



Controversies regarding the Change of the Legal Framework during the Trial of the Offense Stipulated by art. 132 of the Law no. 78/2000 referring to art. 297 para. 1 Criminal Code

Sandra Gradinaru¹

Abstract: The institution of changing the legal framework of the crime is a right of the court that aims to restore the identity between the act and its classification in law in case the identification of the rule of law was made wrong, or the data in which the deed was committed were not correctly retained. This right of the court must be accompanied by procedural guarantees established in favor of the defendant, so that his right to defense is respected. We appreciate that a request to change the legal framework formulated by the prosecution at the end of the court investigation, after administering all the evidence that would make the situation of the defendant difficult and that does not result from a change in the factual situation retained in the indictment, the, but based solely on the error of the case prosecutor in retaining an aggravating circumstance can not be received by the court. We also appreciate that the incidence of a case of termination of the trial must be analyzed by the court with priority before any other request. Thus, the institution of changing the legal framework cannot be used to supplement the subject of criminal action and to cover the effects of fulfilling the limitation period of criminal liability.

Keywords: change of legal framework; prescription of criminal liability; offence of abuse of duty; termination of criminal proceedings

¹ Associate Professor, PhD, Alexandru Ioan Cuza University of Iași, Romania, Address: 11 Carol I Blvd, Iași 700506, Corresponding author: sandra.gradinaru@yahoo.ro.



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1. Changing the Legal Framework Seen as a means of Circumventing the Rights of the Accused

In examining the issues under investigation, we will start from a situation found in the case law of the national courts, namely a case pending before the Neamt Court, registered under no. 1590/103/2018, what concerns the sale of corruption offenses, namely the offense of abuse of office if the public official obtained for himself or for another an undue benefit, the act stipulated by art. 132 Of Law no. 78/2000, with reference to art. 297 para. 1 Criminal code.

At the end of the judicial investigation, after the publication in the Official Gazette of the Decision of the Constitutional Court no. 358 of May 26, 2022, The National Anticorruption Directorate has requested the change of the legal framework in the offense of abuse of office if the public official has obtained for himself or for another an undue benefit, stipulated by art. 132 Of Law no. 78/2000, with reference to art. 297 para. 1 Criminal code withholding the provisions of art. 309 Criminal code.

The purpose pursued by the National Anticorruption Directorate was to prevent the termination of the criminal proceedings following the Decision of the Constitutional Court no. 358 of May 26, 2022.

The request was motivated by the fact that the indictment was only a simple error in retaining the correct legal framework related to the value threshold that exceeds the provisions of the Criminal Procedure Code, which, in this case art. 183 Criminal code, which addresses the particularly serious consequences.

Defendants of the defendants have requested the priority finding of the intervention of the prescription of criminal liability, in relation to the legal classification with which the court was initially invested.

Considering the fact that by the Decision of the Constitutional Court no. 358 of 26 May 2022 it was found the unconstitutionality of the provisions of art. 155 para. 1 Criminal code, in relation to the initial legal classification, the limitation period of the criminal liability would have been 8 years, a term that would have already been fulfilled.

In case the change of the legal framework would have been ordered by retaining the provisions art. 309 Criminal code, the penalty limits would have increased and the limitation period of criminal liability would have been 10 years. Or, the time since the act was committed was 9 years.

The Neamt Court rejected the request of defendants' defenders regarding the finding of the intervention of the limitation period before the change of the legal framework, ordered the change of the legal framework in the sense required by the prosecution, and by the Criminal Sentence no. 30 Of 01.04.2024 ordered the conviction of the defendants to the prison sentence.

2. The Solution of the Court

The Neamt Court upheld the request to change the legal framework requested by the prosecution, noting that the defendants had the representation that the charges brought against them relate to a total prejudice that would exceed the amount of 2,000,000, but, by mistake, the prosecutor failed to remember, regarding each, the incidence of the provisions of art. 309 Criminal code.

