

# DEFICIENCIES IN ENACTING ARTICLE 44 OF ROMANIAN LAW NO.111/1996 REGARDING THE SAFE DEPLOYMENT, REGULATION, AUTHORIZATION AND CONTROL OF NUCLEAR ACTIVITIES

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## Abstract

*In this paper, the author analyses the main practical issues that can be discussed when enacting the provisions of article 44 of Romanian Law no.111/1996 regarding the safe deployment regulation, authorization and control of nuclear activities.*

*The paper is structured in two parts. The first aims at pointing out the particularities of the incrimination discussed, by reference to its constitutive content, and the second part adapts the mechanism of the Romanian Constitutional Court Decision no.405/2016 to the provision analyzed, in order to comply with the regulation of art.73, paragraph 3, letter h of the Romanian Constitution.*

*The author concludes that the only effective way to prevent the deficiencies previously discussed is the intervention of the legislator, reason for which a de lege ferenda proposal has been made.*

**Keywords:** nuclear activities, crimes against the nuclear regime, crimes against environment, incomplete provisions, organic law, deficient incrimination

## 1. Introduction

Human activities involving nuclear materials require a high degree of responsibility of the state for environmental protection both nationally and internationally. As stated in legal literature<sup>1</sup>, nuclear energy is the most important discovery of man in the 20<sup>th</sup> century, but also the worst weapon against the creator itself.

In Romania, the special legislation in the field of nuclear activities is Law no.111/1996 regarding the safe deployment, regulation, authorization and control of nuclear activities<sup>2</sup>. **Article 2 of the quoted act establishes the area of regulation of the law in question in the following way:** “The provisions of this law shall apply to the following activities and sources of radiation: a) research, design, possession, placing, construction, installation, commissioning, trial run, operation, modification, conservation, decommissioning or closure, import, export and intra-Community transfer of nuclear installations, including the management of used nuclear fuel; b) the design, ownership, location, construction and assembly, commissioning, operation, conservation and decommissioning of mining and preparation of uranium and thorium and facilities of waste from the mining and preparation of uranium and thorium; c) the production, placing, construction, supply, rental, transfer, handling, holding, use, intermediate storage, removal, transportation, transit, import, export and intra-community transfer of radiological facilities,

including radioactive waste management facilities; c<sup>1</sup>) producing, manufacturing, supply, rental, transfer, handling, storing, processing, utilization, recycling, intermediate storage, transport, transit, import, export and intra-community transfer of radioactive material and radioactive sources, as appropriate; c<sup>2</sup>) producing, manufacturing, supply, transfer, handling, storing, processing, utilization, intermediate storage, transport, transit, import, export and intra-community transfer of nuclear materials, including fresh and spent nuclear fuel; c<sup>3</sup>) the transfer, handling, holding, pre-storage, intermediate storage, permanent storage, transport, transit, import, export and intra-community transfer of radioactive waste; d) the production, the providing and use of dosimetric and of ionizing radiation detection systems, of materials, and devices for the protection against ionizing radiation, and means for packaging or transport of radioactive materials, specially arranged for this purpose; e) the production, manufacture, lease, transfer, possession, import, export and intra-community transfer of materials, devices and equipment referred to in Annex no.1, f) holding, transfer, import, export and intra-community transfer of unpublished information relating to materials, devices and equipment pertinent to the proliferation of nuclear weapons and other nuclear explosive devices, referred to in Annex no. 1, g) providing products and services for nuclear facilities; h) providing products and services for radiation sources, dosimetric control instruments, ionizing radiation detection systems, materials and devices used for protection against ionizing radiation; h<sup>1</sup>) design and execution of nuclear

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<sup>1</sup> D.S.Marinescu, M.C.Petre – *Environmental Law Treaty (original title: Tratat de Dreptul Mediului)*, 5<sup>th</sup> edition, Universitara Publishing House, Bucharest, 2014, pg.609

