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The effects of the decision of the Constitutional Court no 358/2022 on court decisions. Application of judicial error

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Abstract

The prescription of criminal liability presupposes the extinction of the criminal legal relationship appeared as a result of committing a crime due to the fact that it was not committed within a certain term established by law, which affects and empties the idea of criminal repression and prevention. The main objective of this research is related to the exposure of the effects of the Decision of the Constitutional Court no. 358/2022 with reference to Decision no. 297/2018 by which the phrase "by fulfilling any procedural act in question" from the content of art. 155, paragraph 1 of the Criminal Code, especially from the perspective of multiple issues that may be defended in practice, which also determines the possibility of the existence of a judicial error. The article analyses the content of the two decisions of the Constitutional Court, but also their implications identified in the practice of the courts, taking into account the importance of respecting the principle of legality, but also the observance of the rights of the parties in a criminal trial.

Keywords: prescription of criminal liability; interruption of the course of prescription; judicial error; decisions of the Constitutional Court

Introduction

Criminal liability is determined by the commission of a crime and presupposes that the persons who have committed crimes must bear the consequences of their deeds from a legal point of view in order to fulfill the function of coercion, but also of prevention.

In order for the criminal prosecution of the perpetrators to be effective, it is important that the application of the legal provisions and the pronouncing of a punishment be done as close as possible to the moment of committing the deed, so that the purpose of the criminal law is effectively achieved[1], which outlines the importance of the time factor in fulfilling preventive and educational goals.

[1] Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, ediția a IX-a revăzută și adăugită, Editura Universul Juridic, București, 2012, p. 381.

In these conditions, the Criminal Code regulates the institution of the prescription of criminal liability, as a cause that removes criminal liability, determined by the fact that the investigation and trial of the deed were not carried out within a period provided by law at the time of its commission[2], the exception to this rule being constituted by some serious offenses provided by art. 153, para. 2 Criminal Code, which harm the life and liberty of the person. The institution of the prescription of criminal liability is regulated in the general part of the Criminal Code is related to the punishment provided by the normative act and not to the amount of the punishment established by the court.

The Criminal Code regulates, on the one hand, the general prescription terms, and, on the other hand, the interruption of the prescription of the criminal liability which is performed in the situation of legally fulfilling any procedural act, before the fulfillment of the prescription term, but also the special prescription which implies the removal of criminal liability no matter how many interruptions occur, if the general limitation period is exceeded once again. On April 26, 2018, the Constitutional Court of Romania pronounced Decision no. 297/2018, by which he admitted the exception of unconstitutionality of the provisions of art.155 paragraph (1) of the Criminal Code[3], noting that the criminal law requires the clear, precise and predictable regulation of the facts that constitute crimes, but also of the conditions under which a person can be held criminally liable for committing them.

In this sense, the Court found that it is necessary to guarantee the predictability of the effects of the provisions of art.155 par. (1) of the Criminal Code in respect of a person who has committed an act provided by criminal law, which is not observed in the situation where a person who has the quality of suspect or defendant finds himself in an uncertain legal situation regarding the legal requirements for criminal prosecution as long as he does not have the opportunity to know and have control over the course of the prescription of criminal liability.

According to art. 147 of the Romanian Constitution, the provisions of the laws in force, found to be unconstitutional, cease their legal effects 45 days after the publication of the decision of the Constitutional Court if, during this period, the Parliament or the Government, as the case may be, does not agree the unconstitutional provisions with the Constitution. Thus, seeing that within the term imperatively established by the Romanian Constitution, the Romanian Parliament did not intervene on the provisions of art. 155, para. 1, the phrase declared unconstitutional has automatically ceased to have effect after the expiration of the 45-day period. It should be noted that despite this aspect, most courts have found that the text of the law in its original form continues to produce effects, the interruption of the prescription of criminal liability was interruptedby the communication of any procedural act[4].

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[2] Mihail Udroiu, *Drept penal. Partea generală. Noul Cod Penal*, Editura CH Beck, București, 2014, p. 369.

[3] Decision no. 297/2018 was published in the Official Gazette of Romania, Part I, no. 518 / 25.06.2018, available online at https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_297_2018.pdf

[4] Dragoș Pârgaru, *Prescripție, quo vadis? Gânduri în legătură cu prescripția răspunderii penale în urma Deciziei nr. 358/2022 a Curții Constituționale,* article published in Annals of the University of Bucharest, Law series, Legal Forum no. 1/2022, p. 46.