The rationale of the institution of changing the legal framework is to restore the correspondence between the facts regarded in their materiality and the rules of incrimination, and, in situations where the prosecutor has made a wrong assessment or in situations where such an amendment results during the judicial investigation – by discovering circumstances that lead to the retention of a legal classification different from the original one (in the same sense, the Constitutional Court of Romania, by Decision no. 90 of 28 February 2017, published in the Official Gazette of Romania, Part I, no. 291 Of 25 April 2017).

The constitutional court also found that the legal classification of the act involves the achievement by the judicial bodies of a concordance between the legal content of the crime and its concrete content. For example, it may change the legal classification from one crime to another, but with the retention of the same objective side, but with different consequences or circumstances, as is the case in this case. Therefore, by changing the legal classification of the act, the court refers to the same act provided for in the act of referral, but with the retention or removal of circumstances of which it does not/it is spoken in the indictment (see Decision no. 253 of 25 April 2017, published in the Official Gazette of Romania, Part I, no. 570 of 18 July 2017, paragraph 30).

In the current regulation, following the decisions of the Constitutional Court, the criminal procedural rules of art. 386 para. (1) It obliges the court to put into discussion the parties the new legal classification when it considers that the classification given by the act of referral is to be changed, without allowing the court to order the change of legal classification even through the court decision rendered

on the merits of the case, as the right to a fair trial would be violated, individual freedom and the right to defense, which is why the change of the legal classification of the act of complaint must be decided by a separate conclusion.

Moreover, the court notes that the option of the legislator is also consistent with the principles that derive from the case-law of the European Court of Human Rights, that the defendant must be duly and fully informed of any change to the charge, including changes related to «cause» thereof, and they must have the necessary time and facilities to react to these changes and to organize their defense.

From the same perspective, the Constitutional Court of Romania has ruled (by Decision no. 250/2019) that only the order of changing the legal classification of the act, by a decision that does not solve the case's substance, has, following the discussion of the parties of the new legal classification, but prior to the resolution of the case by sentence or decision, it ensures the fairness of the process and the possibility of further effective defence, in criminal proceedings, by the defendant, given that only in relation to a legal classification definitively established, during the criminal trial, and not at the end of it, the defendant may make concrete defenses.

The above considerations also justify the analysis of legal classification as a priority, a contrary approach being deeply flawed and contrary to the rules of substantive and procedural law governing the attraction of criminal liability (since, obviously, only in relation to a final legal classification, judged to be correct, it is possible to analyse the incidence of a case that removes criminal liability).

Or, under the conditions in which the correct legal classification of an act for which a person is accused is related to the correct application of the criminal law, to the observance of the principle of legality in the course of judicial proceedings, to, in order to respect these principles and the right of the parties to a fair trial, during the criminal trial the criminal charge may be modified from the perspective of the legal classification of the act.

Returning to the situation deduced from the judgment and synthesizing, while avoiding to rule on factual elements and details regarding the merits of the case and the resolution of the civil side, the court notes that, in relation to the configuration of the charges and the manner in which the facts deduced from the judgment were allegedly committed, in the event that, at the end of the judicial investigation, the, from the corroboration of the entire probation would be drawn the conclusion that a crime of abuse of office with the guilt provided by law was committed and this would have involved the production of material damage, such damage could only be related

to a possible difference paid in addition by the beneficiary, thus avoiding its unjust enrichment.

The summary assessment of the available evidence therefore suggests that the prosecution has correctly applied the rules in the matter and, since this mathematical calculation resulted in a value exceeding the amount of 2 million lei, it is necessary to modify the legal classification found in the indictment, being incidents, as follows, in addition to the legal provisions indicated initially, the provisions of art. 309 Criminal code.

Such a conclusion does not constitute a way of expressing in advance the opinion on the solution which may be adopted in question, because the preliminary assessment of the data in the file cannot mean that it would be likely to influence the final assessment, the court does not express its opinion on the solution that could be given in question, as invoked by the defence, but makes the application of the criminal procedural principles, and, especially the principle of finding out the truth.

