Offenses of Service - Negligence at Work. Critical Opinions

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Abstract: In the content of the article we proceeded in examining the constitutive content of the crime of negligence in the service, with emphasis on the objective and subjective side. On the occasion of the analysis, we referred to the recent judicial practice in the matter, as well as to the considerations of two decisions of the Constitutional Court regarding this crime. From the perspective of repealing the legal norm of criminal law, we insisted on formulating a critical opinion regarding this action of the legislator, arguing the need to maintain the incrimination. The study is part of a course to be published in the next period at a recognized publishing house in the field. This paper can be useful both to students and masters of the profile faculties in the country, as well as to practitioners in the field of criminal law.

Keywords: Crime; objective side and subjective side; the constitutive content

1. Introduction

The offense of negligence of service is mentioned in the provisions of art. 298 Criminal Code and is part of the group of crimes with the marginal name "Crimes of corruption and service" provided in Title V of the Romanian Criminal Code, Special Part.

This crime consists in the act of the civil servant (or assimilated) who, through guilt, violates a duty of service, by not fulfilling it or by its defective fulfillment, causing a damage or injury to the legitimate interests of a natural or legal person.

In our recent doctrine it was emphasized that "the norm of incrimination has a *general feature* in the matter of sanctioning abusive activities by culpable violation of the attributions provided by the primary legislation; therefore, the offense of negligence in office provided by art. 298 New Criminal Code has a *subsidiary*

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feature, being retained only if the act committed by the civil servant *is not provided as an offense distinct from another rule of incrimination of a special nature* whether it concerns the same legal object or a different legal object" (Udroiu, 2019, pp. 665).

At the same time we emphasize the fact that the mention in the text of the incrimination of the fact that it is committed only through fault was necessary, because, in art. 16 para. (6) of the Criminal Code stipulates that the act committed through guilt constitutes an offense only when the law expressly provides for it.

We specify that this crime was also provided in the Criminal Code of 1969, between the two incriminations there are both some elements of differentiation and resemblance.

As elements of difference we identify the renunciation of the legislator to the alternative consequence which consists in causing a "significant disturbance of the smooth running of a body or of a state institution or of another unit of those referred to in art. 145".

We also find that the special limits of the sentence have been increased (imprisonment from one month to 2 years or a fine under the previous law, imprisonment from three months to 3 years or a fine).

In the old law we find an extension of the scope by providing as an immediate consequence and "harm to the rights" of a natural or legal person.

As elements of similarity we identify the same marginal title, keeping as a consequence the damage of the legitimate interests of a person, as well as causing of a damage.

2. The Objective Side

The *material element* of the objective side is achieved by violating the duties of service, a violation that can be achieved by not fulfilling them or by their defective fulfillment.

Violation of official duties means "disregard, violation, non-compliance with a task imposed by the job" (Stanoiu et al., 1972, p. 104).

Duty of service means "everything that falls under the responsibility of an official (or other employee) according to the rules governing the office or which are inherent in the nature of that job" (Stănoiu et al., 1972, p. 104).

Failure to perform a duty of service involves failure to perform an act that falls within the duties of the perpetrator.

Defective performance of a duty of service means "performance other than that which should have been performed. Defective performance may concern the content, form or extent of the duty, the time of performance, the conditions of performance, etc." (Stănoiu et al., 1972, p. 104).

Therefore, the material element that implies *the violation of a service attribution,* can be achieved in two alternative ways, respectively: by an inaction consisting in the non-fulfillment of the service duties or by an action that is performed by their *defective fulfillment*.

Regarding the interpretation of the phrase *defective fulfillment*, by Decision no. 518/2017[1], the Constitutional Court admitted the exception of unconstitutionality and found that "the provisions of art. 249 para. 1 of the Criminal Code of 1969 and of art. 298 of the Criminal Code are constitutional insofar as the phrase "its defective fulfillment" in their content means "*fulfillment by violation of the law*".

