ABUSE OF OFFICE IN ROMANIAN LAW, A TWO-PART SYMPHONY

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ABSTRACT: *If in the socialist political regime, the abuse of office was a somewhat insignificant crime, either in the version against the interests of individuals or in the version against the public interests, the transition to a democratic political regime meant a real revelation in its proliferation, placed with hypocrisy like a bomb with a delayed effect, in the baggage of the jurisprudence of the courts. The criminal prosecution bodies were very skilful in this crime, which they used in any circumstance, whether they should or should not, in order to prove that they had not lost, with the "revolution", the force to act, the need to exist and to increase their own competence, removing any reasonable and proportionate relationship with social reality. Not infrequently, in the face of abusive legal constructions, the courts have come to a standstill, and they have tried with great determination to oppose any violation of the exercise of the rights and freedoms guaranteed by the European Convention. (Coman, 2017)*

With the appearance of Law no. 78/2000, regarding the acts of corruption, a new classification problem arises, such as the fact that we have two offenses of abuse of office, the aggravation regarding the particularly serious consequences also applies in the case of the offense of abuse of office under this law.

Abuse of office as an offense either in aggravated or attenuated form may have no other meaning than that which is objectively and reasonably justified, in resonance with the means employed and a legitimate aim pursued by the use of the principle nullum crimen sine lege nulla poena sine lege. (Blaj & Chiriac, 2018)

KEY-WORDs: *abuse of office; criminal law; incrimination; corruption*
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1. BRIEF INTRODUCTION TO THE HISTORY OF ABUSE OF OFFICE

It is said that abuse of office is of Soviet origin, but elements of the legal framework or rather of criminalization are found in the history of Romanian law, but also in the structure of criminal law in other countries.

Thus, the incrimination of a deed, more or less in a terminological beginning[1] - abuse of office, we find in the Romanian Criminal Code of 1864, which regulated in art. 147-abuse of power against individuals and in art. 158-abuse of authority against public

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[1] Decision of the Romanian Constitutional Court no. 405 from 8 July 2016, paragraph 41, published in M.Of. no. 517 from 8 July 2016

works; The criminal code of 1936 provided in art. 245-abuse of power, in art. 246-abuse of authority, art. 247- excess of power; The criminal code of 1969 republished in 1997, incriminated in art. 246-abuse of office against the interests of persons, in art. 247-abuse of office by restricting certain rights and art. 248-abuse of office against public interests; The 2014 Criminal Code provided for abuse of office in art. 297 and in art. 298; on the other hand in a special form in art. 13 ind. 2 of Law no. 78/2000 for the prevention, discovery and sanctioning of corruption (it was introduced by Law no. 421/2004).

A whole series of international documents have been transposed into Romanian legislation (Coman, 2020), even if the reference to them, not infrequently, it's done for example or justification, such as: the Civil Convention on Corruption in Strasbourg of 4 Nov. 1999, ratified by Romania by Law no. 147/2002[2]; The Criminal Law Convention on Corruption, adopted by the Council of Europe on January 27, 1999 in Strasbourg, ratified by Romania by Law no. 27/2002[3]; United Nations Convention against Corruption adopted in New York on October 31, 2003, signed in Merida on December 9, 2003 and ratified by Romania by Law 365/20044 (for the first time the concept of "improper use" is used[4]).

The Parliamentary Assembly of the Council of Europe, through the Committee on Legal Affairs and Human Rights, requested the Venice Commission to present a Report on the relationship between political and criminal ministerial responsibility adopted on its 94th plenary session (8-9 March 2013).

On its 27th meeting, the Parliamentary Assembly of the Council of Europe, based on the Report of the Venice Commission, adopted Resolution no. 1950/28 June 2013 calling on the Member States "to consider repealing or reformulating general provisions on abuse of office" precisely in order to prevent abuses of justice.[5]

The Criminal Code of Portugal recognizes the abuse of power (art. 382) consisting in the act of an official who abuses power or violates his duties, with the intention of obtaining an illegal benefit or causing harm to others (Paşca, 2017).

The Spanish Criminal Code, even if, criminalizes the act of a civil servant who acts arbitrarily or exercises his duties without fulfilling the legal requirements, but with lower punishments and sanctions than those in the Romanian Criminal Code.[6]

The German Criminal Code criminalizes under the title of service crime, deeds also considered in Romanian criminal law crimes such as bribery, negligence in office, receiving undue benefits, but does not have a regulation similar to abuse of office in the Criminal Code Romanian.[7]

From the general regulation of the crime in different national criminal law systems, we understand that the crime of abuse of office is the most severe provided by regulation (including by assimilating the quality of civil servant and other professional categories) and punishment in Romania. Practically any act of some persons, civil servant or not, can be considered abuse of office, *a priori* excluding other forms of legal liability, not to mention the lack of any other legal liability, possibly a moral liability.

