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PhD Thesis Summary

THE OFFENSE OF ABUSE OF OFFICE

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SYNTHETIC CONTENTS OF THE DOCTORAL THESIS

Keywords in the Thesis

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1. Justification for choosing the subject and scope of the research

The offense under analysis captured my attention during my practical activity when I was required to identify the reprehensible element of a public official's conduct accused of committing the offense of abuse of office and to assess the existence of the typical conduct. The case in question raised many of the issues examined in this thesis, including its relationship with other offenses and the question of whether certain contemporary forms of social harm reflect the necessary degree of reprehensibility to justify criminalization.

My own dilemma overlapped with a period in which the interpretation and application of the legal provisions incriminating abuse of office were the subject of extensive doctrinal and jurisprudential controversies, especially given the frequent occurrence of this offense in judicial practice. These controversies concerned numerous aspects: terminological issues (the meaning of terms used in the basic form of the offense, the attenuated form and the form assimilated to corruption offenses), the concept of abuse of office, the legality of criminalization, the rationale for incrimination, the legal regulation of public officials' duties, the scope of the offense, the existence, meaning and extent of its subsidiary character, its relationship with other offenses and its interaction with other forms of legal liability.

Starting from this point, I documented the offense of abuse of office from a historical and comparative law perspective to identify the concept envisioned by the Romanian legislator and the ideological foundation of the offense, in order to determine whether it adequately addresses the complexity of contemporary social relations.

In the same time, I sought to answer the question of whether the current formulation of the offense complies with the principle of legality in criminalization, and whether it is clear and foreseeable for legal subjects. Additionally, the terminological and interdisciplinary analysis of the offense aimed to clarify whether concepts from other legal field, such as administrative law, civil law, or labor law, could be transferred or adapted to elucidate the meaning of certain terms in instances where criminal law lacks sufficient autonomous development (e.g., the notions of "act," "official duties," "harm," "rights," or "legitimate interests").

It is noteworthy that, although Law No. 286/2009 on the Criminal Code systematized the legal provisions on abuse of office and introduced certain changes regarding the effects of the offense, an initial analysis reveals that the terminology used by the legislator formally extended

the social domain to which abuse of office might apply, at least until interventions by the Constitutional Court of Romania.

For a better understanding of the scope of application of the offense, this research aims to identify the criteria for delineating its limits, starting from the protected social value, as viewed from the perspective of the rationale for incrimination in the present social context.

To achieve this objective, it was necessary to analyze, within the limits set by the chosen topic, certain relevant principles or legal institutions of general criminal law and/or criminal procedural law as applied to this offense, such as the legality of criminalization, the principle of minimal intervention, action and inaction, the result of the offense, concurrence of offenses, apparent concurrence of legal provisions and its resolution criteria, or the *ne bis in idem* principle.

The subsidiary nature of the offense presents significant challenges to both legal doctrine and judicial practice, particularly concerning its relationship with other offenses. The opinions expressed in this regard are as varied as they are striking. Consequently, this research has had to examine this issue in detail.

It will be observed that, at present, the subsidiary character of the offense is used as an argument to invoke any relationship with other offenses and appears to stem both from specialty criterion, subsidiarity and other resolution criteria, as well as directly from the principle of minimal intervention of criminal law (the principle of subsidiarity), in a highly particular manner.

Indeed, one of the challenges of this research has been to determine the meaning and scope of the subsidiary nature of the offense of abuse of office, a necessary step in resolving the "conflict" between abuse of office and various other offenses.

The structure of this doctoral thesis comprises six parts. The first part of the study is dedicated to the theory of the offense of abuse of office and its legislative evolution. The second part analyzes the standard form of the offense in all its aspects, as this form encompasses the entire architecture of the concept of abuse of office. The third part examines the other four forms of abuse of office. The fourth part focuses on the particularities of the offense in the judicial field, the fifth part on its relation with other offenses and the final part on the manner in which abuse of function/office is regulated in other jurisdictions.

The comparative law analysis crosses the entire structure of the thesis, but I appreciated that in order to adequately present how public office is protected in other states, as well as the differences between the conceptual foundations of the respective regulations (abuse of office, on

the one hand, abuse of power, abuse of authority and excess of power, on the other hand), a fragmented analysis within the thesis – based on the specific subject of different sections – would not suffice. Therefore, a unified, distinct approach was also necessary.

2. The theory and legislative evolution of the offense of abuse of office

In the first part, I addressed the rationale for criminalization from two perspectives: one concerning the current rationale for criminalization, focused on the object of the offense and the other as a synthesis derived from historical evolution and comparative law regarding how the protection of public office could be conceptualized. An initial conclusion is that national legislation has seemingly focused on protecting the rights and interests of third parties, even though the primary protected value concerns the proper functioning of service relations.

However, observing the legislator's efforts to domestically integrate at the national level various provisions of international conventions regarding abuse of office, as well as to match the requirements of the rule of law, the rationale for criminalization tends towards ensuring the professional performance of legally regulated service duties and protecting public authorities, public institutions (including legitimate public interests), legal entities and individuals from intentional unlawful conduct by those exercising service duties.

An analysis of other regulations revealed that offenses similar to abuse of office focus on flagrant, unlawful, arbitrary and deliberate violations of the law, elements that are not necessarily specific to the offense of abuse of office.

I employed epistemic and contextual methods to delineate the concepts of abuse of power, abuse of authority and excess of power, on the one hand, and abuse of office, on the other.

