Interference of criminal legislation and criminal procedure law in some cases of suspension of the individual employment contract

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Abstract: *We appreciate that the recent legislative changes as well as the considerations of Constitutional Court decisions, quoted in this material, express the trend of enhancing the warranties accompanying the suspension of employment relationships or suspension from office, in order to ensure not only the objective character of this measure with wide-range consequences for those affected by it, but also intervenes in substantiated cases, least subjected to uncertainties. At the same time, we believe that the legislative interventions that had as purpose to amend certain provisions relating to the status, rights and obligations of certain categories of staff -prosecutors, judges, police, civil servants and civil servants with special status - were made to assimilate at the level of special criminal and noncriminal legislation the effects of new categories of preventive measures not provided for in the previous legislation, such as house arrest and judicial review as well as the goal of correlation with the new solutions of not indicting, respectively the resolution of criminal proceedings without a conviction, provided for by the Code of Criminal Procedure.*

Keywords: *suspension; employment relationships; service reports; criminal acts; decisions; the Constitutional Court.*

Preliminary considerations concerning the institution of the individual employment contract suspension

The suspension of the individual employment contract is regulated by article 49-54 of the Labor code, republished.

The performance of the individual employment contract involves a process that unfolds over time. While this contract is in force some situations may arise which prevent the fulfilment of the parties mutual obligations. Thus, the suspension of the individual employment contract arises [1]. If the failure to perform the contractual obligations constitutes the result of transient causes and the obligations can be subsequently executed, the individual employment contract can and must be saved. This is what it is achieved through the institution of suspension of the employment contract [2].

The suspension of the individual employment contract is in reality a suspension of its main effects - performance of work and its payment - what is manifested through a temporary cessation of the contract [3].

For the failure to fulfill benefits to lead to the suspension of contract and not to its termination, it is absolutely necessary for the failure to be temporary and not to have wrongful nature. If these conditions are not satisfied, the employment contract will not be suspended but terminated. The effects of the agreement will resume as soon as the cause of the suspension ends [4].

The suspension of the employment contract takes place only when the object is not achieved through successive benefits to which the employee agreed upon and not in the case when for various reasons, the salary is not paid within the time limit agreed upon by the parties [5].

Throughout the duration of the suspension of the individual employment contract, the employee shall be provided livelihood by providing, where appropriate, material assistance and money for health insurance (for example, during the period of temporary incapacity for work or motherhood), through the provision of scholarships or allowances (in the case of leave with pay for vocational training); through the award of damages (where the employer has filed a criminal complaint against the employee and the Court finds his innocence).

In the case of suspension in which due to facts attributable to the employee, for the duration of the suspension, he will not benefit from any rights resulting from his quality of employee.

There are two cases of suspension in which the employee shall not be granted any kind of pecuniary rights: the case of leave without pay and the case of unjustified absences.

When, during the period of suspension of the contract there is a cause for termination of the individual employment contract, the termination cause takes precedence [6].

The temporary non-execution by the employee of the benefits, can have many different causes, some resulting from the will of the parties, others acting independently, being exterior from their will. Also, we may encounter instances when suspension [7] has its source only in the will of one party and the circumstances caused by the act of third parties.

There are several cases of suspension, namely: - the suspension de jure; - the suspension from the employee's initiative; - suspension from the initiative of the employer; - suspension by mutual agreement.

I. The suspension de jure of the individual employment contract in the case provided for by article 50 lit. g) of the Labor code, republished: the preventive arrest of the employee

As stated in art. 202 paragraph (1) of the Criminal procedure code, preventive measures can be arranged if there is evidence or reasonable indications which show reasonable suspicion that a person has committed a crime and if they are necessary in order to ensure the proper conduct of the criminal trial, to prevent the evasion of the suspect or accused from prosecution or criminal trial or to prevent the commission of another crime. Among the preventive measures are listed: *judicial control* [art. 202 para. (4), letter b)], *the judicial control on bail* [letter c)], *house arrest* [letter d)].

