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DO WE STILL HAVE, OR DO WE NO LONGER HAVE, THE LAW?

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Abstract: *Although the question in the title is generally formulated, this study aims to reduce its scope to a particular hypothesis: What happens if a law is repealed, and subsequently the Constitutional Court finds the unconstitutionality of the law of repeal? Although it is not so common, the problem is important by the very possibility that such situations may occur in the future, but especially in the light of the legal effects that may be generated, effects suggestively contradicted by the title question: Do we still have, or do we no longer have law?*

Keywords: *law; repeal; unconstitutionality; effects; interpretation.*

Introduction

The idea to write this material was triggered by a real-life situation when, as a lawyer, I was asked to provide legal assistance in connection with an alleged electoral offense.

Checking, within the legislation software that I use, the rule allegedly violated, I found the following mention (I specify that it is about the provisions of Art 98[1] Para1 Let t) of Law no. 208/2015[1]) – the

[1] Art 98 Para 1 Let t)* of the Law no. 208/2015 states the violation of provisions mentioned by Art 16; continuing electoral propaganda after its conclusion, as well as advising voters at polling stations on voting day to vote or not to vote for a particular

text of the law as reproduced in the legislation software has an asterisk and the explanatory text to which I am about to refer is written underneath it:

*) Point 43 of the G.E.O no. 26/2020 repealing the current letter, has been declared unconstitutional by the Decision of the Constitutional Court of Romania no. 150/2020, published in the Official Gazette no. 215/17 March 2020, let t) thus returning to its initial form.

So here's what challenged me:

Within the legislation software, the legal text represented by Art. 98 Para 1 let t) of Law no. 208/2015 is mentioned and, through the previously cited text, we are informed of the following:

- we learn that the text was expressly repealed by Point 43 of the G.E.O no. 26/2020;
- we learn that by the Decision of the CCR no. 150/2020 the repealing text was declared unconstitutional.
- finally, we are informed that, given this circumstance, the text of Art. 98 Para 1 let t) is again in force in the form it had prior to its repeal "thus returning to the previous form".

The first two aspects represent genuine information regarding changes in the legal order. We were informed that the legal text that represented the incriminating norm was repealed. Then, we were also informed that the repealing norm was found to be unconstitutional by a decision of the Constitutional Court published in the Official Gazette (therefore producing legal effects).

The third aspect obviously represents an unofficial legal reasoning belonging to the creators of the legislation software, it represents their logical-legal deduction and an explanation for maintaining the text of the norm that incriminates the act that constitutes a contravention, in the reproduced text of the law.

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political party, a particular political alliance, electoral alliance, organization of citizens belonging to a national minority or an independent candidate.

[1] Law no. 208/20 July 2015 on the election of the Senate and the Chamber of Deputies, as well as for the organization and functioning of the Permanent Electoral Authority.

It is a well-known fact that legislation software is used by millions of subscribers, individuals, legal entities, public authorities, courts, which gives the information provided by them a direct effect on the concrete legal reality. The vast majority of participants in any form of the legal phenomenon get their information regarding regulations from this legislation software.

Therefore, the presence within the legislative information accessible to the public of the text of the law initially repealed, but whose repealing norm was found to be unconstitutional, provides full legitimacy to the question in the title of this study: "Do we still have, or do we no longer have, the law?"

In analyzing the issues raised by this question, I thought of a situation in legal symmetry with the hypothesis of our question: "The repeal of the repeal".

If the legislator shall repeal the repealing norm, then the initial repealed norm shall re-enter into force or not?

The repealing (Popescu & Gheorghe, 2012, p. 116) represents a legal institution through which a legal provision or even a normative act ceases its validity. The effect of repeal is not to annul the repealed rule or act, but rather to cease to produce legal effects for the future. The mechanism of repeal is based on the idea of the appropriateness of the repealed norm or act towards the topicality of the social realities to be adequately regulated. For the repeal we have the same reasoning, successively applied, twice. The legislator, taking into account the need to adapt legal norms to changes in society, the legal system and the fundamental values of the rule of law, finds it necessary to repeal a normative act in force. The same reasoning is necessarily to be found in the decision on the grounds for the repeal of the repeal rule. As has been consistently held in the doctrine, the repeal of the repeal does not represent a "change of mind on the part of the legislature, for this would create the premises of a legislature that is oscillating, unstable and uncertain in relation to social needs and the rules governing social

relations"[1]. This would imply a social danger, and it is unthinkable that this would come from the legislator.