The concepts of abuse of power, abuse of authority and excess of power (originating in the penal system established by the Napoleonic Penal Code of 1810) essentially elaborate on the following ideas: violation of service duties or the law, implying a misuse of conferred prerogatives characterized by a lack of any legal basis, unrelated to fulfilling a public interest, for the purpose of obtaining benefits or harming others (abuse of power); unauthorized use of public force (abuse of authority); exceeding legal competencies and interfering with powers conferred on other officials (excess of power). These concepts also presupposed a specific intent of the official.

On the other hand, the concept of abuse of office differs from the aforementioned notions and has its ideological foundation in the former socialist legal system. This is the main conclusion derived from historical legal research. Abuse of office essentially incorporates the three previously mentioned concepts; however, its meaning surpasses them as it emphasizes a broadly defined outcome and does not objectively limit the scope of conduct that may be deemed abusive.

From a terminological perspective, abuse of function/office is a broad concept that encompasses all these forms of misconduct by public officials.

Through the historical contextual research method, I sought to determine the existence, meaning, and scope of the subsidiary nature of the offense of abuse of office, as well as its relationship with other offenses. The first regulation of abuse of office was introduced by Decree No. 192/1950, issued by the Presidium of the Grand National Assembly of the People's Republic of Romania, which reconfigured Article 245 of the Penal Code of King Carol II, renaming the offense from abuse of power to abuse of office. The criminalization provision explicitly included a subsidiarity clause: "*if the act does not constitute another offense punishable by law as committed by an official in the exercise of his duties*."

The subsidiarity clause was apparently removed by Decree No. 318/1958. The Supreme Court ruled that this legislative solution stemmed from the nature of the offense of abuse of office itself, as reflected in the wording of the criminalization text, which referred to all situations where, under certain conditions, an official unlawfully violated his service duties. The Supreme Court explained that the removal of the subsidiarity clause from the legal text was unnecessary, given the nature and scope of the offense.

Considering this position of the former Supreme Court, I concluded that the reasons for removing the subsidiarity clause were that its explicit inclusion in the text was redundant. The socialist legislator's intent was not to eliminate it; rather, the clause transformed from explicit to implicit. This is the meaning of the subsidiary nature of the offense. Its interpretation cannot differ from that of the express subsidiarity clause removed from the legal text in 1958.

The 1968 Penal Code retained the general concept of abuse of office from the previous regulation, with the subsidiary nature being one of its inherited characteristics. Moreover, this concept was preserved in the current Penal Code, which merely systematized the old criminalization provisions and introduced limited terminological changes.

The current regulation of the offense faces challenges in adapting outdated concepts to contemporary social realities, given the lack of substantive modifications.

Within this framework, I presented the relevant international legal instruments for criminalizing or limiting the criminalization of the offense of "*abuse of office*" (United Nations Convention against Corruption, adopted in New York on October 31, 2003; Report on the Relationship Between Political and Criminal Ministerial Responsibility, adopted on March 8-9, 2013, by the European Commission for Democracy through Law; Opinion No. 930/2018 of the European Commission for Democracy through Law at its 116th Plenary Session). A detailed analysis of the convention and reports highlighted that criminalization should focus not on the result but on the particularities of the action/inaction and the intended purpose of the perpetrator.

Subsequently, I placed the offense within the framework of legality requirements, based on an analysis of the case law of the European Court of Human Rights (notably the judgment in *Liivik v. Estonia*).

I concluded that three key points emerge regarding the legality of the criminalization provision: the criminal culpability of certain conduct in relation to the regulatory technique of the typical action/inaction (the issue of proportionality in criminal liability); the issue of the required criminal consequence, particularly due to the vague notion of harming a person's legitimate interests; and the subjective element imposed by law, without specific characteristics.

3. Analysis of the Offense in Its Basic and Other Forms. Specific Features of the Offense in the Judicial Field

The second and third parts of the thesis reflect the "classic" analysis of any offense: the prerequisite situation, object, subjects, objective and subjective elements, completion, continued form and sanctioning regime.

In the second part, three distinct sections examine the subsidiary nature of the offense, its interaction with administrative law and the most relevant justificatory and non-imputability causes applicable to the offense of abuse of office.

The entire study is based on an extensive analysis of national jurisprudence, as well as case law from other jurisdictions where abuse of office is criminalized separately (e.g., decisions of Spanish, Italian, French or Texan courts).

The analysis of the subjects of the offense was carried out in detail. Criteria for distinguishing between public officials, assimilated public officials and private officials were identified and defined. Furthermore, the primary differentiation methods among various subcategories of public officials were outlined. Several particular cases were analyzed, revealing that classification within one of these categories or subcategories must be made *in concreto* rather than *in abstracto*.

The study sought to determine whether a *de facto official* could be an active subject of the offense in its basic form, in its aggravated form involving a restriction of rights, or in the form assimilated to corruption offenses and under what conditions. Regarding the attenuated form of the offense, as long as the manner in which a private official is entrusted with duties does not influence the application of Article 308(1) of the Criminal Code, the validity of the employment or service relationship (broadly speaking) is no longer relevant. Any potential nullity does not exclude the status of an official, making it unnecessary to resort to the theory of appearance in law.

The theory of the "*de facto official*", developed in administrative law to "*preserve*" acts issued by incompetent officials, was also examined. This theory is based on the legitimate interest of recipients and the public interest in ensuring the continuity of public service, meaning that acts should be definitively considered legal in favor of recipients if they reasonably believed that the author was competent to issue them.