In the course of criminal investigation or judgment, the judicial can be disposed by the Prosecutor, the judge of rights and freedoms, preliminary chamber judge or court of law [art. 215^1 para. (1) and (7) of the Code of criminal procedure], [8]. The measure may be taken for a period not exceeding 60 days and may be extended by a period which may not exceed 60 days [art. 215^1 para. (2) and (3)]. Judicial control on bail can be ordered under the conditions of art. 216-217 of the Code of criminal procedure [9].

Regarding the execution of preventive measure of judicial control, including control on bail, the competent judicial body may specifically forbid the compliance with territorial limits, going to work or he can even prohibit the exercise of the profession, craft or activity during which the deed was committed [10]. In such cases the suspension of the individual employment contract will be decided and in the absence of such prohibition, the individual employment contract can continue to be executed.

For the purpose of those presented earlier, in the doctrine it was argued that the obligations laid down to the employee accused (defendant) are liable "to negatively influence the execution of the individual employment contract, according to the monitoring programme drawn up, the frequency of visits to the supervisory bodies or to the judicial body that has ordered the measure, as long as these obligations must be met and the necessary duration" [11].

House arrest is governed by art. 218-222 of the Code of criminal procedure and is ordered for a period not exceeding 30 days, which may be extended by the judge of rights and freedoms, preliminary chamber judge or court of law, provided that the conditions laid down in article 223 CPC are met and taking this measure is necessary and sufficient to achieve one of the purposes referred to in article 202 para. (1) of the Criminal procedure code.

Of course, in such a case, the impossibility of leaving the residence, by itself, constitutes an obstacle to the execution of the contract that will be suspended by the employer [12].

In an exceptional and temporary case, leaving the residence may be permitted, in order for the employee to present himself at the workplace, in order to complete a work, to submit goods or works, including management, etc. [13].

The Criminal Procedure Code regulates both the preventive arrest of the suspect (art. 223 and 224).

The measure may be taken by the Court, on a proposal from the Prosecutor.

The duration of the detention of the defendant shall not exceed 30 days [art. 226 para. (2) Criminal procedure code] and can be extended by the Court (art. 234).

During the measure of preventive arrest the individual employment contract of the employee is suspended de jure as stated in art. 50 lit. g) of the Labor code, republished.

In such cases the suspension lasts until the end of arrest, ranking, removal of indictments, cessation of criminal prosecution (art. 305-326 of the Criminal procedure code).

Exactly, as stated in the judicial practice, [14] from the moment of his release, the employee must return to his place of employment in order to resume his activity.

The suspension lasts until the termination of the arrest, ranking, removal from prosecution, its cessation (art. 305-326 of the Criminal Procedure Code) date on which the employee must return to his place of work to resume his employment [15].

But if the measure of pre-trial detention exceeds 30 days, the employer is justified [16] to order the dismissal of the employee.

In the event of pre-trial detention, the person concerned enjoys the presumption of innocence; not always they lead to the establishment of the guilt of the person concerned. If the employee will be found not guilty during the suspension of his contract he will deserve all the rights, including salary, which he was deprived of throughout that entire time [17].

II Suspension of the individual employment contract where the employee is charged or indicted for criminal acts incompatible with the position held

The suspension of the individual employment contract where the employee is charged or indicted for criminal acts incompatible with the position held is regulated in article 52 para. (1), letter b) of the Labor code), republished, which provides that the employer may suspend the individual employment contract if "a criminal complaint was formulated against the employee or he was sent to court for acts incompatible with the position held, pending the final judgment of the court".

Referring to this text some authors [18] have highlighted, justifiably, in my opinion, that the suspension of the individual employment contract in such a case should be a *requirement* for the employer, as it was stated in law no. 1/1970 (now repealed), and not just a capacity because "to allow an employee to continue the work after having committed, acts incompatible with the function held" means to facilitate and enable them to commit such acts" [19].

Suspension from office may be ordered only if the following conditions are met:

- the employer has filed a criminal complaint against the employee who has committed an act incompatible with the position held, regardless of whether such deed was perpetrated as author, co-author, instigator or accomplice; the question whether or not the criminal deed is incompatible with that function is resolved from case to case in relation to the office attributes and the responsibility of the person concerned;
- the employee was sent to trial for such an offence, regardless of the employer's complaint.