Thus, both the institution, as well as the reasoning founding this legal institution, are opposite to the presumed effect according to which the repeal of the repeal would determine the rebirth of the initial norm.

We considered this analysis necessary in order to compare it with the solution chosen by the legislator.

Indeed, we can see that the legislator fully adheres to the reasoning set out above, explicitly regulating the relationship between the repeal of the repeal and the rule originally repealed.

Art 46 Para 3 of the Law no. 24/2000 expressly states the conclusion reached above, through a logical-legal reasoning: "The repeal of a provision or a legislative act shall be definitive. It shall not be permissible for the repeal of an earlier repealing act to re-establish the force of the original legislative act"[2].

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[1] Vlad, Ș., *Despre OUG nr.14/2017*, available at https://www.juridice.ro/493559/despre-oug-nr-142017.html; "The principle of definitive repeal, which opposes the "repeal of repeal" technique, creates linearity, predictability, stability and legitimate trust, attributes that give substance to the principle of security of legal relations. The law creates in the minds of the recipients a legitimate expectation regarding the lack of fluctuation and normative stability, from the very moment of publication in the Official Gazette, regardless of the moment of entry into force. Consequently, from this moment on, the recipients of the legal norm, even if it has not yet entered into force, base their behavior, decisions, intentions, etc. on the fact that the legislator, in the activity of regulating social relations, considered that a certain legal provision no longer satisfies social needs and that it is to be eliminated from "legal life" either on the date of publication or at a time after publication. We would like to point out that repeal represents one of the firmest legislative events, this solution being applicable when the legislator absolutely considers that a certain legal norm no longer reflects the needs and values of society. Now, the legislator should not be allowed to have oscillating attitudes regarding the need to remove a legal norm. The solution of repeal is (or should be) the result of a careful analysis of the needs of society and the obsolescence of the legal provisions that regulate these needs. Therefore, we consider that the legislator's "change of mind" cannot have any effect, (…).

[2] The legislator also regulates an exception, but this exception is justified by the particularity of the legal regime of the repealing normative act: Art 46 Para 3 third

The legislator does not mince his words, explaining his will in the second sentence of the quoted paragraph, even using a plastic wording "it is not allowed" that a repealed normative act may not be reinstated into force even by repealing the repeal. The legislator's statute has in mind precisely the effect of the repeal, that of ceasing the legal effects of the repealed rule for the future, definitively (these are terms that will help us in the following analysis).

The legislator also regulates an exception, but this exception is justified by the particularity of the legal regime of the repealing normative act.

We close the parenthesis made by the incursion into the legal regime of a symmetrical institution (repeal) in order to ask the question: If the repeal of the repeal cannot reactivate the rule initially repealed, and since the repeal of a rule and the declaration that a rule is unconstitutional have the same consequences for the rule concerned, then, in application of the principle "ubi eadem est ratio, eadem solutio esse debet", would the same legal effect not be required, in the sense that it is impossible to reactivate the repealed rule even if the repealing rule is declared unconstitutional?

Let us address the same question to the Constitutional Court – The answer is in the form of a quote from a recent decision of the Court, Decision no. 409/19 September 2024[1], published in the Official Gazette in January 2025: We note that by the aforementioned decision, the Constitutional Court admitted the plea of unconstitutionality and found that Law no. 11/2024 is unconstitutional in its entirety[2].

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sentence "The exceptions are the provisions of the Government ordinances that provided for repeal norms and were rejected by law by Parliament".

[1] Decision no. 402/19 September 2024 regarding the exception of unconstitutionality of the Law no. 11/2024 on the statute of the status of clerks and other categories of personnel occupying specialized positions within the courts, prosecutor's offices and the National Institute of Forensic Expertise, in its entirety published in the Official Gazette, no. 15/10 January 2025.