<sup>2</sup> Republished in the Official Gazette, Part I, no.552 / 27.06.2006

specific constructions; i) orphan sources, from their detection to their permanent storage as radioactive waste; j) manufacture, import, export and transit of products for consumption which have been irradiated, containing or contaminated with radioactive material; k) activities leading to exposure of workers or the population to radon and thoron or their inside offspring, the external exposure caused by building materials, and prolonged exposure situations caused by long-term effects of an emergency or a past human activities; l) locations contaminated with mineral substances associated in ore with uranium or thorium or with residual radioactive contamination resulting from a radiological or nuclear accident, after the emergency status was over; m) human activities that involve the presence of natural sources of radiation which leads to a significant increase in the exposure of workers or other people, including the operation of aircraft in terms of exposing the crew during the flight, the extraction and processing of minerals associated in ore with uranium or thorium, and other raw materials in the process of extracting and processing, lead to an increase in the concentration of natural radionuclides in intermediate products and waste, and the processing of materials containing naturally occurring radionuclides; n) preparation, planning and response for all cases of exposure to ionizing radiation in order to protect public health, workers and workers in emergency situations”.

**The national authority exercising regulatory powers, licensing and control of nuclear materials is the National Commission for Nuclear Activities Control, in accordance with article 4, paragraph 1 of Law no.111 / 1996, as amended and supplemented.**

## 2. Particularities of the incrimination

For the purpose of this paper, we shall focus our attention on the provisions of art.44 of Law no.111/1996. According to this text, “(1) Carrying out an activity among those referred to art.2, art.24, par.1, art.28, par.2 and art.38, par.1 without proper authorization required by law alongside the breach of art.38 par.2<sup>1</sup> and 2<sup>2</sup> constitutes an offense and shall be punished as follows: a) with imprisonment from six months to two years or a fine, the activities referred to in: art.2 letter a, on the research, development, ownership, location, construction or assembly, conservation of nuclear installations; art.2, letter b; art.2, letter d, regarding means of packaging or transport of radioactive materials, specially arranged for this purpose; art.2, letter g; art.24, par.1, and art.38, par.1; b) imprisonment from 2 to 7 years and deprivation of certain rights, the breach of art. 38 par.2<sup>1</sup> and 2<sup>2</sup>, and performing unauthorized activities under:

art.2 letter a, relating to the commissioning, trial-run, operation, modification, removal, import and export of nuclear installations; art.2 letter c, if radiological facilities, nuclear or radioactive materials, radioactive radiation generating waste presents a special risk; art.2, letters e and f and art.28 par.2, if nuclear or radioactive materials, radioactive waste and radiation generators present a special nuclear or radiological risk. (2) Attempt to offenses under par.1, letter b is punished”.

Regarding the special legal object, we have observed that legal literature is not unitary. In this regard, some authors have noted that the object is represented by the social relations developed in order to “prevent radioactive pollution by exercising strict control of nuclear activities through the authorization procedure”<sup>3</sup>.

Other authors have defined the special legal object as “social relations concerning the safety of nuclear activities for exclusively peaceful purposes, so as to meet the conditions of safety, protection of occupationally exposed workers, population, environment and property”<sup>4</sup>.

We believe the second definition is preferable for including in its area of protection the integrity of the environment, but also for circumscribing the use of nuclear energy to peaceful purposes only. Our opinion is that article 44 of Law no.111/1996 aims mostly at protecting public health, public safety and the environment with all its natural and anthropologic components.

In what concerns the material object, we appreciate that it depends on the normative variant of the incrimination. In general, it is represented by nuclear materials, goods subjected to radiation, or to processing by nuclear materials or nuclear facilities. In some normative variants, we consider that no material object can be determined, the offense being purely formal.

The active subject of the crime is not qualified by law therefore it can be represented by any physical person or legal entity that can be held liable according to common criminal law provisions.

In fact, given that the access to nuclear materials is limited by law, we believe that the active subject of the offense can only be a physical or legal entity that usually operates, apparently legal, in the nuclear field.

The main passive subject is the State, as the main protector of the environment, public health and public safety. If by the same action the integrity of a person is harmed, we believe that we cannot consider the victim a secondary passive subject for this crime, but a primary passive subject for a crime against its integrity or life.

