Cristina Nicorici, PhD, Assistant Professor
Faculty of Law West University of Timisoara, Romania

THE PRINCIPLE OF LEGALITY AND GENERAL CRIMES – THE PARTICULAR CASE OF ABUSE IN SERVICE OF PUBLIC OFFICER

Key words: principle of legality, predictability of the law, accessibility of the law, clarity of criminal law, criminal responsibility, public officer, clause of subsidiarity

Summary

The principle of legality is a fundamental part of the criminal law system and a rule that is a part of the positive legislation in most of the countries. One of its components – the law – should state clearly, in a predictive and comprehensible manner, what actions or inaction constitute crimes. Many countries including Romania attempt to regulate and penalize, as precisely as possible in accordance with this principle, by the means stipulated in criminal law, the actions of public officers who fulfil their duties improperly, or fail to fulfil them, with the intention to cause damage to others. The current article considers the crime of abuse of office, – an incrimination that aims to define all types of conduct of a public officer that are not regulated by law as more specific crimes. However, such a general incrimination invariably is on the edge of the principle of legality. The aim of this article is to analyse the ways how the crime of abuse of office has been regarded in Romania in the latest years, in connection with the principle of legality.

Introduction

Specific and clear wording should be used when criminalizing a conduct by the legislator. This is an important rule, directly derived from the principle of legality – a core and fundamental rule of the continental and the common-law system. Crimes should be regulated in a clear manner, to enable every citizen to understand what they should do or refrain from doing, and what actions engender criminal liability. Definitions of crimes should not be excessively narrow, in order to avoid a situation when dangerous conduct, which could not be penalized by other branches of law, remains outside of the scope defined in the law (notably, in criminal law, an interpretation by analogy is only permitted if it is in the favour
of the defendant, hence the types of conduct which are not expressly stipulated by law cannot be penalized by using analogy). At the same time, the regulated conduct should not be defined excessively broadly or generally, aiming to punish a person for every action or inaction, instead of defining specific types of conduct which are considered dangerous for the society.

These guidelines have as a goal to protect, in the end, the freedom of the citizens, who should not have to live thinking all the time whether their conduct can make them criminally liable or not.

In Romania, an extensive discussion has taken place during the past 10–15 years, regarding a crime which was considered, by many, to be very general, and which remained on the edge of the rules concerning the principle of legality. Article 297 of the Romanian Criminal Code penalizes the abuse of office of a public officer. This crime was punishable previously, in the Criminal Code of 1969, Articles No. 246–248. Several times in the past ten years, the legislator tried to modify the content of this crime, and occasionally the Constitutional Court of Romania was questioned with regard to the predictability of the law. However, the last 10–15 years have showed, since the fight against corruption has been intensified, that many prosecutors have sought conviction for any harmful conduct of a public officer under the crime of abuse of office1. In this article, the author will analyse some of the problems pertaining to predictability of this crime from the perspective of the principle of legality.

1. What is an abuse of office?

Abuse is defined by Black’s Law Dictionary as “a departure from legal or reasonable use”2, while abuse of power is defined by the same dictionary as “the misuse or improper exercise of one’s authority, the exercise of statutorily or otherwise duly conferred authority in a way that is tortious, unlawful, or outside its proper scope”3.

The social value protected by punishment entailed by the crime of abuse of office is a beneficial development of work relations involving public officers4. In some authors’ opinion5, the social value protected thereby is represented by

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3 Ibid., p. 13.
the legitimate interest of all persons to be safeguarded from the abuse of office by public officers.

Before 2023, the abuse of office was penalized in Romania according to three different crimes defined in Articles 246, 247, 248 of the former Romanian Criminal Code. Article 246 stated: “the public officer which, in exercising their duty of service, does not fulfil an act or fulfils it incorrectly, thereby causing an injury to the legal interest of a person, is punishable by 3 months to 7 years of imprisonment”. Article 247 stated: “the restriction of the rights of a citizen by a public officer, based on race, nationality, sex or religion, is punishable from 6 months to 5 years of prison”. Article 248 stated: “the public officer which, in exercising their duty of service, does not fulfil an act or fulfils it incorrectly, thereby causing a problem in the development of an organization as stipulated in Article 145 or bringing about a damage to the public resources, is punishable with imprisonment from 6 months to 5 years”. In the new Criminal Code in force since 2014, the abuse of office has been regulated in Article 297, establishing a prison sentence from 2 to 7 years to the public officer who, in exercising their duty of service, does not fulfil an act or fulfils it incorrectly, thereby causing an injury to the legal interest of a person.