[2] Published in M.Of. of Romania, no. 260 from 18 April 2002
[3] Published in M.Of. of Romania, no. 65 from 30 January 2002
[4] Published in M.Of. of Romania, no. 903 from 5 October 2004 / Part I
[5] Decision of the Romanian Constitutional Court, no. 405/2016 (pg. 72)
[6] Idem
[7] Idem

2. THE DILEMMA OF THE TWO SCORES

During a judicial investigation, the court ordered the change of the legal classification, retaining a new legal classification, such as the one provided in art. 132 of Law no. 78/2000, reported to art. 297 and art. 309 of the Criminal Code with the application of art. 5 paragraph 1 Penal Code. Thus, to the initial legal classification, the judge added art. 309 of the Romanian Criminal Code which provides for certain crimes, including abuse of office provided by art. 297 that in case of particularly serious consequences, the special limits of the punishment provided by law are increased by half.

In the text of art. 297 paragraph (1) The Criminal Code describes the offense of abuse of office, as "The act of a civil servant who, in the exercise of his duties, does not perform an act or perform it in a defective manner and thereby causes damage or injury to the rights or legitimate interests of a natural person or a legal person shall be punished by imprisonment from 2 to 7 years and the prohibition of exercising the right to hold a public office."

The *text of art. 13^2 of Law no. 78/2000* states that "In the case of offenses of abuse of office or usurpation of office, if the civil servant has obtained for himself or for another an undue benefit, the special limits of punishment are increased by one third."

In the text of art. 309, the Criminal Code stipulates that under the incidence of this article are regulated the offenses provided by art. 295 (embezzlement), art. 297 (abuse in setviciu), art. 298 (negligence in office), art. 300 (usurpation), art. 303 (disclosure of state secret information), art. 306 (illegal obtaining of funds), art. 307 (misappropriation of funds).

With reference to the crime provided by art. 13^2 of Law no. 78/2000, it is necessary to have first the constitutive content of the crime of abuse of office, and secondly the immediate consequence which is the "improper use" (undue advantage, see - Civil Convention on Corruption, adopted in Strasbourg on 4 Nov. 1999 - ratified by Law no. 147/2002).

There are some observations to make:

1. The abuse of office is provided in art. 297 paragraph 1 of the Criminal Code- crime that is part of Title V - Corruption and service offenses, Chapter II - service offenses. If the legislator wanted this crime to be part of the corruption offenses provided by the Criminal Code, he could very easily move it to Chapter I "Corruption Offenses" and no longer include it in Chapter II of this title of the Criminal Code. As a result, abuse of office is and remains a crime of service and not a crime of corruption.

2. The provisions of this article - art. 297 paragraph (1) Criminal Code - constitutes the general norm to which an aggravating circumstance is added by the legislator, provided by art. 309 of the Criminal Code, but also a mitigating factor depending on the quality of the active subject, provided in art. 308 of the Penal Code. As such, in the situation where the quality of the active subject is missing, even if the aggravation is retained, it will be in competition with the mitigating circumstance provided in art. 308 of the Penal Code.

Art. 308 of the Criminal Code refers to crimes of corruption and service committed by other persons, and not necessarily civil servants, who exercise permanently or temporarily, with or without remuneration, a task of any other nature, in the service of a

natural person (person who exercises a service of public interest for which he has been invested by the public authorities or who is subject to their control and supervision regarding the fulfillment of the respective public service)[8]

3. On the other hand, Law no. 78/2000 has as object only the corruption offenses, so that the legislator through art. 13^2 of the law separately defined abuse of office as an act of corruption starting from general to special *specialia generalibus derogant*, and we thus have a crime of abuse of office of special corruption, autonomous, in which the civil servant obtains an undue benefit.

The Constitutional Court of Romania, in Decision no. 400/2016 (paragraph 16) notes that 'Law 78/2000 constitutes a special regulation, derogating from common law, which establishes measures for the prevention, detection and sanctioning of acts of corruption and applies to certain categories of persons clearly circumscribed by the legislator, since the first article of the law "(...). The provision contained in art. 13^2 of this normative act represents, as provided by the title of the sanction of which it is part, a crime assimilated to those of corruption, by the way in which it was incriminated constituting a special form of the crime of abuse of office "(Decision no. 405 / 2016 paragraph 42).

