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ABUSE OF OFFICE AND THE MAGISTRATE'S LIABILITY IN THE INTERPRETATION AND APPLICATION OF THE RULE OF LAW

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ABSTRACT: *The law gives the judge the power of choosing, after his appreciation, from several possible solutions, the one that he thinks best fits the concrete case to his judgment. The lack of predictability and clarity is an aspect of the very existence of the legal norm, instead, when it is obvious that a legal norm has lost its substance, for example affected by a decision that establishes its unconstitutionality in its application, the judge has the obligation to find that it has no "precise and rigorous rules" before, but indefinite terms with such a general meaning that the legal norm no longer guarantees that the reasons, object and purpose pursued by the legislator can be attained by applying that legal rules. A person in a criminal case cannot be condemned by the very fact that the legal norm is subjected to a subjective interpretation that comes to move the reasoning principle in dubio pro reo. Even more, this problem becomes irrelevant if we are faced with a constitutional abrogation by a Constitutional Court decision. In the latter case, if the judge refuses to implement the decision of the Constitutional Court he is guilty of denial of justice.*

KEYWORDS: *abuse of office; liability; constitutional abrogation; justice denial; judicial power*
JEL Classification: *K14*

1. "*Crime is the sole basis for criminal liability* (Dongoroz, 1969) ", said the great Professor Vintilă Dongoroz, Doctor of Law of the Sorbonne University, coauthor of the Criminal Code of Carol II in 1936 and the Criminal Code of 1968, statement that refers to the respect due by professionals to a fundamental principle "*nullum crimen sine lege, nulla poena sine lege*".

2. We find *the crime of abuse of office* historically regulated in the Criminal Code of 1864 as "abuse of power against individuals" (article 147) and "abuse of authority against the public good" (article 158). The Criminal Code of 1936 (Official Gazette of Romania, 1936) incriminates the abuse of power (art. 245), abuse of authority (art. 246) and excess of power (art. 247). In turn, the Romanian Criminal Code of 1968 provided for abuse of office against the interests of individuals (art. 246), abuse of office by limiting certain rights (art. 247) and abuse of office against public interests (art. 248) as crimes. At

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present, the New Romanian Criminal Code contains in one article the crimes of abuse of office provided for in the Criminal Code of 1968, which incriminates all forms of "abuse of office" (article 297 of the Criminal Code). In full connection with the above, Law no. 78/2000 for the prevention, discovering and sanctioning of corruption (Official Gazette of Romania, 2002), in art.13 ind.2 shows an aggravating variant of the crime of abuse of office (Haratau, 2017) or "a special form of the crime" (Official Gazette of Romania, 2016) for a certain category of legal subjects. The crime of abuse of service in the 1968, 2000 and 2014 variants is inherited from the former Soviet legal system currently implemented with the "knowledge" of some outsiders to have effects on a hostile land. (CEDO , 2009)

3. The *crime of abuse of office* is also regulated in the *criminal law of other countries*, of course in different ways. However, as a general observation, "abuse of office" is not treated with the same severity as in the Romanian legislation, nor with the distinctions that make this crime become a "crime of office in the statistical justification of the important, necessary and irreplaceable role" of the criminal prosecution authorities. To demonstrate endemic corruption in all layers of society, criminal prosecution authorities have used "abuse of office" as a woman of easy virtue, losing the substance of the crime in the operation - *ex nihilo nihil.* (Lucretiu, fără an)

In *Italy*, abuse of office is an act committed intentionally in the exercise of official duties by a civil servant who does not perform an action or fails to do so and thereby causes damage or injury to the legitimate rights or interests of another. The crime has two variants, a simple and an aggravated one, "when it has a high degree of severity", the judge being able to apply up to 4 years of prison, this being the maximum punishment. In *France*, the abuse of office consists in the act of a civil servant who, in the exercise of his duties, by his actions, prevents the execution of the law, the punishment being up to 5 years imprisonment and a fine of 75,000 EUR. If the deed was followed by consequences (??), the punishment is up to 10 years of imprisonment and 150,000 EUR fine.

