

Considerations on Some Adverse Decisions of the Constitutional Court and their Impact on the field of Justice in Romania

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ABSTRACT: The present study brings to the attention of specialists in the field of legal sciences the inaccuracies of the decisions with identity of object to the Constitutional Court of Romania and the decadent consequences that they create. We also want to emphasize that the decisions of this high legal institution must harmonize from a legal point of view, judicial practice and the doctrine of this field in relation to multiple situations and not isolated legal situations, because it can create erratic and palliative situations that may have negative consequences on the Romanian criminal legislation.

KEYWORDS: decisions, Romanian Constitutional Court, exception of unconstitutionality, inconsistencies

Presentation of the legal situation subject to constitutional review

The Romanian Constitutional Court was seized in order to rule on the exception of unconstitutionality of the provisions of art. 35 para. (1) of the Criminal Code and ruled in this regard, Decision no. 837 of 2015. The object of the exception of unconstitutionality is the provisions of art. 35 para. (1) of the Criminal Code, which reads as follows: "It is argued that the criticized text violates the constitutional provisions of art. 16 para. (1) on equal rights and art. 124 para. (2) regarding the administration of justice". The Court notes that the author invokes, through the arguments brought in support of the exception of unconstitutionality, the provisions of art. 1, para. (5) of the Constitution. Following the examination, *the Court rejected, as unfounded, the objection of unconstitutionality* raised by Andreas Nadasdy in File no. 16.233/3/2010 (3.909/2013) of the Bucharest Court of Appeal - Criminal Section II and finds that the provisions of art. 35 para. (1) of the Criminal Code are constitutional in relation to the criticisms made.

Having the same object of the notification, namely the provisions of art. 35 para. (1) of the Criminal Code, the Constitutional Court of Romania pronounced Decision no. 368 of May 30, 2017. In the motivation of this decision, regarding the unconstitutionality of the phrase "**and against the same passive subject**" of **art. 35 paragraph (1) Criminal Code**, which stipulates that "The offense is continued when a person performs at different intervals of time, but to achieve the same resolution and same subject passively against actions or inactions presenting, each one, the content of the same offense". Unanimously, the constitutional judges ruled that the criticized phrase creates discrimination within the same category of persons who commit at different time intervals, but in the realization of the same resolution, actions or inactions that each present the content of the same crime. In the opinion of RCC, the phrase contradicts art.16 par. (1) of the Romanian Constitution regarding the equality of citizens before the law, without privileges and without discrimination. Following the examination of the application, *the Constitutional Court admits the exception of unconstitutionality raised, ex officio, by the court in File no. 3.422/108/2015 of the Arad Tribunal - Criminal Section and finds that the phrase 'against the same passive subject' within the provisions of art. 35 paragraph (1) of the Criminal Code is unconstitutional.*

Subsequently, the RCC ruled that "*by maintaining the condition of committing the crime continued against the same passive subject, in the case of crimes against the person, the criticized text violates the Decision of the Constitutional Court no. 368 of May 30, 2017*".

And in order to clarify the argumentation of the present decision, in 2019, the Court reiterates its argument sustained in 2018, establishing that *“following the pronouncement of Decision no. 368 of May 30, 2017, the distinguishing mark between the continuing offense and the concurrence of offenses is exclusively the unity of the criminal resolution, [...] so that the option [...] to establish the retention of the continued form of the offense when the acts are committed against the same passive subject in the case of crimes against the person, violates Decision no. 368 of May 30, 2017”* (RCC, dec. no. 466/2019 regarding the objection of unconstitutionality of the Law for amending and supplementing Law no. 286/2009 on the Criminal Code, as well as Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption).

Consequences of inconsistencies of RCC decisions with object identity

We note that we are currently hearing two decisions of the RCC that are identical in object (the provisions of Article 35 paragraph (1) of the Criminal Code), but the solutions of the RCC are opposite. If in the first decision of 2015 RCC it was declared as constitutional the phrase **“and against the same passive subject” from art. 35 par. (1) of Criminal Code** and it does not violate the provisions of art.16 par. (1) of the Romanian Constitution, as pointed out by Andreas Nadasdy in File no. 16.233/3/2010 (3.909/2013) of the Bucharest Court of Appeal - Criminal Section II, in the decision of 2017 the same Constitutional Court decides that the phrase **“and against the same passive subject” from art. 35 par. (1) of Criminal Code** is not constitutional, being in contradiction with art. 16 par. (1) of the Romanian Constitution regarding the equality of citizens before the law, without privileges and without discrimination.

Basically, by Decision no. 368 of May 30, 2017, RCC returned to the old art. 41 para. 2 of the Criminal Code. Thus, the Court considers that it has put an end to the situations in which the courts are forced to apply sentences of more than 20 years of imprisonment to persons who have committed crimes with minor social danger, such as deception, but with several “passive subjects”. According to the provisions of the RCC’s 2017 decision, the persons concerned would have committed a series of offenses, more precisely as many offenses as the injured parties were, not a continuing offense, so that, after calculating the sentences, they would have served huge sentences, who, in concrete cases of convictions handed down by Romanian courts, have reached the age of 30.

We consider these pseudo-arguments of the RCC to be inadvertent and redundant because the cases in which these situations have occurred are limited and even if they are multiple, we consider that the clemency of the legislator is not the natural solution to limit the criminal phenomenon but the severity of punishments.

