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THE DECISION OF THE CONSTITUTIONAL COURT NO. 24/2021

The Decision of the Constitutional Court No. 24/2021 on the decriminalization of the criminal offense Article 262/1 of the Criminal Code, organization and participation in illegal gatherings and manifestations, and the consequences of other indirect criminal offenses arising from this provision.

Abstract. The Constitutional Court on May 4 2021, took a decision announced on June 2, 2021 to abolish the phrase “without prior permission of the competent body under special provisions” of the first paragraph of Article 262 of the Penal Code of the Republic. of Albania, as incompatible with Articles 17, points 1 and 47 of the Constitution of the Republic of Albania, a provision decriminalizing the criminal offenses of organizing gatherings and events of persons in squares and public places of passage, without prior permission from the competent department according to the special provisions or when the organizers violate the conditions set out in the application for a permit, constitute a criminal offense and it is punishable by a fine or imprisonment of up to one year,

However, this decision of the Constitutional Court does not exhaust the whole scope of the interpretation of the decriminalization of criminal offenses that appear during illegal assembly as criminal offenses that are indirectly absorbed by major criminal offenses such as disturbing public order, blocking the road, disobedient to the police, which will guarantee even more freedoms and individual rights, but also by decriminalizing them so as not to leave room for obstructive interpretation by the courts.

The Constitutional Court must make an interpretation and make a complete decision regarding the decriminalization of these indirect criminal offenses which are resulted from a major criminal offense such as the illegal gathering that is now legal and consequently the other criminal offenses covered by this criminal offense should be decriminalized as a criminal fact and should not constitute a criminal offense in cases where these criminal offenses have been raised and found in an illegal gathering / protest.

Keywords: gathering, protest, Constitutional Court, European Convention on Human Rights, criminal offense, absorption, charge, decision, Criminal Code.

Introduction

1. On 4 May 2021, the Constitutional Court of Albania, by its decision [6], abolished the phrase “without first obtaining permission from the body

competent under special provisions” in the first paragraph of Article 262 of the Criminal Code of the Republic. Albania, as incompatible with Articles 17, points 1 and 47 of the Constitution of the Republic

of Albania, as well as with Articles 11 and 18 of the European Convention on Human Rights, a provision decriminalizing the criminal offenses of organizing gatherings and demonstrations in squares without the prior permission of the competent body under special provisions or when the organizers violate the conditions set out in the application for authorization, constitute a criminal offense and shall be punished by a fine or imprisonment of up to one year following a request for incidental control. to be submitted by the Shkodra Court of Appeals (reference court), with an intermediate decision, on 15.11.2018 which has decided to suspend the review of the case [7] and on 13.12.2018 addressed to the Constitutional Court (Court) with a request with the object *“Removal of the phrase” without previously receiving permission from the body competent according to special provisions ‘ in the first paragraph of article 262 of the Criminal Code [3] as incompatible with Articles 17, points 1 and 47 of the Constitution.*

The Constitutional Court accepts the legitimacy of the Shkodra Court of Appeals and its arguments (It claimed that the phrase “without first obtaining permission from the competent body according to special provisions”, provided in Article 262, first paragraph, of the CC, contradicts some of the constitutional principles and jurisprudence of the Court, submitting a summary of these arguments: The referring court is entitled to address the Court, as there is a direct link between the provision that is considered unconstitutional, namely Article 262, first paragraph, of the CC and the resolution of the concrete case. permits from the competent body according to special provisions” contradicts Articles 47 and 17 of the Constitution, as well as Article 11 of the ECHR. This article was adopted before the entry into force of the 1998 Constitution and has not been subject to scrutiny to verify its compliance with the Constitution. Lack of prior notice cannot serve as a legitimate basis for crowd dispersal. Restriction of freedom of a peaceful demonstration and association must be done in accordance with the criteria set out in Article

17 of the Constitution and in accordance with the jurisprudence of the European Court of Human Rights (ECHR). According to the referring court, prosecuting the participants and organizers of a peaceful protest, regardless of whether it took place without the permission of the authorities or beyond the terms of the permit, would constitute an even more serious violation of the right of a peaceful demonstration. Also, according to it, Article 262 of the CC is not in accordance with law no. 8773/2001. The phrase “without first obtaining permission from the competent body according to special provisions” also contradicts Article 17, point 1, of the Constitution, as the penalty of a fine or one year of imprisonment for organizing gatherings, without first obtaining permission from the competent body, appears in significant disproportion in relation to the situation that has dictated it; The provision as a criminal offense of organizing rallies and manifestations without prior permission and the eventual criminal punishment violate the balance between the limited right and the public interest, as well as contradict Article 11 of the ECHR. Law no. 8773/2001 has an approach closer to international standards than Article 262, first paragraph of the CC, in terms of justifying criminal prosecution with the existence of a public interest violation), and in conclusion considers that the claim of the referring court, that the phrase “without first obtaining permission from the competent body according to special provisions”, in the first paragraph of Article 262 CC is incompatible with Article 47 of the Constitution, and should be repealed by the Criminal Code, as it violates legal certainty and constitutional freedoms and rights, such as that for a peaceful demonstration (The European Court of Human Rights has recognized that the right to a peaceful demonstration guaranteed by Article 11 of the ECHR is fundamental in a democratic society and, therefore, should not be construed narrowly (see Kudrevičius and Others against Lithuania, 15 October 2015, § 91) guaranteed by the European Convention on Human Rights. Even though the Shkodra Court of Appeals referred the case to the

Constitutional Court at the end of 2018, at a time when due to the reform of justice in Albania this court did not have the necessary quorum to convene a review and decide on this reason. This court in its request had not submitted any other claims directly related to the criminal offenses or Blanket (criminal offenses that absorb the main criminal offense such as that of illegal demonstration).