In *Portugal***,** the abuse of service has two variants, the first when a civil servant, by an action or omission, facilitates obtaining patrimony or financial benefits, damaging the rights or interests of others (the penalty is from 60 days of community service to 6- month imprisonment), the second, when by his action, he damages the state, regardless of value (punishment is up to 5- year imprisonment). In *Sweden*, the crime of abuse of office involves the breach of office duties by fault or by intent, and an individual or legal entity suffers an injury to his or her interest (if the damage is of no importance impinges on impunity, and when it has a specific value, the penalty is a criminal fine, or up to 2- year imprisonment). If the seriousness of the crime is significant, the punishment is from 6 months to 6 years in prison. In *Spain***,** the punishment provided by law for abuse of office is from six months to two- year imprisonment. In *Germany***,** this crime is not covered by criminal law.

4. Here, in various *international documents*, we may find *references to the crime of abuse of office*, for the breach of office duties by public servants (public agents) directly or indirectly or by omission. Such references are to be found in the *Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union* adopted by the Council of the European Union on 26 May 1997 (J.O.C.E, 1997), Romania acceded to this Convention by Council Decision of 8 November 2007; the *Criminal Convention on Corruption* adopted by the

Council of Europe on 27 January 1999 in Strasbourg (Official Gazette of Romania, 2002), completed by the *Explanatory Report of the Criminal Convention on Corruption* of 1999 (CETS, 1999). By this Convention, the signatory State undertakes to take legislative measures, other measures to criminalize active corruption or passive corruption as crime; *the United Nations Convention against Corruption* adopted in New York on 31 October 2003 (Official Gazette of Romania, 2004); upon the request of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, the *Venice Committee (European Commission for Democracy and Law)* adopted the *Report on the Relationship between Political Accountability and Criminal Accountability of Government Members*, adopted at 94th Plenary Session (Venice, 8-9 March 2013), by which it considered that "the provisions *abuse of office, abuse of power and other similar expressions* should be interpreted closely and applied at a high level so that they can be invoked only in cases where the deed is of a serious nature ", such as: "serious crimes against national democratic processes, violation of fundamental rights, undermining the impartiality of the public administration, etc." Moreover, the Report states, "*additional criteria* such as, for example, the requirement of serious intention or negligence must be imposed. For cases of *abuse of office* or *abuse of power* involving economic interests, the requirement of a personal gain to either the person concerned or a political party can be considered appropriate". It is important that the report states that "*the level of sanctions should be proportionate to the crime committed and not be influenced by political grounds and disagreements.*"

For the reasons set out in the Report of the Venice Committee, the Parliamentary Assembly of the Council of Europe adopted, on 28 June 2013, at its 27th meeting, *Resolution no. 1950/2013* by which it "invites the legislative bodies of those states whose criminal law provisions still contain general provisions on *abuse of office* to consider the repealing or reformulation of such provisions in order to limit their scope". In the Communication of the Venice Committee to the European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions and others. it is said that "the legislator should analyze whether other measures than those of the criminal law, for example, administrative or civil sanctions regimes, could not ensure sufficiently the enforcement of the policy and whether the criminal law could address the issues more effectively". (Official Gazette of Romania, 2017)

5. *First of all*, in exercising the unique legislative authority of Romania (Valea, 2014) (art.61 par. 1 Contitution of Romania), the Parliament must take into account the principle according to which the protection of a social value can be done through civil, administrative rules, but also by rules of criminal law, understanding that if the civil and administrative rules are not suitable to achieve the intended purpose, the last solution remains, according to the *ultima ratio* principle, the one regarding the application of the criminal law.

In order to apply the criminal sanction, it is necessary that the harm to the protected social values should present a certain degree of intensity, seriousness, to justify it (Official Gazette of Romania, 2016).

6. *In a second reason*, we should notice that the person called to apply the law is the judge who, by virtue of his independence and impartiality, in a fair trial must interpret the law (Coman, 2017). Hence, in the context of the study, at least two questions arise: *the first*, if the interpretation of the law can attract the judge's liability and *the second*, if the

application of the decriminalisation is a procedure for the interpretation of the law, so it is *optional* or an *obligation* once the action is no longer incriminated.

