"* with the criticized provisions creates the premise of their application as a result of arbitrary interpretations or assessments.

Taking into account all these considerations, as well as the fact that the person having the status of a civil servant within the meaning of the criminal law must be able to determine unequivocally which conduct may have criminal significance, the Court finds that the phrase "defects" 297 para. (1) of the Criminal Code *can be interpreted only in the sense that the performance of the service is performed "in violation of the law".* This is the only interpretation that can determine the compatibility of the criticized criminal norms with the constitutional provisions regarding the clarity and predictability of the law.

In conclusion, the Court ruled that the material element of the crime of abuse of service consisting in the non-fulfillment or defective performance of an act should be analyzed only by reference to duties expressly regulated by primary legislation - laws and ordinances of the Government. Therefore, the normative acts that can regulate the duties of the service are not only those issued by the Parliament, but also the ordinances and emergency ordinances of the Government, the effects of which are assimilated to the law.

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