It was shown by some authors that this crime gives rise to serious problems with regard to the principle of offensive criminal law, and derisory scenarios can fall under the criminal law. One of the main analysed problems is whether any action or inaction of the officer, which turns out to be damaging to a person, can be viewed as the crime of abuse of office, as the law does not provide a clear distinction between criminal and disciplinary liability. It has been demonstrated through an example of public officer who closes its office five minutes earlier than scheduled, thereby preventing a person X from paying their taxes, and causing X to pay one day of penalty for failing to pay their taxes on time – this would constitute a typical conduct involving abuse of office. It would also be a crime if a salesperson of a small store closed the store 2 minutes before the closing time, and thereby preventing a person from buying something (therefore causing a material damage to the store).

As a theoretical argument, it was invoked that criminal law should not penalize every damaging conduct of a public officer, as there are other (civil, administrative, disciplinary) forms of liability. Ultimately, criminal responsibility is the last resort, as it has the most detrimental effect upon individual freedom. In another opinion, it was appreciated that by its decision No. 405/2016, the court implicitly stated that

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7 Ibid., p. 293.
8 Ibid., p. 441.
9 Ibid.
10 Udroiu M. 2020, p. 775.
the facts that lacked importance or could incur disciplinary liability could not be considered an abuse of office. The author will explore this decision below.

2. Interpretations and attempts to modify the crime of abuse of office

It took several years since the fight against corruption was declared a national priority and the crime of abuse of office began to be used by the prosecutors before the decision No. 405/2016 of the Constitutional Court of Romania\(^\text{11}\). This decision considered the predictability of Article 297(1) of the Romanian Criminal Code, and analysed its compatibility with the principle of legality in the light of the European Convention of Human Rights.

The Court showed that a person could not be penalized for failure to comply with a duty which was not regulated at a normative level. The reason for this, the Court argued in its decision, was that solely the legislator could establish the conduct that the subject of the law was obliged to respect. If the faulty actions of the public officer were not compared to the standards imposed by the law, this would mean that the content of the crime of abuse of office would be regulated both by the legislator and by the Government or other persons (including private persons – for acts that fall under the labour law). Such situation could not be accepted under the Romanian legal system. In Romania, only the legislator can establish the conduct that the public officer is obliged to comply with, under the threat of the criminal penalty, as the criminal liability is the most serious form of liability, and the consequences of applying the criminal law are the most severe. Therefore, it was concluded that “inadequate compliance with the duties” is to be interpreted as “breaking the law”.

It would seem that this decision represented a guarantee of the principle of legality concerning Article 297 of the Criminal Code (although it generated other problems, for instance, if this standard could apply in the case of manslaughter, where generally the rules of conduct of professionals are stipulated in an act inferior to an organic law).

After this decision of the Constitutional Court, two directions of interpretation emerged in practice: according to the first one, of the strict interpretation of the decision, the abuse of office would exist only if the attributions of the public offer were regulated by primary legislation. According to the second direction, of the broad interpretation of the decision, it is considered that, in order to discuss a typical fact, it is sufficient to identify the violation of a legal provision, even if it is very general, which regulates the activity of the public officer at a level of

\(^{11}\) Judgement of the Constitutional Court of Romania, No. 405/2016, published in Official Monitor No. 517 of 8 July 2016.
principle\textsuperscript{12}. In the actual event, the prosecutors generally identified very broad, generic rules applicable to the public officer and then invoked that the public officer, by breaking those rules, had committed the crime of abuse of office. The Supreme Court of Romania also argued at the time, in several decisions, that, if the primary legislation contained fundamental duties or principles of the public officer, it constituted sufficient grounds for a conviction for abuse of office, even if public officer’s particular duties were regulated through secondary legislation.

This direction was criticized according to the doctrine\textsuperscript{13}, as it actually represented an attempt to return to the times before the Decision No. 405/2016. This was because, as it was argued, for every public officer it was possible to identify, at the level of the law that regulates their activities, the rules of conduct, generic dispositions regarding the public officer’s domain of activity defined in the primary legislation.

Admittedly, it seems that in the recent years the Supreme Court of Justice has changed its direction of reasoning, and has recognized that solely a general regulation of a principle or of a duty of conduct in the primary legislation is not sufficient to convict a person for abuse of office\textsuperscript{14}.