7. As for the *first question*, we have the answer in article 66 of the Recommendation CM (2010) 12, where talking about the judge's independence and accountability, it states: "*the civil or disciplinary liability of a judge for the way he interprets the law, assesses the facts or appraises the evidence, except in cases of bad faith and gross negligence, cannot be imputed*."

8. As for *the second question*, a fair answer obliges us to analyze to what extent the texts of incrimination of the abuse of office in the New Criminal Code (article 297), in the Old Criminal Code (articles 246, 247, 248) and Law no. 78/2000 (art. 13 ind. 2) still produce legal consequences after the publication of the Constitutional Court Decision no. 405 of 15 June 2016. In this work of implementation, we ask ourselves to what extent the text of the incrimination rule of the abuse of office really applies the constitutional provisions of art. 1 par. 5 (the supremacy of the Constitution and the law), art. 20 (the priority of covenants or treaties on fundamental human rights to which Romania is a party and internal laws) (Coman, 2014), art. 52 (right of a person damaged in a right or a legitimate interest by a public authority to obtain recognition of the claimed right or legitimate interest), art. 124 par. 1 (law enforcement in the name of the law)? The interpretation given by the Constitutional Court by Decision no. 405/2016 is applicable to legislative instruments enacted at national level, as well as legislative instruments adopted by the European Union (extensive interpretation) (Neagu, 2017) (Official Gazette of Romania, 2016) applicable in Romania.

9. According to art. 19 of the United Nations Convention against Corruption, the States -parties *have been recommended to take legislative or other measures* necessary to incriminate actions committed with intent by a *public servant* in order to abuse his office or job, that is to fulfill or to refrain from performing an act in the exercise of his functions in violation of the law and in order to obtain for himself or for another undue benefit.

10. For this reason, in order for such incrimination and punishment to achieve its purpose "*the law must clearly define the applicable crimes and punishments, this requirement being met when a person subject to the law has the opportunity to know through the text of the pertinent legal rule, if necessary by means of its interpretation by the courts and by obtaining appropriate legal assistance, which are the acts and omissions that may commit his criminal liability and what is the punishment that he risks under the authority thereof.*" (Official Gazette of Romania, 2016) In fact, in art. 8 par. 4 of Law no. 24/2000 on the legislative technique (Official Gazette of Romania, 2010), the legislator states that: "*the legislative text must be worded clearly, fluently and intelligibly, without syntactic difficulties and obscure or equivocal passages*." Referring to the European jurisprudence, in the same paragraph (§45), the Constitutional Court of Romania asks for *clarity and predictability* for the criminal rule in general and for the rule that incriminates abuse in office, in particular. The reference is addressed to the legislator, that is to clarify the legal rule so that the interpretation of the judicial authority reflects the purpose of the law, precisely to avoid that the recipient's assessment is not subjective and the judge's is not discretionary. (Official Gazette of Romania, 2014) The European Court of Human Rights (Chilea, 2016) has held that the provisions of art. 6 of the Convention are breached, for the lack of clarity of the law. (CEDO, 1987) The normative instrument

must be sufficiently precise and clear to be applicable. (Official Gazette of Romania, 2010) (Official Gazette of Romania, 2012) (CEDO, 2000)

11. It is to be appreciated that *in the absence of objective criteria* of clarity and distinction, it is possible that in the case of committing some actions, both forms of criminal liability, but also other forms of liability, such as disciplinary, administrative or civil, may be involved. In the above, only administrative or disciplinary liability can be the priority, even more so if the deed is not of special gravity, no personal advantage or other benefit has been pursued, so that criminal sanctions would not be in the general interest of the society.

12. The offense of abuse of office is a *crime of result*, which is intended to cause damage or injury to a person's legitimate rights or interests, or to make an undue benefit.

