RELEVANT JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF ROMANIA

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The Principle of Legality in Criminalization

The meaning of the concept of „law", with reference to Decision no. 283 of 17 May 2023, published in the Official Gazette of Romania, Part I, no. 488 of 6 June 2023 and Decision no. 284 of 17 May 2023, published in the Official Gazette of Romania, Part I, no. 490 of 6 June 2023.

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1. Material and formal criteria in defining the concept of „law"

• «With regard to the legislative activity, (...) the provisions of Art. 61 para. (1), second sentence, of the Constitution confers on the Parliament the status of sole legislative authority of the country, and, by virtue of this legislative monopoly, the Parliament is the only public authority that adopts laws. The concept of „law" is defined by reference to two criteria: the formal or organic and the material. According to the first criterion, a law is characterised as an act of the legislative authority, identified by the body called upon to adopt it and the procedure to be followed for that purpose. This conclusion follows from a combination of the provisions of Article 61(1), second sentence of the Constitution with the provisions of Articles 67, 76, 77 and 78, according to which the Chamber of Deputies and the Senate adopt laws which are subject to promulgation by the President of Romania and which enter into force three days after their publication in the Official Gazette of Romania, Part I, unless their content provides for a later date. The material criterion takes into account the content of the regulation, being defined in consideration of the object of the rule, i.e. the nature of the social relations regulated, in this respect the Parliament having full legislative power (...). By Decision no. 838 of 27 May 2009, published in the Official Gazette of Romania, Part I, no. 461 of 3 July 2009, the Court ruled that "as regards legislative power, pursuant to Article 61 para. (1) of the Constitution, «The Parliament is the supreme representative body of the Romanian people and the sole legislative

authority of the country». In addition to the Parliament's legislative monopoly, the Constitution, in Article 115, enshrines legislative delegation, by virtue of which the Government may issue simple or emergency ordinances. Thus, the transfer of legislative powers to the executive authority is carried out by an act of will of the Parliament or, by constitutional means, in extraordinary circumstances, and only under parliamentary control".» (Decision no. 283/2023, paras. 85-86).

2. Primary regulatory acts

• «With regard to the notion of criminal "law" and its retroactive application, the case law of the Constitutional Court takes into account the primary regulatory act adopted by the Parliament or the Government, as the case may be, and, by assimilation, the effects of the Constitutional Court's decision finding an incriminating rule unconstitutional. In this regard, by Decision no. 619 of 11 October 2016, published in the Official Gazette of Romania, Part I, no. 6 of 4 January 2017, para. 44, it was established, with regard to the material requirements to which the legislator is bound in criminal matters, that the legislator has the power to incriminate acts that pose a threat to the social values protected by the text of the Constitution, an expression of the character of a state based on the rule of law and democracy, or to decriminalize offences when the need to use criminal means is no longer justified, but it is clear that its margin of appreciation is not absolute (see also the Decision of the Constitutional Court no. 2 of 15 January 2014, published in the Official Gazette of Romania, Part I, no. 71 of 29 January 2014). Thus, criminal policy measures must be promoted in accordance with the values, requirements and principles enshrined in the Constitution and expressly and unequivocally assumed by the Parliament. Therefore, the Court constantly emphasises in its decisions that the incrimination/de-incrimination of certain acts or the reconfiguration of the constituent elements of an offence is within the margin of appreciation of the legislator, a margin which is not absolute, being limited by constitutional principles, values and requirements (Decision no. 683 of 19 November 2014, published in the Official Journal of Romania, Part I, no. 47 of 20 January 2015, paragraph 16, and ad similis Decision no. 54 of 24 February 2015, published in the Official Journal of Romania, Part I, no. 257 of 17 April 2015). Also in the same sense, the Court stressed that the margin of appreciation of the legislator, when it calls into question the limitation of a constitutional right, in this case Article 23 of the Constitution (Decision no. 603 of 6 October 2015, published in the Official Gazette of Romania, Part I, no. 845 of 13 November 2015, paragraph 23), or the failure to sanction the violation of social relations which would result in the existence of a threat to the institutions of the rule of law, democracy, human rights, equity and social justice (Constitutional Court Decision no. 2 of 15 January 2014) is limited and subject to strict control by the Constitutional Court. However, any

measure relating to criminal policy must be achieved through a substantively clear, transparent, unequivocal criminal law norm expressly assumed by the Parliament.» (Decision no. 283/2023, para. 83, Decision no. 284/2023, para. 152).

