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The New Romanian Criminal Code and the Current Romanian Criminal Code, Related to Prior Complaint in Case of Abuse of Office

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Abstract: According to paragraph 2, art. 258, Criminal Code, introduced by the sole article of Law. no. 58 as of 19th March 2008, published in the Official Gazette no. 228/25 as of March 2008, "In the case provided at para 1, for the facts set out in art. 246, 247 and 250 para. 1-4, the criminal proceedings shall be initiated at the prior complaint of the aggrieved party, except for those that have been committed by a person out of those mentioned in Article 147, para 1". Thus, the criminal proceedings shall be initiated at the prior complaint of the aggrieved party in case of *abuse of office against the interests of persons, abuse of office by limitation of some rights, abusive behavior*, when these crimes are committed by other officials, according to art. 147. para 2, Criminal Code. Changes brought by the Romanian Criminal legislator to art. 258, Criminal Code, had in view, obviously, the nature of the protected interest. The legislator appraised that there is no justification to further allow the initiation of ex officio criminal proceedings in case of injuring some private interests like those covered by these three articles (Articles 246, 247, 250, para. 1 - 4 Criminal Code). In the new Criminal Code, the legislator does no longer provides the condition of formulating the prior complaint in the case of perpetrating the facts of abuse of office by other officials or by other persons assimilated to public officials, as in the actual Criminal Code. As in the new Criminal Code it is not provided the existence of prior complaint of the aggrieved party, as condition of the fact of being susceptible of punishment and initiating the judicial procedure, in what concerns committing certain acts of abuse of office, makes that the actual Criminal Code becomes *mitior lex*.

Keywords: abuse of office; prior complaint; aggrieved party; more advantageous criminal law

1. General Considerations about the Prior Complaint

Lato sensu, any claim made by the person who was the victim of an offence is called a complaint. But when the law conditions the initiation of criminal proceedings by the intervention of a complaint, than the complaint is given the rating of prior, because it must precede any other procedural activity (Dongoroz, 1939, p. 580).

Professor Vintila Dongoroz shows that the prior complaint has as reason the need to enable the conciliation of the collective interests with the private interests, for those offenses to which protecting the latter prevails (Dongoroz, 1939, p. 581).

Arguments in supporting the conditioning of criminal accountability by the existence of a prior complaint for certain categories of offenses, although different in form, according to the types of criminal offenses, however, have a common feature, a common content - namely, the interest of **protecting individuals**, interest that becomes **social interest**, in relation to the consequences of the crime.

Criminal Law provides *in terminis* the offenses for which criminal proceedings shall be initiated at the prior complaint of the aggrieved party, the legislator itself delimiting the range of offenses for which

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criminal liability is dependent on the existence and maintenance of such a complaint, because it institutes an exception when starting the public action is left to the discretion of the aggrieved part.

In the offence indictment norm, it must be mentioned that the criminal proceedings for that office is initiated at prior complaint of the aggrieved party (Pascu, 2007, p. 374).

Practically, this condition delimits the range of offenses for which criminal liability is subject to the complaint, and the lack of prior complaint determines the removal of such liability (Dongoroz et al., 1970, p. 388), (Dima, 2007, p. 462), (Bică et al., 2007, p. 249).

In terms of technique's systematization, this condition is provided either by the same article that contains the indictment rule, at the end of the paragraph, as distinct hypothesis, or in another paragraph, usually at the end of the article, or in a different article, placed after the group of indictment rules, when the condition refers to more offences[1].

Obviously, the base of the regulation can only be the special part of the Criminal Code, special criminal or non-criminal laws that comprise provisions with criminal character.

The Constitutional Court's jurisprudence implies that the settlement of offences for which a precursory complaint is necessary, as well as of those when criminal prosecution is granted ex officio is an option of the legislator, and the distinction provided by law do neither mean privileges awarded to one of the parties in the penal process, nor discriminations[2].