13. From the analysis of the crime, we find that the sphere of *active subjects* that can commit the crime exceeds the category of civil servants, so that besides them, any other individual who permanently or temporarily, with or without remuneration, can be actively subject to a charge of any kind in the service of an individual as provided for by art. 175 par. 2 of the Romanian Criminal Code or within any legal entity (see article 308 paragraph 1 of the Romanian Criminal Code) (Official Gazette of Romania, 2015)

14. *The objective side* of the offense has as *material element the failure to perform* an action or *wrongful fulfillment* of an action, in the exercise of his duties. However, the notion of "*action*" is not defined by the legislator, the meaning can be either a material action performed by a person, or of legal normative action, source of law, or an action of the judicial power (Decision of the Constitutional Court of Romania no. 392 of 06.06.2017, 2017). As a result, the notion may be circumscribed to any judicial procedure governed by law (action or inaction) that could represent disciplinary misconduct, control of the legality of an administrative act (administrative litigation) or it involves direct civil tort liability, resulting from lack of clarity and foresight of the legal rule (Decision of the Constitutional Court of Romania no. 495 of 2016, 2016). From the above it is repeated the finding according to which the criticized phrase is devoid of clarity and foresight, which leaves room for interpretation. The Court, in its Decision no. 405/2016 found (§55) that the phrase "*performs in a faulty way*" has only one interpretation, that "*the fulfillment of the duty of office is accomplished*" "*in violation of the law*." But what the constitutional judge finds as the power of judged action, *on the immediate consequence*, is even worse, as it leads us to the thesis according to which the Parliament, when regulating the crime of abuse of office, *did not establish a value threshold of the damage and no degree of injury.*

The incrimination of an action as abuse of office claims by its very nature that the action has a certain severity, precisely in order to justify criminal liability.

15. *The Constitutional Court of Romania, in Decisions no. 405/2016, 392/2017 and 518/2017* (Official Gazette of Romania, 2017), analyzing the crime of abuse of service, as it appears in the text of art. 297 of the New Criminal Code, but also in art. 246, 247, 248 of the Old Criminal Code, *proceeds from the finding* that it is a result crime and consequently *its achievement by immediate action* means to cause damages or injury to the legitimate rights or interests of an individual or legal entity. The Constitutional Court finds that the words "*legitimate interest*" are not defined in the Criminal Code. According to the Explaining Dictionary of Romanian, "*interest*" is the action to satisfy certain needs, the action to cover some needs, use, and profit. The interest is legal if it is protected or guaranteed by a normative provision. At the same time, it was necessary to clarify the

meaning of the notion of "*damaging the rights or legitimate interests of an individual or legal entity*" by "*the moral, physical or material damage or injury to the legal interests of such persons, which implies the effective loss of legitimate rights and interests in any way: the failure to grant these, preventing their capitalization, etc., by the civil servant having duties as regards the achievement of those rights and interests.* " As for the notion of "*damage*" caused to the individual or legal entity, it must be certain, effective, well-defined, because and in relation to this criterion, we may appreciate if the deed presents, or not, a certain degree of social danger.

16. In order to clarify the way in which the *dangerous outcome* is achieved, the Constitutional Court details: "*damage to legitimate rights and interests*" *means to affect, injure an individual or legal entity in its desire / concern to satisfy a right / interest protected by law. It has been noted that injuring a person's legal interests implies any violation, any physical, moral or material offense to the interests protected by the Constitution and the laws in force, in accordance with the Universal Declaration on Human Rights. Thus, the range of interests (the desire to meet certain needs, the preoccupation to obtain an advantage, etc.) referred to by the legal text is very broad, including all the possibilities for manifestation of the person according to the general interests of the society which the law acknowledges and guarantees. It is, however, necessary for the deed present a certain degree of severity. Otherwise, in the absence of the degree of social danger of a crime, the deed entails, as the case may be, only administrative or disciplinary liability.*" (Decision of the Constitutional Court of Romania no. 405 of 2016, 2016)