In a following decision\textsuperscript{15} of 2017, the Constitutional Court of Romania once again analysed the possible constitutional breach of Article 297 of the Romanian Criminal Code, and showed that in order to make a delimitation to differentiate between the forms of liability, the only criterion used, according to positive legislation, was the value of the act whereby the duties of the public officer were regulated (in primary or secondary legislation). Or, in order to make a proper distinction, the Court argued, that a threshold of the damage should be established in order to better appreciate the necessity of a criminal penalty.

In the same year, after this decision, an attempt to modify\textsuperscript{16} Article 297 was made by the legislator. The intention was to introduce a monetary threshold: the definition of the conduct by public officer remained the same, but the legislator wanted to introduce a damage amount – the conduct would have attracted a criminal responsibility only if the damage surpassed 200 000 RON. This attempt of modification (made by Governmental decision, not by law – an exception of ruling in Romania), and adopted during the night, generated massive protests in the Romanian society (around 300 000 in Bucharest only\textsuperscript{17}).


\textsuperscript{13} Bogdan S., Serban D. A. 2020, p. 379.

\textsuperscript{14} See, for instance, judgement No. 338/A/13.11.2023 of the Supreme Court of Romania.

\textsuperscript{15} Judgement of the Constitutional Court of Romania, No. 392 of 6 June 2017. Public Monitor No. 504 of 30 June 2017.

\textsuperscript{16} Governmental Order of Emergency No. 13/2017.

\textsuperscript{17} See, for instance, Cinci ani de la “Noaptea, ca hotii”: cei care au emis OUG 13/2017 sunt la putere [Five years since ‘At night, like thieves’: those who issued GEO 13/2017 are in power]. Available: https://defapt.ro/cinci-ani-de-la-noaptea-ca-hotii-cei-care-au-emis-oug-13-2017-sunt-la-putere/ [viewed 05.12.2023.].
The protesters contested not only the modification itself, but it was considered that the modification was made with a particular intention, as the prime minister of Romania at that time, Liviu Dragnea, was being accused of abuse of office, and would have escaped prison if the modification would have entered into force. After a week of protest, the Government abandoned the project 18.

A new attempt of modification was made in 2023, when the legislator tried again to introduce a new threshold of value for this crime. Initially, the Parliament tried to introduce a limit of 250 000 RON, but this decision repeatedly caused a big scandal in the Romanian society. A second proposal put forth a limit of 9000 RON (around 2000 EUR), which again generated protest 19. Ultimately, by Law No. 200/2023 20, the only modification that was introduced – the content of the crime was modified to expressly state that by acting inadequately, the officer is breaking a primary norm of the legislation.

The Supreme Court of Justice of Romania asked, this time, the Constitutional Court of Romania whether this type of modification is in accordance with the Constitution. By decision No. 283 of 17 May 2023 21, the Constitutional Court of Romania was called to analyse, once again, whether a threshold was necessary to consider abuse of office a crime, and the answer of the court, was, surprisingly, that there was no need for a monetary limit when it came to abuse of office (thus contradicting its previous decision).

It remains a crime which has been subject to many socially political and juridical controversies 22. It was argued that this formulation of a crime made it very easy to substantiate a conviction, and very difficult for a judge to motivate an acquittal. All the elements of stability of an accusation are affected in this case by the generality of the incrimination: the conduct is very generically described, the fact is commissive or omissive, the legislation which indicates the fault of the public officer is very complex, and the result is also very generically described, and making it very challenging to identify a conduct whereby the public officer does not respect their duties of service, but an injury of the interests of a person does not appear 23.

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18 Liviu Dragnea was convicted later – see Liviu Dragnea a fost condamnat definitiv la trei ani si jumatate de inchisoare [Liviu Dragnea was definitively sentenced to three and a half years in prison]. Available: https://www.hotnews.ro/stiri-esential-23166668-breaking-news-liviu-dragnea-afla-sentinta.htm.


23 Ibid., pp. 367–368.
Conclusions

1. With regard to a very similar instance from the Estonian Criminal Code, the European Court of Human Rights has already showed that the interpretation and application of the article regarding the abuse of office has implied very broad notions and general criteria, stating that the incrimination is not respecting the standard of clarity and predictability impose by the Convention.24

2. Therefore, it can be concluded, that the necessity of this incrimination can (and should) be subject of a serious evaluation, although at present there is a major reticence of the actors from the judicial system to lower the importance of this incrimination in practice.25

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