3. Distinction between primary regulatory acts and Constitutional Court decisions, components of the "normative order of the State".

• «According to the case law of the Constitutional Court, primary regulatory acts and decisions of the constitutional review court finding unconstitutionality are part of the normative order of the State (Decision no. 847 of 8 July 2008, published in the Official Gazette of Romania, Part I, no. 605 of 14 August 2008).» (Decision no. 283/2023, para. 84, Decision no. 284/2023, para. 153).

4. Pre-constitutional laws

• «With reference to the phrase "or by another legal act which, at the time of its adoption, had the force of law" in Article I(3) [reffering to Article 297(1)] and Article V(1) of the analysed law, –"the enumeration found in article I(3) [reffering to Article 297(1)] and Article V(1) of the criticized law regarding expressly identified and established normative acts - whose violation entails the retention of the offense of abuse of office - refers, in principle, to primary regulatory acts adopted under the 1991 Constitution, in a formal and material sense. If the legislature had confined itself to that list, however, it would not have covered the scope of the pre-constitutional legislative acts. Instead, by adding the phrase criticised, he has implicitly assimilated pre-constitutional law (adopted, for example, under the Constitutions of 1923, 1938, 1948, 1952, 1965, as the case may be, or Decree-Law no. 92/1990) to the law in the sense of a primary regulatory act adopted by the country's legislative authority, having regard to its very title. On the other hand, since there are pre-constitutional primary regulatory acts in respect of which no such assimilation/conversion can be made (for example, the regulatory decrees of the Council of State adopted under the 1965 Constitution), in view of their nature and title and the person who issued them, the contested legislation expressly covers that sphere of primary regulatory acts. The phrase criticised therefore has a dual function: on the one hand, it implicitly assimilates, conceptually, the pre-constitutional law with the law adopted after the 1991 Constitution, which means that the concept of law used covers primary regulatory acts which have that title under the constitutional regime under which they were adopted, and, on the other hand, it explicitly brings within the scope of the

primary regulatory acts whose infringement leads to the offence of abuse of office those which, at the time of their adoption, had the force of law, that is to say, were also considered to be primary regulatory acts (Decision no. 283 /2023, para. 64)» (Decision no. 283/2023, para. 82)

5. The judgment is not "law" in either a material or formal sense

5.1 Judgments handed down by ordinary courts

• «The Constitutional Court, in its case law, has held that, in the Romanian constitutional system, the judgment delivered by the ordinary courts does not constitute a formal source of constitutional law (see mutatis mutandis Constitutional Court Decision no. 1. 601 of 9 December 2010, published in the Official Journal of Romania, Part I, no. 91 of 4 February 2011, Decision no. 282 of 4 June 2020, Official Journal of Romania, Part I, no. 693 of 3 August 2020, para. 20, Decision no. 431 of 17 June 2021, published in the Official Journal of Romania, Part I, no. 1027 of 27 October 2021, para. 62). The Court found that the authority of res judicata of a judgment is circumscribed to a specific situation, the judgment not having the legal value of a formal source of constitutional law (Decision no. 617 of 12 June 2012, published in the Official Journal of Romania, Part I, no. 528 of 30 July 2012, and Decision no. 105 of 27 February 2014, published in the Official Journal of Romania, Part I, no. 371 of 20 May 2014).Therefore, neither the judgments delivered following appeals in the interest of the law nor the prior judgments of the High Court of Cassation and Justice constitute a formal source of constitutional law (Decision no. 384 of 31 May 2018, published in the Official Journal of Romania, Part I, no. 702 13 August 2018, par. 57). In several decisions, the Court has established that legislating is a competence of the original or delegated legislator, as the case may be, and the courts cannot take over such competence by the judgments they deliver. Thus, courts are not allowed to establish/amend/complement/repeal primary regulatory rules [Decision no. 685 of 7 November 2018, published in the Official Journal of Romania, Part I, no. 1021 of 29 November 2018, paragraphs 138 and 175, Decision no. 26 of 16 January 2019, published in the Official Journal of Romania, Part I, no. 193 of 12 March 2019, paragraph 139, and Decision no. 417 of 3 July 2019, published in the Official Journal of Romania, Part I, no. 825 of 10 October 2019, paragraph 115]. The meaning of Article 124 para. (1) of the Constitution is that the bodies which administer justice and which, according to Art. 126 para. (1) of the Constitution, which are the courts, must respect the law, whether substantive or procedural, which determines the conduct of natural and legal persons in the civil circuit and in the public sphere. The Court also held that it is unanimously accepted that "the judge's duties involve identifying the applicable rule, analysing its content