17. Concerning the *aggravated variant of the abuse of office* (in the case law, as proof of the lack of clarity and predictability of the norm of incrimination, some courts consider it an autonomous crime), (Official Gazette of Romania, 2016) expressly referring to the crime provided by art. 13 ind. 2 of the Law no. 78/2000, by the Constitutional Court Decision no. 400 of 15 June 2016, the term "*undue benefit*" has also been defined. Thus, "*the notion of undue use used by the legislator is not unequivocal, as it has its doctrinal explanations outlined over the years and reflects the fact that the benefit thus obtained is* "*legally unjustified*", *it has the character of retribution, being a payment or reward in order to determine an explicit act, a counter-equivalent of the unethical conduct of the active subject of the abuse of office or usurpation of the function. Moreover, as long as ubi lex non distinguit, nec nos distinguere debemus, then the use implies any property advantages, goods, commissions, loans, prizes, free services, employment, promotion, but also non-patrimonial advantages, provided that these are legally undue. Besides, the notion is not new, it may also be found in the legislation and in art. 11 of Law no. 78/2000.*" (§24)

Art. 15, art. 16, art. 18, art. 19 and art. 25 of the United Nations Convention Against Corruption, adopted in New York on 31 October 2003, signed by Romania at Merida on 9 December 2003 and ratified by Law *no. 365/2004*, uses the notion of *undue benefit*, for the purpose of which each State, which is a party, adopts the legislative measures and other measures that prove to be necessary to assign the character of crime, if the actions were committed intentionally, to the actions related to corruption of national public officials, corruption of foreign public officials and officials of international public organizations, trafficking in influence, abuse of office, corruption in the private sector and obstruction of the proper functioning of justice. Similarly, *the Civil Convention on*

corruption adopted in Strasbourg on 4 November 1999 and ratified by Romania by *Law no. 147/2002*, uses the notion "undue advantage" (synonym with undue benefit) in defining corruption. (Decision of the Constitutional Court of Romania no. 400 of 2016, 2016)

18. *The Constitutional Court of Romania*, by Decision no. 405/2016, considered the texts of art. 297 New Criminal Code, art. 246, 247, 248 Old Criminal Code, and even if not directly but indirectly art. 13 ind. 2 of the Law no. 78/2000 (the Constitutional Court rejected the objection of unconstitutionality for article 13 ind. 2) as *incomplete* (incomplete rules) and *reconfigured* them. (Decision of the Constitutional Court of Romania no. 405 of 2016, 2016) Without any doubt, the Constitutional Court *in its recitals (§75) held that the rules of incrimination are incomplete once the legislator did not regulate a value threshold of the damage and no degree of injury. In Decision no. 518 of 6 July 2017 on the exception of unconstitutionality of the negligence office*, the Constitutional Court found in the *reasons* (§45) "*the need for the legislator to comply with the legal omission ascertained, in terms of the amount of damage or the intensity of the severity of damage to the rights or legitimate interests of an individual or legal entity to ensure the clarity and predictability of the criminal rule under examination*." (Official Gazette of Romania, 2017) *Mutatis mutandis*, this has become an imperative task for the legislator taken from the reasons of Decision no. 405/2016 and Decision no. 392/2017.

19. *The Constitutional Court of Romania in Decision no. 405/2016* considered that "*the provisions of art. 13 ind. 2 of the Law no. 78/2000 must relate to the provisions of art. 246 of the Criminal Code of 1968 and of art. 297 par. 1 of the Criminal Code as these were reconfigured by this decision, the provision being an incomplete rule*" *(§88).*

From the foregoing, it results that *the objective side of the abuse of office has been reconfigured* in terms of *dangerous outcome* (setting a value threshold for the damage and a certain intensity of the injury), the rules to which we must relate in the provisions of art. 246 (Criminal Code 1968) and art. 297 par. 1 (Criminal Code 2014) are incomplete.

20. According to *art. 147 par. 4 of the Constitution*, the decisions made by the Constitutional Court are generally binding (generate effects *erga omnes*) in their entirety and *have power only for the future*, with the consequence that, with their publication and the finding of unconstitutionality of the provisions of the laws and ordinances, *these cease their legal effects in 45 days after publication*, while the provisions declared unconstitutional are legally suspended. The decision to declare unconstitutionality is part of the normative legal order, the effect of which is that the unconstitutional legal rule ceases to apply in the future. (Official Gazette of Romania, 2008)