2. The Prior Complaint in case of Abuse of Office in the Actual Romanian Criminal Code

According to paragraph 2, art. 258, Criminal Code, introduced by the sole article of Law. no. 58 as of 19th March 2008, published in the Official Gazette no. 228/25 as of March 2008, "In the case provided at para 1, for the facts set out in art. 246, 247 and 250 para. 1-4, the criminal proceedings shall be initiated at the prior complaint of the aggrieved party, except for those that have been committed by a person out of those mentioned in Article 147, para 1".

Thus, the criminal proceedings shall be initiated at the prior complaint of the aggrieved party in case of *abuse of office against the interests of persons, abuse of office by limitation of some rights, abusive behavior,* when these crimes are committed by other officials, according to art. 147. para 2, Criminal Code.

In case the criminal acts mentioned are committed by *public officials* mentioned in art. 147, para 1, Criminal Code, the criminal proceedings shall be initiated and they are exercised ex officio.

Thus, the criminal accountability for the acts under the provisions of art. 246, 247, 250, para1-4, Criminal Code, perpetrated by officials starting with 28th March, 2008, the date when the text of the law entered to force, is depended upon the existence (formulation) of prior complaint of the aggrieved party; in the absence of such complaint, it will be decided the termination of criminal prosecution or trial, as case may be (Sima, 2008, p. 120).

The changes brought by the Romanian Criminal legislator to art. 258 Criminal Code, had in view obviously, the nature of the protected interest. Moreover, in judicial practice, it was discussed often the issue whether the initiation of criminal proceedings, in case of such offences that injures a private

[1] This last technique of systematization is met in non-criminal special laws that comprise indictments. For example, Law no. 8/996 regarding the copyrights and related rights, art. 144; art. 277-297 from Law no. 53/2003 regarding Labor Code; art. 86 from Law no. 168/999 regarding solving the work conflicts. In Criminal law, for example, this technique is met in the case of punishing the theft at prior complaint, placing art. 210 after the law texts that comprise the indictment of simple theft and respectively, aggravated theft, it leads to the conclusion that previous complaint becomes a condition of punishment and proceeding both for simple and aggravated theft, when the conditions provided at art. 210, Criminal Code, are met.

[2] The Constitutional Court, decision no. 161/2000, published in the Official Journal no. 520/ 23.10.2000; The Constitutional Court, decision no. 197/2000, published in the Official Journal no. 543/ 01.11.2000

interest, should not have at its basis the previous complaints of the aggrieved party (Ciuncan, 2008, p. 105).

In the cases had in view, the social interest protected by criminal norm is a private one, and the aggrieved party has an essential role in the criminal investigation of these facts. Such a provision is also found in the case of some offenses against person or against property, mentioning that in the latter situation, the regulating regards the offenses against private property - breach of trust, fraudulent management, and destruction.

The legislator appraised that there is no justification to further allow the initiation ex officio of the criminal proceedings in case of injuring some private interests as those covered by the three articles (Articles 246, 247, 250, para. 1-4, Criminal Code.) (Ciuncan, 2008, p. 105). Neither the state, nor any person should substitute itself/himself/herself to the aggrieved party in case of abusive exercise of job requirements. It is natural also that failure to submit a prior complaint would prevent the initiation of criminal proceedings, and its withdrawal determines proceedings stoppage. Initiating ex officio the criminal proceedings in the cases mentioned makes room for abuse, under conditions where the investigation can be continued even against the legitimate interest of the aggrieved party.

From another point of view, prior complaint can be formulated only against an official, according to art. 147, para 2, Criminal Code, with the limitation imposed by art. 258 Criminal Code. According to art. 147, para 2, Criminal Code, "By *official*, it is understood *the person referred to in paragraph 1, as well as any employee* who performs a task under the service of a legal person, other than the ones provided at the previous paragraph", and according to paragraph 1, art. 147 Criminal Code, "by *public officials* it is understood any person that performs constantly or temporary, with any title, no matter how he/she was invested, a task of any nature, remunerated or not, under the service of a unit within those referred to by art. 143".

Having in view that the provisions of art. 258, paragraph 2, Criminal Code, makes exception from the situations when it is submitted a prior complaint for the abuse of office facts committed "by a person out of those provided by art. 147, paragraph 1", it results that the law text considers only the (other) officials, in the sense of art. 147, paragraph 2, second thesis.

