

GENERAL AND SPECIFIC ISSUES REGARDING THE OBJECTIVE SIDE OF THE CRIME OF BRIBERY, ACCORDING TO THE LEGAL PROVISIONS IN FORCE

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Abstract: *The phenomenon of corruption – as it is not a mere random fact, but a true phenomenon - is one of the most frequent phenomena nowadays, which has a tendency to state its power in all areas of human life: social and private life, cultural and economic life, as well as the spiritual and educational life. Thus, the phenomenon of corruption is ever present, so much so that society finds it to be indispensable to local administration and impossible to relinquish, thus affecting social welfare, stability and progress. The present article aims to discuss relevant aspects of the objective side of the crime of bribery, by also listing the judicial practice in this domain.*

Key words: *bribery, crime, Criminal Code, corruption.*

1. Introductory issues regarding the crime of bribery

Each state faces the issues caused by corruption and its negative consequences. This issue causes distress in the activity of public authorities and questions the integrity and credibility of public workers.

This negative social phenomenon, expressed by the bribery of some people by other people is generally known as a major issue of modern society, with enough power to endanger the security and stability of the state of law, as well as all moral and democratic values. What we are describing is a universal, complex and spread out phenomenon.

Corruption is much more than a legal issue, it is a dangerous vice of society and a universal definition is impossible to provide. Corruption is a destructive social phenomenon, consisting of the illicit obtaining of material goods, money or other advantages or personal benefits, by the abusive use of the office held by the people who hold public offices.

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The crime of bribery is regulated in Title V (Corruption and work related crimes) of the Criminal Code. Corruption crimes (this is also the name of the chapter) are in close connection with the work activity and the public workers and thus the lawmaker correctly decided to regulate these crimes along with work related crimes within the same chapter.

The special judicial object of corruption crimes supports this idea; thus, by committing the crimes regulated in articles 289-292 “the social relations regarding the correct performance of work relations”(Udroiu, 2018, p.461) is affected.

2. The Objective Side of the Crime of Bribery

The material element of the crime can be achieved by one of three ways: the request, the accepting or the promise to accept money or other advantages.

Thus, the behavior of the public worker is deviant from the obligations of the office he holds by claiming, receiving or accepting any valuables or any other undue advantages (whether material or not, corporal or not) in the public sector or the private one, thus violating the rules which pertain to public services and by violating an obligation should have upheld.

We must also mention the fact that when the material element of the objective side of the crime is achieved by claiming advantages, the initiative always belongs to the corrupt worker, whereas, in case of any of the other two means, the initiative belongs to the person who offers the bribe or an intermediary who can act as an accomplice or instigator.

“To claim something” means to insist on demanding something from another person, to phrase a request. Claiming money or any other advantages can be seen as an act of preparation in regard to the actual receiving of money or advantages, seen as enough to consider the crime as committed, as it is irrelevant whether the claim of the public worker was actually met, namely if the money or advantages were actually received.

The action of claiming money or advantages can be achieved by any of the following: the most used path is the direct approach, namely by speaking, but there are certain situations when this action can be achieved by gestures, letters, signs or a certain behavior which states the claim of the worker or any other means.

In case the corrupt worker would claim money or other advantages through a letter (this is less likely to occur in day to day activity), regardless of whether the letter is mailed or sent as e-mail, we believe that the action which fixates the material element of the crime is not consumed at the time the letter was mailed, but at the time it was received by the recipient, who must open it, read it, understand its content and the demands it contains.

In case the public worker grants a request, but refuses to provide the solution to the petitioner before being offered an amount of money, this is equivalent to the conditioning of an act regarding his work duties in exchange for a material advantage (S.C.J., Criminal Section, decision no. 473/1996).

The deed is a crime regardless of whether the public worker effectively received the advantage or not, even in the case in which the work duty was not executed. The claiming must be unequivocal, it is not necessary to be phrased and achieved so as to be understood by anyone, it is necessary and sufficient to be understood by the person to whom it is addressed.