The change of legal classification appears necessary precisely to ensure a correct resolution of the case in a fair trial. After the completion of the judicial investigation, based on the entire evidence administered and interpreted in conjunction with the judge of the fact, it will be determined whether all the requirements of objective and subjective typicity of the crime of abuse of office are met, by reference to the conduct attributed to each defendant and, if so, whether the act caused, in particular, damage to the contracting authority, attributable to the persons being sued.

3. Arguments in the Sense of Finding the Prescription of Criminal Liability

At the time when the change of the legal framework was discussed, the defense requested the termination of the criminal trial motivated by the intervention of the prescription of the criminal liability of the defendants.

The defence request was based on the Decisions of the Constitutional Court no. 297 of 26 April 2018 on the exception of unconstitutionality of the provisions of Article 155 para. (1) of the Criminal Code, by which it was found that the legislative solution providing for the interruption of the term of limitation of criminal liability by the performance of „any procedural act in question”, of the provisions of Article 155 para. (1) Of the Criminal Code, it is unconstitutional, as well as the Decision of

the Constitutional Court no. 358 of 26 May 2022, which found that the provisions of Article 155 para. (1) Of the Criminal Code are unconstitutional as a whole.

In order to decide so, the constitutional court held that Decision no. 297 of 26 April 2018 sanctions the legislative solution contained in the text of the criticized law, so that, it cannot be classified as interpretative decisions but, through the effects it produces, borrows the legal nature of a simple/extreme decision, because, noting the unconstitutionality of the fact that the interruption of the term of limitation of criminal liability was carried out by the performance of any procedural act in question, the Court sanctioned the only legislative solution on which the provisions of Article 155 para. (1) Of the Criminal Code regulated it.

Application in pending cases of the provisions of Article 155 para. (1) Criminal code, in the form in force until the date of its amendment by Government Emergency Ordinance no. 71/2022, according to the Decisions of the Constitutional Court no. 297/2018 and no. 358/2022, it is imposed as a provision that is part of a more favorable criminal law until the final settlement of the case.

Provisions of Article 155 para. (1) Criminal code have the nature of a substantial criminal law subject to the principle of more favorable criminal law enforcement, which can be done under Article 5 para. (2) Of the Criminal Code and in the case of normative acts declared unconstitutional.

Therefore, without being qualified as a *mitior lex* themselves, the Decisions of the Constitutional Court no. 297/2018 and no. 358/2022 configure, by the effects they produce at the level of the norm inscribed under art.155 para. (1) Criminal code, a genuine concrete criterion for determining the more favorable criminal law until the final settlement of the case, consisting of a more favourable legal regime applicable to a case which removes criminal liability (prescription of criminal liability).

Thus, the criminal law that regulated in the content of Article 155 para. (1) Criminal code, the normative solution declared unconstitutional, from its entry into force (1 February 2014) until the amendment of the legal provision by Government Emergency Ordinance no. 71/2022, it is a substantial criminal law that is more concretely favourable to the accused person until the final settlement of the case, thus applicable globally to the conflict report.

In application of *mitior lex*, Decisions of the Constitutional Court no. 297/2018 and no. 358/2022 Shall apply to all criminal cases pending on 25 June 2018 (date of publication in the Official Gazette of Romania of Decision no. 297/2018).

In the case under discussion, no act performed until 25 June 2018 – when Decision no. 297 Of April 26, 2018 – cannot produce interruptive effects of limitation of criminal liability, based on a legal provision that, since its entry into force, it has configured a single unconstitutional regulatory solution, sanctioned as such, both by Decision no. 297 of 26 April 2018 and by Decision no. 358 of 26 May 2022, applicable to pending legal conflict relations.