Regarding the constitutive content, we believe that the offense in question exists on a premise situation namely, the pre-existence of the obligation to obtain

<sup>3</sup> M.Gorunescu in M.A.Hotca (coord.) – Criminal offenses under special laws, Comments and explanations (original title: Infrațiuni prevăzute în legi speciale, Comentarii și explicații), 3<sup>rd</sup> edition, CH Beck Publishing House, Bucharest, 2013, pg.593

<sup>4</sup> N.Conea, E.Tanislav, C.Gheorghe, M.Conea – Criminal offenses under special laws (original title: Infrațiuni prevăzute în legi speciale), Semne Publishing House, Bucharest, 2000, pg.244

authorization for the conduct complained of, but only in the first normative variant.

As the incrimination text clearly states, the first normative variant consists of conducting one of the activities referred to in art.2, art.24, par.1, art.28, par.2 and art.38, par.1, without proper authorization required by law. The second normative variant consists of a breach of art.38 par.2<sup>1</sup> and 2<sup>2</sup>.

To understand the action or omission punishable under criminal law, we find it necessary to examine the texts earlier referred to. In this regard, article 2 defining the regulatory field of the law was reproduced in the first part of the paper. Article 24, paragraph 1 of the same law states that: "The authorization of management systems in the nuclear activities of design, location, supply, manufacturing, service delivery, construction, installation, commissioning, operation, decommissioning or conservation of nuclear installations and products, services and systems classified as important for nuclear safety is mandatory". Article 28, paragraph 2 of the Law refers to obligatory licensing of ownership, conservation, decommissioning or transfer, providing that: "Upon closure or decommissioning of nuclear or radiological facilities, and in case of partial or complete transfer of nuclear and radiological installations, radioactive products or nuclear materials, the authorization holder must, in advance, request and obtain, as provided by law, the authorization for possession, storage, decommissioning or transfer, as appropriate".

Finally, article 38, paragraph 1 of Law no.111/1996 stipulates: "The Ministry of Public Health shall authorize: a) the introduction into the economic and social circuit, for use or consumption by the population, of products which have undergone irradiation or containing radioactive materials; b) the introducing into the field of medical diagnosis and medical treatment, radiation sources closed, open, ionizing radiation generating devices and pharmaceutical products containing radioactive materials".

The multitude of actions resulting from cumulating the offending provisions found in article 2 of Law no.111/1996, as amended and supplemented, generate a poor and possibly confusing incrimination. This is, from our point of view, an effect of the repeated reference technique, which, in criminal law, can lead to severe misunderstandings of the text, most of all, when certain actions or omissions are prohibited, but they are not sanctioned as such.

We appreciate that only the following actions or omissions resulting from article 2 are actually incriminated by article 44, namely because they are the only conducts for which a sanction is provided: a) research, design, possession, placing, construction, installation, commissioning, trial run, operation, modification, conservation, decommissioning or closure, import, export and intra-Community transfer

of nuclear installations, including the management of used nuclear fuel; b) the design, ownership, location, construction and assembly, commissioning, operation, conservation and decommissioning of mining and preparation of uranium and thorium and facilities of waste from the mining and preparation of uranium and thorium; c) the production, placing, construction, supply, rental, transfer, handling, holding, use, intermediate storage, removal, transportation, transit, import, export and intra-community transfer of radiological facilities, including radioactive waste management facilities; d) the production, the providing and use of dosimetric and of ionizing radiation detection systems, of materials, and devices for the protection against ionizing radiation, and means for packaging or transport of radioactive materials, specially arranged for this purpose; e) the production, manufacture, lease, transfer, possession, import, export and intra-community transfer of materials, devices and equipment referred to in Annex no.1, f) holding, transfer, import, export and intra-community transfer of unpublished information relating to materials, devices and equipment pertinent to the proliferation of nuclear weapons and other nuclear explosive devices, referred to in Annex no. 1, g) providing products and services for nuclear facilities.

In national legislation, so far, we have not encountered any crime likely to be committed in so many normative variants. We appreciate that the choice of the legislator is mainly determined by the use of a *per relationem* incrimination method, which complicates determining the actual content of criminal offense and the framing of facts in one of the legal provisions in question.