We believe that the framework for regulating and sanctioning crimes cannot be changed on the grounds that the offender will serve sentences of a very long duration, but the potential offender must know the severity of the legislator in case of committing even a single crime but a plurality of passive subjects. However, if we were to agree with the reasons for the RCC decision of 2017, we should admit, by a logical legal extension, that if drug trafficking and consumption increase, for example, in the end the legislator should reduce the penalties for this crime or even not to include it in the category of facts that constitute crimes and the examples could continue with other crimes.

The consequence of the Court’s finding of the unconstitutionality of the phrase “and against the same passive subject” in the provisions of Article 35 paragraph (1) of the Criminal Code is, in practice, a return to the solution adopted by judicial practice under the Criminal Code from 1969, in the sense of the existence of a limited compatibility between the continued crime and the plurality of passive subjects, compatibility to be retained on a case-by-case basis by the courts. The Court notes that, according to the practice of the judiciary crystallized under the Criminal Code from 1969, in order to determine whether all actions or inactions were committed in the same criminal resolution or whether they have their source in separate

resolutions, it is essential to examine all factual circumstances and conditions in which they were committed, and the identity of the injured person may be taken into account, among other elements.

The unity of the passive subject cannot constitute a legal/obligatory criterion of differentiation between the continued crime and the competition of crimes. Thus, while the unity of the criminal resolution is an objective, intrinsic criterion, related to the cognitive process specific to the criminal behavior, being, implicitly, controllable by the active subject, the unity of the passive subject constitutes a criterion external to the will of the perpetrator for this reason, unjustified. The Court held that the aspect of committing the continuing crime against the person does not, *per se*, presuppose the knowledge by the active subject of the identity of the passive subject. Following the pronouncement of Decision no. 368 of May 30, 2017, the differentiating mark between the continued crime and the competition of crimes is, exclusively, the unit of criminal resolution, which we do not consider to be the fair and equitable interpretation of the law.

The Court considered it necessary to change its jurisprudence regarding the provisions of Article 35 paragraph (1) of the Criminal Code, taking into account the evolution of legislation, doctrine and judicial practice in the matter of continuing crime and re-evaluating the impact of in many situations in which it is not possible to justify, rationally and objectively, the incidence of the sanctioning treatment of the competition of crimes. Thus, the Court finds that the phrase ‘also against the same passive subject’ in the provisions of Article 35 paragraph (1) of the Criminal Code, which imposes the condition of unity of the passive subject in the case of continued crime, creates discrimination within the same category of persons different time intervals, but in the realization of the same resolution, actions or inactions that present, each in part, the content of the same crime, which attracts the violation of the provisions of art.16 paragraph (1) of the Constitution regarding the equality of citizens before the law. The Court notes that the defense of the constitutional order by means of criminal law falls within the competence of the Parliament, but it falls within the attributions of the Constitutional Court to verify the way in which the criminal policy configured by the legislator reflects on the fundamental rights and freedoms of the person in order to respect a fair balance in relation to the protected social value (Decision no. 903 of July 6, 2010, published in the Official Gazette of Romania, Part I, no. 584 of August 17, 2010, Decision no. 3 of January 15, 2014, published in the Official Gazette of Romania, Part I, no. 71 of January 29, 2014, and Decision no. 603 of October 6).

We are of the opinion that, in the present case, it cannot be a question of legislative evolution, or of doctrine, much less of judicial practice, because no multiple cases have been reported in which convictions for very large sentences have been reached, but on the contrary, these cases are isolated, or, the legislator legislates for general cases and not special or particular ones, thus creating the danger of violating the principle of legal certainty and the dynamic interpretation of a rule of law becomes unpredictable, in case of any jurisprudential reversal, interpretation” (Varga 2017).

In support of our argument, we highlight a case from the judicial practice in which the defendant, a school bus driver from Bacău, was accused of sexual assault against four minors aged between 9 and 13 years. His behavior in relation to the victims had strong sexual connotations: he locked the bus and pulled the curtains to be alone with the victims on various occasions. From the statements of the girls and the expert reports prepared by psychologists, it is clear that this behavior of the man was the source of strong traumas for the four minors. In such a case (Bacău Court of Appeal, dec. no. 1407/2018) the Bacău Court of Appeal ordered the change of the legal classification established by the first instance from 4 crimes of sexual assault committed in real competition in a single crime committed in a continuous form. In the motivation, among the grounds of this sentence, was also one of the decisions of the Constitutional Court regarding the unconstitutionality of the phrase “*and against the same passive subject*”.

We agree with an opinion expressed on this topic according to which, a potential solution would be to condition the existence of the crime continued by the uniqueness of the passive subject only in cases where those actions affect the life, liberty, health and physical or mental integrity of the person. A text of law constructed in this way, similar to the interpretations enshrined in judicial practice, would draw a clear limit on the incidence of the unity of the passive subject (Racoviță, asandru.ro).

Conclusions

The courts of constitutional jurisdiction are the courts empowered to carry out the control of constitutionality, i.e., the activity of verifying the conformity of the laws and other normative acts with the provisions of the Fundamental Law. This type of control of legal norms is a consequence of the fact that the legal system is not presented as an indistinguishable set of norms, all placed at the same level, but as a hierarchy based on the legal value of the sources of law, articulated at the top with the supremacy of the Constitution.

Given the role of the courts of constitutional jurisdiction, their activity must be approached and analyzed in the complex system of relations determined by this evolution at national, international and supranational level. The amplification and consolidation of the dialogue of the constitutional judges, both domestically and internationally, determines a phenomenon of emergence towards common constitutional values. This type of cooperation leads to the constitutionalization and standardization of the law, respectively to a general consolidation of the protection of the values of the rule of law in Europe and in the world.

References

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