



The Correlation between Contraventional and Criminal Abuse of Power

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Abstract: Abuse of power is one of the most serious violations of the principles of the rule of law, directly affecting public confidence in state institutions and the fairness of law enforcement. In the Republic of Moldova, abuse of power is regulated both in contravention and criminal law, which raises questions about the delimitation and correlation between these two forms of sanctions. This article aims to analyze the correlation between contraventional abuse of power and criminal abuse of power, taking into account the provisions of the legislation of the Republic of Moldova.

Keywords: contraventional code, criminal code, abuse of power, abuse of service, public person, intentional use of the situation of service, harmful act, harmful consequences.

1. Introduction

The phenomenon of abuse of office is a persistent problem in public administration. These administrative offenses are regulated by the contravention legislation of the Republic of Moldova and reflect the state's efforts to combat illegal and immoral behavior of public officials. The purpose of this article is to analyze these facts, highlighting the legal regulations, their implications for the functioning of the administrative apparatus and possible preventive solutions. Contraventions related to abuse of power, abuse of office, neglect of duty and excess of power are clearly regulated in modern legislation, but their roots are to be found in the history of the relationship between authority and responsibility. The development of these legal concepts reflects the evolution of the rule of law and public administration from archaic societies to contemporary state structures.

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According to the Explanatory Dictionary of the Romanian Language (DEX), the terms “abuse of power” and “abuse of office” are defined as the improper use of a function or authority for personal purposes or contrary to the law, exceeding the limits of the competence or rights assigned.

Abuse of office - an action or inaction by a person exercising a public function which violates the law and which affects the legal rights or interests of others or harms the public interest.

Both terms imply unlawful or abusive behavior by a person in a position of public authority or public office who acts contrary to the law or established rules, using his or her power or authority for personal ends (*Explanatory Dictionary of the Romanian Language*, 1998, p. 4).

In ancient societies such as Egyptian, Mesopotamian, Greek and Roman, authority was often centralized and dominated by political or religious leaders. Although legal concepts like modern ones did not exist, abuse of power was perceived as a problem when leaders disrespected community norms or acted against public interests.

The bourgeois revolutions of the 17th and 18th centuries led to the emergence of the concept of the rule of law and the establishment of clearer checks and balances on power. It was during this period that abuse of power and negligence in office began to be treated under the rule of law, and civil servants became accountable not only to the monarch, but also to the law and the citizens.

In revolutionary France, the Declaration of the Rights of Man and of the Citizen (1789) laid the foundations for the accountability of civil servants to citizens. Abuse of power was condemned as a violation of fundamental rights.

With the development of administrative law in the 19th and 20th centuries, abuses of power, neglect of duty and excess of power were more strictly regulated. The liability of civil servants became a fundamental principle in public administration.

In the inter-war period, Romania adopted laws inspired by the French legal tradition, emphasizing the prevention of administrative abuses. The 1923 Constitution emphasized the need for accountable and transparent administration.

In totalitarian regimes, such as the communist regime, the concept of abuse of power took on different meanings.

Although the regime controlled officials, the very structure of the state was based on an abusive system where authority was used to suppress citizens' freedoms.

In recent decades, globalization and the development of international organizations have brought new challenges to the handling of administrative offences. Officials in supranational institutions such as the European Union are subject to strict rules to

prevent abuse. At the same time, national laws continue to evolve to cope with new forms of negligence and excess of power.

Abuse of power or abuse of office are actions or inactions committed by public officials or other people in official positions that damage the interests of the state, public institutions, natural or legal people. In the legislation of the Republic of Moldova, these acts are regulated both in the Contravention Code and in the Criminal Code, which creates a clear distinction, but sometimes difficult to apply in legal practice.

According to both Moldovan and European legal norms, acts of abuse of office are punishable by criminal, administrative or disciplinary sanctions, and the guilty officials may be held liable and subject to appropriate sanctions.

Administrative doctrine, through the works of renowned authors, offers valuable insights into the phenomenon.

Romanian thinkers, such as Antonie Iorgovan, emphasize the need for jurisdictional control of administrative acts to prevent excesses of power.

In his works, Antonie Iorgovan emphasizes the importance of striking a balance between the responsibility of civil servants and their rights. Iorgovan emphasizes that "abuse of power becomes a pathology of the administration, affecting both its efficiency and legitimacy" (Iorgovan, 2005, p. 243).

Antonie Iorgovan also emphasizes that abuse of power is "a deviation from the legal purpose of powers, which undermines the authority of the public institution".