3. The Abuse of Office in the New Romanian Criminal Code

Interesting to note is that, although art. 258 Criminal Code was completed in 2008 by Law no. 58, in 2009, by adopting a new Criminal Code by Law no. 286/2009, the criminal legislator changed its vision in this matter.

Thus, office offenses are regulated separately from the offenses in connection to the office (corruption offenses) in Chapter II of Title V from the new Criminal Code - special part ("Corruption and in office Offenses"- art. 289-309), the chapter covering the majority of existing offenses in the current Criminal Code, but it also brings novelties, in terms of systematizations and indictments, including offenses of misappropriation, misuse of position for sexual purposes, usurpation of office, violation of secrecy of correspondence, disclosure of state secrets, disclosure of secret office or nonpublic information, illegal obtaining of funds, embezzlement.

It should be emphasized that, in regulating the new Criminal Code, an important change was made (also) in what concerns the notion of *official*, in agreement with the solutions from other legislation. The notion of *official* shall designate, according to the provisions of art. 175, the person which performs attributions, with a permanent or temporary character, that allow him/her to take decisions, to participate to decisions taking or to influence taking them, within a legal person that develops an activity that it is not in the private domain.

At the same time, the legislator opted for *assimilating to officials* the physical persons that exercise *a profession of public interest*, for which a special certification is required from public authorities and which is subject to their control (notaries, Court Enforcement Officers, etc.). Although these persons

are not proper officials, they exercise public authority attributes that have been delegated through an act of the competent state authority and that are subject to its control, which justifies their assimilation to officials.

In what concerns the active subject in case of offenses in office, it is provided a case of reduction of sentence (with one third), as in the actual Criminal Code, if the facts are committed by "*other persons*" than public officials (*other officials or persons assimilated to public officials*), i.e. "*the persons* that perform, constantly or temporarily, with or without remuneration, a *job* of any kind under the *service* of a physical person out of those provided at art. 175 paragraph 2 or within any legal person" (art. 308, paragraph 1, the new Criminal Code).

The legislator does not provide also the condition of formulating the prior complaint in case of committing the facts of abuse of office by other officials or by the persons assimilated to public officials, as in the actual Criminal Code.

4. More Advantageous Criminal Law. Implications

As in the new Criminal Code it is not provided the existence of prior complaint of the aggrieved party, as condition of the fact of being susceptible of punishment and initiating the judicial procedure, in what concerns committing certain acts of abuse of office, makes that the actual Criminal Code becomes *mitior lex*.

In order to determine the more advantageous criminal law, doctrine and jurisprudence have established over time several criteria: conditions of indictment, criminal accountability conditions, and punishment.

An analysis of the law texts which provide the facts of abuse of office subject to the condition of prior complaint in the Criminal Code in force (abuse of office against the interests of persons, abuse of office by restriction of rights, abusive behavior) shows that, in principle, in terms of indictment conditions, they are the same in the two normative acts, even if the first two criminal offenses are reunited in the same article - art. 297 - (re)called marginally "*abuse of office*".

In this case, the law more advantageous will be that which provides more restrictive conditions for criminal accountability; the Criminal code in force, by providing the restrictive condition of prior complaint for criminal accountability will be the more advantageous law, as such, as relation to the new Criminal Code, which provides ex officio tracking of the respective offenses.

5. Conclusions

Regarding the application of criminal law in time, we point out one thing. It is known that prior complaint institution is a dual legal institution: the substantive criminal law and formal criminal. It is known that institution prior complaint is a dual legal institution: the substantive criminal law and formal criminal. If criminal legal norm refers to the conditions of criminal liability character liability - as was discussed in this approach, will prevail the substantial legal norm character, that will apply as a more favorable law. In this situation, will apply more favorable criminal law at any stage are the criminal proceedings, and the solution will be the cessation or termination of criminal prosecution, if not filed prior complaint.

If the complaint criminal legal norm concerns only the procedural aspect of the institution – hypothesis implies that the prior complaint is provided in both successive criminal law, but the application of criminal procedural rules differs, will apply the principle of immediate application of the standard criminal procedure.

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