

POSITION PAPER

CHANGING THE PENAL CODES

April 24th, 2019

The Plenary of the Chamber of Deputies showed once again that the main priority of the current parliamentary majority is to escape the criminals from justice. Changes in the criminal and criminal procedure codes, past on a fast-forward track, left no room for debate despite all the recommendations coming from both the Romanian practitioners, civil society, specialists as well as from international and European institutional partners.

For more than two years, since the infamous OUG 13, the current majority does not seem to have any other priorities besides the changes to the legislation in the field of justice and criminal policy. In recent weeks, we have repeatedly heard the mantra "criminal codes must be urgently changed to be in line with CCR decisions." This is factually and, in terms of consequences, wrong. Here is why:

On the compliance with the decisions of the Constitutional Court

The constitutionality of legislative changes is necessary, but not sufficient.

We start off with a clarification. Early amendments to criminal codes (including OUG 13) have always invoked the need to bring the legislation into line with the decisions of the CCR. Now, for the new changes that were passed, something else is said: the fact that only those amendments that the CCR considered constitutional were voted on. Here is the time for an important distinction:



- There are articles from criminal codes that have been declared unconstitutional by CCR; some of these were "resolved" by the initial amendments to criminal codes. Others, no.
- There are articles in the amended criminal codes in Parliament which, after the CCR filter, have been declared unconstitutional. Others, no.

At this time, to say that the changes made are in order to put the legislation in line with the decisions of the CCR is false.

Example #1:

There is no previous decision of the CCR that states that having a misconduct in the workplace is not constitutional. Nonetheless, the Parliament has modified on July [2018](#) the Criminal Code and so the criminal offence was eliminated. During the constitutionality check, CCR said that this modification is not constitutional, since it is up to the lawmakers in which way he incriminates or not facts that affect the social values. Therefore, in this case we cannot talk about an alignment with the decisions of the CCR, but about using as a pretext the fact that this option does not infringe the fundamental law.

Example #2:

The results of the changes brought to the extinction of the criminal liability are even more serious, given that many of the case files under investigation risk to be classified, and many of those already sent to trial risk to end by abandoning the prosecution. This modification has been considered constitutional by the CCR, but is it appropriate? Can we, as a society, afford to have files in which we will never know the truth for the mere intervention of extinction?

The amendments to the criminal codes not only exceed the framework of the precedent decisions of the CCR, but they also use this explanation in a wrong way. Besides constitutionality, there should also be taken into account:

- the opportunity of regulations
- the consistency with the international standards
- the way they respond to the values and expectations of the society.

And even if the amendments were constitutional, what about the international standards we have subscribed to? In accordance with art. 11 (1) of the Romanian Constitution, *“the Romanian State undertakes to fulfil duly and in good faith its obligations from the Treaties to which Romania is a party.”* If we assume that the Romanian legislator can always decide what is and what isn’t appropriate, and the legislator decides that Romanian citizens should only serve jail time if they are guilty of murdering a cat and in no other case whatsoever, then this law is considered constitutional. But is such a law in accordance with the international treaties signed by the Romanian state? Would it be appropriate?

About the emergency of the adoption of codes

For the last 2 years and a half we’ve been in a constant state of urgency

Since January 2017 we’ve been told that the revision of the criminal legislation is **of the utmost urgency**. Taking all of this into account, since then, there has been more than enough time avoid reaching once again, the issue of passing said changes through an emergency procedure through Parliament. We still don’t have coherent answers to the following dilemmas, born on the eve of the 31st of January, together with the Emergency Ordinance no. 13:

- 1. Why don’t we have an impact assessment regarding the changes brought to the criminal legislation?** How can we know, for instance, how many case files will be affected by the changes on the statute of limitations? Beyond the case files, we are not aware, and probably won’t be until prosecutors and judges will analyse every case of every file in which the crimes won’t be taken to court ever again simply because the offence exceeded its statute of limitation.
- 2. Why do we prefer a form of legislative mauling, passing some articles through the Parliament as we speak, without any debate within the entirety of the criminal framework?** How do we explain the fact that although there has been a whole debate on the grounds of redefining work misconduct, this normative act “resolves” through abolishment, the aggravated form of work misconduct, but does

not resolve the problems related to its definition. (Without taking into account article 297, on which the constitutional court already took a decision)