Specialty literature states that “if the demand was phrased in an equivocal manner by the public worker, but it is proven, by any other means of evidence, that it is specifically understood by the recipient, based on preexisting relations between the two, the crime is considered to be committed in the form of claiming” (G. Bodoroncea et.al, 2014, p.624).

A contrary opinion states that “the material element is not achieved in case of unclear, equivocal or ambiguous phrasing” (Cioclei et.al, 2019, p.231). In such a situation, we tend to agree with the first thesis, as claiming money or other advantages can be codified by the public worker so as only the recipient understands that it is a request for money or other advantages.

We are in the presence of bribery by an action of claiming money or other advantages, when the defendant, acting as a police agent within the O Police Department - being in the course of his duties, claimed 50 lei from the H.S. in order to not fine him from crossing a red light in the area of the M street (<https://www.jurisprudenta.com/jurisprudenta/speta-104w16vy/>).

“To receive” means to take something in possession or to accept, undertake an object which is given or gifted, namely the receiving of the good or the money by the active subject.

The distinction between the two means is that, unlike the activity to claim money or other advantages, in which case the initiative belongs to the public worker, in case of receiving, the initiative belongs to the person who offers the bribe or to an intermediary; surely, receiving money or other advantages entails the effective transfer of money or advantages.

In case of receiving, there is a simultaneous activity between suggesting, accepting and receiving, as all these can only occur at the same time, spontaneous and simultaneous. In case these actions occur at a greater difference in time, as the suggestion is accepted, but the goods or money were not effectively handed over, the crime will be considered as committed at the time of the acceptance and not the time of the effective transfer of goods or money.

We conclude by stating that, in order to consider the crime as committed by means of accepting, it is necessary for the perpetrator to receive the money or advantages immediately after accepting it. “If the public worker does not refuse the advantage, but also does not manifest his will to receive it, for example, leaves the money or the plane ticket or the theater ticket on the table, thus the possibility to receive it is still open, we are in the presence of a receiving of undue advantages as stated by law” (Dobrinioiu et.al, 2002, p.43-44).

Judicial practice (Cluj Appeal Court, Criminal and Minors Section, decision 51/A of May 12th 2009) states that the situation in which, in exchange for his service, the public

worker would receive an amount of money, as a loan, is a crime of bribery, as the loan is effectively an advantage, as regulated by criminal law, because the two parties does not share a long term friendship or trust relationship. We must also mention that the crime is consumed in case the public worker returns the money or the advantages he received.

“The accepting of a promise” is the third means of the material element of the objective side of the crime of bribery, namely the active subject’s behavior to consent, approve, agree or entail the promise of money or other advantages, promised in exchange for services rendered.

Similar to the case of “accepting”, the initiative belongs to the person who offers the bribe or the intermediary and the action of the public worker entails he approves of it.

Accepting the promise can be of tacit or express form, depending on the conduct of the public worker, but it must be categorical, namely that the public worker accepted the promise of bribe he was offered. In practice, it was decided that it is a crime of bribery for a prison guard to accept the promise of money in order to provide an inmate with a mobile phone (Timișoara Appeal Court, Criminal Section, decision no 617/A/2015 apud Cioclei et.al., 2019, p.232).

However, if the crime is committed by more than one of its means, by considering the same act which is the duty of the public worker, we are not in the presence of a multiple crime, a continued crime of several crimes, as the deed is committed once the first means is consumed.

We believe that if the public worker first claims an amount of money and after a while he receives the money, we are in the presence of a natural unity of crime. The above mentioned actions are just a part of the material element of passive corruption and, in order to complete the material element of the objective side, a series of conditions must be met simultaneously for the deed committed by the public worker to be deemed a crime.

In the following section, we will analyze these conditions, in the order stated in article 289 first alignment of the Criminal Code.

