

CORRUPTION OFFENSES: ELEMENTS OF DIFFERENTIATION BETWEEN THE NEW PENAL CODE AND THE OLD REGULATION

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***Abstract:** This article aims to make a foray into the matter of corruption offenses, based on the differentiation elements between these offenses as they were regulated in the previous laws and in the new Penal Code. Corruption offenses, stated in the first chapter of the fifth title were elaborated considering the regulation of these facts in the previous Penal Code and the regulations of Law no 78/2000 for the prevention, discovery and sanctioning of corruption facts; also, the fact of aligning our national law with that of other European states such as the German Penal Code, the Finish Penal Code, the Swedish Penal Code, was considered. Corruption is one of the most serious threats for the state of law in contemporary society, undermining institutions and democratic values.*

***Key words:** corruption, accepting bribe, offering bribe, influence peddling, public servant.*

1. Introduction

The history of human society proves that corruption offenses existed since the oldest times and have manifested in different ways as society evolved.

In the contemporary society, the problem of this scourge is in the center of public opinion, by different means of communication such as the press, radio, television and we are confronted daily with different corruption offenses in which public servants, members of public authorities or arbitration courts are involved.

In close connection with organized crime and terrorism there is the phenomenon of corruption.

Thus, there is a connection between corruption and other forms of crime, as corruption becomes transnational.

This phenomenon is becoming more and more significant in Romania, despite the state's will to fight it, despite some anticorruption ultimatums coming from outside Romania, as well as the current law in this domain, which is constantly modified and the anticorruption organisms which are already created or about to be created.

As we can easily notice, corruption is a threat to democracy, it undermines the economy, it erodes the principles of an adequate administration and, more seriously, it endangers the stability of all the state's institutions.

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Presently, a consensus stating that these two phenomena are a direct threat to the good functioning of every state has been reached on an international level.

The efforts of the international community were concluded by the signing of some international conventions which aim to diminish the effects of organized crime and corruption in society.

Corruption tends to destabilize the current international society.

The report between corruption and organized crime is characterized by the fact that corruption can exist and manifest itself without organized crime, while organized crime without corruption is unlikely to happen.

The main course of action of a strong and influential organized crime network is corruption.

It's a tool favored by organized crime due to its efficiency and discretion.

On an international level, but also in Romania, public servants, regardless of their area of activity or their rank, are often corrupted, thus penetrating the state's decisional forums.

Basically, we are daily confronted by the media, radio and television with the actions of public servant which constitute corruption.

Corruption is one of the most serious threats for the state of law in contemporary society, undermining institutions and democratic values.

Corruption can threaten economical stability, can slow down economic development and reduce the available resources for social programs; it can also violate man's fundamental rights and cause serious damage to the environment.

By analyzing the historical evolution of corruption, we can state that this phenomenon has evolved along with mankind, although, throughout all ages, corruption was blamed by society and incriminated by the laws of those times.

Corruption offenses, as stated in the first chapter of the fifth title, were elaborated considering the regulation of these offenses in the previous Penal Code, on one hand, and the provisions of Law no 78/2000 for the prevention, discovery and sanctioning of corruption offenses, on the other hand; last but not least, the fact of aligning our national law with that of other European states such as the German Penal Code, the Finnish Penal Code, the Swedish Penal Code, was considered, as well as the fact that Romania has ratified numerous international instruments against corruption.

2. The offense of accepting bribe stated by article 289 of the Penal Code

In regard to the offense of accepting bribe, this fact is regulated by the new Penal Code, in article 289 and is defined as: "the fact of the public servant (according to the provisions of article 175 first alignment of the Penal Code, "a public servant is the person who, with a permanent or temporary title, with or without payment:

- a) exercises responsibilities established according to the law with the purpose of achieving the prerogatives of the legislative, executive or judiciary power;
- b) exercises a function of public office or a public function of any kind;
- c) exercises, alone or along with other people, within an autonomous institution, another company owned partially or completely by the state any activity in connection with the objectives of that company") who, directly or indirectly, for himself or for others, claims or receives money or other benefits which he is not entitled to or accepts the promise of such benefits, in connection with the fulfillment or failure to fulfill or the

delaying of an act which falls within his duties or an act contrary to his duties ” as opposed to the previous regulation (article 254 of the Penal Code) which defines accepting bribe by its purpose ”in the purpose of ”fulfilling, not fulfilling or delaying to fulfill an act which falls within its legal duties or in the purpose of an act contrary to those duties”.