3. **Why was there no time for debate, consultation or involvement of stakeholders over the course of the last two years?** We notice how these changes were passed in such a hurry once more, but there are no consultations with experts in the field or with those nominated to enforce the law. To claim there's an emergency in this case is nothing short of a lie. Six months have passed since the Constitutional Court's decision issued in October 2018 and up to this moment. Enough not to end up in an situation of emergency.
4. **Why sacrifice the general stability of the judiciary and of the state's criminal policies?** The changes operated during the last two years have generated confusion, roadblocks in courts and prosecutor's offices, and uncertainty. This stems from changing both the laws on the judiciary (and organizing the system) and the criminal legislative framework ("the tools of the trade"). Best case scenario - all this manages to do is freezing cases. Worst case scenario? Nobody knows how and on which basis they can judge a case, meanwhile the proverbial sword of the Special Section for Magistrates' Investigation dangles over the heads of judges and prosecutors.

On disregard

What about the European Commission's and Venice Commission's recommendations

The Venice Commission (full name: European Commission for Democracy through Law) is an advisory body of the Council of Europe that concerns itself mostly with matters of constitutionality. As an advisory body, the Commission issues recommendations that, without being mandatory, are seen as extremely important - for example, the European Commission declared, in October last year, that the CVM analysis for Romania will take into account the opinion of the Venice Commission, explicitly requesting that the Romanian authorities take into account said recommendations.

Throughout the years, the Venice Commission issued several opinions regarding the internal situation of Romania - for example, in 2012, following some major political events, that unravelled over the course of just several days, it was then-PM Victor Ponta who asked



for an opinion from the Venice Commission. The answer was the following - the changes are problematic regarding both matter of constitutionality and those of rule of law. Back then, the opinions were taken into account.

The reports of the Venice Commission were used in the past in an attempt to justify certain controversial initiatives, like introducing a financial threshold in the legal framework of the abuse in office; an official statement from the spokesman of the Venice Commission was required to clarify the situation at hand. In short, this wasn't the case.

When visiting Bucharest in April 2017, just a couple of months after Emergency Government Ordinance number 13, the President of the Venice Commission, Gianni Buquicchio, stated the following: *"Those that win the elections have the tendency to impose certain options upon the society, regardless of transparency and inclusion. (...) The rule of the majority has to follow the laws. The majority rules the country, but must not subdue the minority and must treat those who lost the last round of elections with respect."*

When there were talks about notifying the Venice Commission in the case of changes to the justice laws in autumn 2017, minister of justice Tudorel Toader, a member of the Venice Commission himself, mentioned that he wasn't entitled to ask for an opinion, since this is the prerogative of those tasked to handle said changes, namely the parliamentary commission led by Florin Iordache. We are talking about the same commission that adopted the criminal code changes yesterday, just to have them ready in time for a vote in the Parliament today. Florin Iordache, the "artisan" of emergency ordinance 13, stated a few days ago that he does not wait for the Venice Commission as if it were Messiah to talk to its representatives.

Of course not all recommendations by the Venice Commission (regarding both the justice laws and the criminal codes) will be taken into account, Iordache declared last October, adding that the Constitutional Court's decisions hold priority over the recommendations. Nonetheless, PM Viorica Dăncilă stated, in the plenary of the European Parliament, in October 2018, during the debates on rule of law in Romania, that Romania will take into account the opinions of the Venice Commission: *"Mister Timmermans, of course we will take*



into account the opinion of the Venice Commission. Today, the minister of justice, here by my side, will go to the Venice Commission." , the PM said.

Thus, it is uncertain when exactly do the Romanian authorities consider that it's OK to respect our statute of member state of the Council of Europe and of the European Union (which also imply recommendations form the Venice Commission and the CVM)? Only when they agree with their content or always, regardless of their interest? Can we be members in these select groups only from time to time?