This perspective required a distinction between an *usurper of public office* (one who exercises the office without any legal appointment) and a *de facto official*. Concerning the usurper of public office (who does not fall under Article 300 of the Criminal Code, meaning they are not a public official acting within the scope of their service), if they knowingly acted without any appointment, with intent, they could be held criminally liable for the offense of impersonating an official (provided that the impersonated capacity involves the exercise of state authority).

If, while "performing" the usurped function, the usurper causes harm or damage to another person, they could not be charged with abuse of office but rather with another offense that does not require a special active subject – for example, fraud under Article 244(2) of the Criminal Code (through the use of false credentials), provided they acted with the intent to obtain an unjust material benefit, as mere damage causation would not suffice.

As a conclusion to this section, it remains debatable whether the legal appearance created by the public exercise of official prerogatives can lead to criminal liability for abuse of office. This

is because such appearance cannot be invoked by the very party initiating criminal proceedings, who, through an unlawful appointment, created the nullity in the first place, but possibly by private parties, which is not applicable in criminal law.

If, by analogy, legal appearance derived from the public exercise of official prerogatives were applied to similar cases, legally unsustainable situations might arise. For instance, it would imply that a person performing, in fact, duties of an official without holding that status (such as someone replacing an official without proper authorization) should also be held criminally liable. However, this solution is unacceptable, as in such cases, the special legal object of the offense would not be affected by the person's conduct.

Furthermore, legal doctrine emphasizes that individuals who only occasionally replace public officials without the permission of the relevant authority or institution do not qualify as public officials.

Therefore, the essential aspect is that the criminal law relationship arises before the nullity or annulment of the appointment act is established. This relationship cannot be undone by declaring the appointment void based on administrative law considerations. What remains relevant is whether the authority, public institution, or state-owned legal entity conferred, even without fulfilling all formalities, the specific power of public office or, where applicable, the duties related to fulfilling of the object of activity.

Voluntary collaborators of public authorities and institutions (who have not undergone any form of appointment and have not been authorized by the relevant authority or institution) do not fall under this hypothesis and therefore cannot be held criminally liable for abuse of office.

Another sensitive issue analyzed in this chapter concerned the potential liability of a lawyer for secondary participation in abuse of office.

The lawyer’s position may be considered a special one. In the exercise of their profession, a lawyer is an indispensable partner of justice, protected by law. They do not bear criminal liability for oral or written statements made before courts, criminal investigation authorities, or other judicial administrative authorities, nor for legal consultations provided to clients or the defense formulated in a given case, as long as they act in compliance with professional ethics.

Starting from a judicial practice example that sparked significant controversy in legal circles, the thesis sought to clarify the necessary criteria for distinguishing between lawful legal practice and unlawful secondary participation in abuse of office.

Relevant criteria include the existence or absence of a fraudulent agreement between the alleged accomplice-lawyer, their client and the abusive public official, as well as the lawyer's involvement in corruption offenses related to abuse of office.

A lawyer is not restricted to requesting authorities to recognize only legitimate rights or interests. The fact that a client commits offenses related to the object of the legal assistance contract does not, in itself, indicate the lawyer's participation in those offenses.

The mere drafting of legal documents after the illicit benefit has been obtained by the offenders does not necessarily constitute fraudulent intent unless it is proven that the lawyer was aware of the fraudulent means used by their client and other involved parties and actively participated in them.

It was not the lawyer's duty to highlight the vulnerabilities of their client's request to the relevant legal entity. The opposite approach would imply a breach of loyalty to the client, which is fundamental to this liberal profession.

In other words, as long as the lawyer limits their actions to those typical of legal practice, without engaging in fraudulent agreements or deceptive conduct, their behavior cannot constitute participation in the offense of abuse of office. For this reason, their conduct does not meet the legal criteria of the offense, and the issue should not be analyzed in terms of justification based on the exercise of a right or fulfillment of a duty.

This chapter also examined whether a person could improperly instigate a magistrate to issue a ruling in violation of the law (improper instigation to abuse of office), as well as secondary participation (proper or improper) in abuse of office in relation to bribery, influence peddling and influence buying. Furthermore, it explored whether a legal entity could be an active subject of the offense of abuse of office.

Regarding the objective element of the offense, the research began with the structure of the legal provision, the formulation of the material element and the interpretation of certain terms. The meaning of "act" and "job duties" as regulated by primary legislation was examined in detail. Relevant cases of both forms of the material element – own omission and commission – were further explored.

A key challenge was theorizing the concept of sufficiently defined primary legislation, as following Decision No. 405/2016 of the Constitutional Court, the abuse of office offense can only be supplemented by provisions that, at the time of their adoption, had the force of law.

In formulating this "theory," I have considered that for a service duty to be sufficiently characterized by law, the following conditions must be met:

- The public office to which the duty is attributed must have a legal regulation;

This does not mean that the position must be explicitly named in the law, but it should be determinable based on legal provisions, for instance, when service duties of a group of public officials operating in a specific field of social life are regulated.

However, general obligations assigned to a group of public officials, such as the duty to respect the law and regulations, to avoid causing harm, to act prudently, or to remain loyal to the employer, are not sufficient.

It is also insufficient to merely establish that the conduct in question relates to normative provisions; it is necessary for those primary regulatory acts to establish a specific conduct or the observance of certain explicitly determined obligations and for the active subject to violate them in the exercise of their service duties. In this context, not every obligation derived from the law constitutes a service duty.

- The core of the conduct (the essential elements of the supplementary norm) must be established by primary regulation.

The core of the conduct refers to setting forth sufficient requirements, conditions and circumstances designed to configure the service duty in a particular manner. Detailed specification is not required, but it must be clear what the service duty, task, or obligation is.