The suspension measure ordered without fulfilling these conditions is unlawful [20].

With regard to the possibility of the employer to dispose the suspension of the employment contract, in this case, it was argued that this fact would violate the presumption of innocence enshrined in article. 23 para. (8) of the Constitution [21].

The Constitutional Court [22] held that, "by taking the measure of suspension of the individual employment contract, the employer does not pronounce itself on the guilt or innocence of the employee nor his criminal liability, these being matters whose resolution falls within the sphere of activity of the judicial bodies and therefore, that the provisions of article 52 paragraph (1), letter c) that became letter b) after republication, s. n.] of the Labor code does not violate the presumption of innocence".

The employer can only formulate a criminal complaint against the employee, if he holds sufficient data and clues relating to the perpetration of a criminal act incompatible with the position held, by requesting to the competent authorities the resolution of the case. In this situation, or when he learns about the indictment of an employee for committing an offence of the same nature, he can take the measure of suspension. The suspension measure lasts until a final judgment is taken, having thus a transitional nature.

The Court has found that even in the situation when the offence, for which criminal complaint was formulated or indictment was disposed, will not attract criminal liability, this may constitute disciplinary misconduct that can provide the basis for the termination of the employment contract. Thus, the institution of the employment contract suspension represents a measure of protection for the employee whose contract of employment cannot be terminated until the court judgment is final.

The Constitutional Court observed that the provisions of article 52 paragraph (1), letter c) currently lit. b) of the Labor code, do not contravene the right to work guaranteed by article 38 para. (1) of the Constitution, thus the employee is not prevented during the period of suspension of the employment contract to work for another institution or on a different position than the one for which he was declared incompatible, offence which constitutes the subject-matter of the prosecution ".

Through decision no. 814/2015 the Constitutional Court [23] nuanced those established by its previous jurisprudence, stating: "(...) the considerations of the above mentioned decisions answered the criticisms concerning the extent of the individual employment contract suspension provided for in article 52 para. (1), letter b) of law no. 53/2003, without making a distinction between the two theses of this legislative text, namely *the first theses* regarding the suspension of the contract as a result of the wording of a prior complaint from the employer against the employee, and the *second theses*, on suspension of the individual employment contract when the employee is sent to court for criminal offences which are incompatible with the position held (...).

In another context, namely the proportional character of the measures covered by article 52 para. (1) letter b) thesis one of law no. 53/2003, meaning achieving a fair balance between the right to work and the employer's right to take measures necessary for the proper conduct of the economic activity, "the Court retains that the suspension of the individual employment contract, on the initiative of the employer, when there are grounds to appreciate that the illicit activity of the employee could jeopardize the interests of the employer, must comply with certain conditions to ensure that this measure is not arbitrary. In other words, the Court considers that, since the law ensures to the employer the possibility to suspend the individual employment contract in order to protect its economic interests, as an expression of article 45 of the Constitution, such a measure with broad consequences on the rights of the employee, must be accompanied by the guarantee of an objective and duly substantiated decision by the employer. In this respect, the Court retains that the suspension measure determines the temporary cessation of the obligations of the parties stemming from the individual employment contract, and, according to the analyzed legal text, the cause of the suspension does not operate de jure, nor it is an expression of the will of the employee, but of the employer. Furthermore, the Court retains that, unlike the situation of other socio-professional categories, when suspension operates as a result of the setting into motion of criminal action and/or prosecution, acts ordered by magistrates, which have an objective character, extrinsic to the relationship between the one who carries out a professional activity and the institution, authority or professional body to which it belongs, the suspension of the employment contract in the hypothesis of article 52 para. (1), letter b) thesis one of law no. 53/2003 can be disposed by the employer as a result of the criminal complaint that he also formulates against his employee, thus his will is the one who controls the cause of the suspension of the employment contract and the imposition of the measure. In these circumstances, the Court considers that the guarantees of objectivity and rationality of decision of suspension ordered by the employer can be easily put into question, since article 52 para. (1), letter b) thesis one of law no. 53/2003 leaves the appreciation of the suspension basis entirely at the disposal of the employer whose decisions are likely to be qualified as subjective and sometimes even abusive, especially in the context of contractual employment relations which, by their nature, involve a significant human interaction. Thus, we should not omit that these ratios imply a subordination of the employee to the employer characterized by the performance of the work under the employer's authority, which has authority to give orders and directives, to control the labor supply and to punish violations committed by the employee.

