THEORETICAL AND PRACTICAL CONSIDERATIONS REGARDING THE INTERRUPTION OF THE STATUTE OF LIMITATIONS PERIOD FOR PENAL LIABILITY IN LIGHT OF THE DECISION NO. 297 OF 2018 OF THE CONSTITUTIONAL COURT OF ROMANIA

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Abstract

The authors intend to present in this article a series of theoretical and practical aspects with regard to the application of the Decision of the Constitutional Court of Romania no. 297 of 2018, declaring the unconstitutionality of the dispositions under art. 155 par. (1) in the New Penal Code, and the problems showed by the practice of the Romanian courts, in the meaning of non-uniform application of such decision. We shall attempt hereinafter to present, subject to our own conscience, a series of theoretical and practical aspects regarding the correct interpretation of the decision aforementioned and of the effects it causes, given that the legislator did not intervene in any manner on the law text declared unconstitutional, as provided by the dispositions under art. 147 in the Romanian Constitution.

Keywords: *Statute of limitation, judicial practice, non-uniform practice, communication of procedural acts, constitutionality*

1. Introductory Aspects

The New Penal Code of Romania entered into force on 1 February 2014. As of that date, the Constitutional Court of Romania has successively intervened, declaring the unconstitutionality of some articles, while, on the other hand, the High Court of Cassation and Justice settled some interpretation problems, through the stipulations provided under art. 471 *et seq*. and art. 475 *et seq*., namely, the Appeal in the interest of law and pronouncing a preliminary decision for solving some law matters.

Without describing the entire activity of such courts, in this article, we will focus on the law matter notified to the Constitutional Court of Romania by the Oradea Court of Appeal with regard to the unconstitutionality of the dispositions under art. 155 par. (1) in the Penal Code, in relation to which the authority controlling the constitutionality of normative acts admitted the objection to constitutionality, and established that the legislative solution providing for the interruption of the statute of limitations period for penal liability, by fulfillment of „any procedural act in the case", in the dispositions under art. 155 par. (1) in the Penal Code, is unconstitutional.

The interruption of the statute of limitations period for penal liability consists of losing the benefit of the time passed until the performance of any procedural act in the case (a procedural act that, according to the penal process law, may be a prosecution act or an adjudication act, fulfilled until the pronouncement of the final judgment), a moment as of which a new statute of limitations period starts to pass.

In the old regulation, the stipulation of interruption of the statute of limitations period for penal liability was provided in the dispositions under art. 123 in the Penal Code:

„The statute of limitations period provided under art. 122 is interrupted by the fulfillment of any act that, according to law, should be communicated to the accused or the defendant during the penal trial."

In the new regulation, the stipulation of interruption of the statute of limitations period for penal liability is provided in the dispositions under art. 155 in the Penal Code:

„The statute of limitations period for penal liability is interrupted by the fulfillment of any procedural act in the case."

By this new regulation, the legislator proposed a legislative solution inspired from the French and Spanish law. In these two national law systems, the interruption of the statute of limitations periods is not conditional upon serving the process documents to the suspect or the defendant.[1] On the other hand, in countries such as Estonia, Finland, France, Germany, Italy, Malta, The Netherlands, Portugal and Slovakia, the interruption of the statute of limitations period for penal liability is performed through the fulfillment of process acts that are communicated to the suspect or

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[1] Ilie Pascu, Traian Dima, Costică Păun, Mirela Gorunescu, Vasile Dobrinoiu, Adrian Mihai Hotca, Ioan Chiş, Maxim Dobrinoiu, The New Penal Code with Comments. General Part. 3rd Edition, Universul Juridic Publishing House, 2016.

the defendant, or which involve the latter"s presence before the judiciary authorities, or through acts that concern directly the settlement of the conflicting penal legal relationship.

We notice that the fundamental difference between the two law texts reviewed arises mainly with regard to the need for communicating the act that should be fulfilled for complying with the dispositions regarding the interruption of the statute of limitations period for penal liability.

Thus, in the old regulation, the condition of the act fulfilled for the occurrence of the interruption of the statute of limitations period concerned an act that, according to law, had to be communicated, while the new regulation loosened such condition in the meaning of fulfillment of any procedural act in the case.

The new regulation was subject to the checks performed by the Constitutional Court of Romania for the purpose of assessing the constitutional character of the phrase „*any procedural act in the case*", establishing that the legislative solution in the dispositions under art. 155 par. (1) in the New Penal Code is unconstitutional.