However, it is not enough for the law to regulate a principle applicable to a particular field, a general rule that does not describe the conduct to be followed, or to delegate the regulation of service duties to secondary legislators.

If a secondary regulatory act is approved by an act specific to primary legislation, such as the approval of a regulation by a government ordinance, it can be considered that the duties regulated by the secondary legislation are incorporated into the primary legislation.

Regarding the manner in which the non-criminal legal norm prescribes the conduct of the public official, it is necessary that it be either onerative (imposing an obligation, requiring the subject to act) or prohibitive (prohibiting a certain behavior), otherwise, the meaning of a service duty could not be inferred.

- Secondary legislation may have an auxiliary character, namely to detail the law if the latter contains clear elements that determine the service duty.

The concretization of the duty must emerge from the law, while technical details should be provided by normative acts inferior to the law.

For this reason, a legal provision that states regulations such as "*the duties of the management bodies of the county chamber shall be established in accordance with their own statutes*" [Article 20(1) of Law No. 335/2007 on Chambers of Commerce of Romania] is not sufficiently characterized.

The consequence of the offense is problematic, as it involves, as an alternative modality, the impairment of a person's rights or legitimate interests. This required an in-depth study from a terminological, comparative and interdisciplinary perspective.

The other modality of the consequence, damage, raised another issue concerning the method of determining the amount of damage in certain cases (e.g., in the field of public procurement).

Based on the Constitutional Court's jurisprudence on this matter, a distinct section was dedicated to ultima ratio, the "minimum value threshold," "minimum intensity of harm," and "high threshold," issues reflected both in the Court's jurisprudence and in reports of the European Commission for Democracy through Law. This analysis was also relevant in the attempt to delineate the offense from other forms of legal liability.

In relation to the current *legal status* of abuse of office, as long as negligence in office remains criminalized in the same *broad* manner, several criteria can be identified that could improve the method of determining significant damage and the intensity of harm: the relevance of the diminution of the victim's assets (rather than strictly the amount of damage from a neutral perspective); whether the abusive public official knew or foresaw the victim's financial situation (for example, a loss of 1,000 lei may have a different impact on a company on the verge of insolvency compared to a multinational corporation with sufficient liquidity); the existence of subsequent consequences resulting from circumstances known to the public official that aggravate the initial damage or harm; whether, in the course of the activities of the authority, public institution, or other legal entity in which the public official is *employed*, or of the authority that entrusted the public official with the exercise of a public service or supervises the fulfillment of that public service, blockages were generated or the abuse led to the impossibility of satisfying the public interest for a certain period of time; the occurrence of blockages in inter-institutional cooperation between the aforementioned legal entities and other public legal entities; whether the

normal functioning of these legal entities required significantly increased additional efforts; whether the affected interest is public or private; the significance of the breached duty for fulfilling the role of the respective authority or public institution within the framework of the rule of law; the importance of the infringed right or legitimate interest for the victim; the intensity of the harm in relation to its duration over time; and the inconveniences caused to the victim in family, social and particularly professional aspects.

Finally, in light of the corrective measures applied by the Constitutional Court to the incriminating norm, it is not sufficient to generically identify the infringed right or interest (e.g., institutional image or the inability to fulfill a constitutional role), but it is necessary to specify concretely how the right or legitimate interest was harmed.

Furthermore, merely indicating the harm as the opposite of the breached duty of the public official is not sufficient.

Regarding subjective elements, it is noteworthy that the offense can also be committed with indirect intent and no other particularities exist to narrow its scope of application.

The sanctioning regime of the offense is at least inadequate due to its severity, given the generic way in which the conduct is regulated and the subsidiary nature of the offense.

As previously indicated, Part II of the thesis includes a detailed analysis of the subsidiary nature of the offense, focusing on differentiating it from other concepts/principles (the principle of subsidiarity or minimal intervention, the principle of specialty, alternative qualifications). The study highlighted that this characteristic does not pertain to the objective aspect of the offense and does not derive from the principle of minimal intervention. Instead, it serves as a criterion for resolving relationships between offenses, alongside other criteria such as specialty or alternativity. The subsidiary nature does not address its relationship with other forms of liability (such as contraventional liability).

As regard the dialogue with administrative law, the main aspects analyzed focused primarily on whether the notion of "act" within the meaning of criminal law also encompasses administrative acts and in what limits, the relationship with the legality and expediency of administrative acts, the connection with the right to political belief, the distinction from the field of administrative litigation, the interaction between the offense and the disciplinary liability of public officials, as well as its relationship with contraventional law.

One of the relevant conclusions of this analysis was that the notion of "act" in the context of criminal law includes both material acts and legal acts (including administrative acts, within certain limits). The issuance of an individual administrative act may constitute abuse of office if the act is illegal. The costs of the inopportunity of the administrative act do not include criminal liability for abuse of office. The normative administrative act falls outside the scope of the offense, even if the act is illegal.

Illegality and imputability have required careful analysis in cases involving the fulfillment of an obligation arising from an authority's directive and errors.

Regarding justifying causes, an interesting hypothesis arises when a superior public official issues a mandatory directive to a subordinate [which may or may not meet the conditions set forth in Article 21(2) of the Criminal Code] and the strict implementation of that directive/order constitutes a typical offense of abuse of office.

If the subordinate public official could invoke the aforementioned justifying cause, the question arises as to whether the superior (also a public official) would benefit from the effects of the justifying cause as an instigator, based on Article 18(2) of the Criminal Code.

