



ORIGINAL PAPER

Enforcing New Regulations in the Romanian Criminal Law on the Public Officer: Selective Analysis of the Institutional Change and Mechanisms

Ruxandra Răducanu*

Abstract

The new Criminal Code of Romania has reshaped the institution of the public officer – as active subject of the offense and at the same time, has imposed much more requirements on its behavior. The extent that corruption has taken and the notification of the attitudes and behavior inconsistent with the status of the public officer have imposed the criminalization of some actions which, under the old penal code were outside of the criminal area, such as abuse of office in sexual purposes or usurping the function. At the same time, existing regulations were clarified to ensure their efficient implementation. The constitutive content of the offense of bribery was amended so as to include the act of receiving undue benefits, which had a separate criminalization in the previous legislation. It is necessary to observe what theoretical and practical consequences of these changes and new incrimination generate in relation to criminal offenses of service.

Keywords: *public officer, work related duties, bribery, abuse of office, usurping the function, criminal liability, criminal offence*

* Associate Professor, PhD, University of Craiova, Faculty of Law and Social Sciences, Law specialization, Phone: 004035117700, E-mail: raducanuruxandra@gmail.com.

General considerations on the need to criminalize acts committed by public officials

Criminal law pays special attention to acts committed by public officers in the performance of their duties, to intervene and severely punish a behavior which, in addition to failing to comply with ethical norms, has a pronounced criminal fingerprint. What is sought, in the first place, is to ensure that legal compliance in the performance of work related duties, as an abusive behavior, beyond the legal limit, diminishes the prestige of the institutions where the civil servants are working, but also their proper functioning.

As shown in the scientific literature, the proper performance of the activities of public interest, as well as of other activities regulated by law, is incompatible with the idea of corruption of public officers in that they could be influenced by outsiders in the performance of their duties by offering them benefits to which they are not entitled to by law (Loghin, Toader, 1998: 333). Romanian law has undergone many changes and additions to harmonize with the EU legislation; their need was justified by the internationalization of corruption, the emergence of foreign elements in the legal structure of certain crimes. Criminal law provisions are aimed at ensuring the effective exercise of public interest and other activities regulated by law. The right behavior of the officials is the foundation of proper conduct of employment relationships and also guarantees compliance with the legislation and implementation of the legal interests of individuals. Acts committed by a public officer in the performance of work duties are incriminated by the Romanian legislature in offenses of corruption or work duties.

Offenses of corruption or service, with few exceptions, are crimes that require a qualified active subject determined by the quality of "public officer" as required by the text of criminality in case most of the cases of offenses of corruption or service (taking Bribe – article 289 Criminal Code, embezzlement – article 295 of the Criminal Code, abuse of office – article 297 Criminal Code., negligence in service – article 298 Criminal Code, misuse of office in sexual purposes – article 299 Criminal Code., usurping the function – article 300 Criminal Code., conflict of interests – article 301 Criminal Code). The offenses referred to in articles 289, 295, 297-301 committed by other persons exercising, temporarily or permanently, with or without remuneration, a commission of any kind in the service of an individual provided by article 175 paragraph 2 or under any other legal person, represent attenuated versions of crime which know a distinct sanction regime, in this case, special limits of the punishment are reduced by a third.

Understanding the need for separate incrimination by the criminal law of acts committed by public officers in the line of duty should be based on the analysis and interpretation of the concept of public functioning as it is configured Romanian criminal law. Thus, according to article 175 paragraph 1 of the Criminal Code which came into force on 1 February 2014, a public servant within the meaning of the criminal law, means "a person who, permanently or temporarily, with or without remuneration: a) exercises the powers and responsibilities established by law in order to achieve the prerogatives of the legislative, executive and judicial powers; b) exercises a public dignity or a public office of any kind; c) exercises, alone or with others, in an autonomous, of another operator or a legal entity owned or majority state tasks related to achieving the objects of it". Also, by provisions, article 175 paragraph 2 of the Criminal Code operates assimilation, as a public officer, for "person exercising a public service which has been entrusted by the public authorities or which is subject to their control or supervision of the fulfillment of that public service".

The new regulation and reconfiguration of the notion of the “public officer” in the Romanian criminal law has raised many issues and required clarification from the Supreme Court to ensure uniform practices. Thus, as a public officer, the surgeon with an employment contract of indefinite duration in a hospital in the public health system, it was necessary to determine if he has this capacity, the existence of quality, depending on its existence lays the criminal liability for the offense of bribery. As practice alternated between incriminating doctors for the offense of bribery, there were even solutions of the High Court of Cassation and Justice in which such person who was acquitted for the offense of bribery, considering that, according to the new regulation of the concept of public officers, he does not qualify as a public officer.