[2] Admits the exception of unconstitutionality raised by the Ploiești Court of Appeal in court case no. 3243/2/2024 of the Bucharest Court of Appeal – Section X for

We quote Para 49 of the recitals: In view of the above, the legal regulations repealed by Law no.11/2024 shall re-enter into force on the date of publication of the unconstitutionality decision. Therefore, Law no. 567/2004, as well as the other normative acts repealed by Law no. 11/2024, shall re-enter into force on the date of publication of this decision.

As explicit as the legislator has been on the effects of repeal, stating that "it is not permissible" for the repeal of the repeal to have the effect of activating the rule originally repealed, the Constitutional Court is also explicit in stating that by declaring the repealing rule unconstitutional, the repealed rule "re-enters into force". The answer is therefore clear: in almost identical situations we apply different solutions.

We now note that the spark from which the present study started (the mention in the legislative software of the wording "thus reverting to the previous form") was not a logical-legal deduction of the makers of the software but, rather, it was a takeover by them of an explicit wording of the Constitutional Court ("reintroduce into force") found, as I was to realize later, in a constant of its case law.

However, the problem of different solutions regarding the initially repealed rule should not be closed in an explanation of the kind "it is so because it is so". We need to understand why the Constitutional Court states that its decisions finding the repealing rule unconstitutional have the effect of bringing the repealed rule back into force.

We offer the explanation by means of a quotation, a quotation which obviously belongs to the Constitutional Court: "46. The Court held that, having regard to the above-mentioned constitutional texts, the finding of unconstitutionality of the provisions of the repealing primary

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administrative and fiscal litigation and for public procurement and by the Bucharest Court of Appeal in court case no. 480/42/2024 of the Ploiești Court of Appeal – Section for administrative and fiscal litigation and finds that Law no. 11/2024 on the status of clerks and other categories of personnel occupying specialized positions within the courts, the prosecutor's offices attached to them and the National Institute of Forensic Expertise is unconstitutional, in its entirety.

regulatory act does not result in the emergence of a legislative void, but determines the re-entry of the repealed acts into the active substance of the legislation, after the publication of the Constitutional Court's decision in the Official Gazette of Romania, Part I (see, in the same sense, Decision No.1039/5 December 2012, published in the Official Gazette of Romania, Part I, No. 61/29 January 2013); 47. In such cases, in which normative acts that repeal other normative acts are found to be unconstitutional, there is no "repeal of the repeal", in order to be able to take into account the provisions of Art 64 Para 3 second sentence of Law no. 24/2000, according to which: it is not permissible for the repeal of a previous act of repeal to bring the original normative act back into force – provisions that may be relied against the legislature in its law-making activity, but this is a specific effect of decisions finding the unconstitutionality of a repealing norm, an effect based on the constitutional provisions of Art 142 Para 1, which enshrines the role of the Constitutional Court as guarantor of the supremacy of the Constitution, and Art 147 Para 4, according to which the Court's decisions are generally binding[1].

We note that the essence of the constant case law of the Constitutional Court in this regard is based on its main function as guarantor of the supremacy of the Constitution and the generally binding effect of its decisions. Starting from such a premise, the finding by the Constitutional Court of the "loss of constitutional legitimacy" ("a different and much more serious sanction than a mere repeal") of the repealing norm cannot have any other effect than that of restoring the original normative act to its original legal force.

We propose an interesting case law study composed of 4 elements:

[1] Decision no. 402/19 September 2024 regarding the exception of unconstitutionality of the Law no. 11/2024 on the statute of the status of clerks and other categories of personnel occupying specialized positions within the courts, prosecutor's offices and the National Institute of Forensic Expertise, in its entirety published in the Official Gazette, no. 15/10 January 2025.

1. Article I, item 56 of Law no. 278/2006 on amending and supplementing the Criminal Code and amending and supplementing other laws repealed the provisions of Art 205-206 of the Criminal Code, articles that criminalized offenses of insult and slander.
2. By Constitutional Court Decision no. 62/2007[1], the exception of unconstitutionality invoked was admitted and it was found that the provisions of Art I, item 56 of Law no. 278/2006 on amending and supplementing the Criminal Code, as well as amending and supplementing other laws, the part relating to the repeal of Articles 205, 206 and 207 of the Criminal Code, are unconstitutional.
3. The adoption of the Constitutional Court Decision no. 62/2007 led to the emergence of different positions in the jurisprudence of the courts on the issue of the existence or non-existence of criminalization of the two crimes of insult and slander, which led to a non-uniform jurisprudence, with solutions being, on the one hand, acquittal, justified by the non-existence of criminalization, and on the other hand, conviction, justified by the re-enactment of the criminalizing texts, as a result of the finding of unconstitutionality of the repealing rule.