The material element of this offense, as regulated by article 289, first alignment of the new Penal Code is different from the old regulation through the exclusion of incriminating the act and not dismissing a promise of bribe.

This change was made in order to give up the distinction between the provisions of the previous penal code regarding the offense of accepting bribery and receiving undue benefits, a distinction which was causing difficulties when attempting to prove it, in case the agreement took place before the deed was done and the goods were given at a later moment.

We must also mention that the new Penal Code clearly states that receiving undue benefits can be done on behalf of someone else other than the public servant who accepts the bribe and claims or receives money which he is not entitled to or accepts the promise of such benefits for himself or for others, a hypothesis which was clearly regulated in the previous law.

Article 289 of the new Penal Code sanctions any kind of acceptance of any amount of money or other benefits, be it express or tacit such that even though the refusal to dismiss a promise of an amount of money or other benefits is not stated in article 289, the person who receives money will commit the crime of accepting bribe if the acceptance is tacit.

The scope of people involved in corruption has been expanded as Romania ratified some international instruments regarding corruption.

According to the provisions of article 293 of the Penal Code, articles 289 and 290 are applied in accordance with those who based on an arbitration agreement are called to decide on a litigation regardless of whether the arbitration procedure takes place according to Romanian law or any other law.

This provision was introduced as a result of the ratifying by Romania of the Additional Protocol of the Criminal Law Convention on Corruption.

Thus, it was necessary to complete the frame of corruption offenses with a regulation which extends the criminal responsibility to those who are involved in litigation through internal or international arbitration.

According to the provisions of article 294 of the Penal Code, the first chapter of the fifth title is applied accordingly to the following categories of people if the treaties to which Romania is a part of do not state any differently.

Also, the new text uses the phrase “in connection with” instead of “for the purpose of”, the immediate consequence being the criminal irrelevance of the “time” criteria which distinguishes the acceptance of bribe from receiving undue benefits in the old regulation.

As a consequence, as long as the incrimination of the offense of accepting bribe no longer depends on the timing of the claim of receiving or fulfilling the duty which is “bought”, the ulterior activity has no criminal distinctive relevance.

As a conclusion, although apparently it could be stated that the crime of receiving undue benefits is no longer incriminated, in reality, this fact will be classified as acceptance of bribe according to the new Penal Code.

The old law is the most favorable criminal law. The new text introduces, as a variant of this crime, the deed of expediting an act which falls within the

duties of the perpetrator, a variant which is not presently incriminated.

The maximum punishment for this crime decreases from 15 to 10 years and the complementary punishment is the deprivation of the right to hold public office or to exercise the profession or activity during which s/he accomplished the deed and no other complementary punishment stated by the law.

The deed done by a public servant with control duties is no longer incriminated distinctively as the previous regulation of the Penal Code stated.

Article 289, second alignment establishes that the crime of accepting bribe is committed when it involves a person who holds a public office but only if the deed is done with the purpose of not fulfilling or delaying the fulfillment of an act which is his legal duty or in the purpose of doing an act contrary to his duties.

By this regulation, the law maker wishes to solve any controversial situation in judicial practice in which the notary public or an officer of the court can become an author of this crime.

The reason for this would be the fact that the people which article 175, second alignment refers to, given their special statute, can charge an extra cost for an urgent act which falls within their duties without altering the trust of the community in the public officer; also, in exchange for a fee with no criminal relevance, they place their experience, skills at the disposal of those who need the services they provide.