The High Court of Cassation and Justice, binding judgment pronounced by the Complete for unraveling certain law related problems on a problem that had already generated uneven practice stating that “a contract employed doctor in a hospital in the public health system is a public office in the sense of the provisions of article 175 paragraph. (1) b) second sentence of the Criminal Code” (High Court of Cassation and Justice, The Complete for unraveling certain law related problems in the matter of criminal law, Decision no. 26/2014, published in the Official Gazette of Romania, Part I, no. 24/13.01.2015).

In establishing the fact that the doctor is a public officer, exercising a public office of any kind, the Supreme Court started from the Romanian legislator’s rational interpretation, bringing in support of this claim elements of comparative law. Thus, it was found that the new regulation of the notion of public official, in the New Penal Code, the legislator did not want a decriminalization of corruption committed by doctors, especially that from this point of view, the medical field is an area that requires increased attention and effective solutions. It was also found that, based on liberal character of the medical profession, it cannot justify the lack of criminal liability and “with the importance of the public health service, patients cannot be left unprotected by the criminal law, on the grounds that any acts of claiming or receiving money or other benefits by the doctor operating within the health system can be integrated in the sphere of incidence of non-criminal legal provisions”. Regarding corruption committed by the technical judicial expert, The High Court of Cassation and Justice has determined that he “exercises a public service – drawing expertise to establish the truth and resolving pending cases handled by courts or prosecution bodies – service for which he was invested by a public authority – The Ministry of Justice” (The High Court of Cassation and Justice, The Complete for unraveling certain law related problems in the matter of criminal law, Decision no. 20/2014, published in the Official Gazette of Romania, Part I, no. 766/ 10.22.2014).

An important criterion that the High Court of Cassation and Justice had in mind when stating that if the judicial expert’s assimilation with the public officer operates under the provisions of article 175 paragraph 2 of the Criminal Code was that although such a profession is organized in the absence of budgetary financing, it pursues a public service and is subject to the control or supervision of a public authority. Furthermore, certain professions that are supported from the national budget was one of the arguments that the Court relied to in determining the quality of public officer – understood as the exercise of a public office of any kind – a doctor hired with a contract in a hospital in the public health system. Therefore, determining the quality of public officers is essential to criminal liability for corruption offenses and service and reconfiguration of the meaning that the legislator gave to the concept of public officer. It produced non-unitary solutions in practice, solutions that could not be ignored and that required the intervention of the

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Supreme Court for setting some clear directions leading to the unification of judicial practice.

Novelties brought by the 2009 Criminal Code in relation to corruption offenses.

The extent of corruption and frequent findings of commissions of such acts, despite an extremely tough sanctioning system, prompted the legislator of the Criminal Code of 2009 to pay special attention to this group of offenses. What is to be observed is primarily related to the punitive treatment of these crimes. Although the Criminal Code of 2009 has adopted a preventive criminal policy, opting to mitigate punishment provided by law for various offenses in relation to criminal offenses of corruption this principle was not applied. Although for the offenses of bribery and influence trafficking the maximum punishment was diminished, though the sentence is quite severe at 10 years imprisonment and respectively 7 years imprisonment, especially when compared with other changes to the system of enforcement of other offenses (for theft, for example, after the maximum of imprisonment was reduced from 5 to 3 years, the new Criminal Code provided an alternative penalty of fine). The reason for maintaining this highly repressive sanctioning system is precisely the legislator's desire to repress such acts signifying an incorrect and misconduct behavior of public officers, given that corruption is difficult to eradicate and certainly impossible to stop.

Particular attention of the legislature on these facts is proved by the many changes in this area. Thus, as the offense of bribery changes were necessary in order to grasp and sanction all situations that may manifest an attitude of public officers may signify the breach of the correct way of fulfilling their duties. Experience has shown that there are cases where the official demanding money or undue benefits were made in the interest of another person, not in the interest of the public officer. The Criminal Code of 1968 did not regulate such a possibility which fell under criminal law and may not apply a criminal penalty. It was obvious that in such a situation – of claiming an undue advantage by the public officer to another as equivalent to fulfill, not fulfill, speed up or delay an act falling within the officer's duties or performing an act contrary to these duties – the severity of the offense was the same as in the case where such was claimed for the use of the public officer himself. And identical situations require identical solutions, provided that, in criminal matters, they are required by law. Or, what was newly brought in the Criminal Code of 2009 was just filling in the gaps of the law to punish all facets possibility of bribery.