21. By the *Decision of the Plenary of the Constitutional Court no. I of 17 January 1995* (Official Gazette of Romania, 1995), it is "ordered" that *the authority of res judicata attaches not only to the operative part, but also to the grounds on which it is based***.** The grounds are a unitary structure, being the motivation of the decision, without being independent of one another. "*All the grounds in a decision support its operative part [...], so that the authority of res judicata and the binding nature of the solution are reflected in all the grounds of the decision.*" (Decision of the Constitutional Court of Romania no 362 of 06.06.2017, 2017) In *Decision no. 163 of 12 March 2013*, the Constitutional Court "*notes that the authority of res judicata accompanying the decisions of the Constitutional Court is attached not only to the operative part but also to the grounds on which it is based. Both the grounds and the operative part of the decisions of the Constitutional*

Court are generally binding, according to art. 147 par. 4 of the Constitution, and impose the same force on all subjects of law.“ (Official Gazette of Romania, 2013) (Official Gazette of Romania, 2013)

Therefore, “*both the Parliament and the Government, respectively the public authorities and institutions, shall comply with those established by the Constitutional Court in the reasons and the operative part of this Decision.*” (Official Gazette of Romania, 2010)

22. It is certain that by *Decision No. 405 of 15 June 2016, the Constitutional Court of Romania* established that the primary or delegate legislator has the obligation to regulate *the amount of the damageand severity of injury* resulting from the perpetration of the offense of abuse of office. It is necessary to follow and repeat the argument and explanation of the legal reasoning initiated in the Decision no. 405/2016, respectively in Decision no. 392 of 6 June 2017 (paragraph 53). Thus, the Constitutional Court considers that it is not enough that for the delimitation of the various forms of legal liability and criminal liability to be considered, as a single criterion, only the type of the normative instrument breached by the exercise of official duties (law or government ordinance or administrative instrument), withholding the possibility of making the criminal resolution only by violating a law or ordinance of the government with the consequence of criminal liability, removing from the discussion any other normative instruments with such a consequence.

23. The Constitutional Court *also considered in its reasons* (Decision No 392/2017) an additional criterion which it considered to be essential to clearly and precisely define the crime and to differentiate other forms of liability “the degree of intensity required for the application of a criminal penalty, namely the need for a certain amount of damage or a certain severity of damage to legitimate rights or interests“(§53). Therefore, the rule of incrimination, its objective aspect must be explicit, clear in the immediate follow-up.

24. As a result, it would have been natural that in the present case, *after the publication of Decision no. 405/2016, the legislative to proceed*, within 45-day term required by the Constitution, during which the provisions declared unconstitutional cease their effects by being legally suspended (Valea, 2010), to the *reconfiguration of the crime of abuse in office*, by a law, respectively an emergency ordinance.

25. Undoubtedly, by the change required in the incrimination of the crime of abuse of office, the Constitutional Court did not exceed the limits of its constitutional competence, its provisions being of value only for the future and not retroactively. But once the legislator did not proceed to the reconfiguration of the constituent elements of the crime, the legal effects did not occur during the period of the constitutional suspension, and the constitutionally criticized legal provisions became shapeless, ceased to exist after the passing of this term, based on the reasons showed above.

26. In the reasons of Decision no. 392 of 6 June 2017, the Constitutional Court states: “*With regard to the criminal provisions related to the act of* “*abuse of office*”, *the Court finds that the lack of circumstance as to the determination of a certain amount of damage or of a certain severity of damage to the rights or legitimate interests of an individual or a legal entity makes it difficult and sometimes impossible, the delimitation of criminal liability from other forms of legal liability, with the consequence of initiating criminal investigation procedures, brought to justice and conviction of the persons who in the exercise of their professional duties cause damage or damage the rights or legitimate*