Alexandru Țiclea warns of the importance of clarity in defining the powers of public officials to reduce the risks of abuse or exceeding the powers (Țiclea, 2018, p. 69).

Virginia Vedinaș points out that an essential element in the delimitation of the two forms of abuse of power is the subjective intention of the author. In the case of criminal abuse of power, the intention is more serious, being associated with a higher degree of culpability, while contraventional abuse of power can also be committed out of negligence or imprudence (Vedinaș, 2002, p. 37).

Article 312 of the Contraventional Code of the Republic of Moldova defines contraventional abuse of power or abuse of office as the abusive use of office by a responsible person, which causes minor damages, which do not reach the threshold of seriousness of a crime. The sanctions provided include fines as well as deprivation of the right to hold a certain office or the right to carry out a certain activity for a period of 3 months to one year.

Article 329 of the Criminal Code criminalizes abuse of power or abuse of office, emphasizing significant damage to the fundamental rights of individuals or public

interests. The penalty may include imprisonment, substantial fines and prohibitions from exercising certain public functions.

The distinction between contraventional and criminal abuse of power must be made according to the seriousness of the act and the effects produced. Contraventional abuse of power is characterized by violations of low severity, which do not exceed certain limits, and the sanctions applied are milder, such as fines or temporary suspension from office. In contrast, criminal abuse of power involves a serious violation of official duties, with serious consequences, such as considerable material damage, significant damage to a person's legal situation or, in extreme cases, loss of life.

A contravention may acquire a criminal character if it is committed with the intention of causing major damage or if its effects are, objectively, serious. The distinction between contravention and crime is sometimes subtle, but essential for the correct application of sanctions.

Victor Guțuleac notes that there is a continuity between the contraventional and criminal abuse of power, because both forms of abuse have as a common element the violation of official duties (Guțuleac, V., 2009, p. 267). However, the transition from contraventional to criminal abuse of power occurs when the consequences of the act exceed certain thresholds of seriousness. For example, if a public official commits a minor violation of his or her duties, this can be classified as a contraventional abuse of power. However, if the same act leads to significant material damage or a serious worsening of a person's situation, it can be reclassified as a criminal abuse of power (Guțuleac, 2009, p. 267).

According to Article 19 "Abuse of office" of the UN Convention against Corruption, adopted in New York on 31.10.2003 (UN, 2003), each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the act of a public official abusing his or her functions or position, that is, of performing or refraining from performing, in the exercise of his or her functions, an act in breach of the law, with the aim of obtaining an undue advantage for himself or herself or for another person or entity.

Likewise, in accordance with the provisions of the Law on the Code of Conduct for Civil Servants (Republic of Moldova, 2008), the civil servant is obliged to serve in good faith the public authority in which he acts as well as the legitimate interests of citizens, the civil servant is obliged to refrain from any act or deed that may harm the image, prestige or legal interests of the public authority; the civil servant is obliged to ensure the protection of public property and to avoid any damage to it; the civil servant is obliged to use working time, as well as the goods belonging to the public authority only for the purpose of carrying out the activities related to the public office held; the civil servant must ensure, according to his duties, the efficient

and appropriate use of public funds; the civil servant is prohibited from using the goods of the public authority to carry out journalistic, teaching, research or other activities not prohibited by law for personal interest.

Considering these legal provisions, as well as similar provisions, the legislator regulated, in Article 312 of the Contravention Code of the Republic of Moldova, the liability for acts classified under the heading of abuse of power or abuse of office.

The special legal object of the contravention provided for in paragraph (1) of Article 312 of the Contravention Code of the Republic of Moldova is represented by the social relations that ensure the proper conduct of service activity in the public sector. These require a public person to perform his or her duties correctly, without abuse, respecting both public interests and the legitimate rights and interests of natural and legal people, protected by law.

The material object of the contravention of abuse of power is the actions or inactions that violate the norms of conduct in the exercise of service duties or public power, without reaching the threshold of seriousness necessary to be criminally incriminated. The natural or legal person, whose rights or interests protected by law suffer damage, but the act does not meet the constitutive elements of the offense, is the victim of the offense specified in paragraph (1) of art. 327 of the Criminal Code of the Republic of Moldova.

The objective side consists of the following signs: 1) socially dangerous act, which is expressed through action or inaction and which involves the commission of an illegal act by a public person in the exercise of his official duties, 2) which affects the interests of the public or of other persons, harmful consequences, without however reaching the seriousness necessary to be considered criminal offenses, 3) the causal link between the harmful act and the harmful consequences.

The expression "intentional performance or failure to perform, in the exercise of office, by a public person of an action in violation of the law" refers to the commission of actions or inactions that derive from the official duties of the perpetrator and that fall within his official competence.