By the provisions of article 308 of the Penal Code, the law maker thought that the facts clearly mentioned in this text are a less serious violation as opposed to the same deed done by a public servant.

Thus, if the corruption offenses stated in article 289-292 of the Penal Code as well as those stated in articles 297-301 of the Penal Code were committed by

the people who temporarily or permanently hold a public office, with or without payment, the special limits of the punishment are reduced by a third.

However, the judicial practice states that the crime of accepting bribe in the following situation: the deed of a warehouse manager at a timber factory who receives certain amounts of money to falsely confirm the reception notes; also a crime is the deed of a Commissioner of the Financial Guard who claims and receives the amount of a thousand dollars in order not to sanction the deficiencies he has observed; the train manager who allows access to passengers that do not hold a valid ticket and receives money from these passengers in order to allow them to travel or the policeman who claims and receives an amount of money in order to release a minor from a correctional facility, the deed of the doctor who claims and receives money or other benefits to write prescriptions, etc.

The crime of offering bribe stated in article 290 of the Penal code is defined as:

(1) The promise, the offering or giving money or other benefits in the same conditions as those stated in article 289 are punished by imprisonment from 2 to 7 years.

(2) The deed stated in the first alignment is not a crime when the person offering bribe was forced by any means by the person who took the bribe.

(3) The person offering bribe is not punished if he denounces the fact before the police is informed of it.

(4) Money, values or any other given goods are given back to the person who offered them if these were given in the case stated in the second alignment or given after the denunciation stated in the third alignment.

(5) Money, things of value or any other goods offered or given are subjected

to confiscation and when these goods are not found, their equivalent is confiscated.

The differentiation elements presented above are also valid here.

The promise, the offering or giving are no longer conditioned by the purpose of fulfilling or not fulfilling or delaying the fulfilling of an act regarding his duties or in the purpose of doing an act contrary to these duties, but are done in connection with an act regarding his duties or in connection with the fulfillment of an act contrary to these duties.

As a consequence of these legislative changes, the new regulation incriminates the act of the person who offers a benefit to the public servant after the act was fulfilled as a token of appreciation for his activity, something which was not regulated in the previous law.

A new regulation appears in regard to the restitution of the undue benefits in case the bribe giver denounces the fact.

If in the previous regulation, the benefits were given back in case of denouncing the fact, regardless of the time when they were offered, in the new Penal Code clearly states that all the money, things of value or any other goods are given back to the person who offered them if these were given after the denounce was made.

If the goods are given prior to the denunciation, the person who denounces the fact is not punished but s/he is not given back the goods, which are to be confiscated.

Influence peddling stated in article 291 of the Penal Code is defined as:

(1) Claiming, receiving or accepting a promise of money or other benefits, directly or indirectly, for himself or for others, by a person with influence or by a person who implies he holds influence over a public servant and who promises to determine the public servant to fulfill, not

fulfill, to expedite or to delay the fulfilling of an act in connection to his duties or to fulfill an act contrary to these duties is punished by imprisonment from 2 to 7 years.

(2) Money, things of value or any other goods which are received are to be confiscated and when these are no longer found, their equivalent is to be confiscated.

(3) It is clearly stated that the promise of influence peddling must be extended over the behaviour of the public servant in order for him to: fulfill, not fulfill, to expedite or delay the fulfilling of an act regarding its duties or to fulfill an act contrary to these duties.

Another change refers to the rephrasing of the aggravated variant stated in article 7 of Law no 78/2000 and whether the previous regulation refers to the crime of influence peddling by a person, who, according to the law, has duties of observing or sanctioning contraventions is punished severely if it is done by a person who holds public office, by a judge or prosecutor, or a person stated in article 293 of the Penal code.

The punishment is less severe in the new regulation and is also differentiated according to the quality of the person whose influence is peddled: a public servant, a person stated in article 308 of the Penal Code.