In arguing this solution, the Court notes that "the reason for incriminating the act of negligence in the service is similar to that for which the abuse of office is incriminated, the difference between the two offenses being distinguished at the level of the subjective side - the intent in the case of abuse of office, respectively willful misconduct/actionable negligence or simple (negligence) in the case of the offense of negligence in office. The objective side of the crime of negligence in the service consists, as in the crime of abuse of office, of the material element, accompanied by an essential requirement, the immediate consequence and the causal link between the unlawful activity and the produced result. The Court also notes that the material element of the objective side of the offense of negligence in office involves the breach of a duty by a civil servant or another person employed (in the case of the mitigated variant provided by art. 308 of the Criminal Code) through the two normative modalities, respectively its "non-fulfillment" or "defective fulfillment"[2].

Also, "The Court notes that in Decision no. 405 of 15 June 2016, referring, in paragraphs 44-47, to both the jurisprudence of the European Court of Human Rights, concerning the clarity and predictability of the criminal law in general, and of the rules incriminating the abuse of office, in particular, as well as to the infraconstitutional internal regulations regarding the norms of legislative technique

[1] Published in the Official Monitor of Romania, Part I, no. 765 of September 26, 2017.
[2] Decision of the Constitutional Court no. 518/2017, para. 28.

for the elaboration of normative acts, it was found that the legislator has the obligation that, in the act of legislation, regardless of the field in which he exercises this constitutional competence, to insist upon the principle of clarity and predictability of the law. On the other hand, the judicial bodies, in the mission of interpreting and applying the law and establishing the defective fulfillment in the performance of their duties, have the obligation to apply the objective standard, as established by the normative prescription (paragraph 52)"[1].

At the same time, "the Court noted that, with regard to duties related to a particular function or job, there is a set of rules, some contained in general normative acts, concerning the duties of employees in general, others in normative acts with special feature. The fulfillment of a service assignment implies the manifestation of will on the part of the person concerned, which is materialized in his / her actual actions and which aims at carrying out / fulfilling the prescribed obligation. The achievement of this approach refers both to a subjective / internal standard of the person exercising the service attribution, and to an objective standard. The subjective standard is related to the internal forum of the person concerned, and the extent to which it is achieved is related to the self-assessment of the actions taken. The objective standard has as main reference element the normative of the act that regulates the respective service attribution. The Court also noted that, although the two standards coexist, the subjective standard cannot exceed the objective standard, in the analysis of how to perform a service the latter being a priority. The Court also noted that, since the objective standard is determined and limited to the normative requirement, the regulation of duties and the manner in which they are exercised determines the scope of that standard. It cannot, without infringing the principle of predictability, have a wider scope than the relevant regulatory requirement. Consequently, a person cannot be accused of violating the objective standard by finding that he has not complied with implicit prescriptions, which are not determinable at the normative level. Furthermore, the Court noted that, although certain actions accompanying the exercise of a duty may be based on a certain custom/usance, it cannot be circumscribed, without infringing the principle of legality of incrimination, by the objective standard to be considered, in determining the criminal act (paragraphs 50, 51)"[2].

At the same time, "the Court held that criminal wrongdoing is the most serious form of violation of social values, and the consequences of the application of criminal law

[1] *Ibidem,* par. 31.
[2] *Ibidem,* par. 32.