This notion does not include actions that clearly exceed the limits of the rights and duties conferred by law. In this case, the provisions of art. 328 of the Criminal Code of the Republic of Moldova or art. 313 of the Contravention Code shall apply, as the case may be.

As stated, public interest means the general interest of society, which concerns the entire legal order, in particular constitutional democracy, national security,

territorial integrity¹, public security and public order, their defense and the prevention of crimes, the protection of health and public morals, the guarantee of the authority and impartiality of the powers in the state, the satisfaction of community needs, by achieving the competence of public authorities, reflecting a social necessity that requires the establishment of collective utility service activities, by means of administrative law, in the organization of services at the state level, responding to community needs or public use, in the service of the state and civil society.

Starting from the systemic interpretation of the criminal law norms, in particular from the corroboration of art. 126 with art. 327 of the Criminal Code of the Republic of Moldova, it follows that the prejudicial consequences provided for in paragraph (1) of art. 327, as well as those in letter c) paragraph (2) of the same article, may have both a patrimonial and a non-patrimonial nature.

If the damage caused by the commission of the abuse of power or abuse of office is of a patrimonial nature, the authorities responsible for the application of criminal law must establish, based on the evidence administered, the exact amount of the damages. This stage is essential, since the determination of the damage represents a fundamental criterion for differentiating between art. 312 of the Code of Contraventions and art. 327 of the Criminal Code.

Regardless of the form in which the use of the official position is manifested, it is essential that, in the process of qualifying the contravention – based on the analysis of all the norms regulating the legal status of the perpetrator – it is established that his action or inaction derives from his official duties and falls within his professional competence. In other words, it is crucial to demonstrate that the perpetrator did not flagrantly exceed the limits of the rights and duties conferred on him by law.

We support the opinion of the local researcher M. Orlov regarding the fact that the components of the objective side are the material element, the dangerous result, the causal relationship and some conditions of place, manner, circumstances (Orlov, 2001, p. 157).

The subjective side of the contravention specified in paragraph (1) of art. 312 of the Contravention Code of the Republic of Moldova is characterized by direct or indirect intent. The reason for the contravention in question has a special feature. In general, Article 312 of the Code of Contraventions does not identify the notion of material interest. By deduction, we conclude that material interest or other personal interests are characteristic of abuse of power or abuse of criminal office.

¹ Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova On the application of the legislation on criminal liability for abuse of power or abuse of office, excess of power or exceeding official duties, as well as negligence in office, p. 8.1

If it is not possible to demonstrate the existence of a material interest or other personal interest that would substantiate the criminal activity of exploiting the official position – even if this activity causes considerable damage to public interests or the rights and interests protected by law of natural or legal persons – the committed acts fall under the type of contraventional illicit act. This solution is justified according to the provision of Art. 312 of the Code of Contraventions of the Republic of Moldova, which establishes that, “if the act does not meet the constitutive elements of the offense”, then it cannot be qualified as an offense. In the absence of the criminal motive required by the norm of incrimination, the lack of the subjective side makes the act not meet the constitutive conditions of an offense (Eşanu, 2015).

The subject of the contravention provided for in paragraph (1) of Article 312 of the Contravention Code is the responsible natural person who at the time of the commission of the act has reached the age of 16. Also, the subject must have the special status of a public figure.

Within the meaning of Article 327 of the Criminal Code, abuse of power is a criminal conduct that can only be committed by a public figure, namely, a person with a public position, who carries out his activity within a public authority. Other people who do not represent a public authority commit abuse of office (for example, employees of a state or municipal enterprise)¹.

We specify that abuse of power is committed by a public figure who represents a public authority.

We support the explanations in the 2017 Decision of the Plenum of the Supreme Court of Justice, which states that whenever it is found that, as a result of the use of the official position or the manifest exceeding of the limits of the rights and powers granted by law, the prejudicial consequences, provided for in art. 327 and 328 of the Criminal Code, did not occur, consequences that the perpetrator did not even want, those committed will be classified, based on art. 312 or, as the case may be, according to art. 313 of the Contravention Code.

As already mentioned, the legislator did not provide as a crime the errors resulting from the interpretation of the law, which lead to the adoption of wrong or contradictory solutions by public officials. Therefore, in such situations, they cannot be held responsible for committing the crime of abuse of office or other crimes. The cancellation or abolition of legal acts issued by public officials, when they are

¹ Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova On the application of the legislation on criminal liability for abuse of power or abuse of office, excess of power or exceeding official duties, as well as negligence in office No. 7 of 15.05.2017, p. 4.2

considered erroneous, is carried out at the request of interested people, through judicial procedures established by law, and not through criminal proceedings.