In relation to this aspect, it is absolutely necessary to perform an analysis of the manner in which the stipulation reviewed was applied, in the context of the declared unconstitutionality and its statement of reasons in which, among others, the constitutional control authority mentions that „**the previous legislative solution, provided under art. 123 par. (1) in the Penal Code of 1969, fulfilled the predictability conditions** prescribed by the constitutional dispositions reviewed, given that it provided the interruption of the statute of limitations period for penal liability only through the fulfillment of an act that, according to law, had to be communicated, in the case in which the person concerned acted as an accused or defendant"

Given that, within 45 days since the publication of the decision in the Official Gazette, as otherwise did on a regular basis, the legislator failed to fulfill their obligation to intervene on the law text declared unconstitutional, the effects generated were challenged in practice.

2. Modes of interpretation of art. 155 par. (1) in the Penal Code, determined by the Decision of the Constitutional Court of Romania no. 297/2018

A first case law **interpretation**[2] (in minority), the Decision of the Constitutional Court of Romania „is not an interpretative one, but one declaring the unconstitutionality of a part of art. 155 par. (1) in the Penal Code", while the phrase through the fulfillment of any procedural act in the case was lawfully suspended, as a consequence of the legislator"s passivity, therefore it ceased to be effective.

Such first interpretation, whereby the decision of the Constitutional Court is granted a plain and not an interpretative effect, was used before by other Romanian courts, too[3] establishing that „**at present, there are no regulated causes for interruption of the statute of limitations period for penal liability**, because, under the Decision of the Court, the court for constitutional disputes declared as unconstitutional the dispositions under art. 155 par. (1) in the Penal Code, which provided the causes for interruption of the statute of limitations period (...)"

It was underlined that this aspect does not amount to such Decision acquiring an interpretative character, given that:

a) the operative part of the Decision is very clear, and should the constitutional control forum wished to provide an interpretation of the relevant legislative solution in compliance with the Constitution, it would have provided the explanations required by means of reasons;

b) The Constitutional Court may not proceed to an interpretation reactivating the old regulation, because, in such a case, it would subrogate the legislator, a fact that is prohibited by art. 61 par (1) in the Constitution, according to which „The Parliament is the sole legislating authority of the country." The Court itself, in paragraph no. 23 in the Decision no. 629/2014, established that: „it has constantly stipulated in its case law that it has no jurisdiction to get involved in legislating matters and in the penal policy of the state, any contrary attitude being interference in the jurisdiction of other constitutional authorities".

This opinion was stated also by other authors of specialist literature, in the meaning that „the phrase through any procedural act performed in the case came from the active source of penal legislation, the legislator failing to introduce another phrase in its place; otherwise, the decisions of the Constitutional Court declaring the unconstitutionality of some legal dispositions amount to repealing laws (...) a repealed legal disposition may never be reinterpreted or applied again and, mutatis mutandis, neither may do so a decision of the Constitutional Court. To do otherwise would mean, by judiciary means, to keep in force a text that was removed from the active legislation by establishing its unconstitutionality"[4].

According to the second case law **interpretation** (in majority), it was showed that the Decision of the Constitutional Court no. 297/2018 is a

[2] Penal Decision no. 1348/A/2018, of 19 November 2018 of Cluj Court of Appeal. Decision rescinded by appeal in cassation - Decision no. 174/RC of 15 May 2019 of the High Court of Cassation and Justice.

[3] Penal Decisions no. 1208/2018 and 1209/2018, of 31 October 2018 of Timișoara Court of Appeal.

[4] An opinion stated by the Faculty of Law within „Nicolae Titulescu" University of Bucharest, on the occasion of the petition filed by Constanța Court of Appeal – Penal Section for minors and family cases, in the penal case no. 18.348/212/2016 – Decision no. 5/2019 of the High Court of Cassation and Justice.

decision provided in **the interpretation of art. 155 par. (1) in the Penal Code**, its effects being mandatory as regards both the operative part and the reasons.

For these purposes, it was assessed that the unconstitutionality of the legislative solution does not involve the unconstitutionality of the dispositions under art. 155 par. (1) in the New Penal Code in their entirety, as showed by the considerations of the decision of the court for constitutional disputes, which mention that the regulation under art. 123 par. 1 Penal Code of 1969 – interruption of the statute of limitations period for penal liability through fulfillment of an act that, according to law, should have been communicated to the accused or the defendant – met the predictability conditions prescribed by the constitutional dispositions reviewed.