are among the most serious, so that the establishment of guarantees against the arbitrariness by regulating clear and predictable rules by the legislator is mandatory. The prohibited conduct must be imposed by the legislator even by law [understood as a formal act adopted by Parliament, pursuant to art. 73 para. (1) of the Constitution, as well as a material act, with the force of law, issued by the Government, based on the legislative delegation provided by art. 115 of the Constitution, respectively ordinances and emergency ordinances of the Government], not being able to be deduced, possibly, from the reasoning of the judge likely to replace the legal norms. In this respect, the court of constitutional contentious held that, in the continental system, the jurisprudence does not constitute a source of law so that the meaning of a rule can be clarified in this way, because in such a case the judge would become legislator (in this case meaning being cited Decision No. 23 of January 20, 2016, published in the Official Monitor of Romania, Part I, No. 240 of March 31, 2016, paragraph 16). Regarding the concept of "law", the Court, referring to Decision no. 146 of March 25, 2004, published in the Official Monitor of Romania, Part I, no. 416 of May 10, 2004, held that it has several meanings depending on the distinction that operates between the formal or organic criterion and the material one. According to the first criterion, the law is characterized as an act of the legislative authority, it being identified by the body called to adopt it and by the procedure that must be observed for this purpose. This conclusion results from the corroboration of the provisions of art. 61 para. (1) the second sentence of the Constitution, according to which "the Parliament is [...] the only legislative authority of the country", with the provisions of art. 76, art. 77 and art. 78, according to which the law adopted by the Parliament is subject to promulgation by the President of Romania and enters into force three days after its publication in the Official Monitor of Romania, Part I, if its content does not provide another later date. The material criterion considers the content of the regulation, defining itself in consideration of the object of the norm, respectively of the nature of the regulated social relations. With regard to Government orders, the Court noted that, in drafting such normative acts, the administrative body exercises a power by attribution which, by its nature, falls within the legislative competence of the Parliament. Therefore, the ordinance does not represent a law in the formal sense, but an administrative act in the field of law, assimilated to it by the effects it produces, respecting in this respect the material criterion. Consequently, since a normative legal act, in general, is defined both by form and by content, the law in the broadest sense, so including the assimilated acts, is the result of combining the formal criterion with the material one. Thus, in the light of its case-law, the Court

held that the Government's ordinances and emergency orders, in material terms, contain rules of primary regulation, having a legal force assimilated to the law. Moreover, the Court noted that, according to art. 115 para. (3) of the Basic Law, "If the enabling law requires it, the ordinances are subject to the approval of the Parliament, according to the legislative procedure", and according to par. (7) of the same article the emergency ordinances "with which the Parliament was notified are approved or rejected by a law (...)[1]".

The Court further found that, "if the non-fulfillment or failure to perform an act does not relate to the duties provided for in a normative act with the force of law, the situation would be reached that, in the case of the crime of abuse of office, its material element to be configured by the legislator, Parliament or Government, as well as by other bodies, including legal persons under private law, in the case of the job description, which is not acceptable in the criminal law system. The Court noted that, although the primary legislation may be detailed through the adoption of secondary regulations, according to art. 4 para. (3) of Law no. 24/2000 regarding the norms of legislative technique for the elaboration of normative acts, the normative acts given in the execution of the laws and ordinances of the Government are issued only within the limits and according to the norms that order them. In conclusion, in criminal matters, the principle of legality of incrimination, "*nullum crimen sine lege, nulla poena sine lege*", requires that only the primary legislator would be able to establish the conduct that the recipient of the law is obliged to observe, otherwise they are subject to criminal sanction[2]".

In conclusion, for these arguments, the Court found that the criticized provisions violate the provisions of art. 1 para. (4) and (5) of the Constitution by allowing the configuration of the material element of the objective side of the crime of abuse of office through the activity of other bodies, other than the Parliament - by adopting the law, pursuant to art. 73 para. (1) of the Constitution -, or the Government - by adopting ordinances and emergency ordinances, based on the legislative delegation provided by art. 115 of the Constitution. Thus, the Court found that the provisions of art. 246 of the Criminal Code of 1969 and of art. 297 para. (1) of the Criminal Code are constitutional insofar as the phrase "defective performs" in their content means "performs in violation of the law" (paragraphs 59-65)[3].

[1] *Ibidem,* par. 36
[2] *Ibidem,* par. 37.
[3] *Ibidem,* par. 38.

Finally, the Court considers that these considerations "are applicable *mutatis mutandis* also with regard to the provisions of art. 249 para. 1 of the Criminal Code of 1969 and of art. 298 of the Criminal Code regarding the crime of negligence in office, especially since the form of guilt under which the latter is committed is guilt (ease and negligence), so the Court will admit the exception and find their constitutionality only to the extent in which the phrase "its defective fulfillment" in their content means "fulfillment by breaking the law"[1].