The offense of trading in influence stated in article 292 of the Penal Code, defined as:

(1) The promise, the offering or giving of money or other benefits, directly or indirectly to a person who has influence or gives the impression that s/he has influence over a public servant in order to determine the public servant to fulfill, to not fulfill, to expedite or to delay the fulfillment of an act which falls within his duties or to fulfill an act contrary to these duties is punished by imprisonment from 2

to 7 years and prohibition to exercise some rights.

(2) The person who committed such an offense is not punished if s/he denounces the deed before the police was informed of it.

(3) Money, things of value or any other goods are given back to the person who provided it, unless it was given after the denunciation stated in the second alignment.

(4) Money, things of value or any other goods are subject to confiscation; if these are no longer found, their equivalent should be confiscated.

In regard to the incrimination of this crime, there are certain elements of differentiation as opposed to the old regulation.

First of all, the limits of the promise made by the influence peddler over the behaviour of the public servant in connection with his duties are clearly stated: he should fulfill, not fulfill, expedite or delay the fulfillment of an act which falls within his duties or to fulfill an act contrary to these duties.

Another change refers to article 7 and article 9 of Law no 78/2000, by giving up the aggravated variants stated by these two articles.

Also, another change concerns the regulation regarding the restitution of any benefits in case the person offering the bribe denounces the deed. In the previous law, the benefits were restituted in case a denounce was made.

Regardless of the moment when they were given, the current law states that money, things of value or any other given goods, are given back to the person who provided them if these were given after the denounce was made.

If the goods are given before the denounce was made, the person who denounces is not punished, but will not be given back the benefits, which will be confiscated in this case.

The punishment seems less severe in the current law, as the sanction is different according to the quality of the person whose influence is bought: a public servant or a person as stated in article 308 of the Penal Code.

As we continue this analysis, we will discuss a case, which is relevant to the point we have expressed in this article.

The prosecutors from the National Anticorruption Direction - T. Territorial Service, started prosecuting the defendant B.R., a lawyer within the M. County Bar, claiming that he committed the offense of trading in influence. In their indictment, the prosecutors noted that:

On March, 12th, 2014, considering his quality of attorney at law within the M. County Bar and while ensuring legal assistance to a suspect prosecuted for committing traffic offenses on public roads, he promised an officer of police that he will provide him with 1000 euros to pass along to a prosecutor from another county.

The purpose of this was to determine the prosecutor to release his client and prosecute and trial him without imprisoning him.

3. Conclusions

By analyzing the historical evolution of corruption, we can state that this phenomenon has evolved along with mankind, although, throughout all ages, corruption was blamed by society and incriminated by the laws of those times and today this evil is present in all areas of social life.

As we have stated at the beginning of this study, corruption appeared since the antiquity and was then repressed with severe punishment and certain measures to prevent and dismiss this criminal phenomenon.

However, corruption not only survived, but it progressed as time passed.

On January 27th, 1999, Romania signed the Criminal Law Convention on Corruption, but our internal law incriminated such facts long before this convention was signed.

But, as the law was in continuous change, while the economic market changed as well as the social-political frame, a new law was passed, namely Law no 78/2000 for the prevention, discovery and sanctioning of corruption offenses.

This law was meant to incriminate corruption in a modern manner and to award greater meaning to the corruption phenomenon.

Corruption can threaten economic stability, can slow down economical development and reduce the available resources for social programs; it can also violate man's fundamental rights and cause serious damage to the environment, undermining the authority of state institutions.

As we have noticed while writing this article and analyzing every corruption crime, all these offenses suffered numerous changes over time, changes imposed by the evolution of society and the natural tendency to align Romanian law to the community acquis, to align Romanian law with European law, as the law maker considered the similar provisions of other European states (Germany, Finland, Sweden, Portugal, Estonia).

We can conclude that the most harmful form of corruption is that which occurs in the public sector because, unlike the private sector, it does not affect a single group of individuals, but the entire society.

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