Also, another supplement to the Criminal Code of 2009, also in the idea of sanctioning all situations where an incorrect behavior can be seen in the public officer refers to money or undue benefits related to service of his duties. They may be claimed in connection with the speeding of an act falling within the duties of service of public officers. Such a hypothesis was not foreseen in the Criminal Code of 1968; its regulation by the Criminal Code of 2009 is further proof of the attention of the legislator to punish all acts that mean corruption in the field of service and activities of public officers.

The desire of the legislator to suppress such behavior also led to a disproportionate treatment provided by it for situations of different gravity. Thus, the regulation and punishment of the situation after the public officer fulfilled his job duties has received money or undue advantages in the absence of a prior agreement with the briber, the 1968 Criminal Code regulated a distinct offense as the reception of an unfair advantage for such a situation. Obviously, in this case the public officer's behavior was

not correct and did not correspond to the ethical and moral requirements imposed by his function. The presence of interference with the social value protected by law in this situation was serious enough to justify the criminal liability. The 1969 Code distinctly regulated the situation, penalizing it less seriously than bribery, considering that although not done correctly, the public officer has conditioned the performance of his service to receiving money or undue benefits. It was a legal distinction between the two situations and the gravity was reflected in the penalties provided by law. The Criminal Code of 2009 does not distinctly regulate this fact. Apparently, the crime of receiving undue benefits is not criminalized. This is only an appearance, because the intention of the legislator, especially in the matter of corruption offenses has not been to decriminalize such offences, but, on the contrary, to punish them more severely.

The new formulation of the offense of bribery states that between the action of claiming by the civil servant, receipt or acceptance of promises of money or undue benefits should be linked to the performance that he engaged to have fulfilled on the act of service. The Criminal Code of 1968 provides that the offense of bribery had to be committed in order to perform, not to perform or delay the fulfillment of an act falling within the duties of service or perform an act contrary to these duties. This statement leads to the conclusion that receiving money or profits could not be made before the performance of the officer. If the legislator requires that the action is to be committed by public official about his performance, the new wording, although seemingly insignificant, produces two important consequences. Absence of purpose of incrimination means, on the one hand that committing the offense of bribery is possible both with direct intent and indirect intent, and, on the other hand, demanding, receiving or accepting the promise may take place either before and after the time of the public officer's fulfillment of his duties which enter his service (Crișu-Ciocântă, 2014: 469).

The conclusion resulting from the interpretation of the text of incrimination is that, not only there was no intent to decriminalize the offense of receiving benefits, but it was incorporated into the crime of bribery. The will of the legislator was therefore to equate public officers who have, from the beginning a misconduct behavior in that he conditions his performance by certain benefits, and public officers acting in accordance with the requirements of professional and moral performance of the service and only after the fulfillment of this act, without claiming, accept, receiving undue benefits. It is worth noting that, given that in both cases the same punishment is provided, in addition to an extremely harsh punitive treatment, it also creates a disproportionate treatment to the seriousness of the offence, which can cancel the preventive nature of the criminal provision that represent the desire of the Romanian legislator.

The offense of receiving undue benefits was considered a variety of species of the offense of bribery (Diaconescu, 2004: 94). The criminalization of the offense they are in the tradition of the Romanian legislator, and also its attenuated character to bribery resulted in milder punishments treatment is a constant Romanian legislator. Therefore, it might be consistent with the principle of proportional penalty to the seriousness of the offense, provided that the offense of undue advantages is an attenuated variant of the crime of bribery. The option of the Romanian legislator to identically treat the two offenses, although obviously different in severity provides no evidence of criminal prevention, but instead of an exaggerated repress.

Another element that comes to argue the predominant character of the rule of preventive criminality is everything related to the enforcement regime provided by the 2009 Criminal Code for the offense of bribery. Thus, besides imprisonment, there was an

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additional punishment provided of prohibition to exercise the right to hold public office or to practice or work in performance of the offender. Complementary punishment is a criminal sanction, besides constraint acts in the directions of re-education and exemplarity (Mitrache, Mitrache, 2014: 239). Prohibition by the legislature of the right to hold public office or to practice or work in performance that was committed bribery is evidence of a thorough regulation of the legislature in this matter; by providing this additional punishment was completed and preventing the conduct of bribery, which was a priority for the legislator to change in criminality rule.