Therefore, "*it will operate a concrete decriminalization of the facts consisting in the culpable non-fulfillment of an act or its faulty performance* by a public / private official in the exercise of his duties provided only in the secondary legislation or provided in predictably and precisely only in secondary legislation, if the norm of primary law is equivocal, unclear, unpredictable, not being able to establish the limits within which the acts of secondary law can be issued; it is necessary for the judicial bodies to evaluate "*the incidence of the principle of minimum intervention of the criminal law*" (Udroiu, 2019, p. 668).

For the existence of the crime it is necessary to establish the existence of *an essential requirement* which consists in the need for the deed to be committed by the civil servant (assimilated or private official) in *the exercise of his duties.*

The immediate consequence consists in the production of a damage in the patrimony of a natural or legal person or in the production of a damage of the *rights* or *legitimate interests* of a natural or legal person.

In the event that in the same case, the same active subject causes damage and harms the rights or legitimate interests of the same passive subject, only one offense of negligence in office will be retained.

The *causal link* between the incriminated actions and inactions and the result produced must be proved by the judicial bodies.

In judicial practice it was decided that the act of the defendant, "who as a doctor in the medical office serving the Independent Detention and Preventive Arrest Service, did not fulfill his duties of daily clinical examination of AZ, a pre-trial detainee declared in a food-refusal as of July 11, 2012, and has improperly fulfilled the task of providing adequate medical care so that his life is not endangered, thus causing harm to his rights to health care and life, by on July 11, 2012 he agreed to his transfer to the Detention and Preventive Arrest Center no. 1, in a room with several persons

[1] *Ibidem,* par. 39.

on pre-trial detention, considering that his health condition did not require transfer to a penitentiary hospital and on July 13, 2012 he did not consult the deceased, but further appreciated that neither the administration of glucose (or the verification of blood glucose), nor the transfer to a penitentiary with an infirmary, meet the constitutive elements of the crime of negligence in the service"[1].

In another case, the court ruled that "The act of the civil servant within the General Directorate of Social Assistance and Child Protection who, at fault, as a social worker in charge of the case and head of the professional maternity assistant service, did not fulfill properly the duties of the evaluation and monitoring of the foster care assistant who subjected to violence the minor in his care, causing harm to the minor's rights to life, bodily integrity and harmonious mental development, meets the constituent elements of the crime of negligence in service provided in art. 298 New Criminal Code"[2].

Also, "the breach at fault, by the civil servant of the penitentiary administration system, of the duties of service regarding the supervision of persons deprived of liberty, by the defective fulfillment of these duties, which resulted in the bodily injury of a person deprived of liberty by another person deprived of liberty, meets the constitutive elements of the crime of negligence in office"[3].

The deed of the "policeman in charge of recording the contravention reports and their capitalization by giving in payment, of not fulfilling for more than 1 year this obligation, with the consequence of contravention fines of over 150 million lei were prescribed, constitutes the crime of negligence in office[4]".

3. The Subjective Side

The form of guilt with which this crime can be committed is *at fault* in both ways, foresight (ease) or without foresight (negligence, mistake).

At fault, "as a subjective element of negligence in the service, is not presumed. Therefore, it is not sufficient to find that the perpetrator did not perform or has failed

[1] Bucharest District 4 Court, sentence no. 627/2015, unpublished, apud, (Udroiu, 2019, pp. 668).
[2] Î.C.C.J., Criminal Section, decision no. 1998 of June 11, 2014, available on www.scj.ro (apud Mihail Udroiu, 2019, pp. 669).
[3] Î.C.C.J., Criminal Section, decision no. 946 of March 14, 2014, available on www.scj.ro (apud Udroiu, 2019, pp. 669).
[4] I.C.C.J., Criminal Section, decision no. 946 of March 14, 2014, available on www.scj.ro (apud Udroiu, 2019, pp. 669).

to perform an act relating to his duties, but it must be proved that he had a specific attitude of guilt towards his act of service and its consequences" (Pascu et al., 2016, p. 572).