Regarding the Government Emergency Ordinance no. 71/2022, the interruption of the course of the limitation periods of criminal liability under this act will be able to operate only in the case of the deeds committed after the publication of this ordinance in the Official Gazette (30.05.2022), since the legal provisions from 01.02.2014-29.04.2022 are more favorable to the defendant.

The accusation brought to the defendants in the case under discussion consists of a simple offense, whose objective side involves causing damage, as well as realizing an undue use (abuse in service, abuse of office, whether the civil servant has obtained for himself or for another an undue benefit, stipulated by article 132 of Law no. 78/2000 for the prevention, discovery and sanctioning of corruption deeds).

According to the Decision of the High Court of Cassation and Justice pronounced in full for the absolution of legal issues no. 5 of 11.02.2019, published in M.O. Part I no. 334 of 02.05.2019 (indicated also in Requisitoriu on tab 119), “By the date of the offense and, implicitly, the date of the offense, the date from which the limitation period for criminal liability begins to run in the case of simple offences whose objective side involves causing damage or rendering undue use over a period of time it is understood the moment of the first damage or of obtaining the first undue use”.

The defense appreciated that the date of occurrence of the act and the date from which the limitation period of the criminal liability began to run is June 2015, this being fulfilled on the date of the request for the termination of the criminal trial.

4. Arguments in the Sense of Rejecting the Application for Change of Legal Framework

The change of the legal framework at the end of the judicial investigation is equivalent to an extension of the object of the trial, not allowed by the criminal procedural legislation, which affects the right to defend the defendant, the law of the criminal trial, the prosecution has not begun for this act and no evidence has been administered to prove this fact.

The object of the judgment is rendered by the facts and persons to whom the prosecutor has expressly ordered the sentencing and for which the criminal investigation was carried out.

According to the literature, “by facts shown in the act of referral to the court under no circumstances is understood the mere reference to certain facts in the descriptive part of the indictment, the, exposed on the occasion of presenting the activities of the defendant, but it is those facts that are described in a manner likely to produce legal consequences, namely to invest the court, the, condition which is fulfilled only if the facts stated in the indictment are accompanied by the specification of their legal classification and the provision for referral to court” (G. Bodoroncea, in M. Udrouiu (coordinator), Criminal procedure code. Comment on articles, ed. 2 Ed. C.C. Beck, Bucharest, 2017, p. 1509).

Or, the defendants because of the discussion were sued for the act of abuse of office, if the public official obtained for himself or for another an undue benefit, the statement said, act stipulated by art. 132 of the Law no. 78/2000.

All the criminal prosecution documents, namely the judicial investigation, were carried out by reference to this legal classification.

During the criminal investigation, no accounting expertise was administered to clarify the extent of the damage.

The determination of the extent of the damage was not clarified during the court investigation, and no additional means of proof were administered.

In these conditions, the priority of the analysis of the request for the change of the legal framework, the judicial investigation should have been extended to establish the extent of the damage, as well, aspect that had to be fulfilled since the criminal prosecution phase.

In this regard, we mention the considerations of the Criminal Decision no. 613/21.06.2022 of the Bacau Court of Appeal:

“The change of legal classification cannot generate the addition to the initial accusation of new elements that radically change the consequences of the employment of criminal liability, respectively to considerably increase the limits between which the penalty can be established. This legal reasoning does not lack the efficiency of the norm related to changing the legal framework, and, it only excludes its application in the assumptions in which it would lead to the amendment of the

accusation made in the sense of its aggravation without carrying out the judicial investigation”.

We appreciate that the manner in which the prosecution requested the change of the legal framework is likely to violate the right of defendants to a fair trial because they had the right to be informed immediately of the accusation that it was to be imputed at this procedural time.

The defendants had the right to request the administration of evidence in order to prove that the damage invoked by the accusation is wrong (in the criminal prosecution phase, reported to the legal classification of the accused act, as follows, the defendant had no interest in this).

The legality of the criminal prosecution documents, respectively of the act of referral to the court, could be analyzed differently in the preliminary chamber procedure, in relation to the legal classification that is required to be modified.