As regards the characteristics of the act interrupting the statute of limitations period, the Constitutional Court mentioned that only a procedural act procuring that the person has the possibility to be aware of the aspect of interruption of the statute of limitations period for penal liability and of the start of a new statute of limitations period warrants the predictable character of the dispositions under art. 155 par. (1) in the New Penal Code (par. 28).

In other words, the court for constitutional disputes has established that a new statute of limitations period may not pass prior to guaranteeing the person concerned the right to become aware of the aspect of interruption of the statute of limitations period for penal liability and of the start of a new statute of limitations period.

In its turn, in the reasons of the Decision no. 25/2019, the High Court of Cassation and Justice „established that the interruption of the statute of limitations period may be performed only by fulfilling an act which, according to law, should be communicated, in the case within which the person concerned acted as an accused or defendant, as expressly stipulated by the Constitutional Court."

The facts stipulated by the High Court of Cassation and Justice were reviewed also by the National Institute of Magistrates, which mentioned that „based on the reasons of the decision no. 297/2018, we may draw the conclusion that the present regulation is prone to prejudice the suspect or the defendant through the state of perpetual uncertainty this is in, taking into account that this was not informed, through interruption documents, that the penal deed committed by them has not lost its social significance that it had when it was committed".[5]

According to the opinion of the National Institute of Magistrates, the regulation regarding the interruption of the statute of limitations period for penal liability in the previous Penal Code was resumed.

In line with the High Court of Cassation and Justice is both the specialist literature and national case law, which assess that the effect interrupting the statute of limitations period occurs as of the date when the act is communicated, or as of the date when this is performed in the presence of the suspect or of the defendant, as we will show hereinafter:

In the Penal Decision no. 907/21.06.2019, the Bucharest Court of Appeal established: „the interruption of the statute of limitations period for peal liability means the cessation of that period through the fulfillment by the judiciary authorities with jurisdiction, before the expiry of the statute of limitations period, of any act that, according to law, should be communicated to the defendant (summons, notice of charge, initiation of penal action, hearing, confrontation, etc.) and that these acts should be communicated to the defendant or performed in its presence."

In the Penal Decision no. 368A/10.08.2018, Oradea Court of Appeal has established that: „with regard to the Decision no. 297/26.04.2018 pronounced by the Constitutional Court, it shall establish that the statute of limitations regarding penal liability of the defendants with regard to committing the crimes (...) occurred, as a consequence of the fact that, since the moment when the deed was committed, that is 06/07.06.2004, and until the moment of performance of some penal procedural acts that should be communicated to the defendants (...)"

In another case, the court of law[6] proceeded to reviewing the effects of the Decision no. 297/2018 on the defendants" situation, in light of the last act performed in the case, prone to interrupt the penal statute of limitations period.

Therefore, in the absence of a procedural act that should be communicated according to law to the suspect or the defendant, the interruption of the statute of limitations period for penal liability may not be carried out, considering the dispositions under art. 155 par. (1) in the Penal Code, as construed considering the Decision of the Constitutional Court no. 297/26 April 2018.

3. Practice of the High Court of Cassation and Justice

Up to the present, the High Court of Cassation and Justice has dismissed as inadmissible both a petition requesting to pronounce a preliminary decision for solving in principle some law matters, and the appeal in interest of the law filed by the Attorney General of the Prosecution Office by the High Court of Cassation and Justice, both regarding the interpretation and application of the dispositions under art. 155 par. (1) in

[5] Meeting of the Presidents of penal sections of the High Court of Cassation and Justice and of courts of appeal, conducted at the Bucharest Court of Appeal in the period 16-17 May 2019.

[6] Penal Sentence no. 1923/2018 pronounced by Medgidia Trial Court.

the Penal Code, following the Decision of the Constitutional Court of Romania no. 297/2018.

As regards the petition aforementioned, which was dismissed as inadmissible by the Panel for solving some law issues in penal matters, the High Court of Cassation and Justice stated its opinion in line with the case law of the Constitutional Court[7] according to which „The High Court of Cassation and Justice has no jurisdiction to pronounce itself on the effects of the decision of the Constitutional Court, or to provide mandatory solutions contravening to the decisions of the Constitutional Court".