Aspects regarding the effects of the decisions of the Constitutional Court

On May 26, 2022, the Constitutional Court of Romania pronounced Decision no. 358/2022[5] by which he admitted the exception of unconstitutionality of the provisions of art. 155 para. (1) of the Criminal Code[6], article regulating the interruption of the course of the prescription.

In fact, by this judgment, in essence, the Court found that as long as by Decision no. 297/2018, it was found unconstitutional the expression "by fulfilling any procedural act in question" from the content of art. 155 para. (1) Criminal Code, decision published on 25.06.2018, in the absence of an intervention of the legislator, the legal effects of the partially found unconstitutional norm ceased by right on 10.09.2018.

In its published statement of reasons, the Court states that it has held in its settled case-law that 'both the recitals and the operative part of its decisions are generally binding and are equally binding on all legal subjects. Consequently, both the Parliament and the Government, respectively the public authorities and institutions are to apply, in application of the criticized law, those established by the Constitutional Court in the recitals and the operative part of the present decision".

The practical effects of the unconstitutional declaration of the phrase "by fulfilling any procedural act in question" determine the non-application of the part of article no. 155, para. 1 of the Criminal Code, which remains in a partial form can not produce legal effects, the part of the text of the law that was in force between 10.09.2018 - 30.05.2022 (date on which the Criminal Code was amended by the Emergency Ordinance no.71/2022[7]), having the following content "The course of the term of prescription of the criminal liability is interrupted by the fulfillment…".

In these conditions, it is more than obvious that an incomplete text of law was devoid of legal effects until the appearance of a normative act regulating this situation, which cannot be applied by the courts.

Specifically, as long as the Romanian legislator has not adopted a text of law to regulate this situation between 2018 and 2022, for the period between the date of publication of the limit of the possibility of intervention of the legislator following

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[5] Decision no. 358/2022 was published in the Official Gazette of Romania, Part I, no. 565 / 09.06.2022, available online at https://www.monitoruloficial.ro/Monitorul-Oficial--PI--565--2022.html

[6] The content of the text of the law subject to constitutional review was "The course of the term of prescription of criminal liability is interrupted by the fulfillment of any procedural act in question"

[7]Government Emergency Ordinance no. 71 / 30.05. 2022 was published in the Official Gazette of Romania, Part I, no. 531 / 30.05.2022, text available online at https://legislatie.just.ro/Public/DetaliiDocumentAfis/255795, having a single article with the following content: "The course of the term of prescription of criminal liability is interrupted by fulfilling any procedural act in question which, according to the law, must be communicated to the suspect or defendant*."*

Decision no. 297/2018 (10.09.2018) and until the entry into force of a normative act to clarify the legal norm, respectively to expressly regulate the cases that interrupt the course of the term of prescription of criminal liability (30.05.2022, date of adoption of GEO no. 71 / 2022), the legislation in force did not contain any case that would allow the interruption of the prescription of criminal liability.

Thus, during this period, the prescription of criminal liability could not be interrupted by any procedural act performed in the case, which determines the non-application of the legal institution of the special prescription, provided by art. 155 paragraph (4) of the Criminal Code which stipulates that "The terms provided in art. 154, if they have been exceeded once again, they will be considered fulfilled no matter how many interruptions would occur ".

Practical aspects

The practical situation that will be debated in this article starts from the hypothesis in which Decision no. 358/2022 was adopted by the Constitutional Court of Romania between the date of the ruling by the court and the moment of the effective ruling, and the publication of the motivation in the Official Gazette of Romania was made on the day of the ruling.

Thus, we note that on 09.06.2022 the court invested with resolving the appeal for a crime of driving a vehicle without a driving license, a fact provided by art. 335, para. 1 of the Criminal Code, which has a legal classification of 1-5 years, committed in the fall of 2016, rejected the appeal declared by the defendant as unfounded, the last term in a public hearing taking place on 11.05.2022.

Thus, taking into account that the deed is presumed to have been committed in the fall of 2016, the limitation period expired in the fall of 2021, which means that at the date of pronouncing by the appellate court, the provisions of art. 16, para. 1, lit. f) Criminal Code in the sense that the criminal action can no longer be exercised, being applicable the provisions of art. 386, para. 6 of the Criminal Procedure Code, which establish that the solution to be ordered in the case is to terminate the criminal proceedings.