In the hypothesis in which the guilt of the perpetrator cannot be proved, the deed will not meet the constitutive elements of the crime, from a subjective point of view.

In court practice it was decided that "The constitutive elements of the crime of negligence in office are not met, without guilt in the form of guilt, if the defendant, as a counter operator at a banking company, repeatedly released appropriate sums of money values recorded on several promissory notes signed in white by the administrator of the company, but completed with larger amounts and on behalf of other suppliers than those targeted by the management of the company by the chief accountant, who presented them to the bank, as long as a most of the checks in question were signed in white by the authorized persons themselves, and the presentation of the chief accountant to raise the required sums of money not only could not create any suspicion for the counter operators, but was even likely to emphasize the legitimacy of the operation, due to the guarantee offered by the takeover of the money by the same person who performed the function of chief accountant of the company, authorized by the board of directors, with the right to sign for bank documents"[1].

At the same time, "the act of the notary public, committed through fault, to authenticate a contract for the sale-purchase of a building included in the list of historical monuments, without properly fulfilling his duty to verify whether the state has exercised the right of pre-emption - condition provided, under the sanction of absolute nullity of the sale, in art. 4 para. (4) of Law no. 422/2001 on the protection of historical monuments - meets the constitutive elements of the crime of negligence in office[2]".

[1] C.S.J., Panel of 9 judges, decision no. 325/2004, available on www.scj.ro (apud, Udroiu, 2019, pp. 670).
[2] I.C.C.J., Criminal Section, decision no. 1423/2009, available on www.scj.ro (apud, Mihail Udroiu, 2019, p. 669)

4. Some Critical Opinions and *de Lege Ferenda* Proposals

Through the law amending and supplementing the Criminal Code, the legislator proposes a new approach, in the sense of renouncing at the incrimination of this deed. Under these conditions, the persons who will commit this kind of deeds will be liable only from a civil point of view.

The law itself was challenged in the Constitutional Court, including the provisions repealing the crime of negligence in office, the Court adopting the decision to reject the exception of unconstitutionality.

In its considerations, the Court makes an extremely interesting analysis, but also useful at the same time, regarding the evolution of the incrimination of this deed in the Romanian criminal law.

Thus, "The Court notes that the criticized text repeals the provisions of art. 298 of the Criminal Code regarding the crime of negligence in office, which, according to the legal provisions in force, consists in the culpable violation, by a civil servant, of a duty of service, by its non-fulfillment or by its defective fulfillment, if by this damage or injury to the rights or legitimate interests of a natural or legal person shall be caused"[1].

In its considerations, the Court notes that the provisions of art. 298 of the Criminal Code were subject to constitutional review, in this sense pronouncing Decision no. of July 6, 2017[2].

By the mentioned Decision, the Court found that "the provisions of art. 249 para. 1 of the Criminal Code of 1969 and of art. 298 of the Criminal Code are constitutional insofar as the phrase "its defective fulfillment" in their content means "fulfillment by violation of the law"[3].

Carrying out an extensive examination of the evolution of the incrimination of the deed in Romanian criminal law, the Court shows that by the aforementioned decision, paragraphs 25-28, "held, from a historical perspective, that the crime of negligence in office was incriminated, for the first time, in art. 242 of the Criminal Code of 1936, published in the Official Monitor of Romania, no. 65 of March 18, 1936, Title III - "Crimes and offenses against public administration", Chapter I -

[1] Constitutional Court, Decision no. 650 of October 25, 2018, published in the Official Monitor of Romania, Part I, no. 97 of February 7, 2019, par. 639.
[2] Published in the Official Monitor of Romania, Part I, no. 765 of September 26, 2017.
[3] *Ibidem,* par. 640.