Paradoxically, for the actions found in article 2, entirely indicated by the legislator in the content or article 44, just the conducts set out in paragraphs a, b, c, d, e, f, g are penalized by indicating the penalties applicable. The criminal activities covered by art. 2 lit.c<sup>1</sup>, c<sup>2</sup>, c<sup>3</sup>, h, h<sup>1</sup>, i, j, k, l, m, n, although prohibited, are not subjected to a criminal penalty. We believe that this mismatch was caused by repeated legislative changes, by modifying single articles without remedying the imperfections generated by the reference norms. In this regard, we observe that in the original form of the law<sup>5</sup>, article 2 contained only 7 letters, from "a" to "g", therefore, the rest of article 2 is the effect of legislative upgrades done in the past.

The offense is considered typical also when the perpetrator carries out the activities listed under art.24, par.1, art.28, par.2 and art.38, par.1 without proper authorization required by law. According to the texts previously quoted, the offense consists of activities of design, location, supply, manufacturing, service delivery, construction, installation, commissioning, operation, decommissioning or conservation of nuclear installations and products, services and systems classified as important for nuclear safety; or cessation

<sup>5</sup> Published in the Official Gazette, Part I, no.267/29.10.1996

of the activity or radiological or decommissioning of nuclear installations, as well as the transfer in part or in whole, of nuclear and radiological, nuclear materials or radioactive products; or introduction into the economic and social, for use or consumption by the population, placing the medical field, for diagnosis and treatment, radiation sources closed, open, ionizing radiation generating devices and pharmaceutical products containing radioactive materials.

All regulatory arrangements set out above have the essential request attached to the material element, that the acts must be undertaken without proper authorization.

We appreciate that imposing an authorization that is also an essential element in determining the constitutive content of a crime must be done by a normative act of the same legal force as the organic law, in order to comply with article 73, paragraph 3, letter h of the Romanian Constitution. This problem will be referred to in the second part of this paper, when analyzing the relevance of the Romanian Constitutional Court Decision no.405/2016.

The latter normative variant for the offense in question is represented by the noncompliance of the perpetrator with art.38 par.2<sup>1</sup> and 2<sup>2</sup> of Law no.111/1996. The quoted text, namely paragraph 2<sup>1</sup> stipulates: "It is prohibited to deliberately add radioactive substances in the production of food, feed and cosmetic products, as well as the import or export of such products". Paragraph 2<sup>2</sup> provides that "It is prohibited to deliberately add radioactive substances in toys and personal ornaments, and the import or export of such products".

We believe that the incrimination actually prohibits the manufacturer, importer or exporter of food, cosmetics, toys and personal ornaments to deliberately add radioactive substances in its products to safeguard the life and integrity of human beings. This provision, from our perspective is mainly suitable for the protection of public health, more than for the protection of the environment.

The immediate result is represented by a state of danger to the social values protected, public health, public security and environmental integrity. Being a crime of abstract danger it is not necessary to produce any result for it to be typical. Moreover, if the facts in question have the effect of a more dangerous outcome, and personal life, integrity and property of people are affected, other crimes against life or property will be committed by the same act.

The causal link, given the formal character of the offense, is *ex re*.

The form of guilt required by law, in accordance with article 16, paragraph 6 of the Criminal Code, is the intention, either direct or indirect. The motive and purpose of the perpetrator are relevant only for the judicial individualization of the penalty.

### 3. The particular relevance of Romanian Constitutional Court Decision no.405/2016

Considering the type of normative act as criteria for the quality of a criminal norm, we consider it appropriate to determine the category of law liable to regulate criminal offenses and penalties provided, under the provisions of article 73, paragraph 3, letter h of the Romanian Constitution<sup>6</sup>.

In this regard, we consider relevant to analyze the jurisprudence of the Constitutional Court of Romania in Decision no.405/15.06.2016<sup>7</sup>, regarding the exception of unconstitutionality of the provisions of art.246 of the Romanian Criminal Code from 1969, art.297, paragraph 1 of the current Criminal Code and art.13<sup>2</sup> of Law no.78 / 2000 on preventing, detecting and sanctioning corruption.