As such, we understand that by a special regulation, the Court defined the autonomous character of the crime provided by art. 13^2 of Law no. 78/2000, derived from the special character of the law. (Valea, 2010)

4. The will of the legislator was that art. 13^2 of Law no. 78/2000 should apply only to corruption offenses, thus establishing the autonomy from the provisions of art. 297 of the Criminal Code, even if it generally resumes the material element of the objective side of service offenses. It is true that the legal norm provided by 13^2 of Law 78/2000 is an incomplete norm, reason for which, to complete the incrimination the legislator introduced in the construction of the crime also the elements of the general crime of abuse of office, which does not lead to the idea that it merged two offenses into one.

5. Here is how the situation becomes explicable in which the prosecutor, author of the Indictment, not added to the legal framework, the provisions of art. 309 of the Criminal Code, because it was strictly related to the provisions of art. 13^2 of Law 78/2000. From this point of view, it can be considered that the principle of legality of incriminations and punishments has been respected.

6. The difference between art. 297 Criminal Code and art. 13^2 of Law 78/2000 is essential and derives from the quality of the active subject, respectively from the difference of essence of the immediate follow-up.

Furthermore, in view of the considerations in Decision C.C.R. no. 400/2016, Decision no. 5/2019 R.I.L. of Î.C.C.J. and the C.C.R. no. 405/2016 another clear distinction is between 'damage' and 'improper use'.

The damage caused to the natural or legal person, within the meaning of the criminal law - art. 297 of the Criminal Code - and of the constitutional doctrine (see Decision no. 650/2021), has the meaning of certain, effective, well-determined prejudice (C.C.R. Decision no. 405/2016 paragraph 84).

[8] Decision no. 20/2014 of I.C.C.J, C.d.c.d. published in Official Monitor no. 766/22 October 2014 (forensic technical expert); Decision no. 26/2014 of I.C.C.J, C.d.c.d. published in Official Monitor no. 24/31 January 2015 (surgeon)

Improper use. Analyzing the art. 13^2 of Law no. 78/2000, the element of particularity is given by the certain realization of a certain immediate consequence - "the civil servant obtained for himself or for another, an undue benefit" (paragraph 15, CCR Decision no. 400/2016).

Improper use implies a legally undue advantage for an activity performed by an official in the course of his service and which is given to him either to determine him to fulfill, not to fulfill, to delay the fulfillment of an act regarding his duties or to do an act contrary to these duties.

In Decision of the C.C.R. no. 405/2016 (paragraph 85) it was established that "through the offense provided by the provisions of art. 13^2 of Law no. 78/2000, the legislator wanted to incriminate the act of abuse of office and when, in addition to the immediate consequence provided by the provisions of the Criminal Code, the active subject of the crime obtains for himself or for another an undue benefit. Regarding the phrase "obtained", the Court notes that it has, according to the Explanatory Dictionary of the Romanian language, the meaning of "received", "acquired", "achieved". With regard to the benefit obtained from the commission of the crime, the Court considers that it entails any patrimonial advantages, goods, commissions, loans, prizes, free services, employment, promotion in service, but also non-patrimonial advantages, provided that they be legally undue. The expression "for oneself or for another" refers to the destination of the benefits, by the phrase "for another" the legislator means to incriminate a collateral destination, deviated from the benefits obtained from the commission of this crime by the civil servant. Thus, the Court considers that the existence of a kinship / friendship relationship between the civil servant and the person who acquired the advantage is irrelevant, being essential the acquisition by an person (civil servant or third party) of an undue benefit."

7. The Constitutional Court established that "the crime of abuse of office is a crime of result, so that its consumption is related to the production of one of the consequences provided by the provisions of art. 297 of the Criminal Code, namely causing damage or injury to the rights or legitimate interests of a natural person or a legal person."[9] On the other hand, the result means a special consequence, by obtaining an undue benefit.

8. Article 309 of the Criminal Code has the following content "If the facts provided in art. 295, art. 297, art. 298, art. 300, art. 303, art. 304, art. 306 or art. 307 have produced particularly serious consequences, the special limits of the punishment provided by law are increased by half. "

It should be noted that once the criminal law is of strict interpretation, which implies the exclusion of the analogy or the extension of the incrimination text, article 13^2 of Law no. 78/2000 does not find its place in the enumeration from art. 309 of the Criminal Code, of the articles that consecrate at the discretion of the legislator an aggravated form of some criminal acts and therefore neither the practitioner and even less the judge or the prosecutor, cannot add to the incrimination keeping as a classification this text of law.