interests of an individual or a legal entity, irrespective of the amount of the damage or the severity of the damage. Criminal provisions in force are formulated broadly and in vague terms, resulting in a high degree of unpredictability, a problematic aspect from the perspective of article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as other fundamental requirements of the state founded on the rule of law, this wording being the premise of arbitrary / random interpretations and applications. Such omission is of constitutional relevance in the present case (see also Decision No. 503 of 20 April 2010, Decision no. 107 of 27 February 2014, or Decision No. 308 of 12 May 2016, paragraph 41, whereby the Court stated that "*the legislative omission and inaccuracy are those that lead to the violation of the fundamental right allegedly breached*" *because it affects the fundamental rights and freedoms of the person against whom such a criminal charge is made. In these circumstances, the Court, being bound by the obligation to interpret a legal provision in order to produce effects and thus to give it a constitutional meaning (see, to that effect, Decision No. 223 of 13 March 2012), considers it necessary to establish a threshold of damage and the circumstantial evidence of the damage caused by committing the deed, elements to assess the incidence or not of the criminal law.*" (Decision of the Constitutional Court of Romania no. 392 of 06.06.2017, 2017)

27. "*Given the nature of the relevant legislative omission, the Constitutional Court does not have the power to fulfill this normative flaw as it would exceed its legal powers, acting in the exclusive sphere of competence of the primary or delegate legislator. Consequently, taking into account the constitutional provisions of article 142 paragraph (1), according to which* "*the Constitutional Court is the guarantor of the supremacy of the Constitution*", *and those of article 1 paragraph (5), according to which,* "*in Romania compliance with the laws is mandatory, the Court emphasizes that the legislator has the obligation to regulate the value threshold of the damage and the intensity of the damage to the right or legitimate interest resulting from committing the act within the criminal law regarding the crime of abuse of office, its passivity being likely to cause situations of incoherence and instability contrary to the principle of security of legal relations in its constitution regarding the clarity and predictability of the law***.**" (Decision of the Constitutional Court of Romania no. 392 of 06.06.2017, 2017)

28. Under art. 23 par. 12 and art. 73 par. 4 letter H of the Constitution, "*the legislator is free to appreciate both the social danger according to which he will determine the legal nature of the incriminated deed and the conditions of legal liability for that deed*" (Official Gazette of Romania, 2011).

29. The legislator has no longer exercised the constitutional competence to legislate, that by the content of a new normative instrument to establish with clarity and precision - the dangerous consequence of the objective aspect of the crime, which is equivalent to its lack of predictability. Thus, today's text of the crime does not meet the quality requirements provided for by Decision no. 405/2016 (the crime is not defined) and consequently any addressee of the legal norm cannot comply with the conduct prescribed by the law. On the other hand, the requirement of accessibility of the law requires understanding of the content of the prohibitive rule that prescribes a certain conduct that cannot be presumed. "*One cannot claim to a subject of law to comply with a law which is not clear, precise, predictable and accessible, because he cannot adapt his conduct according to the normative hypothesis of the law, precisely therefore, the law-making*

authority, the Parliament or the Government, as the case may be, has the obligation to enact rules that comply with the above features." (Official Gazette of Romania, 2015)

30. *If only a law can define a crime and establish a punishment, no one can be convicted of an action or omission, which, either before reconfiguration or after reconfiguration, by the Constitutional Court's requirements would no longer be a crime ("no punishment without law" article 7 CEDO).*

31. *As an example*, we show that the European Union in Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 on fight against fraud for the financial interests of the Union by criminal law in the matter of sanctioning individuals (Title III, article 7) establishes that a significant prejudice or advantage is deemed that involving over 100,000 EUR. For damages or benefits less than 100,000 EUR, the states may provide for sanctions other than criminal penalties. (Official Gazette of European Union of 28.07.2017, 2017)

32. *In the given situation, in our view, in the face of the undisputed passivity of the legislator, the crime of abuse of office has been disincriminated. Article 4 of the Criminal Code states:* "*The criminal law does not apply to actions committed under the old law, unless they are not provided for by the new law. In this case, the execution of punishments, educational measures and safety measures, given based on the old law, as well as all the criminal consequences of the court rulings in respect of these facts, cease with the entry into force of the new law.*" (Criminal Code of Romania, fără an)

33. "*The Court finds that the incrimination / disincrimination of certain facts or the reconfiguration of the constitutive elements of a crime are within the discretion of the legislator, a margin which is not absolute, being limited by the constitutional principles, values and requirements. In this regard, the Court has stated that the legislator should make use of criminal means depending on the social value protected, the Court being able to censor the legislator's choice only if it is contrary to the constitutional principles and requirements*" (Official Gazette of Romania, 2016). "The Court also found that, according to art. 1 par. (5) of the Basic Law, the compliance with the Constitution is mandatory, and it follows that the *Parliament cannot exercise its competence to incriminate and dis-incriminate antisocial actions, except by complying with the rules and principles set in the Constitution*" (Official Gazette of Romania, 2014).