One of the first conditions is that the deed must have as an object a material good, money or other advantages which can be patrimonial or non patrimonial. We will begin our analysis with money, which represent the universal and generally accepted means of payment extreriorized by coins or bills with circulating power which helps us acquire certain products, goods and other benefits which are in the circuit of society. Bribe can consist of national money, as well as international currency, received in cash of by bank transfer.

When we mention “other advantages”, we must distinguish between patrimonial ones and non patrimonial ones.

The patrimonial benefits are those which can provide the public worker with a value which can be evaluated in money, whereas the non patrimonial ones can’t be evaluated in money; however, we believe that some non patrimonial benefits will provide the active subject with benefits which are likely to transformed in money after a certain amount of time.

“Other benefits” which the active subjects can receive as a bribe are food products, different good, commissions, the extinction of a debt, the payment of a school tuition for the child of the public worker, holiday payments, the free use of an immobile good, house renovation, intentional loss at gambling in favor of the public worker and so on. Other non patrimonial benefits are the granting of a certain title or academic degree in science, culture, arts. In our opinion, the object of bribe can also be an exoneration of the public worker or his family members from civil or criminal liability.

We believe that the object of bribe is not relevant in regard to its value, as criminal law does not state a certain minimal value of bribe in order to render the deed a crime. Thus, we can conclude that, regardless of the value of the undue benefit, its author will be criminally liable according to the law in force.

Specialty literature notices that if a public worker receives a gift of less significance in order to perform an act in agreement with the duties of his job, there is no corruption, but if he receives a more significant gift in order to perform an act which is contrary to his duties, then the crime is perfect (V. Dobrinoiu et.al, 2002, p.95).

We must also mention that the expression “other benefits” stated in the Criminal Code does not include the deed of the public worker who claims or obtains sexual favors in regard to an act which is a part of his work duties, as the lawmaker has specifically incriminated such behavior as “use of a public office in order to obtain sexual favors”, a crime regulated in article 299 of the Criminal Code.

A third condition which is necessary is that the money or advantages must be claimed, received or accepted by the public worker for himself or for another person. In case the advantage is received for the public worker, the benefits resulted from the illicit deed profits the worker directly.

We must also mention an essential condition, namely that the money or advantages provided to the public worker must represent counter payment for the actions of the public worker in regard to an act which is a part of his work duties.

It is not necessary for the object of the bribe to be expressly given to the public worker, it can also be represented by the receiving of benefits by another person, which indirectly improves the situation of the public worker, for example, the situation in which certain gifts are offered to the parents or other relatives of the public worker, with his consent and in regard to one of his duties.

In many cases, in order to avoid getting caught, the public worker demands that the money be given to another person. It is not essential that the money or goods be effectively given to the corrupt public worker, they can be given to other people, but it is essential that the purpose and their representation as a reward are known to the public worker.

A situation in which money is claimed for another person is the circumstance in which the corruptive person pays off a debt of the public worker toward a third party. The beneficiary of this “business” is the creditor of the public worker but we must keep in mind that this action pays off the debt of the public worker, thus providing him with an advantage.

Another essential condition is that the money or other advantages is undue. They are considered as undue when they represent payment for an act which represents a duty of the public worker or for an act contrary to these duties, which is of illegal character and is not rightfully owed.

The undue character of money or other advantages is a guarantee which excludes the hypothesis of legally owed payments to which the active subject would be entitled to receive for exercising his duties.

If the advantages are claimed, but are not undue, we believe the crime which is committed is abusive performance of work duties.

Doctrine cites two court decisions in this matter: the court rules on abusive performance of work duties and not bribery when the perpetrator claimed an amount of money but not as an undue payment, but as an obligation which must be met by the person who requested a certain act; thus the perpetrator will use the claimed benefit to the benefit of his employer and not his personal use (Suceava Tribunal, criminal sentence no 19/1985); another case is the action of the perpetrator to request and receive advantages from his employees under the pretext of covering expenses made by the use of his personal vehicle in order to acquire merchandise (The Supreme Court, criminal section, criminal decision no 1965/1973) (G. Bodoroncea et.al, 2014, p.623).