But there were aspects neglected by the legislator and that would have required attention, especially since we wanted a proportional amount of punishment provided to the seriousness of the offense. The material element of the offense of bribery can be seen in several alternative ways: receiving, demanding or accepting money or promises undue benefits. The Criminal Code of 1968 also provided the distinct possibility of a crime of not rejecting the promise of bribery. Although the Criminal Code of 2009 has not expressly provided this way, the offense is also achieved through not rejecting the promise which is a tacit acceptance that falls within the scope and content of the notion of acceptance of promises provided as a means of committing a material element.

Strangely enough these ways were maintained by the legislator even in the form and type of offense intended to treat, in terms of penalties, as if the offender receives or claims money or undue benefits. Claiming represents a request of the public officer, made out of initiative and consists of taking possession receiving money or undue benefits (Boroi, 2011: 371) and folds right on the content of “taking” marginal name used in the crime. By comparison, accepting the promise of money or other benefits, involving even tacit acceptance of any such promises relates to the agreement on a public officer being promised money or consideration. However, this agreement is preceded by the offer, promise, and deed initiative belonging in this situation briber. Surely criminal law imposes public officers a right attitude, asking them to take a firm stand, unequivocal and reject such a promise.

The public officer’s attitude of tacit acceptance of the promise of the briber is undoubtedly an act of corruption which affects the social value protected and requires the sanction of criminal law. But the choice and actual penalty, the legislator ought to exercise caution and define an appropriate penalty commensurate with the seriousness of the offense of accepting the promise. The preventive nature of the criminal provision would have been better highlighted and would have been materialized the propose that the legislator had, to deter the commission of such acts and to form a different attitude of the public officers in the performance of their duties. In conclusion, what stands in relation to corruption offenses is, on one hand, maintaining a repressive character of the criminal provision, and, on the other hand, the inclusion in the scope of the criminal provision of all situations that may represent acts of corruption of public officers.

Novelties brought by the 2009 Criminal Code offenses in the field of service

The novelty of the 2009 Criminal Code in the matter of offenses in the field of service can be synthesized in more systematic and structured criminal rules in this area. Undoubtedly, in this matter, the importance of the value protected by the legislature is in the foreground, and the public officer is the central pillar of the existence of which the existence of the crime itself depends. A first difference from the 1968 Criminal Code refers to the crime of embezzlement. The content of this crime remained unchanged from the previous regulation, what is different is regarding the place of the crime. Conceived

by the legislator in 1968 as a patrimonial crime, embezzlement was naturally placed, by legislator of the Criminal Code of 2009, among service offenses. It is not coincidental such a transfer, and not lacking in criminal meaning. Embezzlement has been and remains a crime that affects both the service of activity and economic relations. If you weigh what offence is more serious, obviously, the service relations pose a greater threat. And this conclusion derives mainly from a public officer in charge of managing and administering the active subject of the offense. It is an argument that the 2009 Code's systematization tried to achieve in relation to criminal offenses provided for in the special part.

Regulation of the offense as a crime of embezzlement in service takes into account other European criminal laws (The Spanish Criminal Code, French Criminal Code, the Italian Criminal Code) which consider and criminalize embezzlement as a service offense. The introduction of the offense of embezzlement in service offenses is not new in Romanian criminal law, the same solution was consecrated by the Criminal Code of 1936. The new regulation is an acknowledgment of the Romanian legislator tradition which means that the embezzlement is not primarily affect heritage but social relations on the effective exercise of public service units or other legal entities. The quality of the active subject, that a public officer is the main element of a criminal offense scene prints service since its action is related to the assets they manage or administer appropriate disciplinary, and there is the view that if the offense is committed by a manager actually need it to be a person, even if in fact fulfill these tasks, it must be an employed person in that unit. Regulating the crime of embezzlement as a service offense illustrates the relevance of this opinion that conditions the crime by the existence of a relationship of service.

There are also new incriminations in the matter of service offenses that come to fill gaps in the legislation since the period indicated during the applicability of the Criminal Code of 1968. The offenses of abuse of position for sexual purpose (article 299 of the Criminal Code) and usurping the function (article 300 of the Criminal Code) are such examples. What the legislator missed and also presents seriousness, affecting protected social values, was the action of a person who promotes or offers sexual favors to public officers in order to perform, not perform, speed-up or delay the performance of an act regarding the duties of his office or in order to perform an act contrary to these duties.