Unlike Article 137(2) of the Penal Code of King Carol II, the current Article 21(2) of the Penal Code does not provide that the superior is liable as the author of the offense committed by the subordinate. Moreover, improper participation in the offense of abuse of office cannot be invoked, as the perpetrator did not commit the act without guilt or under the incidence of a ground for non-imputability.

The German legislator addressed this issue by introducing a distinct criminalization under Article 357(1) of the German Penal Code (inducing subordinates to commit a criminal act). Thus, it has criminalized, among other offenses, the act of a superior who induces a subordinate to commit an unlawful act. Evidently, this offense does not have a direct equivalent in Romanian criminal law.

At present, given the current wording of the Penal Code, the situation becomes even more complex when only the subordinate’s duties derive from primary legislation, while the superior’s duties are regulated by other provisions rather than primary legal norms (which prevents the attribution of authorship for an independent offense of abuse of office). Consequently, it has been necessary to assess to what extent the superior – acting as an instigator to the offense of abuse of

office – could benefit from the effects of the justification ground applicable to the subordinate he instigated, especially since the act of instigation consists precisely in issuing the illegal order.

As a result of the teleological, historical and comparative law analysis, it has been established that a person who issues an unlawful order or directive in their capacity as a competent authority (in the form prescribed by law, without being manifestly illegal), imposing obligations on a subordinate, is liable for the consequences arising from its execution or implementation, even if the person who complied with the imposed obligation benefits from the justificatory ground provided under Article 21(2) of the Criminal Code.

The issuer of the directive imposing the obligation appears to be held liable as an instigator, regardless of whether the justificatory ground is applicable to the principal offender. Such a solution tends to be paradoxical, given that justificatory grounds should produce effects *in rem*.

It is evident that the legislator, in its brevity, has not regulated the concept of a *mediated perpetrator*, while improper instigation is excluded due to the requirement that the principal offender act without culpability (a broad notion that includes non-imputability). Consequently, given the legislator's adherence to the outdated objective-formal theory in determining authorship, it becomes impossible to classify the act as direct perpetration in such a case.

On the other hand, despite the *in rem* effects established by the legislator, the justificatory ground regulated under Article 21(2) of the Criminal Code, which refers to the fulfillment of an obligation imposed by the competent authority, tends toward an *in personam* character.

Accordingly, it follows that the issuer of the directive/order would be deemed an instigator to the commission of an act that is justified for the subordinate executing the order – justification from which the issuer cannot benefit. At this juncture, the legislator’s responsibility is evident: not only to intervene by regulating the concept of a *mediated perpetrator*, but also to amend Article 21(2) of the Criminal Code explicitly to establish the liability of the order issuer as the author of the offense, which is justified for the subordinate executing it. This approach would align with the model of the Criminal Code of King Carol II and the current German Criminal Code.

In the third part of the thesis, the research raised several specific issues, particularly regarding the attenuated form of abuse of office (establishing the meaning of the concept of private official) and the form assimilated to corruption offenses (the issue of the lack of specificity of the subjective element of the offense).

The abuse of office in its assimilated form (*through the restriction of certain rights*) does not raise concerns regarding compliance with the principle of legality. However, it is, inexplicably, devoid of case law.

The grounds for discrimination represent an element of the subjective aspect, serving as a motive. Consequently, it will have the legal status of a subjective personal circumstance. It is irrelevant for the classification of the offense whether the passive subject, from an objective standpoint, belongs to the category of persons that the active subject envisions and that determines the discriminatory conduct. Participants in committing the act will be held criminally liable only if they act under the same motive.

Maintaining this form of abuse of office is justified concerning both public officials and private officials. Thus, under the provisions of Article 308(1) of the Criminal Code, the explicit reference to Article 297(2) of the Criminal Code should be maintained.

Furthermore, the scope of application of the offense of abuse of office in the private sector [Article 297(1) in relation to Article 308 of the Criminal Code] has been significantly narrowed following Decision no. 405/2016 of the Constitutional Court.

The requirement borrowed from the basic form of the offense, "*in the exercise of official duties*," is a flexible concept that adapts depending on the content of the provision regulating or incorporating it. For this reason, it does not impose significant limitations on the extent of private officials.

The regulation does not align with the principle of minimal intervention of criminal law, and in my opinion, this form of the offense should be decriminalized. Disciplinary liability is sufficient in this matter, with criminal liability being applied exceptionally (in cases of specific conduct falling under other criminal provisions, such as embezzlement, abusive conduct etc.). However, I consider that abuse of office in the private sector, assimilated to corruption offenses, must remain criminalized, both in order to comply with Romania's international obligations and due to the high danger, such conduct poses to social relations.

Aggravated abuse of office, like the other forms of abuse of office referring to the basic form, incorporates, among other things, the elements of the basic offense and, implicitly, its foreseeability issues. In its current form, the offense is not a progressive type, but can be committed as a continuous offense or as a simple offense causing successive damages. This aggravated form currently applies to abuse of office committed by private officials as well.

The abuse of office as regulated by Law no. 78/2000 does not adequately reflect its assimilation with corruption offenses and does not fully comply with the obligations assumed by Romania through its accession to the United Nations Convention against Corruption, adopted in New York.

This Convention shows explicitly clear that a public official must act with the intent of obtaining an undue advantage and that the actual acquisition of this benefit is not necessary. Moreover, the effective acquisition of an undue advantage, without it being the purpose of the official's abusive conduct, is not relevant for its assimilation with corruption offenses.

The duplication of the consequence imposed by Article 297 of the Criminal Code appears to be purely artificial. The acquisition of an advantage could be reconsidered as an aggravated form of this offense, with specific features (including the nature and amount of the benefit).