34. What did the Constitutional Court ask by Decision no. 405/2016, Decision no. 392/2017, Decision no. 518/2017? Establishing that by committing an action, one of the liability forms (criminal, administrative, disciplinary, civil) may be incident, the legislator has the constitutional obligation to indicate which is its degree of severity, because as there is no degree of social danger of a crime, the deed attracts, as the case may be, only the administrative or disciplinary liability, not the criminal liability. *As the legislator was passive and did not act in any way, the crime of abuse of office was disincriminated.*

35. Article 3 of *Law no. 187 of 2012* provides that the provisions of art. 4 of the Criminal Code on the criminal law on discrimination are also applicable in the situation where a determined deed, committed under the old law, is no longer a crime under the new law *due to the modification of the constitutive elements of the crime*, including the form of guilt, required by the new law for the existence of the crime. The provisions of art. 4 of the Criminal Code would not have been applied in the situation in which the action would be incriminated by the new law or by another law in force, even under another name. (Law 187 of 2012 for application of Law 286 of 2009, 2012) In our case,

the elements of the objective side of the crime of abuse of office have been changed (reconfigured).

36. For a normative instrument (law, ordinance) to be applied, it must be sufficiently precise and clear. (Official Gazette of Romania, 2010) (Official Gazette of Romania, 2012) (CEDO, 2000) In our case, the Constitutional Court determined that the current text provided by art. 297 of the Criminal Code is not clear, precise, foreseeable, so it cannot be applied.

37. The *disincrimination* of some facts or the reconfiguration of the constitutive elements of a crime belongs to the legislator, but in our case also to the "criticisms" brought by the "gendarme" of the constitutional order for defending the conformity of the ordinary legal norms with the constitutional provisions. As the Parliament or the Government did not, as a consequence, regulate the criminal legal protection of actions that may cause through action or omission certain damages or injuries to the legitimate rights or interests of some persons, *the content of the crime itself was devoid of substance, the constitutional consequence occurred, and* the crime of abuse of office was disincriminated because only the legislator can confer, depending on certain seriousness of the deed or certain intensity of the consequences of the deed, protection on important values for society. Disincrimination acts not only on abuse of office, but also on the crime under art. 13 ind. 2 of the Law no. 78/2000 because it is not an autonomous crime but an aggravated variant of the crime of abuse of office and of the crime of usurpation of the position (immediate action is required by art. 297 of the Criminal Code) or negligence in the office (the crime in the mirror with the abuse of office, but on ground of guilt). It is true that, on the other hand, other forms of legal, disciplinary, administrative or civil liability may be exercised, but in no case criminal liability, once the social values protected by the legal rule have not been identified in the particular part of the Criminal Code.

38. *Conclusions***.** Starting from the finding that the *reasons* of a decision, as a whole, support the order of the operative part of the judgment, and enjoy the power of res judicata, the legislator's obligation to intervene within the period of lawful suspension, according to art. 147 par. 1 and par. 4 of the Constitution is unquestionable. Once with the expiry of the 45-day period after the publication of Decision no. 405/15 June 2016 in the Official Gazette, the "constitutional recall" intervened; reconfiguring the elements of the objective side of the crime of abuse of office according to the reasons of the constitutional decision is an obligation for the legislator. The legislator's passivity is not right.

As such, if they have been notified under art. 16 par. 1 letter b, Thesis I New Criminal Procedure Code (the action is not provided for by the criminal law), the prosecution authorities are to proceed with the *classification* (article 315 paragraph 1 letter b of the Criminal Procedure Code), respectively the courts will order the *investigation* (article 396 paragraph 5 of the Criminal Procedure Code).

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