and adapting it to the legal facts which he has established, so that the legislator, unable to foresee all legal situations, leaves part of the initiative to the judge, who has the power to lay down the law. Thus, in his task of interpreting the law, the judge must strike a balance between the spirit and the letter of the law, between the requirements of drafting and the aim pursued by the legislator, without having the power to legislate by substituting the authority competent in this area". The Court also found that "by virtue of the constitutional texts mentioned, the Parliament and, by legislative delegation, under the terms of Article 115 of the Constitution, the Government have the power to establish, amend and repeal legal rules of general application. The courts have no such power, their constitutional mission being to achieve justice - Article 126(1) of the Constitution - i.e. to settle, by applying the law, disputes between subjects of law as to the existence, extent and exercise of their subjective rights" (Decision no. 838 of 27 May 2009, cited above, and, for the purposes of the aforementioned, Decision no. 685 of 7 November 2018, cited above, paragraphs 138-140)" (Decision no. 283/2023, para. 87-89)».

- "The judgment cannot be subsumed under the concept of criminal law, it cannot be qualified as more favourable or not, as this character is inherent and intrinsically linked to the law. The court judgment enshrines a way of interpreting the legal rule, without having the same legitimacy and authority in terms of the principle of the separation and balance of powers in the State". (Decision no. 283/2023, para. 92, Decision no. 284/2023, para. 156)

5.2. Judgments handed down by the High Court of Cassation and Justice in the resolution of appeals in the interest of the law. The act of the High Court of Cassation and Justice does not have normative value, but interpretative value, so that it cannot be given the effect of an activity generating or overturning rules.

- «90. As regards the jurisdiction of the High Court of Cassation and Justice, which is reflected in the infra-constitutional regulation of the appeal in the interest of the law, it is provided for in Art. 126 para. (3) of the Constitution, according to which "The High Court of Cassation and Justice shall ensure the uniform interpretation and application of the law by the other courts, in accordance with its jurisdiction". The Constitutional Court ruled, by Decision no. 838 of 27 May 2009, that "in exercising its power under Article 126 para.(3) of the Constitution, the High Court of Cassation and Justice has the obligation to ensure the uniform interpretation and application of the law by all courts, in compliance with the fundamental principle of separation and balance of powers, enshrined in Art. 1 para. (4) of the Romanian Constitution. The High Court of Cassation and Justice has no constitutional competence to establish, amend or repeal legal rules with the force of law or to review their constitutionality."

Thus, the jurisdiction of the High Court of Cassation and Justice to decide on appeals in the interest of the law is twofold - only with regard to "the interpretation and uniform application of the law" and only with regard to "the other courts" [Decision no. 206 of 29 April 2013, published in the Official Gazette of Romania, Part I, no. 350 of 13 June 2013]. The judiciary, through the High Court of Cassation and Justice, has the constitutional role of giving a legal text certain interpretations, with the aim of uniform application by the courts. However, this does not imply that the Supreme Court can substitute itself for the Parliament, the sole legislator in the State, but it does imply certain constitutional requirements relating to the concrete manner in which the interpretation is carried out [Decision no. 198 of 9 April 2019, published in the Official Gazette of Romania, Part I, no. 577 of 15 July 2019, paragraph 24, or Decision no. 653 of 17 October 2019, published in the Official Gazette of Romania, Part I, no. 32 of 17 January 2020, paragraph 16]. (...)