The appeal in the interest of law was in its turn dismissed as inadmissible, the panel for adjudication of appeals in the interest of law, based on the case law of the Constitutional Court of Romania and also of the High Court of Cassation and Justice, „establishing that the law issue on which the courts pronounced themselves differently goes beyond the jurisdiction of the supreme court, the Constitutional Court being the only one that may stipulate on the effects of the decisions pronounced"[8].

After reviewing most of the judgments provided by the High Court of Cassation and Justice, we have not been able to identify any judgments by which it followed the minority interpretation of the effects of the decision of the Constitutional Court aforementioned. However, given that, at a national level, we have identified a trend of non-uniform practice, the problem should be solved by a decision with a mandatory effect on courts, whether we speak about an appeal in the interest of law, or we speak of a preliminary decision for solving some law matters, given the importance of the stipulation reviewed.

4. The phrase „that should be communicated" and the interruption of the statute of limitations period

With regard to the acts that lead to the interruption of the statute of limitations period for penal liability and with regard to the moment when such interruption becomes effective, most judiciary doctrine and practice assessed that a new statute of limitations period starts to pass starting from the date when the act was communicated, or the date when the act is performed in the presence of the suspect/ defendant.

The following are prosecution acts that should be communicated to the defendant: continuation of prosecution of a person, initiation of the penal action, preventive arrest, etc. The following are process documents that should be served on the defendant: summons, decisions made during adjudication, etc. We shall consider as acts communicated to the defendant also the procedural acts performed before them (interrogation, confrontation) or the acts performed in their presence (searches, investigation on site). The date when a new statute of limitations period starts to pass is, as the case may be, either the date when the act was communicated to the defendant, or the date when the act was performed in the presence of the accused or of the defendant, that is the date when the procedural act interrupting the statute of limitations period was fulfilled.[9]

Without reiterating the aspects presented previously, we consider that three conditions are required for the interruption of the statute of limitations period:

1. fulfillment of a process or procedural act;
2. the act interrupting the statute of limitations period should be communicated according to law. In other words, the law provides what the (process or procedural) acts are that should be communicated to the defendant; in general, these are related to guaranteeing their rights during the penal trial, but also related to their obligations arising from the penal legal relationship, given that the accused or the defendant is held liable for the penal deed committed.
3. the act, according to law, should be communicated to the suspect or the defendant during the penal trial and not only should it be among the ones that should be communicated. The communication should be carried out effectively.[10]

5. Conclusions

We consider that, pursuant to the provisions under art. 147 par. (1) in the Romanian Constitution, according to which „The dispositions in the laws and ordinances in force, as well as the ones in regulations, found as being unconstitutional, cease their legal effects within 45 days since the publication of the decision of the Constitutional Court if, during such interval, the Parliament or the Government, as the case may be, do not align the unconstitutional provisions to the dispositions in the Constitution. During such term, the dispositions found as being unconstitutional are lawfully suspended", the Decision no. 297 of 26 April 2018 of the Constitutional Court of Romania is effective *ex nunc*, more precisely starting from 25 June 2018, the date of its publication in the Official Gazette.

Given the legislator"s failure to intervene in order to amend the unconstitutional provisions, we consider that the interruption of the statute of limitations period for penal liability occurs in the conditions established in paragraph 34 in the Decision no. 297/2018, namely only „through the fulfillment of an act that, according to law, should be communicated to the suspect or the

[7] Decision of C.C.R. no. 454/2018, of 4 July 2018.
[8] Decision no. 25/2019, of 11.11.2019 of Î.C.C.J.
[9] V. Dongoroz et al., Theoretical Explanations of the Romanian Penal Code. General Part. Vol. II, Academia Republicii Socialiste România Publishing House, Bucharest, 1970, p. 363- 364.
[10] H. Dumbravă, Penal Liability, Interruption of Statute of Limitations Period, in R.D.P. no. 1/2000, p. 62-64.

defendant during the penal trial", similarly to the previous legislative solution, provided under art. 123 par. (1) in the Penal Code of 1969, which, in the constitutional judge"s opinion, „met the predictability conditions prescribed by constitutional dispositions".

In our opinion, by agreeing on the majority interpretation, namely based on the old regulation (according to par. 34 in the Decision of the Court), one of the basic rules of the penal trial, that is guaranteeing the right to defend oneself, is supported. Otherwise, we could found the dissolution of a fundamental principle, a fact that is incompatible with the right to a fair trial in the meaning of art. 10 in the Penal Procedure Code and art. 6 in the European Convention of Human Rights (the right to a fair trial).

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