An indispensable and welcomed condition is that the claiming, receiving or accepting the promise of money or other undue advantages and benefits by a public worker must be committed in relation with the fulfillment, non fulfillment or delaying the performing of an act which represents a duty of the public worker or an act which is contrary to his duties.

The most recent change to the Criminal Code listed major changes in regard to the connection between the perpetrator's act of claiming, receiving or accepting the promise and the act which represents the counter payment.

The previous regulation used the phrasing "with the purpose", whereas the New Criminal Code replaced this phrasing with "in connection with". Although it appears to be a less significant change, it has important consequences. Thus, in the absence of purpose, it results that the claiming or accepting of a promise of money or other advantages can occur subsequent to the time of the counter performance.

The consequence of this change is that, in all situation in which a public worker accepts bribe in relation to the performing, nonperforming, the delaying or performance an act contrary to his duties, the deed will be seen as bribe, regardless of the time when the material element of the crime is performed, as the lawmaker eliminated the distinction between the crime of bribery and the one of receiving undue benefits, regulated in article 256 and which no longer has a correspondent in our current law.

As a consequence, the essential condition of previous occurrence in relation to the performing of the act was eliminated and we can conclude that the crime of receiving undue benefits has been absorbed in the content of the crime of bribery. In case the public worker claims an amount of money and receives it after the act was performed, we will be in the presence of a one time crime of bribery.

A last essential condition is that the act which is performed as counter payment must be a part of the public worker's duties at work or it must be an act in close connection with his work duties.

The claiming or receiving of undue benefits by a public worker, in order to fulfill an act in relation to his job requirements, even if limited, in order to achieve the final act, represents the crime of bribery (SCJ, Criminal section, decision no 391/1999).

An act represents any activity which must be performed by a public worker in agreement with his work duties and competences.

The work duties of the public worker represents all that he must fulfill in accordance with his job requirements. He must effectively know his work requirements in order to establish if he violated these requirements or not.

It is important to state that it is necessary and sufficient that the public worker negotiates the performance of an act which meets his job requirements, as the law does not expressly require the act to be performed.

Under these conditions "it makes no difference if the negotiation, claiming, receiving or accepting money or other undue benefits – occurred during work hours or outside the work hours of the public worker" (Diaconescu, 2004, p.39).

The person who is in charge of conducting and controlling a certain activity, when he receives undue advantages for performing his duties, becomes an active subject of the crime of bribery. Acts in regard to the public worker's duties are those acts which normally fall within the duties of another public worker, but the person who is in charge, as is the maire for example, can perform them directly (SCJ, Criminal section, decision no 605/1995).

Judicial literature, but also judicial practice, repeatedly debated the hypothesis of whether the culprit is competent to perform the act or if the act does not fall within his duties, but he misled the person who provided money of other undue advantages that he is competent to perform the act. In this case, the High Court of Justice ruled that "the deed of claiming and receiving money, by misleading the injured party into believing that he is competent to perform an act which does not fall within his duties, represents, in fact, another crime, namely fraud and not bribery" (SCJ, Criminal section, decision no 3622/2004).

The last form in regard to the material element of the crime is in connection with performing an act which is contrary to his duties and the acts he was supposed to perform.

In order for the crime of bribery to exist, it is necessary that the perpetrator commits the crime in relation with the fulfillment, non fulfillment or delaying of an action which pertains to his work obligations or an action contrary to these obligations.

When we talk about "fulfillment" we refer to that particular situation when the act falls within the work duties of the public servant, something he is required to do, but he demands a separate payment for what he is supposed to do. For example, in order to provide medical care and present interest in the patient's condition, the doctor receives an informal payment.

