THE RIGHT OF ACCESS TO INFORMATION OF PUBLIC INTEREST IS IN DANGER

On June 17, 2020, the Civil, Commercial, and Administrative College of the Supreme Court of Justice (SCJ) issued a decision that is able to generate a significant impact on the exercise and claim of the right of access to official information *(of public interest)*.

Ab initio, it should be noted that the entry into force of the Administrative Code of July 19, 2018, generated a series of ambiguities regarding the incidence of its provisions to the exercise and claim of the right of access to information. The current legal framework already contained a special legislative act – the Law on Access to Information – that regulated and continues to regulate the legal relations related to the process of ensuring and realizing the constitutional right of access to information of public interest, as well as the methods of protecting this right.

The administrative and judicial practices that have crystallized so far, after the entry into force of the Administrative Code, reflect the application of both the Administrative Code and the Law on Access to Information *(special law)*, depending on the quality of the subject providing information.

In contradiction with these practices, by the recently issued decision, the SCJ ruled that the Law on Access to Information **has fallen into disuse**, and this arbitrary finding of the high court was clearly devoid of legal and factual substratum. In addition, the interpretation and application of legal principles and legal provisions by the Court raises numerous legal debates regarding the subsequent regulation of the process of exercising and claiming the right of access to information.

In establishing the "obsolete nature" of the Law, the Court relied on the following reasoning: *"although* (the law) *is not repealed or expired,* (it) *no longer applies due to the change of conditions that initially required its adoption."*

At the same time, the Court erroneously held that *"the legislator did not expressly repeal the* ***Law on Access to Information*** *no. 982 of 2000, but it* ***became inapplicable with the entry into force of the Administrative Code*** *on April 1, 2019, this being a distinct case of cessation of a law in time, provided in art. 74 para. (1) lit. e) of the Law on Regulatory Acts no. 100 of December 22, 2017."*

The unfoundedness of these findings and the erroneous application of the obsolescence theory to the Law on Access to Information can be demonstrated both by analyzing the principles of law regarding the action of the law over time and by referring to the Constitutional Court's case-law regarding the assessment of the obsolescence of regulatory acts.

The Law on Regulatory Acts, to which the SCJ College itself refers, provides in art. 74 para. (1) lit. e) that regulatory acts cease their action if they become obsolete.

In this regard, I shall note that according to a ruling of the Constitutional Court (CC), the obsolescence of a law implies, on the one hand, the lack of its long and continuous use, and, on the other hand, the existence of an opposite practice within the community. In essence, the theory of obsolescence is an implementation of the idea that law must evolve with the change of social realities.

By analyzing the ruling of the SCJ in terms of the criteria for finding the obsolescence of the law *(criteria defined by the Constitutional Court)*, as well as by applying it to the specific nature of cases referred to by the CC, we can deduce with certainty that the SCJ misinterpreted both the provisions of the Law on Regulatory Acts and the theory of obsolescence.

Given the current administrative practices and the national case law, it is clear that the Law on Access to Information reflects current legal realities and must have the force initially conferred to it by the

legislator. Moreover, by virtue of the long and continuous application of the provisions of the said law, as well as the non-existence of an opposite practice in this respect, it can be unequivocally stated that, at present, the obsolescence of the Law on Access to Information cannot be subject to SCJ rulings.

Moreover, the Court's attempt to justify the "inapplicability" of the law in the light of the concept of the "will of the legislature" is also inappropriate. At the time of the adoption of the Administrative Code, the Parliament expressly repealed two regulatory acts (the Law on Petitions and the Law on Administrative Litigation), which had become inapplicable. At the same time, the Law on Access to Information was left intact, which indicates that the legislator considered it still applicable after the adoption of the Administrative Code.

In addition, in contrast to the provisions of the Code of Constitutional Jurisdiction, the rhetoric of the possibility for a court – even the Supreme Court of Justice – to exercise the powers of constitutional law, to declare certain laws inapplicable (obsolete), imposes a dose of skepticism and reluctance.

Furthermore, the SCJ ruling is likely to lead to a faulty judicial practice, as the SCJ is the supreme tribunal that ensures the correct and uniform application of the legislation, and its rulings serve as benchmarks for uniformity in national case law.

Thus, the statement of the College of the Supreme Court of Justice is able to determine exclusive application – in disputes regarding access to official information – of the provisions of the Administrative Code in similar cases brought before the courts of first instance, of appeal, and of cassation.

Although the Administrative Code establishes a mechanism consisting of procedural rules that can ensure the regulation of procedures for exercising the right of access to information, it does not contain material rules that include rights and guarantees similar to those provided by the Law on Access to Information. In essence, applicants, in the absence of a sufficient legal framework, will be deprived of the possibility to base their applications on material law rules that would justify the exercise of their right of access to information of public interest.

At the same time, please note that the inapplicability of the Law on Access to Information will result in the impossibility for applicants to address requests to the information providers that are not public institutions/authorities. Specifically, individuals and legal entities that, under the law or contract with a public authority or public institution, are authorized to manage public services and collect, select, possess, store, and dispose of official information cannot be required to provide information under the Administrative Code, as it regulates exclusively the administrative relations that appear in the process of carrying out the administrative activity.

In addition to the issues discussed above, there is uncertainty about the application of legal provisions in case of violation of the legislation on access to information (art. 71 of the Contravention Code). In other words, *how will sanctions be applied for violation of provisions that have been declared obsolete and inapplicable?*

The growing use of the right of access to information and the elimination of the many barriers in the exercise of this right is an aspiration of democratic societies, which have created the tendency to regulate relations related to the right of access to information through special laws. This is due to the need for a special regulatory act establishing sufficient, effective, clear, and predictable guarantees in order to facilitate faster access to information of public interest.

It should be pointed out that even when the Law on Access to Information was being applied, applicants faced various difficulties and encountered many barriers in exercising the right of access to information.

Now, the statement of the SCJ's College regarding the obsolescence of the said law will worsen the situation, generating repercussions and limitations of the right of access to information of public interest.

In the context of the above, the extent of the danger of restricting the right of access to information is obvious. In the nearest future, the course of case law and the way in which national courts react to the findings of the Supreme Court of Justice remain to be seen. What is certain is that the decision of the SCJ College can create a dramatic impasse in the exercise, use, and defense of the right of access to information, guaranteed to all citizens in a state governed by rule of law, which aspires to the ideals of an advanced democracy.

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