The subsidiarity of the basic form is also adopted by the forms of the offense that complement the basic offense. However, the meaning of the subsidiarity clause is adapted in relation to the special active subject of the different forms of the offense. The assimilated form *involving the restriction of rights* does not have a subsidiary nature.

The fourth part of the thesis analyzes the specific characteristics of the offense within the judicial field (where specificity derives from judicial activities rather than any administrative function). The research also aimed to establish criteria for differentiating criminal liability from the disciplinary liability of magistrates for exercising their functions in bad faith.

In this analysis, the specificity element was provided by the competencies of judicial bodies, which revolve around the principle of finding the truth and the legality of the criminal trial. In this apparent necessary conflict, where finding the truth is constrained by legality, an issue arose that I chose to highlight. In this context, the responsibility of the judicial body in administering justice was viewed as the counterpart of the independence of judges and prosecutors.

The research was based on these coordinates and on a set of criteria used in comparative law. For instance, *judicial prevarication* in Spanish criminal law represents a distinct incrimination of the abuse of function specific to the judicial domain. Spanish legal literature has synthesized three theories regarding the concept of *injustice* (where contradiction with the law is the starting point but not sufficient): the subjective theory, the objective theory and the intermediate or mixed theory.

According to the subjective theory of injustice, an act is unjust when the person issuing the act (rendering a judgment or making a ruling) does so contrary to how they believe it should have been done. Under this theory, any decision made outside the judge's conviction would be abusive, even if it were the correct one.

The objective theory requires an objective legal contradiction with the legal system as the sole criterion for assessing injustice. Thus, the magistrate's legal conscience is only relevant for determining the subjective element. Under this perspective, correctly resolving a dispute (according to the law) but contrary to the judge's conscience would at most constitute an inadequate attempt.

Under this theory, if, from an objective standpoint, an interpretation of the law is unreasonable, the magistrate's motivation is irrelevant. Furthermore, injustice implies an additional requirement beyond mere illegality, namely a deviation from the magistrate's entrusted function, as it strays from all legally protected options, lacking any reasonable interpretation.

If the interpreted and applied legal text is sufficiently unclear and allows for a wide margin of judicial interpretation, the judge's discretionary power is broader, making it nearly impossible to establish objective injustice.

According to the majority of Spanish doctrine, focusing on the contradiction with objective law is the most solid hermeneutical standard for delineating typical conduct.

The mixed or intermediate theory combines the first two theories, as its name suggests, to eliminate the shortcomings each presents.

The prevailing Spanish doctrine and case law employ the objective criterion to determine the injustice of a "*judgment*". Thus, concerning the objective element, the offense in Spanish criminal law requires that the judge's ruling lacks any reasonable explanation, meaning it is manifestly contrary to the law. Illegality may pertain to procedural or substantive aspects, legal qualification issues, factual matters, or the evaluation of evidence.

Not every illegal decision is unjust. Therefore, the sustainability criterion must be applied to assess whether the norm's interpretation or application is justified and whether the reasoning has a minimum level of justification.

For example, justifying a decision outside of established case law is a form of justification, provided there are no factual elements indicating otherwise. Conversely, a judge's obstinate belief without rational legal grounds is incompatible with the notion of law. Illegality and injustice are

not equivalent, as legality is clearly defined by law and its interpretation, whereas injustice implies an action taken with knowledge of the discretionary nature of the judicial decision adopted.

Unlike Romanian criminal law, which criminalizes both abuse of office and misconduct in office regardless of the status of the public official, Spanish law provides a culpable equivalent only for judicial prevarication (not for administrative prevarication). For this reason, the objective criterion used in Spanish criminal law to assess the injustice of a decision issued by a judicial body serves as an important guiding tool in determining the scope of criminal liability for judicial authorities in cases of abuse of office.

In the judicial sphere, for an act, committed or omitted, to be considered unlawful, the improper, unlawful, or omitted performance of the act by a judge or prosecutor must be evident and clear, and their conduct must not be justifiable by any method of legal interpretation or application.

However, this requirement is not explicitly stated in the wording of Article 297(1) of the Criminal Code, which merely requires that the breached official duties be provided by law. Nevertheless, this criterion naturally follows from the need to respect the principle of judicial independence, as previously discussed.

In other words, although the criminalization provision does not explicitly require that the decision be unjust (in the objective sense reflected in Spanish judicial doctrine and case law), this requirement naturally arises from the specific role that a judge is called to fulfill.

For this reason, for example, a judicial opinion that contradicts prevailing case law or doctrine – so long as it is logically reasoned and its arguments remain relevant to the decision – cannot constitute such an injustice. Similarly, a judge's change of opinion over time, provided it is properly substantiated, does not constitute abuse of office.

Given the similarities between Romanian and Spanish regulations (in the judicial field, both legal systems recognize a fault-based equivalent offense, and the starting point for determining injustice is illegality), I believe that evaluating judicial acts should rely on an objective criterion rather than a subjective or mixed one.

This assessment of an act's contradiction with the law and its injustice does not overlap with judicial review but aims to clarify the responsibility with which the magistrate acted within their independence.

Thus, *res judicata* cannot be invoked against the abuse of office in this judicial domain if a final judgment upholding an unjust decision was abusively rendered. Similarly, a prosecutor's decision maintained in a subsequent judicial procedure (e.g., a complaint against a dismissal order) must be assessed accordingly. Therefore, even a final judicial decision could hypothetically be unjust, constituting an abuse of office.