By “not fulfilling” an act, we refer to the situation in which the active subject is required to perform a certain act but he abuses his function by receiving money or other undue benefits, thus illegally transgressing his obligations and fails to perform the act he was supposed to perform; thus the public worker remains passive, he abstains from acting when there is a legal duty to do so, to intervene, to take certain measures and precautions.

For example, the action of a policeman to abstain from fining a person in exchange for an amount of money. In regard to the counter payment of the public worker, we notice the adding of a new conduct as opposed to the old law, namely that of speeding the act which falls within the work duties of the perpetrator.

The “speeding” of an act represents the situation in which the public worker performs the act he was normally required to perform in a much shorter term, speeds the performing of a certain act, works faster than the law requires him to do.

The correct legal qualification of the public worker’s deed to speed up a certain act is appreciated by considering the entire legal background of his activity, his work obligations, the legal status of the institution where he is employed and the specific circumstances of a case.

For example, the deed of the public worker who provided construction authorization – he speeds up the procedure for an authorization in exchange for a bribe.

The “delaying” of an act is that particular situation in which the active subject performs the act which he was required to perform after the usual time or after the term established by law.

Thus, he illegally postpones, he hesitates or prevents a certain act for a subsequent term, in order to create benefits for the person who provides the bribe. For example, the district attorney’s deed who is required to prosecute criminals, delays the criminal investigation in exchange for an amount of money.

It is important to mention that, in case the delaying occurs in relation to an act which is contrary to the work duties of the public worker, these actions will not be absorbed in the crime of bribery, as several crimes were committed.

Out of three ways of achieving the material element, in case of claiming and accepting bribe, this is nothing more than a preparatory act for the effective receipt of the bribe; however, the lawmaker distinctively incriminates this deed. The attempt is not sanctioned.

However, this does not mean that “receiving a bribe” is the only means, out of the three we discussed, which represents an effective receipt of money and that the social danger it presents is less significant; thus criminal liability is justified.

In reality, the crime of passive corruption is an anticipated crime, namely the attempt is assimilated to the consummated form of the crime.

The legal text states that there will be a consummated crime even when the public worker did not receive the money or advantages, but the deed was limited to the claiming of money or advantages and accepting the promise of both.

As the crime of bribery is consumed at the time of claiming or receiving the undue benefit or at the time of accepting such a benefit, any subsequent activity has no influence over the existence of the crime.

Thus, the deed represents bribery even if the perpetrator returns the promised benefit or even if, after he accepts the promise of an undue benefit, he is removed from office.

3. Conclusions

Corruption has always been a preoccupation of any society in order to identify the most effective means to eradicate this phenomenon or, considering that this aim is rather difficult to achieve, in order to diminish it or minimize its harmful effects.

Considering these issues, the preoccupation to identify the necessary tools in order to eradicate this phenomenon has surpassed the border of internal law, thus becoming a major objective of international regulations.

Corruption has become the most seductive and the most dangerous leitmotif of the contemporary age, as everyone discusses corruption and its dangerous consequences.

Among the general population, there is a unanimously accepted idea according to which corruption is the phenomenon which paralyzes the normal functioning and development of the state.

Thus, the majority of honest social communities see corruption as an extremely dangerous phenomenon, which undermines all power structures, the hope for evolution of the country, the achievement of any reform or even a better living for the general population.

As a result of analyzing the current paper, several conclusions can be pointed out, based on the general study of corruption crimes and, more specific, the crime of bribery. Each state faces corruption and its negative consequences.

This causes disruption in the activity of local public authorities and questions the fairness and integrity of public workers.

This negative social phenomenon, expressed by the bribe offered to some people by other people, is generally known as a major problem of modern society, with sufficient power to endanger the stability and safety of the state of law.

We believe that an important role is played by the passing and implementing of a criminal policy capable of preventing the effects of corruption.

Thus, the Romanian lawmaker passed a series of significant legislative changes, meant to stop the progress of this phenomenon, to diminish and remove the sources which generate corruption.

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