Compared to the aspects previously exposed, considering that in the period 10.09.2018-30.05.2022 no cause of interruption of the limitation period operated in the criminal legislation, it is found that in the case from which we started the debate is the applicable term is the provided by art. 154, para. 1, lit. d) Criminal Code, respectively for 5 years.

At the same time, we specify the fact that art. 15, para. 2 of the Romanian Constitution stipulates that the law provides only for the future, except for the more favorable criminal or contravention law, being certain that for the persons who benefit from the provisions of the CCR decision no. 358/2022 is more favorable to ascertain the incidence of the provisions of the decision of the Constitutional Court Decision no. 297/2018 by which it was deprived of legal effects art. 155, para. 1 of the Criminal Code.

Opinions published in the public sphere stating that the institution of criminal liability prescription would be one of criminal procedural law cannot be successfully supported, and the more favorable criminal law operates strictly in the field of substantive criminal law, being more than clear, including in view of the fact that this institution of law is

regulated in the Criminal Code, and not in the Code of Criminal Procedure, this aspect clearly resulting from the considerations of the CCR decisions pronounced[8].

Aspects of legality and the incidence of judicial error

Any criminal trial is required to take place in accordance with the provisions of art. 1 and 2 of the Code of Criminal Procedure which establish that the conduct of a judicial procedure must be done with the guarantee of the rights of the parties and other participants in the criminal process, being imperative to comply with the provisions of the Constitution and other normative acts. the act of justice being performed in the name of the law[9].

Thus, it is essential that the solutions adopted by the courts reflect the fairness of the criminal process, with the imperative obligation to respect the rights of the parties, to respect the principle of equality, as an effect of the positive obligations of any state[10], and to consider as a matter of priority whether there are cases which make it impossible to rule on guilt or innocence under the conditions of the prescription of criminal liability.

In these conditions, any panel must take into account, by virtue of respecting the principle of legality, the legislation and jurisprudence with binding character from the date of pronouncing the solution of the solution on the merits of the case, and not from the moment of remaining in pronouncement.

We specify that the aspects related to the application of the law, but also of the obligatory decisions of the Constitutional Court must be applied ex officio by the courts and questioned, even if they are not invoked by the parties, as they cannot rule directly on the incidence of prescription. criminal liability in cases where it remained pending at the time without reopening the case and putting this situation in the adversarial debate of the parties.

In the situation where the court overrides the aspects of legality seen by the parties, it not only disregards the legal norms in force and the effects of the decisions of the Constitutional Court of Romania, which are binding, but determines the pronouncement of a final court decision obviously contrary to law. , a situation that is limited to the provisions of art. 96, para. 3, letter, b of Law no. 303/2004, based on the high degree of responsibility, professional probity and credibility of any magistrate[11].

Thus, the factual situation presented in this article may fall within the legal definition of judicial error, i.e. it is based on a final judgment clearly contrary to law, which seriously

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[8] See Decision no. 1092 / 18.12.2012 regarding the exception of unconstitutionality of the provisions of art. 124 of the Criminal Code, published in the Official Gazette of Romania no. 67 / 31.01.2012, text available online at https://legislatie.just.ro/Public/DetaliiDocumentAfis/145081.

[9] Lacrima Rodica Boilă, *Răspunderea civilă delictuală obiectivă*, Ediția 2, Editura C.H.Beck, București, 2014, p. 457.

[10] Dragoș – Lucian Rădulescu, *Raporturile juridice de muncă. Discriminarea multiplă*, Editura Didactică și Pedagogică S.A., București, 2021, p. 3.

[11] George Marius Mara, *Prejudiciul nepatrimonial cauzat prin eroarea judiciară*, Editura Universul Juridic, București, 2020, p. 119.

affects the rights, freedoms and legitimate interests of the person, damage that could not be remedied by an ordinary or extraordinary remedy.

It is observed from the analysis of the text of the law that in order to retain the judicial error it would be necessary that before establishing it, the person who considers himself injured try to remedy the situation through an appeal, which can be ordinary before a court of first instance and an appeal may be made) or extraordinary.