By admitting the request to change the legal framework, the principle of separation of judicial functions was violated, as the court should fill in the evidence, but not for the purpose of finding out the truth, but in order to remedy an accusation on which the prosecution, at the end of the court investigation, claims that it is incomplete.

In the course of the criminal investigation, the prosecution may administer any evidence it deems necessary to fulfill any defects of the criminal prosecution documents drawn up, but the administration of evidence to the detriment of the defendant by the court would imply the appropriation of the role of accuser, in order to supplement the omissions of the prosecution bodies.

In the case subject to discussion the prosecution was started on the offense of abuse of office provided by art. 297 Criminal code. Subsequently, the legal classification was changed in the offense of abuse of office if the civil servant obtained for himself or for another an undue benefit, the act stipulated by art. 132 Of Law no. 78/2000, with reference to art. 297 para. 1 Criminal code.

The order for changing the legal framework and the act of referral of the court were subject to the legality check of the Judge of the preliminary chamber of the Neamt Court, no mismatches were identified between the act described in the indictment and the legal classification given by the prosecutor.

Thus, by admitting the request for change of the legal framework, the *res judicata* working authority of the conclusion of the judge of the preliminary chamber would be violated.

Provisions art. 309 C.pen. represents in fact an aggravation of the criminal liability for the offense stipulated by art. 132 of Law 78/2000, by reference to art. 297 C.pen.

The retention of this aggravating act would imply that the court a priori will hold the meeting of the constituent elements of the offence of abuse of office.

We consider that a summary statutory on the constituent elements of the offence of abuse of office with which the court was seised would presuppose a pre-pronunciation of the court.

In a similar sense, the Bucharest Court of Appeal ruled, by the end of the meeting on 06.10.2022: “The court shows that by changing the legal classification, the court of judicial control cannot rule on the existence or non-existence of offences inferred by judgment, art. 309 Of the Criminal Code representing in fact an aggravated variant of the offense provided by art. 297 C.pen. Similarly, if the court of judicial review finds that some of the material acts inferred from the judgment do not meet the constituent elements of the crime, it will not retain them as such, there is no need for a change of legal classification in this respect. At this time, the process, the court can neither analyze nor rule on the existence of the constituent elements of the crime of abuse of office with reference to each material act detained by the defendant, the defendant, it equates to a forepronunciation”.

Thus, an additional argument in the sense of inadmissibility of the request to change the legal framework formulated in the case under discussion is the impossibility of the court to analyze and pronounce on the existence of the constituent elements of the offence of abuse of office prior to delivery on the merits of the case.

5. Critical Opinion on the Solution of the Neamt Court

We consider that the solution of the Neamt Court is appropriate for significant criticism. We are of the opinion that the court has unlicensedly exploited by the national legislation a legal artifice of the accusation meant to deprive the defendant of the protection conferred by the provisions of Article 16 paragraph 1 lit. f) of the Code of Criminal procedure.

Thus, regarding the need to change the legal framework during the criminal trial and not at the end of it, the court omitted to take into account the fact that the judicial investigation was concluded at the time of admitting the request of the accusation.

Even after the moment of admission of the request for change of classification, no additional evidence was administered. In these conditions, the change of the legal framework took place at the end of the criminal trial, the court contradicting its own reasoning.

Regarding the remaining without applicability of the institution of changing the legal framework, plea invoked by the Neamt Court to substantiate the rejection of the defence arguments, as follows, we notice that a general case is invoked to contradict a particular case.

The defence did not invoke the fact that the change of legal classification is inadmissible in the course of the judicial investigation, but the fact that the request made by the accusation cannot be received by reference to the absence of any evidence that would determine the extent of the damage in question subject to debate.

Thus, although in the case subject to debate the evidence was completed, the aspect of the extent of the damage was not clarified. Or, the assessment by the court of law on the incident of the provisions art. 309 Criminal code could be made only on the basis of the probation administered.