By our assessment, the decision is relevant for the reasoning used by the constitutional judges that must apply with regard to other offenses regulated in a similar manner by incomplete criminal norms.

The essential legal question for this thesis focuses on the quality standard of the law when the incriminations is done by an incomplete legal norm, that must be completed with a provision from another act, in order to determine and punish a certain conduct. The same problem, but with reference to the offense of abuse of office, has been resolved by the Constitutional Court decision mentioned above.

In paragraph 51 of the Decision nr.405/2016, the Romanian Constitutional Court stipulated that one cannot be held liable for violating an objective standard if he does not fulfill a conduct undeterminable at normative level. Similarly, the Court held that the fulfillment of service duties improperly, can only be interpreted as meaning that the defective fulfillment is achieved by breaking the law.

The Court held that reference to a large sphere of normative acts, other than laws and Government ordinances, in order to complete criminal regulations, influences the objective side of the offense by extending it to acts that are not stipulated by primary regulation.

Equally, according to paragraph 61 of the decision, the prohibited conduct should be imposed by the legislature even by law (understood as an act formally adopted by Parliament, under Article 73, paragraph 1 of the Constitution, as well as a physical act with the force of law issued by the Government under legislative delegation under Article 115 of the Constitution or ordinances and emergency ordinances), and it cannot be deducted by the judge in a manner in which legal norms are replaced by a reasoning.

Consider the reasoning of the Court, we believe it to be applicable for every situation in which an incomplete norm regulates a criminal offense, and in order to determine the prohibited conduct, the legal text

<sup>6</sup> According to article 73, paragraph 3, letter h of the Romanian Constitution: "Organic laws shall regulate: crime, punishment and the execution thereof."

<sup>7</sup> Published in the Official Gazette, Part I, no.517/08.07.2016

must be completed with another provision, originating in a normative act. Without any doubt, article 73, paragraph 3, letter h of the Constitution does not require that absolutely all components of the constitutive content of the offense to be regulated by an organic law, or Government Emergency Ordinance issued in conditions legislative delegation under article 115 of the Constitution.

We also consider relevant the Romanian Constitutional Court Decision no.599/19.06.2007<sup>8</sup> regarding the exception of unconstitutionality of article 97, paragraphs 1,3 and 4 and the provisions of article 98, paragraphs 1,3 and 4 of Law no.26/1996 regarding the Forest Code. In that case, the exception of unconstitutionality was rejected, but the Court noted in its preamble that “since the average price of a cubic meter of standing timber is established under article 107, paragraph 1 of the Forest Code, by order of the central public authority responsible for forestry, this determination is based on a legal empowerment given by an organic law therefore the Court will not retain a violation of article 1, paragraph 3 of the Basic Law on the supremacy of the Constitution and the law”.

Therefore, we believe that in terms of respecting Article 73, paragraph 3, letter h of the Constitution, an essential request attached to the material element of the offense is part of the constitutive content of the offense, and in order to comply with the Constitutional provisions earlier mentioned, the obligation that constitutes the essential request must be imposed by law, namely by organic law or by a Government emergency ordinance, or by an act of lower legal force, like a Government decision or a Ministry act, as long as the nature of that act is determined or, at least determinable, starting from the incrimination text, or from an act of legal force equal to organic law.

Fortunately, the provisions of article 44 of Law no.111/1996 refer to a proper authorization required by law, and in this respect, we have observed that all activities incriminated must be preauthorized, according to different provisions of the Law. Given the fact that it is an organic law, this quality standard imposed by article 73, paragraph 3, letter h of the Constitution is fulfilled. More than that, in the case of a breach of article 38, paragraph 1, as a normative variant of the offense stipulated by article 44, the normative act of lower legal force, like the act of the Ministry of Public Health is expressly mentioned, and following the mechanism of the Romanian Constitutional Court Decision no.599/19.06.2007, previously quoted, a legal empowerment has operated, and the completing norm, although an act of a Ministry, is determinable as an effect of an organic law provision.