The problems of law that have generated this inconsistent case law have been analysed by the High Court of Cassation and Justice which, by way of appeal in the interest of the law, by Decision No. 8/2010[2] upheld the appeal in the interest of the law ruling that: The rules criminalizing insult and slander stated by Art 205-206 of the Criminal Code, as well as

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[1] Decision no. 62/18 January 2007 on the exception of unconstitutionality of the provisions of Art I, Point 56 of the Law no 278/2006 on the modification and amendment of the Criminal Code, as well as for the modification and amendment of other laws. The Decision has been published in the Official Gazette no. 104/12 February 2007.

[2] Decision no 8/18 October 2010 on the repeal in the interest of the law, regarding the Decision of the Constitutional Court no 62/18 January 2007 on the exception of unconstitutionality of the provisions of Art I, Point 56 of the Law no 278/2006 on the modification and amendment of the Criminal Code, as well as for the modification and amendment of other laws on the provisions of Art 205, 206 and 207 of the Criminal Code. Published in the Official Gazette no 416/14 June 2011.

the provisions of Art 207 of the Criminal Code on the proof of truthfulness, repealed by the provisions of Article I, item 56 of Law 278/2006, provisions declared unconstitutional by Decision No. 62/18 January 2007 of the Constitutional Court, are not in force. Mandatory, according to art. 414^2 Para 3 of the Code of Criminal Procedure.

Therefore, in 2011 (date of publication in the Official Gazette of the HCCJ's Decision no. 8/2010) we have a binding statute for the judiciary on the non-criminalization of the offenses of insult and slander.

4. The fourth element of the proposed jurisprudential study is represented by the issuance, in 2013, of the Constitutional Court Decision no. 206/2013[1].

By this Decision, the Constitutional Court admitted the objection of unconstitutionality concerning the provisions of Article 414^5 Para 4 of the Code of Criminal Procedure, and found that the "resolution of the issues of law decided" by the Decision of the High Court of Cassation and Justice – United Sections no. 8/18 October 2010, published in the Official Gazette of Romania, Part I, no. 416/14 June 2011, is unconstitutional, contrary to the provisions of Art 3, 4 and 5, Art 126 Para 3, Art 142 Para 1 and Art 147 Para 1 and 4 of the Constitution and the Decision of the Constitutional Court no. 62/18 January 2007, published in the Official Gazette of Romania, Part I, no. 104/12 February 2007.

We note that, in its capacity as guarantor of the supremacy of the Constitution, the Constitutional Court considered itself entitled to filter through constitutionality review the Decision of the High Court of Cassation and Justice delivered by Decision No. 8/2010 on appeal in the interest of the law.

It would seem that with this last element of legal conflict between authorities, the question in the title of our study would be answered: WE HAVE LAW!

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[1] Decision no. 206/29 April 2013 regarding the exception of unconstitutionality of the provisions of Art 414^5 Para 4 of the Code of Criminal Procedure. Published in the Official Gazette no 350/13 June 2013.

And yet, in the jurisprudence after 2013 and until the entry into force of the current Criminal Code (1.02.2014), we do not find that offenses of insult and slander have been committed, which cannot be interpreted in the sense of a decrease in criminality, but in the sense that the courts considered that we NO LONGER HAVE LAWS!

The dilemma remains topical because, in spite of this rich and high-level case law, in a similar new situation, we have no binding rulings.

We state this because, in the absence of an express mention in the Decision declaring the unconstitutionality of the repealing norm, the court before which the question "do we still have or do we no longer have a law?" will appear in the future, could only give a solution by way of interpretation, referring, or not referring, to the case law of the Constitutional Court.

So, here we are in front of the question in the title of the article, in a situation where the Constitutional Court, in a new decision, finds the unconstitutionality of a repealing rule and, in the recitals, says nothing about the possible "re-entry" into force of the repealed rule!