In the end, "the Court finds that, as a result of carrying out the proportionality test concerning the measure of restricting the exercise of the right to work, the individual employment contract suspension due to the formulation of a criminal complaint by the employer against the employee does not meet the condition of proportional character, the measure being excessive in relation to the objective that is to be attained, so the provisions in article 52 para. (1), letter b) thesis one of law no. 53/2003 are unconstitutional".

The sanction of suspension from office in the case of committing alleged criminal offences, aims, among other things, at protecting the prestige of the profession or function exerted.

The suspension should materialize in a *decision* given by the person or body entitled to order it, which must include a minimum motivation, the indication of the legal basis, etc., lack of these elements being likely to result in the nullity of the suspension measure [24].

The main effect of suspension from office is to temporarily prohibit the employee to exercise his function. As a consequence, during the period of suspension he is not entitled to salary.

The suspension lasts until:

a) the court judgment for the person concerned is final, in which case the contract is terminated de jure under article 56 of the Labor code, republished, either as a result of the ban on the exercise of the profession or function in question, as a safety measure or supplementary punishment, either as a result of a criminal conviction.

b) the acquittal or cessation of criminal trial decided by court, situation when, to the extent that there is nevertheless a criminal guilt, the employer has the right to apply a penalty disciplinary action, including termination of employment contract [25].

As stated in article 52 paragraph (2) of the republished Labor code, if his innocence in established, the employee resumes his previous activities and he must be paid, under the rules and principles of contractual civil liability, compensation equal to the salary and other rights of which he has been deprived during his suspension. So, after becoming aware of the prosecution resolution to not continue with the prosecution, the employee shall resume his activities immediately. He will receive compensation only for the period during which the individual employment contract is suspension, which lasts until the mentioned resolution and after that date. The compensation is owed by the employer, even if he would prove that he is not at fault for the suspension of the individual employment contract [26].

It is not about any innocence to the employee, but an *absence of criminal culpability* [27].

In case of replacement of conditional criminal liability we are not in the presence of the employee's innocence, because in this situation, the offence retains the character that justifies criminal liability but it is *substituted* with a different kind of responsibility and not removed. In such a situation, therefore, we cannot speak of innocence and, as a consequence, the suspected person is not entitled to the compensation provided for in the Labor Code.

Also if it is ordered the cessation or disposal of criminal prosecution or of criminal process as a result of amnesty, prescription of criminal liability, the withdrawal of the complaint or the reconciliation of the parties, the solution must be nuanced. There is no guilt in the situation where the Prosecutor or, where appropriate, the Court ruled, for the cassation, removal from criminal prosecution, termination of criminal prosecution or acquittal for the reasons laid down in art. 16, letter. a)-d) of the Criminal procedure code. However, when the competent authorities have taken one of these measures, as a result of the fact that it was amnesty, prescription of criminal liability, withdrawal of complaint or reconciliation of the parties, it would not be possible to be withheld the existence of innocence [28]. Under these assumptions, for the one suspended to demand compensation, it is necessary that beforehand, he must have made use of the provisions of the Criminal procedure code and, at the same time, as a result, the Prosecutor or the Court, as appropriate, to have decided the removal or acquittal. Indeed, if the person concerned has not exercised a right provided for by the law shall be deemed implicitly that he accepted his criminal guilt and therefore does not have vocation to payment of compensation as provided by law [29]. However, if the removal from prosecution is ordered because the employee is found to be innocent, he is entitled to receive compensation equal to the rights he would have received if the individual employment contract wouldn't have been suspended [30].