In the case under discussion, the change of the legal framework was ordered exclusively on the basis of the allegations and not on the basis of evidence administered during the criminal investigation or during the court investigation.

We consider erroneous the refusal of the Neamt Court to ascertain, as a priority, the incidence of the prescription of criminal liability. The case provided by Article 16 paragraph 1 letter f) Criminal procedure code prevents the exercise of criminal action.

We believe that such a case must be analyzed as a matter of priority before any other request, having the prevalence also of a request for changing the legal framework.

We do not share the opinion of the court in the sense that a priori a final legal classification should be established.

The opinion of the Neamt Court is contradicted by the provisions of art. 371 C.pr.pen. which stipulate that the judgment is limited to the facts and persons shown in the act of referral to the court, the limits of the investigation being drawn thus by the case prosecutor.

The Neamt Court should have ruled on the case that prevents the exercise of the criminal action in relation to the legal classification existing at the time when it was requested the finding of the intervention of the prescription of the criminal liability.

A contrary conclusion would imply the violation of the provisions of Article 16 paragraph 1 letter f) Criminal procedure code which stipulate that the criminal action can no longer be exercised in case of intervention of the prescription.

The case referred to in Article 16 paragraph 1 letter f) is an objective element that intervenes by right, independent of its finding by the court.

We base our reasoning also on the provisions of art.396 para. 8 Criminal procedure code that stipulate that if there are no incidents of grounds for acquittal, the court has a solution to terminate the criminal proceedings.

The legislator thus attaches great importance to cases where criminal action cannot be exercised due to the lack of object of criminal action, and, these being applied as a priority and if the court finds that the act exists, is stipulated by the criminal law, it was committed with the guilt provided by law, the law, there is evidence that the defendant committed the crime and there is no justifying or non-imputable cause.

We appreciate that if the legislator had sought that through the institution of change of the legal framework to fulfill the lack of object of the criminal action, he would have expressly regulated this situation, because it would obviously make the defendant's situation worse.

We specify that by law there is no provision in the criminal procedural law that allows the court to fill the lack of object of criminal action, but on the contrary, the fact that, the solution for the termination of the criminal trial will be pronounced whenever there is no incident an acquittal case.

The optics of the Neamt Court attributed to the institution of changing the legal framework would determine the unconstitutionality of the provisions 386 of the Criminal Procedure Code, as it represents a diversion of the legal regulation from its legitimate purpose, in violation of the right to a fair trial and implicitly of the defendant's right of defense.

6. Conclusions

The institution of changing the legal framework has as its sole purpose the restoration of the identity between the act and its framing in law.

We consider that this institution cannot be used to prevent the delivery of a solution for the termination of the criminal trial, nor to undermine the procedural guarantees of the defendant.

The defendant configures his defense according to the crime he is accused of. This right to defense is closely related to the procedural attitude adopted during the trial, as well as the evidence required to be administered during the court investigation.

In these conditions, a request for a change of the legal framework that substantially changes the limits of punishment, subsequent to the exercise of the defence by the defendant is likely to infringe the right to a fair trial.

Regarding the competition between a case of termination of the criminal trial and a request for change of the legal framework, we appreciate that always will take priority the analysis of the case of termination of the criminal trial.

The institution of changing the legal framework must be interpreted and applied in accordance with the purpose for which it was edicted. Distorting this institution and applying it to the detriment of the defendant would represent an abuse of procedural law.

At the same time, the ECHR sanctions the extensive or analogous interpretation of the criminal law against the defendant. Any conviction and punishment imposed on a person must have a legal basis, which is the expression of the principle of no punishment without law [European Court of Human Rights, Del Rio Prada case against Spain, p. 116 And the Kokkinakis case against Greece, p. 52].

Given the effects of the institution of changing the legal framework on the situation of the defendant, we appreciate that the courts must conduct a thorough analysis on such requests.

7. Bibliography

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