Among the extraordinary remedies regulated by the Code of Criminal Procedure, related to aspects previously presented, we consider that an appeal for annulment based on art. 426, lit. b), given that the correct solution applicable in the case was to terminate the criminal proceedings, and the defendant was, however, convicted, but also the appeal in cassation, which involves the judgment of the High Court of Cassation and Justice of the conformity of the contested decision with the applicable law rules in question based on art. 433 Code of Criminal Procedure.

From the interpretation of art. 96, para. 3, lit. b) The Code of Criminal Procedure clearly shows that the attempt to remedy the damage caused by an ordinary or extraordinary appeal is a mandatory condition that must be covered before discussing the liability of the state for judicial errors.

Although art. 96, para. 5 of Law no. 303/2004 stipulates that the patrimonial responsibility of the state presupposes that the state has a procedural quality and not the magistrate who investigated the case, based on a type of objective responsibility, independent of any fault[12], however, if this action is admitted, within two months from the communication of the final decision, the Ministry of Public Finance will notify the Judicial Inspection to verify whether the judicial error was caused by the judge or prosecutor as a result of exercising the function in bad faith or serious negligence, based on art. 96, para. 7 of the same normative act.

As long as the non-observance of the decisions of the Constitutional Court constitutes a disciplinary violation under art. 99, lit. ș) of Law no. 303/2004, we appreciate that through the effects produced in the situation of non-implementation of the CCR Decisions no. 358/2022 and 297/2018, respectively the illegal deprivation of liberty, outlines the retention as fulfilled of the subjective condition of exercising the function in bad faith or serious negligence, which would necessarily entail the liability, including pecuniary, of the magistrate.

Conclusions

The institution of the prescription of criminal liability is of great importance from the perspective of the speed of both the criminal investigation bodies and the courts in investigating the facts of a criminal nature, as well as in pronouncing a solution in question.

Although the decision of the Constitutional Court of Romania no. 358/2022 had a great impact both in the media and in the activity of the courts, we consider that, in fact, it contains a statement of the effects of the fact that within 45 days from the date of publication in the Official Gazette of Romania of the decision CCR no. 297/2018, the

[12] Ioan Adam, *Tratat de drept civil. Obligațiile. Volumul II. Responsabilitatea civilă extracontractuală. Faptul juridic licit*, Editura C.H.Beck, București, 2021, p. 820.

legislator did not intervene on the part of the text of the law declaring unconstitutional, respectively of the phrase "by fulfilling any procedural act in question" from art. 155, para, 1 Penal Code.

In this sense, considering the aspect that an incomplete text of law cannot produce legal effects, in the period 10.09.2018 - 30.05.2022 in Romania could not be applied the institution of special prescription, but only the terms of general prescription, which opens the way of resorting to extraordinary means of appeal for the convicted persons, who could benefit from the effects of the CCr decision no. 297/2018, taking into account the fact that they received convictions, although there were reasons for the termination of criminal liability.

At the same time, we consider that they have a practical interest in invoking the decisions of the Constitutional Court regarding the unconstitutionality of art. 155, para. 1 of the Criminal Code, persons who have received convictions, not those who have acquitted or for whom the cessation of criminal proceedings has been established for other reasons.

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Efectele deciziei Curții Constituționale nr. 358/2022 asupra hotărârilor judecătorești. Aplicarea erorii judiciare

Rezumat

Prescripția răspunderii penale presupune stingerea raportului juridic penal apărut ca urmare a comiterii unei infracțiuni din cauza faptului că acesta nu a fost realizat într-un anumit termen stabilit de lege, ceea ce afectează și golește de conținut ideea de represiune penală și de prevenție. Obiectivul principal al prezentei cercetări este legat de expunerea efectelor Deciziei Curții Constituționale nr. 358/2022 cu raportare la Decizia nr. 297/2018 prin care a fost declară neconstituțională sintagma "prin îndeplinirea oricărui act de procedură în cauză" din cuprinsul art. 155, alin.1 din Codul penal, mai ales din perspectiva multiplelor probleme ce pot apărarea în practică, ce determină inclusiv posibilitatea existenței unei erori judiciare. Articolul analizează conținutul celor două decizii ale Curții Constituționale, dar și implicațiile acestora identificate în practica instațelor de judecată, ținându-se cont de importanța respectării principiului legalității, dar și al respectării drepturilor părților într-un proces penal.