Analysis

The Constitutional Court in its decision 24/2021 was referred only on the case requested by the Criminal Court of Appeal Shkodra, regarding the existence of a criminal offense when “protesting” without first obtaining permission from the public order police or the relevant body, but in its decision did not refer the consequences and other criminal facts which emanate indirectly from this criminal offense, such as resistance, disobedience to the order of the public order police officer, when they were asked to leave the protest, while many criminal proceedings in the courts regarding the charges for the criminal offense 262/1 “illegal protests” have been suspended or dismissed by the criminal courts while for other criminal offenses that have come indirectly from this protest have not been dismissed.

What will happen with these criminal offenses which are under investigation or in trial, so it can be built a constitutional precedent with every detail which covers every aspect and does not leave any space for legal interpretations or active criminal proceedings for the ones whose charges existed not only for illegal gathering (protest), but also for not obeying in police’s orders (Article 242 of the Criminal Code disobedience to the order of a public order police officer) such as to leave the protest and the street, or to oppose (Article 236 of the Criminal Code objecting to a public order police officer) the police forces that they do not leave the protest?

What will happen if they are accused of disturbing public order, when protesting is essentially a right to those citizens to raise their voice so their requests can be heard and noticed from the responsible ones

while at the same time respecting the law and the right?

What will happen when they are accused of interrupting the movement of vehicles on the road, as is the case of the residents of the New Tirana Ring Road in 2018–2020 who protested for more than a year on the road in front of their apartments after being against demolition of their homes and properties without a proper legal process by the government? [11; 12]

These residents were accused [8] not only of illegal [13] protests (illegal gathering), they were also accused for obstructing the circulation of vehicles according to the criminal code (Article 293 of the Criminal Code Obstruction of the circulation of means of transport), in Teodor Keko Street (New Ring Tirana 2019), and they were accused too for: opposing the employees of police [9] and also for other criminal offenses that come indirectly from an “illegal protest”. While, the decision of the Constitutional Court is clear on the issue regarding the right and legitimacy of gathering peacefully without permission but only with a notification to the competent body. In the same time this decision should lead to a recall of the other accusations because there is no more criminal fact to commit a criminal offense, such as opposition to a police officer, disobedience to the police order, disturbing public order and peace, obstruction of the movement of vehicles. In conclusion of the previous sentence, as it seems there is not a concrete analyzation with facts for all the other criminal offenses that are a result of the basic one which was considered to be ‘illegal protest’. It is not exactly defined when rejecting the main criminal offense in this particular situation, if it is going to lead to a rejection of the other criminal offenses too from the Constitutional Court considering also the ECHR for their actions. (Article 274 of the Criminal Code Disturbance of public order).

If a citizen or a group of citizens has come out in a public place to protest and he has previously notified the competent body, and the protest is within the rules

of the law on protests [5], and they have been asked to stop the protest and leave and they did not obey or oppose the police order not to block the road while they have been charged by the prosecution and the criminal court has accepted the charges, for illegal gathering and other related criminal offenses, what happens when during this process the Constitutional Court abrogates the criminal offense of Article 262/1 of the Criminal Code for “Organizing and participating in illegal gatherings and manifestations” with the argument that there is no need for permission but for notification and does not clearly define what will happen with other criminal charges, even in the conditions when the Parliament has not yet implemented the decision of the Constitutional Court to review the Criminal Code regarding the harmonization of Article 262 (In view of the above, the Court, in order to give the legislator sufficient time to adopt the new legal rules in accordance with its decision, considers that the Assembly should review Article 262, first paragraph, of the CC for its harmonization with Article 47 of the Constitution, according to the reasoning of this decision, within the 6-month period, which starts from the promulgation of this decision and lasts until its entry into force).

Conclusion

The Constitutional Court should have ruled on other criminal offenses that include the main repealed criminal offense of “organizing and participating in illegal manifestations” Article 262, as criminal offenses of disobeying the instructions of a police officer Article 242 of the Criminal Code, opposition to the police officers Article 236 of the Criminal Code, disturbing public order and tranquility Article 274 of

the Criminal Code, obstruction of the circulation of means of transport Article 293 of the Criminal Code.

The Constitutional Court does not treat the case only in particular, it looks at and treats it in an even broader dimension by making an interpretation of some criminal norms that are indirectly related to Article 262 of the Criminal Code. The Constitutional Court should treat and take decision also for the decriminalization with every detail of the indirect criminal offenses that came from a direct criminal fact such as the “illegal protest” (Criminal Code of the Republic of Albania Article 262, Organization and participation in illegal gatherings and manifestations). When the main criminal fact that relates to the other criminal fact falls, then the indictment also falls and consequently we have no criminal offense, and so the current criminal charges and trials are terminated as there is no legal basis, fact and criminal offense.

The Constitutional Court should have been decisive and detailed in decision number 24/2021, repealing all derivative criminal offenses that have come due to a “legitimate protest” where there is no need for a permit but only for a notification to the competent body. Derivative criminal offenses are disobedience to police orders which asked to leave the protest, or opposition of police forces and others. According to the Constitutional Court the protest is legal from the moment that the competent body is informed of it and does not need a permit, while the accusations of the prosecution had as a main reason the illegality of the protest claim that they have not received a permit and have produced other secondary indirect criminal offenses.

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