For the same reasons, civil servants involved in jurisdictional activities cannot be held criminally liable for errors that occur in the process of interpreting and applying the law or for erroneous solutions pronounced, since these can be contested through judicial review, at the request of people who consider themselves prejudiced.

An act of a civil servant that is not incriminated by law cannot be considered a "criminal offense" that would attract a criminal sanction, but represents an extra-criminal offense, subject to other forms of legal liability, depending on the situation: administrative, civil (delictual or contractual), disciplinary, material, fiscal or contraventional.

Acts issued by civil servants, in relation to their duties and the specifics of the institution in which they carry out their activity, can be annulled or abolished through judicial procedures provided by law. People who consider that they have been harmed in a legitimate right or interest may request, within this framework, compensation for the damage suffered.

All civil servants, not just judges and prosecutors, cannot be held criminally liable for errors in the interpretation and application of the law or for wrong or contradictory solutions. This is because the legislator has not criminalized and cannot criminalize such mistakes, which are often the consequence of legislative deficiencies.

The classification as an offense of abuse of office of extra-criminal acts attributed to civil servants, without these being provided for as offenses by law, and for which there are distinct judicial avenues for resolution, represents an illegal practice promoted, after 1990, by criminal prosecution bodies and courts.

According to Romanian and European legal doctrine, acts of abuse of power or abuse of office have serious consequences on society and the rule of law, affecting both the functioning of public institutions and citizens' trust in the authorities. These consequences can be analyzed from several perspectives:

Erosion of trust in state institutions - when public officials exceed their powers or exercise them abusively, citizens lose trust in state authorities, which leads to a decrease in respect for the law and public institutions.

Increase in corruption - abuse of power is often associated with the phenomenon of corruption, as it involves the use of office for personal or group purposes, to the detriment of the public interest.

Inequality and discrimination – abuse of office can favor some citizens or groups over others, affecting the principle of equality before the law and fair access to public services.

Economic and social blockages – when public officials make abusive decisions, obstacles can be created in the business environment, discouraging investment and economic development.

Violation of fundamental rights and freedoms – abuse of power can lead to the violation of citizens' rights, either through unjust administrative decisions or through acts of repression against people who challenge the authorities.

Undermining the rule of law – when public officials act arbitrarily or abusively, the principle of legality is violated, which can lead to a deterioration in the functioning of the democratic and legal system.

Destabilization of the administrative and legal system – abusive decisions can generate numerous appeals and litigation, which can overload the courts and slow down the justice system.

Dangerous precedents – if abuse of power is not properly sanctioned, a precedent is created that encourages similar behaviors in the public administration and the judicial system.

At the level of the European Union, combating abuse of power and abuse of office is closely linked to the fight against corruption and fraud affecting the EU's financial interests. According to the UN Convention against Corruption, the Council of Europe Criminal Law Convention on Corruption, Directive (EU) 2017/1371 on the protection of the European Union's financial interests, Member States are obliged to adopt effective measures to prevent and sanction abuse of office. The European Commission also monitors annually through the Rule of Law Report the level of combating corruption and abuse of power in the Member States.

In the context of the reform of the legal system in the Republic of Moldova, there is a need to clarify the legal norms regulating the abuse of power. This could include the introduction of more precise criteria for the delimitation of the contraventional and criminal abuse of power, as well as the establishment of clear thresholds of gravity for each form of abuse.

We can state that the abuse of power and abuse of office deeply affect both the functioning of state institutions and the rights and interests of citizens, and the sanctioning of these acts is essential for maintaining the rule of law and a functional democratic climate.

To strengthen the legal order with regard to acts of abuse of power or abuse of office, we propose in ordine de lege ferenda the clarification of the attributions of civil

servants. Both the legislator and employers should more clearly define the limits of their service competences, continuous professional training expressed through the creation of continuous training programs for civil servants, the introduction of effective monitoring and control systems such as – the development of effective internal mechanisms for verifying the activities of civil servants and, last but not least – proportional sanctions, which will be applied appropriately to the gravity of the acts.

The correlation between the contraventional and criminal abuse of power in the legislation of the Republic of Moldova is a complex one, based on the criteria of the gravity of the act and its consequences. Although the two forms of abuse of power are distinct, there is continuity between them, and some acts can be reclassified depending on the gravity of the consequences. For a more efficient application of the law, it is necessary to clarify legal norms and increase the degree of accountability of civil servants.

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