"Crimes committed by civil servants", Section III - "Negligence in office". It was shown that, in the initial form, art. 242 of the Criminal Code of 1936 incriminated negligence in functions only for managers, having as its object the defense of public property and provided that "The civil servant who, through negligence, unpredictability or ease in supervising or guarding money, values, acts or anything entrusted, by virtue of his function, their theft or destruction will be caused, he commits the crime of negligence in office and is punished with correctional imprisonment from 3 months to one year and a fine from 2,000 to 5,000 lei". Subsequently, this incrimination was extended to all civil servants, the provisions of art. 242 of the Criminal Code of 1936 being successively amended by Decree no. 192/1950, published in the Official Monitor no. 67 of August 5, 1950, by Decree no. 202/1953, published in the Official Monitor no. 15 of May 14, 1953, and by Decree no. 318/1958, published in the Official Monitor no. 27 of July 21, 1958. After the amendment of art. 242 of the Criminal Code of 1936, by Decree no. 212/1960, published in the Official Monitor no. 8 of 17 June 1960, the title of Section III - "Negligence in office" of Chapter I, Title III of the Criminal Code of 1936, was replaced by "Negligence in office", in order to reconcile the title of the section with the name of the offense, and the text provided that "Infringement by an official of his duties, by failure to fulfill them or their erroneous performance, committed through fault and repeatedly or even only once but of a serious nature, constitutes the offense of negligence in office if: 1. it has caused a disturbance to the proper functioning of the public unit or an injury to the legal interests of the citizens, or 2. has directly caused damage to the public property. The negligence in service that had any of the consequences shown in paragraph 1 point 1 shall be punished with correctional imprisonment from one month to 2 years or a fine from 300-1,000 lei.

The negligence in the service that had the consequences shown in par. 1 point 2 shall be punished, in relation to the value of the damage caused, as follows: a) up to 20,000 lei inclusive, from 1 month to 1 year of correctional imprisonment; b) 20,000- 50,000 lei inclusive, 1-4 years of correctional imprisonment; c) over 50,000 lei, 4-7 years of correctional imprisonment and correctional interdiction from 1-3 years. Negligence in the service that followed a catastrophe is punishable by correctional imprisonment from 7-10 years, partial or total confiscation of property and correctional prohibition from 1-6 years. The catastrophe consists in the destruction or degradation of some means of public transport of goods or people, or of some important installations or works and which had particularly serious consequences or caused losses of human lives or serious injuries of some persons. In cases of negligence in office, the court may also rule on dismissal". The Court therefore found that, after the 1960

amendment, article 242 of the Criminal Code of 1936 provided that the immediate prosecution of the offense of negligence in office consisted of a "disturbance of the smooth running of the unit or an injury to the legal interests of the citizens", being regulated also the condition that the deed be repeated or have a serious feature to realize the content of the crime, in case of damage caused to public property, the punishment being established in relation to the value of the caused damage. It was also noted that, also in the Criminal Code of 1936, other offenses of negligence with special feature, namely negligence in supervising the execution of supply contracts, negligence in the administration and management of goods, were also charged separately belonging to public establishments, negligence which has resulted in the loss of cattle to a state farm or to a cooperative. The Court further noted that the Romanian Criminal Code of 1969, republished in the Official Monitor of Romania, Part I, no. 65 of April 16, 1997, incriminated the negligence in office in art. 249, according to which "1. The culpable breach, by a civil servant, of a duty of service, by its non-fulfillment or by its defective fulfillment, if a significant disturbance has been caused to the proper functioning of a state body or institution or of another unit from those referred to in article 145 or a damage to its patrimony or a significant damage to the legal interests of a person, shall be punished by imprisonment from one month to 2 years or by a fine. 2. The deed provided in par. 1, if it has had particularly serious consequences, shall be punished by imprisonment from 2 to 10 years, and the Criminal Code in force, in art. 298, establishes, in a partially similar way with regard to the material element of the objective side and the consequences of the offense of negligence in office, that "Failure by a public official of a duty of service , if this causes damage or injury to the rights or legitimate interests of a natural or legal person, shall be punished by imprisonment from 3 months to 3 years or by a fine." In these circumstances, the Court held that the reason for incriminating the act of negligence in the service is similar to that for which the abuse of office is incriminated, the difference between the two offenses being distinguished on the subjective side - the intention in case of abuse of office, respectively guilt (ease) / unforeseen or simple guilt (negligence) in the case of the offense of negligence in office. It was shown that the objective side of the offense of negligence in the service consists, as in the offense of abuse of office, of the material element, accompanied by an essential requirement, immediate consequence and causal link between the unlawful activity and the result. The Court also held that the material element of the objective side of the offense of negligence in office involves the culpable breach of a duty of service by a civil servant or other person employed (in the case of the