If the person concerned has been convicted and subsequently, as a result of an extraordinary way of attack, he is acquitted on the grounds that he did not commit the offence attributed or that offence does not exist, the compensation is not owed by the employer, but by the state under the provisions of the of Criminal procedure code.

Also, the person against whom it was taken a preventive measure, and subsequently was removed from prosecution or was acquitted has the right to compensations [31].

III. The suspension of employment reports in the case of committing criminal offences in the case of other socio-professional categories

The decision of the Constitutional Court no. 814/2015 harmonizes the provisions of art. 52 para. (1), letter (b) the Labor code, republished, with some similar provisions from some special normative acts

regulating the circumstances relating to the suspension of employment reports in the case of other socio-professional categories.

Thus, through art. 53 section 1 of Law 255/2013 [32] it was amended art. 65 of Law no. 360/2002 [33] in the sense that, when against a police officer criminal proceedings were put in motion or he was sent to trial, his maintenance into activity is decided after the final settlement of the case, except for the situation when he has committed any other disciplinary misconduct, in which case the usual disciplinary procedure operates. The police officer found in such a situation is made available, except the cases in which a criminal action has been initiated for an offence through negligence and is assessed that he does not affect the prestige of the profession. He will perform only those tasks and service responsibilities established in writing by the head of the police unit and will enjoy the entitlements corresponding to the professional degree that he has, at a basic level, as well as other rights provided for by law. The policemen taken into custody or found in house arrest shall be suspended from office, and during the period of suspension he shall not benefit from any right provided by law and is obliged to hand over weapons, identification and badge. If, in his case, the court decides to dismiss the case, to waiver prosecution, to acquit, to postpone the application of the punishment, as well as in the case of cessation of the criminal process, the policeman will be reinstated in all prior rights, including the compensation for which he was deprived during the suspension of duties, according to the powers laid down by order of the Minister of internal affairs.

A similar situation we can distinguish in the case of the *public servants with special status* in the National Administration of penitentiaries [34] in the sense that, in a situation where against him criminal proceedings were put in motion, his maintenance in activity is decided after the final settlement of the case, unless he had committed any other disciplinary misconducts, situation when usual disciplinary procedure will apply. Once criminal action has been initiated or he was sent to trial the public servant with special status in the prison system administration will be made available. The consequence of such measures are that he will perform only those tasks and attributes of service laid down in writing by the head of the unit and will benefit entitlements corresponding to the professional degree he has, at a basic level, and other rights provided by law. Duration pre-trial detention and home arrest, the public servant with special status in the prison system administration official audience will be suspended from office, in which case he will not benefit from any of the rights prescribed by law.

In the case when the court decides to dismiss the case, to waiver prosecution, to acquit, to waver or postpone the application of the punishment, as well as in the case of cessation of the criminal process, the public servant with special status in the prison system administration will be reinstated in all prior rights, including the compensation for which he was deprived during the suspension of duties, according to the competences laid down by the Minister of Justice [35].

Also we should keep in mind that civil servants with special status can be kept in activity with this capacity, in the public functions they hold if, for an offence committed through negligence, the court decided to postpone the application of the penalty, suspend the sentence, fine punishment was applied or he was granted an amnesty or pardon before the start of penalty and it is considered that the deed did not interfere with the professional prestige. This measure shall be ordered based on the approval of persons granting professional degrees on a proposal from the Director of the unit [36].

Under art. 64 points 1 and 2 of law No. 255/2013 [37] the quality of *member of the diplomatic and consular Corps of Romania* is lost in the case of preventive arrest or home arrest for a period of more than 60 days or definitive conviction for an offence of such a nature that would make him inconsistent with his capacity, and in a situation in which it was ordered the initiation of criminal action against him for an offence of such a nature as to make him inconsistent with his status, the Minister of Foreign Affairs will take the measure of suspension of employment reports.

According to art. 36 letter g) [38] of the Government Emergency Ordinance no. 86/2006 concerning the Organization of the work of insolvency practitioners, [39] the quality of insolvency practitioner shall be suspended in the case when against him it was initiated criminal proceedings or was sent to court for the commission of an offence likely to harm the reputation of the profession, until delivery of the final judgment.