### Conclusion

As we have managed to show in the first part of this paper, the provisions of article 44 of Law

no.111/1996 are among the vaguest and most confusing incriminations found in Romanian actual legislation.

Given the fact that a great number of legislative changes conducted to non-hermetic correlations, we appreciate that art.44 must be modified to suit the actual status of the legislation and to prevent the need for both the addressee of the criminal provision, but also for the national judge continuously reinterpret the provision in order to determine the prohibited and the punished conduct.

For this reason, we believe that art.44 must incriminate each of the conducts found in article 2, in a direct manner, and therefore we suggest the following form:

1. Carrying out the following activities without the proper authorization required by law constitutes an offense and shall be punished with imprisonment from six months to two years or a fine:
  - a) the research, development, ownership, location, construction or assembly, conservation of nuclear installations;
  - b) the design, ownership, location, construction and assembly, commissioning, operation, conservation and decommissioning of mining and preparation of uranium and thorium and facilities of waste from the mining and preparation of uranium and thorium;
  - c) the production, the providing and use of means for packaging or transport of radioactive materials, specially arranged for this purpose;
  - d) providing products and services for nuclear facilities;
  - e) the design, location, supply, manufacturing, service delivery, construction, installation, commissioning, operation, decommissioning or conservation of nuclear installations and products, services and systems classified as important for nuclear safety, without a management system authorization;
  - f) the introduction into the economic and social circuit, for use or consumption by the population, of products which have undergone irradiation or containing radioactive materials or the introducing into the field of medical diagnosis and medical treatment, radiation sources closed, open, ionizing radiation generating devices and pharmaceutical products containing radioactive materials.
2. Carrying out the following activities without the proper authorization required by law constitutes an offense and shall be punished with imprisonment from 2 to 7 years and deprivation of certain rights:
  - a) the commissioning, trial-run, operation, modification, removal, import and export of nuclear installations;
  - b) the production, placing, construction, supply, rental, transfer, handling, holding, use, intermediate storage, removal, transportation,

<sup>8</sup> Published in the Official Gazette, Part I, no.523/02.08.2007

- transit, import, export and intra-community transfer of radiological facilities, including radioactive waste management facilities, if radiological facilities, nuclear or radioactive materials, radioactive radiation generating waste presents a special risk;
- c) the production, manufacture, lease, transfer, possession, import, export and intra-community transfer of materials, devices and equipment referred to in Annex no.1;
  - d) holding, transfer, import, export and intra-community transfer of unpublished information relating to materials, devices and equipment pertinent to the proliferation of nuclear weapons and other nuclear explosive devices, referred to in Annex no.1;
  - e) closure or decommissioning of nuclear or radiological facilities, and in case of partial or complete transfer of nuclear and radiological installations, radioactive products or nuclear materials, if nuclear or radioactive materials, radioactive waste and radiation generators present a special nuclear or radiological risk.
3. The same penalty as in paragraph 2 will be applied for the deliberate addition of radioactive substances in the production of food, feed and cosmetic products, as well as the import or export of such products and for the deliberate addition of

radioactive substances in toys and personal ornaments, and the import or export of such products.

4. The attempt to offenses under paragraphs 2 and 3 is punished”.

Considering the second part of this paper, regarding the particular relevance of Romanian Constitutional Court Decision no.405/2016, we have concluded that an essential request attached to the material element of the offense is part of the constitutive content of the offense, and in order to comply with the provisions of article 73, paragraph 3, letter h of the Romanian Constitution, the obligation that constitutes the essential request must be imposed by law, namely by organic law or by a Government emergency ordinance, or by an act of lower legal force, like a Government decision or a Ministry act, as long as the nature of that act is determined or, at least determinable, starting from the incrimination text, or from an act of legal force equal to organic law. In this respect, we have observed that the provisions of article 44 of Law no.111/1996 adequately refer to other legal texts from the same law, which is organic, or to normative acts of lower legal force, like an act of the Ministry of Public Health, which is expressly mentioned by article 38, paragraph 1 of Law no.111/1996, being, therefore, determinable by organic law.

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