4. The Relation Between the Offense of Abuse of Office and Other Offenses

In the fifth part of this paper, based on systematic, historical, comparative law, and terminological research, it has been observed that the way in which the offense of abuse of office is regulated – using a synthetic formulation in abstract, universalizing terms – creates, in practice, frequent interactions with other offenses.

The main objective of this research was to establish the hypotheses regarding the relationship between the analyzed legal concepts and the resolution of *conflicts* through real concurrence, ideal concurrence, or the exclusion of one legal provision.

Before the intervention of the Constitutional Court in 2016, there were numerous situations in which judicial authorities simply ignored the subsidiary nature of the offense of abuse of office. The Constitutional Court’s decisions highlighted the issue, including the express recognition of its subsidiary character.

To understand how jurisprudence interprets the subsidiary nature of this offense and to extract arguments that contribute to a rigorous, scientific definition of the concept (theoretically presented in the second part of the thesis), a detailed analysis was necessary regarding the categories of offense relationships that frequently arise in practice and pose significant challenges.

The prevailing tendency in legal doctrine and judicial practice to subsume subsidiarity under the criterion of specialty has led to a lack of clear distinction between these concepts. This trend is rationally justified only in the case of abuse of office, not for other offenses (such as aiding and abetting an offender, which constitutes exclusively a general norm).

The core issue arises from the interpretation of the subsidiarity clause (which is currently implicit) that abuse of office should not be retained if it conflicts with another offense committed by a public or private official in the exercise of their duties. Given the rationale behind criminalizing abuse of office, it is almost impossible to identify a situation where the principle of

specialty applies (in the sense that abuse of office is a general norm) in relation to an offense that does not involve a qualified active subject (i.e., a public or private official performing official duties).

The distinction between these concepts remains relevant because there are cases where the specialty criterion cannot be applied to resolve the apparent concurrence of criminal norms involving abuse of office (such as when the protected legal interests are fundamentally different). However, subsidiarity may still apply.

Most interactions with other offenses involving a public or private official as the active subject, in the case of a single act, will be resolved based on the principle of specialty. Subsidiarity or other specific legal relationships (e.g., antagonistic or exclusionary relationships) will intervene only exceptionally.

After a detailed analysis of various relationships between offenses, one of the key conclusions was that these relationships can be grouped into several categories:

- antagonistic relation, specific to alternative qualifications (e.g., the relationship between the offenses of abuse of office and usurpation of office);
- *genus-species* relation, such as the relationship between most service-related offenses and a significant number of offenses against the administration of justice;
- subsidiarity relation, where the offense of abuse of office, in a narrow sense, is considered subsidiary in relation to offenses such as intellectual forgery, aggravated forgery of official documents, Article 272(1)(b) of Law No. 31/1990 on commercial companies, failure to take legal occupational health and safety measures (Article 349(1) of the Criminal Code), theft or destruction of documents (Article 259(2) of the Criminal Code), or facilitating illegal stay in Romania (Article 264(2)(b) of the Criminal Code);
- real concurrence of offenses, including etiological or consequential connections, as well as ideal concurrence of offenses;
- *sui generis* relationships, which prevent the retention of ideal concurrence, as all legally relevant circumstances or consequences are covered by retaining one of the offenses that applies (for instance, in the relationship between service-related offenses and certain property-related offenses).

The *sui generis* relationships referenced above closely align with the final criterion for resolving the apparent concurrence of legal norms – namely, alternativity (i.e., the dominance of one norm in cases of reciprocal specialty).

In addressing the relation between abuse of office and other offenses, another key conclusion was that the resolution process involves several steps:

- determining whether the case involves a single act or multiple acts, applying the theory of *natural unity of action* – mere occurrence of a single circumstance is insufficient.
- identifying whether multiple incriminating provisions are applicable. If only one provision is applicable, it is unnecessary to verify whether the criteria for resolving apparent concurrence apply. For example, if conflicting provisions exist, the applicable one must be identified, as both cannot be enforced simultaneously.
- if multiple provisions apply to a single act, verifying the presence of a genus-species relationship, subsidiarity conditions, or legal/natural absorption (In the case of abuse of office, legal or natural absorption is not possible under the current law).
- if the relationship between offenses cannot be resolved in this manner, assessing whether formal concurrence of offenses applies by reference to the principle of *ne bis in idem*. If the concrete act (action/inaction), together with all its consequences, corresponds to a single offense, only that offense should be retained.
- if multiple acts are involved, verifying whether the incriminating provisions are incompatible. In cases where abuse of office leads naturally to another offense that protects the same social value and stems from the same intent, the subsequent offense cannot be retained separately. If no such incompatibility is found, real concurrence of offenses applies.

5. Abuse of Office in Other Legal Systems

The sixth part of the thesis examines the different concepts of abuse of office to support final conclusions regarding the current regulation of this offense and proposals to amend the law. The research also reflects how older concepts of abuse have influenced each other, the dominant concept and the resulting legal consequences.

A general observation is that legal systems opting for distinct incriminations, formulated concisely and using highly general terminology, have typically incorporated specific elements into the subjective side of the offense (usually requiring a well-defined special intent).

A special intent requirement generally limits the offense to the most serious level of culpability – direct intent. Moreover, it differentiates the abusive conduct of a public official by extracting the blameworthy element. In such systems, the offense typically constitutes an abstract endangerment offense rather than a result-based offense.

In contrast, Romanian criminal law does not include any specific elements related to the objective or subjective side of the offense in its basic form. Thus, the offense can be committed with either direct or indirect intent, without requiring a special purpose or motive.