Art 94 para 1, letter m) of law no. 188/1999 on the Status of civil servants, [40] it provides that the public report of the *public official* will be suspended de jure when he will be sent to trial;

Dispositions of 31, paragraph (3) of law No. 35/1997 on the Organization and functioning of the Ombudsman institution, [41] provides that the Ombudsman or his deputies will be suspended from office, de jure, until the final judgment if they are arrested or sent to criminal court.

Art. 62 para. (1), letter (a) of law no. 303/2004 concerning the status of *judges* and *prosecutors*, [42] provides that the judge or Prosecutor is suspended from office "when he was sent to court for committing a criminal offence"

Finally, in the context of the reminded legislative amendments, the Constitutional Court has found, through decision no. 270/2015, [43] the unconstitutionality of the provisions of article 48 para. (1), letter a) of law no. 567/2004 relating to the status of the *specialized auxiliary personnel in courts and prosecutors' offices attached to them and the staff that works at the National Institute of Forensic Expertise*, [44] retaining essentially that this legislative text, which regulates the suspension from office of auxiliary personnel in the judiciary at the time the criminal prosecution is initiated against him, is unconstitutional, and in this case the suspension is to take place at the time of referral to court, just as in the case of judges and prosecutors.

Conclusions and proposals

We believe that the legislative interventions which had as purpose to amend certain provisions relating to the status, rights and obligations of certain categories of staff - prosecutors, judges, policemen, civil servants and civil servants with special status - were made to assimilate at the level of special criminal and non-criminal legislation the effects of new categories of preventive measures not provided for in the previous legislation, such as house arrest and judicial control and a correlation with the new solutions of not to indict, namely the settlement of criminal proceedings without a conviction, as provided for by the Criminal procedure code.

Also, we appreciate that the recent legislative changes as well as the considerations of the Constitutional Court decisions, quoted in this material, express the trend of enhancing the warranties accompanying the suspension of employment relationships or the suspension from office, in order to ensure not only the objective character of the measure with wide-ranging consequences for the one it applies, but also intervenes in well substantiated cases, the least subjected to uncertainties.

It also requires that the legislature to proceed as quickly as possible at the implementation in agreement with the provisions of the republished Labor code, with the decisions the Constitutional Court handed down in this matter.

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[7] See Article 49 para. (1) Labor Code; **Alexandru Ţiclea**, *Treaty* ..., 2015, p. 696-697.

[8] Art. 215[1] was introduced through art. 1 para. (1) pt. 3 of the Government Emergency Ordinance no. 84 / 2014 for amending and supplementing Law no. 135/2010 on the Criminal Procedure Code (published in the Official Gazette no. 911 of 15 December 2014).

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[35] Art. 58 of Law no. 293 / 2004, republished, amended by art. 70 pt. 1 of Law No. 255/2013.

[36] Art. 64 para. (2) of Law no. 293/2004, republished, amended by art. 70 pt. 3 of Law No. 255/2013.

[37] Art. 64 pt. 1 and 2 of Law no. 255/2013 amends art. 51 lit. h) and art. 60 of Law no. 269/2003 on the Statute of Diplomatic and Consular Corps of Romania, published in the Official Gazette no. 441 of 23 June 2003.

[38] Letter g) of art. 36 of Government Emergency Ordinance no. 86/2006 on the organization of insolvency practitioners' activity was introduced by Article 85 of Law no. 255/2013.

[39] Republished in the Official Gazette no. 724 of 13 October 2011, subsequently amended and supplemented.

[40] Republished in the Official Gazette no. 365 of 29 May 2007, subsequently amended and supplemented.

[41] Republished in the Official Gazette no. 277 of 15 April 2014.

[42] Republished in the Official Gazette of Romania, Part I, no. 826 of 13 September 2005, subsequently amended and supplemented.

[43] Published in the Official Gazette no. 420 of June 12, 2015.

[44] Published in the Official Gazette no. 1197 of 14 December 2004, subsequently amended, including Law no. 130 / 2015 published in the Official Gazette no. 408 of 10 June 2015.