Conclusions

Instead of Conclusion, a new question emerges: How do we think?

We believe that, in principle, the position consistently expressed by the Constitutional Court is correct.

It is a fact that a rule has been repealed and therefore no longer exists in the legal order.

At the same time, we note that the repealing rule was found to be inconsistent with the Constitution.

We say that, as a matter of principle, the position of the Constitutional Court is the correct one, because once the unconstitutionality of the abrogating norm is established, and as the Constitution is pre-existent to the abrogating norm, this implies that the abrogating norm was never in conformity with the Constitution. This translates into the fact that even in the interval between the date of its adoption and the date of the declaration of its unconstitutionality, the

repealing norm did not comply with the Constitution. Now, as the repealing norm was never in conformity with the Constitution, and as non-conformity with the Constitution is sanctioned by deprivation of legal effects, then the repealing norm could never produce legal effects, therefore it would be fair that the norm repealed by a normative act that could not produce legal effects, be considered as remaining in force.

What is right in principle, however, "clashes" with the effects of the Constitutional Court's decisions.

Art 11 Para 3 of the Law no. 47/1992 stipulates that the decisions of the Constitutional Court are published in the Official Gazette, are binding and (again a plastic expression) "have force only for the future".

Therefore, the correct principle stated above is undermined by the rule cited, in the light of the fact that the decisions finding unconstitutionality have force, and therefore produce effects, only for the future.

Although the normative act whose unconstitutionality has been found has never been constitutional, according to the provisions of Art 11 Para 3 cited above, it will be considered unconstitutional only for the future, the only exception being the lawsuits initiated previously and in which unconstitutionality was invoked or those that are still pending and are based on the same normative provision criticized for unconstitutionality.

Therefore, from the point of view of sanction, what becomes unconstitutional after the publication of the Decision in the Official Gazette can be considered as constitutional for the period prior to publication. This is correct, as I have said, only in terms of the sanction. The sanction implies that the text declared unconstitutional can no longer produce legal effects after the publication of the decision in the Official Journal, but it is considered to have produced valid legal effects until that moment.

If the repealing rule declared unconstitutional can no longer produce legal effects after the publication of the Decision in the Official Journal, but it has produced legal effects until the publication of the

Decision in the Official Journal, then the legal effect of the repeal has been produced, or not?

Clearly, the answer is affirmative, the effect of the repeal has been produced, because the repealing norm has produced legal effects between the moment of its adoption (its entry into force) and the moment of publication of the decision finding it unconstitutional.

As the repeal has "uno ictu" effect, the repealed rule ceases to exist.

The question arises, if the repealing rule ceases to produce legal effects from the moment of publication of the Constitutional Court's decision, what effect does this have on the repealed rule?

If we have previously accepted that the original rule was repealed and the repeal has taken effect, then there are two possible situations:

a) Either declaring the repealing rule unconstitutional for the future cannot produce any effect on the repeal (because the non-retroactive effect is expressly enshrined in the provisions of Art 11 Para 3 of the Law no. 47/1992;
b) Either declaring the repealing rule unconstitutional for the future would cause the repealed rule to re-enter into force.

This second situation would presuppose the existence in Romanian law of the institution of re-entry into force. As this institution does not exist, then it cannot justify such an effect of the Constitutional Court's decision declaring the unconstitutionality of the repealing rule.

We can draw a parallel between two sanctions "Unconstitutionality" and Nullity. Although they are identical in terms of the reason for the violation of the law, both unconstitutionality and nullity presuppose causes (violation of the Constitution and of the law) that occurred prior to the conclusion of the act (adoption of the normative act and conclusion of the legal act) and although this would have justified the retroactive effect of both sanctions, the legislator opted for a different legal regime of unconstitutionality, compared to nullity, in terms of the sense of the effects produced on the time axis. Unconstitutionality does not produce effects for the past, whereas nullity is retroactive.

This is the reason why the "re-entry into force" of the normative act repealed by a norm found to be unconstitutional cannot occur: the non-

existence of a legal institution that would ensure such an effect, given the express regulation of the effects (only for the future) of the decisions of the Constitutional Court.

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