This apparent omission has been partially offset by the requirement for a result, but the way it is formulated in the incriminating provision lacks specificity. Consequently, it is difficult to imagine a situation where the act/omission characteristic of the offense occurs without at least causing harm to the legitimate interests of a natural or legal person (public or private).

Additionally, the concurrent regulation of abuse of office and negligence in office overlaps significantly with administrative litigation.

Legal systems that have criminalized abuse of office generally do not impose a minimum value threshold for the damage as a requirement of the objective side of the offense.

Some jurisdictions, however, consider quantitative value thresholds only for the classification of abuse of office based on the severity of financial harm, with distinct qualifications affecting the applicable penalties (e.g., the Texas Penal Code in the United States).

Furthermore, the penalties prescribed for the basic form of abuse of office in the analyzed legal systems are significantly lower than in Romanian law, regardless of whether their incriminating provisions contain express or implicit subsidiarity clauses. In jurisdictions where subsidiarity clauses are included, the corresponding penalties tend to be even lower.

6. Conclusions

In this final stage, I have synthesized the two main ideas of the thesis: the issues arising from the current criminalization, which cannot be resolved through consistent and predictable case law and the manner in which the criminal provisions could be entirely restructured or improved.

Regarding the first aspect, a central conclusion that permeates the entire study concerns the concept of abuse of office as employed by the Romanian legislator and the rationale for its criminalization. The current Criminal Code has consolidated the former provisions governing abuse of office but has preserved the essence of the concept, which originates from the Soviet legal tradition. This concept is characterized by broad terminology, devoid of subjective particularities, and allows for an extensive scope of application.

The concept brings to focus the harm caused to the rights or legitimate interests of any person (including public entities) while only formally considering the primary social value it aims to protect. It vaguely connected with the rationale underlying the criminalization of abuse of power in Romania's first two penal codes. This inherited framework, transferred without fundamental reconsideration, constitutes the primary source of the legal uncertainties surrounding the offense of abuse of office. The concept, as enshrined in our criminal legislation, was originally established for political, social, and economic reasons that differ significantly from those relevant to modern democracies.

The essence of this concept is found in all forms of abuse of office under the current penal framework, except for the assimilated form (*infringement of rights*).

The reconfiguration of the concept of abuse of office should focus on strengthening the protection of essential social values required to safeguard public office from internal threats, rather than emphasizing the actual damage caused or harm inflicted upon third parties.

The Constitutional Court, faced with the challenge of maintaining the criminal provision in compliance with Romania's international obligations while ensuring that an important segment of societal values does not remain unprotected, sought to mitigate the unpredictability of the provision. However, its intervention created further issues, as the restriction it imposed shifted attention to a formal aspect – namely, the regulation of a public official's duties through primary legislation.

In seeking a legislative proposal that addresses the entirety of the identified issues, I have synthesized the essential coordinates for amending Article 297(1) of the Criminal Code as follows:

- The focus of criminal protection should shift from the secondary consequences of the conduct (harm to legitimate interests) to the injustice and arbitrariness of violating the essence of the public function exercised by the public official, as well as the official's bad faith.

- The identification of a behavioral pattern that best reflects the highest risk to the proper and professional execution of public service duties, while excluding any pursuit of private interests in the exercise of public office.
- Retaining a concise legal formulation but with additional requirements related to the material element of the offense.
- Abuse of office should encompass the violation of any duty of public officials, given that the Constitutional Court's intervention in 2016 was a response to the current concept of abuse of office and the problematic premises and constitutive elements of the regulation at that time, elements that I have already proposed to reform.

The Court's decision does not prohibit, *ab initio*, an open-ended criminal provision; however, if the legislator opts for such an approach, it must ensure that the provision remains predictable and does not leave room for other authorities to substantively define the core of the offense. In other words, a self-contained open-ended norm may be established, provided that all other elements of legal typicity remain clear and that the provision, in its entirety, reflects the criminal reproach with sufficient precision.

- The consequence of the basic form of the offense could be defined as an abstract state of danger rather than an actual result.
- Regarding the culpability requirement, it should be limited to direct intent.
- Additional conditions related to purpose or motive may be introduced, with multiple alternative variants.
- If the basic form of abuse of office retains a concise formulation, it would be necessary to explicitly regulate a relatively determined subsidiarity clause (linked to the offender's status and more severely punished offenses), accompanied by a significant reduction in the sentencing limits.
- The basic form of abuse of office could incorporate, as an alternative modality, the current offense of usurpation of office, following the model of Article 245 of King Carol II's Criminal Code, as there is no justification for a distinct punitive regime, as found in the current regulation.

However, all these proposals are premised on the legislator abandoning the current generic form of the offense of negligence in office. The issue of abuse of office cannot be effectively addressed without legislative intervention concerning negligence in office – the culpable counterpart of the offense.

To simplify the relationship with the offense of bribery, an aggravated form of bribery could be established to legally absorb the offense of abuse of office in cases where the abusive conduct occurs in the same context – prior to, simultaneously with, or subsequent to the corrupt act. If the circumstances are distinct, the standard form of bribery and the offense of abuse of office should be prosecuted separately in real concurrence.

In summary, the thesis's primary conclusion is that the most crucial aspect requiring reconsideration by the legislator is the very concept of abuse of office itself. I have deemed it necessary for the rationale behind its criminalization to focus exclusively on strengthening the protection of public office against threats originating from within public authorities, institutions, and other forms of public service organization. The essence of abuse of office does not lie in the collateral damage that may result from abusive conduct but in the proactive protection of public office before harm to third parties occurs.