9. The fact that we are facing different consequences, distinct between damage and undue use, is much better in the content of Decision no. 5 / 02.05.2019 (A RIL of the

[9] Paragraph 84 from Decision C.C.R. no. 405 from 15 June 2016, published in Official Monitor no. 517 from 8 July 2016.

ICCJ), where the recitals show "the date of the crime and, implicitly, the date from which the limitation period of criminal liability begins in the case of simple damages or the realization of an undue benefit for a period of time is understood the moment of the appearance of the first damage or of the obtaining of the first undue benefit. " So, the explanatory alternative of the constitutional commentator leaves no room for interpretation. Crimes are different.

By changing the legal classification, the court cannot change the legal nature of the immediate consequence, respectively the damage, and as such it cannot be related to art. 13^2 of Law no. 78/2000, because it incriminates something completely different, namely obtaining for oneself or for another an undue benefit.

The more it is required this particularity of art. 13^2 of Law no. 78/2000, if the indictment in the constitutive content of the retained crime does not demonstrate the immediate consequence, respectively the improper use.

10. Regarding the phrase "improper use", the Constitutional Court also noted that, analyzing the constitutionality of the provisions of art. 13^2 of Law no. 78/2000, found that the notion of undue benefit used by the legislator is not equivocal, as it has its doctrinal explanations outlined over the years and reflects the fact that the benefit thus obtained is "legally undue". Moreover, as long as *ubi lex non distinguit, nec nos distinguere debemus*, then the benefit implies any patrimonial advantages, goods, commissions, loans, prizes, free services, employment, promotion in service, but also non-patrimonial advantages, provided that they be legally undue.[10]

11. Illegal conduct cannot have two immediate results in the same legal framework, meaning also harm and undue benefit, because they are the proper consequences of separate crimes.

Once it has been established by the judge that we are in the presence of art. 309 of the Criminal Code, the damage was done in terms of the objective side and the constitutive content of the crime of abuse of office prev. of art. 297 Penal Code, rap. the art. 309 of the Criminal Code, thus lacking the immediate follow-up of the objective side of the crime of abuse of office, prev. of art. 13^2 of Law no. 78/2000 (see CCR Decision no. 418/2019).

It is true that it could be considered in an excess of legal framework, that any immediate consequence or damage of the objective side of the crime would constitute at the same time an undue benefit, which would unjustifiably attract the application of Article 13^2 of Law no. 78/2000.

"The constitutional principle of legality does not have the meaning of uniformity, with the possibility of establishing different legal regulations for situations that are different, if it is justified rationally and objectively" (CCR Decision No 400/2016 (R) paragraph 27).

12. "Prohibited conduct must be imposed by the legislator even by law (...), not being able to be deduced, possibly from the reasoning of the judge, to replace the legal norms" (Decision C.C.R. no. 405/2016 - paragraph no. 61). "In our legal system, jurisprudence is not a source of law, the meaning of a rule cannot be clarified in this way, because in such

[10] Paragraph 23 of Decision C.C.R. no. 547 from 13 July 2017, published in Official Monitor no. 952 from 29 November 2017.

a case, the judge would become a legislator" (Decision C.C.R. no. 23/2016 - paragraph 16).

3. INSTEAD OF CONCLUSIONS

Law no. 78/2000 constitutes a special regulation, derogating from the common law, having as object corruption offenses and marks a clear difference from Title V, Chapter II of the Criminal Code, which has as object service offenses (eg art. 297 Code Criminal).

As such, considering all the above, we consider that it is necessary to remember that we are in front of two offenses of abuse of office, regulated separately in the criminal legislation, one provided by art. 297 and art. 309 of the Criminal Code, and another provided by art. 13^2 of Law no. 78/2000, otherwise it would have violated the *ne bis in idem* principle. Once we have the same violations of duties (the same ways of accomplishing the material element), but with different immediate consequences, no combined offense can be retained, respectively no single offense resulting from the combination of two other offenses or the two offenses in competition, because in this case the special rule is, in fact, also the incrimination of a particular form of abuse (text competition).

It is true, the court is free to decide what legal framework it considers to be correct.

If we stick to the above demonstration, we consider that the notions of "harm" and "improper use" are mutually exclusive, so that the legal classification of the deed implies the abuse of office in two main variants, art. 297 Criminal Code and art. 13^2 of Law no. 78/2

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