93. Examining the above case-law, the Court holds that a decision rendered in the determination of a point of law or in the resolution of an appeal in the interest of the law, even if binding on the courts, cannot be converted into a legal rule. In exercising its powers, the supreme court does not abrogate a rule of law, but interprets it, filters it through the factual and legal situations with which the courts are confronted, determining its meaning, limits, framework and method of application. Therefore, such a decision cannot have normative value, but is exclusively attached to the authority of res judicata, it does not take over the normative force and authority of the primary regulatory acts and it is not identified or assimilated with them. It has a well-defined legal shape and character, guides judicial practice and requires judges to apply it. However, in no way can it be said, it would be attached to a norm-generating component.

94. (...) Although it may be established by a decision rendered on a point of law or in an appeal in the interest of the law that certain factual elements do or do not meet the constitutive or typical elements of an offence, the source of the interpretation lies in the rule, which does not change/modify itself, so that it cannot be held that the interpretation has in itself introduced an innovative element into the very content of the normative act. On the contrary, the interpretative element does not have the conceptual ability to challenge the normative authority of the law or to reconfigure the norm, but to decipher/identify/decode its content. The decision rendered within the framework of the mechanisms for unifying judicial practice gives a certain meaning to the legal question it deals with, so that it may or may not be circumscribed by the incriminating rule, but it does not change/modify the rule.

95. In these circumstances, the legislature cannot confer on the decision of the High Court of Cassation and Justice the legal effects of a law, nor retroactive power by means of a legal fiction. (...) In the present case, the Court finds that, even if the decision of the High Court of Cassation and Justice is per absurdum assimilated by the

legislature to the law, it cannot have an innovative effect, it cannot add a new element to the rule (it cannot eliminate or add elements to the legal rule) in order to have the effect of a criminal law of decriminalisation within the meaning of Article 4 of the Criminal Code or of a more favourable criminal law within the meaning of Articles 5 and 6 of the Criminal Code, so that the aim pursued cannot be achieved from a conceptual point of view. The Court points out that it is the rule which may have retroactive force and that the legislature, in order not to act arbitrarily, may assimilate comparable elements to it, that is to say, acts which concern the normative sphere and not acts which apply the rules. Such a legal fiction would therefore be nothing but arbitrary and would only call into question the separation of powers in the state, which is a legal aporia.

96. (...) According to Articles 474^1 and 477^1 of the Code of Criminal Procedure, the effects of the decision of the High Court of Cassation and Justice – pronounced in deciding a question of law or in deciding an appeal in the interest of the law – cease in the event of repeal, finding of unconstitutionality or modification of the legal provision which gave rise to the question of law decided, unless it persists in the new regulation. At the same time, the Constitutional Court's Decision no. 265 of 6 May 2014, paragraph 56, held that an interpretation of the legal rule established by the decision of the High Court of Cassation and Justice - handed down in the resolution of a question of law or in the resolution of an appeal in the interest of the law - is unconstitutional, which causes its effects to cease. It follows that **the act of the High Court of Cassation and Justice does not have normative value but interpretative value, so that it cannot be given the effectiveness of an activity which generates rules or overrules them.**

97. Consequently, the legislature may not under any circumstances assimilate the decision of the High Court of Cassation and Justice handed down in deciding a question of law or in deciding an appeal in the interest of the law with a law and thus attach to it the effects which a law of decriminalisation entails, since it does not originate from a public authority acting in the sphere of generating legal rules or eliminating them and does not make any normative contribution of its own.» (Decision no. 283/2023, para. 90-97: see also Decision no. 284/2023, para. 155-160).

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