attenuated variant provided by art. 308 of the Criminal Code) through the two normative ways, respectively its "non-fulfillment" or "defective fulfillment"[1].

The conclusion retained by the Court is that by Decision no. 518/2017, the court of constitutional contentious "validated the provisions of art. 298 of the Criminal Code regarding negligence in office (in the configured form), considering that their regulation was the will of the legislator at the date of adoption of Law no. 286/2009 regarding the Criminal Code, expressed according to art. 61 para. (1) of the Constitution and in the margin of appreciation provided by it".

At the same time, the Court notes that "by the norm subject to constitutional review, the legislator proceeded to repeal art. 298 of the Criminal Code, showing in the Explanatory Memorandum of the criticized law that this legislative operation was imposed, as it was very difficult to distinguish between disciplinary misconduct and criminal act. It is argued in the same Explanatory Memorandum that, by maintaining the legal provisions governing the offense of negligence in the service, discretionary incriminations are reached, without any clear distinction between them. It is argued that, moreover, by Decision no. 518 of July 6, 2017, the constitutive content of the analyzed crime was configured in a similar way to the crime of abuse of office, but that it is impossible to imagine the violation of a legal norm by an official who knows it and does not pursue an unlawful purpose. It is emphasized that the regulation of the crime of negligence in office is based on a contradiction, that if the civil servant knows a text of law and violates it intentionally, then the form of guilt cannot be retained, and if he does not know the violated legal provision, regardless of his will, the fault in the form of guilt cannot be retained either"[2].

In conclusion, "The Court notes that the criticized decriminalization norm does not affect the fundamental values of the society, the lack of the provisions of art. 298 of the Criminal Code of the criminal legislation not being likely to violate fundamental rights or freedoms. For this reason, the Court concludes that art. I point 52 [with reference to the abrogation of art. 298] of the law was adopted in accordance with the criminal policy of the state, according to the provisions of art. 61 para. (1) of the Constitution and in the margin of appreciation conferred by them"[3].

As we find out, the Court justifies the Decision by invoking the right of the legislator to repeal a certain legal norm of criminal law for, in accordance with the criminal

[1] *Ibidem*, par. 640.
[2] *Ibidem*, par. 642.
[3] *Ibidem*, par. 643.

policy of the state, provided that this repeal does not affect the fundamental values of society.

We specify that as far as we are concerned we do not agree with the abrogation of the provisions of art. 298 of The Criminal Code, because, mainly, the judicial practice in the matter denotes a certain frequency of this type of crime, as well as the need to combat by a rule of criminal law this type of behavior of a civil servant, which brings infringement of the patrimony or of the legitimate rights or interests of a natural or legal person.

Removing these actions from the sphere of criminal wrongdoing will lead to an increase in the attitude and abusive behavior, even of guilt, on the part of some civil servants. At the same time, the number of individuals or legal entities that have suffered as a result of such behavior will increase.

On the other hand, the tradition followed by the consistency of the Romanian legislator to incriminate this deed must be considered, starting with 1936 (in the Criminal Code Carol II). All these arguments come in support of maintaining this incrimination in the Romanian Criminal Code, and, implicitly, the waiver of the legislator to the idea of repealing the deed.

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