Misuse of position for sex is, according to article 299 paragraph 1 of the Criminal Code, is the act of a public officer which in order to perform, not perform, speed-up or delay the performance of an act concerning the duties of his office or in order to perform an act contrary to these duties, claims or obtains favors of sexual nature from a person directly or indirectly interested of the effects of that act of service. Under the provisions of article 299 paragraph 2 Criminal Code the offense is an attenuated variant requesting or obtaining sexual favors by a public officer who makes use or takes advantage of a position of authority or superiority over the victim arising from his position.

This new indictment replaces a regulatory loophole and sanctions the abuse of public officers, manifestation encountered ever more frequently in practice. Creating this incrimination took as its starting point a reality that could not be tolerated nor ignored and that justify the intervention of criminal law. No doubt there is detriment to the conduct of business service and abusive behavior of an unworthy officer that conditions, fulfillment, non fulfillment, speeding-up or delaying of an act concerning the duties of his office or carry out an act contrary to these duties to obtain sexual favors.

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The limitations imposed to the behaviour of the public officer derive from the general interest of the society to ensure the effective exercise of service, and as shown in doctrine, when the state limits the exercise of liberty, it has to affirm the general interest in such a way not to affect the free development of human personality (Dănișor, 2014: 20). The expression used by the legislator “sexual favors” is very general and involves any act which may help to acquire sexual satisfaction.

The attenuated variant in paragraph 2 was started from the old regulation of the crime of sexual harassment which, rightly, has found its place in the crimes of the civil service while abusing public authority or superiority over the victim, authority or superiority arising from its position. Even if between the victim and the officer there is no relationship of subordination resulting from a service relationship, undermining social value protected there since the civil behavior is abusive and unfair. Another difference from the old regulation refers to conditions in the absence of the incriminating text, a condition which in practice was difficult in the probation of the offense of sexual harassment. The Criminal Code of 2009’s legislator has not provided the required repeatability act of sexual harassment as an indispensable element for the existence of the crime. In conclusion, the act is an offense even if it promises a single action claiming or obtaining sexual favors. This new regulation is yet another proof of better systematization and structuring the rules of criminal offenses in the field of service. Usurping the function, according to article 300 of the Criminal Code is the act of a public officer during the service performs an act that does not fall within his duties if this has produced one of the consequences provided for abuse of office.

This new regulation also fills a legislative gap, completing the offense of abuse of office. As for the offense of abuse of active subject it is all public officers through abusive behavior who produce the same track as in the case of abuse of office: damage or harm to the rights or legal interests of a natural or a legal entity. The essential difference of the additions to criminalize usurpation is that the public officer performs an act that does not fall within his remit. In contrast, the existence of the crime of abuse of office was conditioned by the fact that the public officer poorly performs an act which falls in his duties (Răducanu, 2009: 278). Although the rule does not provide incrimination provided that the public official who usurped his position to poorly produce an act, however, implicit in this condition that must follow a cause offense (either damage or harm to the rights or interests of a natural or legal person), which therefore cannot occur when the proper performance of the act is done (Dobrinioiu, Neagu, 2012: 506).

The common feature of all the crimes that have as qualified active subject a public officer is that criminal participation in the form of coauthors, imposes that the coauthor must be a public officer as the active subject. Instead, the accomplice and instigator can be any person, but they answer for participation in the crime committed by the public officer (Vasiliu, Antoniu, Daneș, Dărângă, Lucinescu, Papadopol, Popescu, Rămureanu 1977: 55). Thus, the public officer quality of the active subject reflects on the offense itself and therefore, under its influence on the situation of the participants follows the real circumstances regime. Thus, the instigator and accomplice shall be considered participants in the crime committed by the public officer if they knew or foresaw the status of the author.

Conclusions

Therefore, the extent that corruption has reached, and referral of inappropriate behaviors and attitudes inadequate with the public officer status have imposed the

incrimination of facts, which under the old penal code were outside the criminal area, such as misuse of office for sexual favors or usurping the function. In conclusion, the quality of public officer of the active subject of an offense distinctly triggers either criminalizing offenses committed by him or framing in an aggravated offense. The legislature sought sanctioning of violations of official duties committed by public officers, considering that this is undermining the prestige of the institution in which they operate, but also damage the interests of individuals, and their confidence in the proper conduct of duties by officials.

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