CORRUPTION AND REGULATION OF ITS LEGAL FRAMEWORK IN OUR COUNTRY

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Abstract: For Romanian criminal justice system, corruption is a normative concept designating priority infringement or illegal and immoral transgression of the rules on duties of public officials, businesses or persons performing various financial and banking operations.
Given this broad sense, we can identify the criminal law, right from its beginning to the present, a number of incriminations that cell as a common denominator, namely material advantage. The term corruption to mean material advantage was introduced in Romanian legislation, with the Criminal Code, which entered into force on January 1, 1969, and resumed in the Law 83/21 July 1992 on urgent procedure prosecution and trial for some corruption offenses. In order to improve the legal framework was adopted the Law no. 78/2000 on preventing, discovering and sanctioning corruption shows that offenses of corruption and similar offenses of corruption offenses and offenses directly related to corruption offenses.

Keywords: public office, public office, incompatibility, conflict of interest.

For the Romanian criminal law system, corruption is a priority normative concept that designates the illegal and immoral violation of the norms that refer to the obligations of the public clerk, economic agents or people that perform different financial or bank operations.

Starting from this generic meaning, we can identify in the criminal legislation, from its beginning until present, a series of incriminations that have as purpose a common denominator, respectively the material advantage. The term of corruption, with the meaning of material advantage, has been introduced in the Romanian legislation together with the Criminal Code, enforced on the 1st of January 1969, and restated in Law 83/21st of July 1992 regarding the urgent procedure of tracking and trial for some corruption infractions. In order to improve the legal frame, Law no. 78/2000 has been adopted, to prevent, discover and punish the corruption[1], showing which are the corruption infractions, the infractions associated to the corruption infractions and the infractions directly related to the corruption infractions.

In 2012, the National Anti-Corruption Directorate has been founded through the Emergency Ordinance no. 43/2002[2], by reorganizing the National Anti-Corruption Prosecution Office, as a structure with legal personality, within the Prosecutor's Office attached to the High Court of Cassation and Justice

Also, some important step towards the harmonization of the Romanian legislation with the requirements of the European Union were: the Law no. 161 from the 19th of April

[1] Law 78/2000 for the prevention, discovery and punishment of the corruption, published in the Official Monitor no. 219 from the 18th of May 2000, with subsequent modifications and addition
[2] Emergency Ordinance no. 43/2002, regarding the National Anti-Corruption Directorate, published in the Official Monitor no.244 from 11th of April 2002.

2003[3] regarding certain measures to ensure the transparency in the exercise of public dignities, public functions and in the business environment and the Emergency Ordinance no. 24 /21.04.2004[4] regarding the increase of the transparency in the exercise of public dignities and public functions, as well as the intensification of the anti-corruption measures, which modified and completed Law no. 115/1996[5] for the declaration and control of the assets of the officials, magistrates, public clerks and certain people with managing positions and the Emergency Ordinance 43/2002 regarding the National Anti-Corruption Directorate.

We have to mention that by act of corruption we mean any act by which a person tries or succeeds to determine a clerk found in the exercise of work to perform an act that comes against the law or his work duties or to favor in any way the people involved, in exchange for certain material benefits or undue advantages. Subsequently, it is fully justified to enlarge the range of acts incriminated within this category of infractions, in close connection to the transparency of the economic activity and the diversification of the manifestations.

Seen as a real scourge that tends to destroy the basis of the fundamental institutions of the rule of law, corruption, with deep international affectations, is a phenomenon that worries both the governments and the public opinion from the entire world.

Thus, in a world confronting with different and complex issues, the corruption activities – including obtaining money by illegal ways – are more and more frequent. The history of the human society shows that crime and corruption, under their different manifestations, existed and happened under different intensities, from the oldest times. Corruption, as a phenomenon, has been present since the ancient times, being a seriously grave behavior, but at the same time spread in the whole world.

In Romania, new forms of corruption appeared and developed, specific to the transition to the market economy, manifested by different means, like: illegal transfers of money and goods, gradual degradation of the public patrimony, fraudulent bankruptcy, taking important economic goods and values, belonging to the national cultural patrimony out of the country illegally, etc.

At present, the corruption infraction and the work crimes are provided in the *Criminal Code, Title V, chapters I and II* („Corruption Infractions" and „Work Crimes")

These crimes, as shown by their denomination, disturb certain public activities or law-regulated activities. These crimes, although numerous and having a huge variety, have been included in a unique title, because they have a common characteristic – that by performing them, the social relations of the same nature are disturbed, relations regarding the work activity or the established regime for certain activities regulated by the law.

The Criminal Law incriminates, under the same title, the following acts: bribery (offering and accepting money), influence traffic, purchasing influence, acts performed by the members of the arbitrary instances or related to them; acts performed by the foreign clerks or

[3] Law no. 161 from 19th of April 2003, regarding certain measures to ensure the transparency in the exercise of public dignities, public functions and in the business environment. (Modified by O.U.G. no. 40/2003, O.U.G. no. 77/2003, O.U.G. no. 92/2004, Law no. 171/2004, Law no. 96/2006, O.U.G. no. 31/2006, Law no. 251/2006 ,Ordinance no. 2/2006, O.U.G. no. 119/2006, Law no. 144/2007, Law no. 359/2004, O.U.G. no. 14/2005, Law no. 330/2009, Law no. 284/2010, O.U.G. no. 37/2011) published in the Official Monitor no.279 from 21st of April 2003.

[4] Emergency Ordinance no. 24/2004 regarding the increase of the transparency in the exercise of public dignities and public functions, as well as the intensification of the anti-corruption measures, published in the Official Monitor no.365 from 27th of April 2004.

[5] Law no. 115/1996[5] for the declaration and control of the assets of the officials, magistrates, public clerks and certain people with managing positions, published in the Official Monitor no.263 from 28th of October 1996.

about them; dilapidation; abusive behavior; abuse at work; negligence at work; the conflict of interests; embezzlement, etc.

By the Law no.161/2003[6] regarding several measures to ensure the transparency in the exercise of the public dignities, public functions and in the business environment, the prevention and the punishment of the corruption are included in one of the most modern regulatory systems of the regime of the incompatibility and the conflict of interests within the European countries.

Regarding the executive, the Law 161/2003 amends Law 115/1999[7] concerning the ministerial responsibility, allowing each citizen to address to the Prime Minister, the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice or the Chief Prosecutor of the National Anticorruption Directorate, if he is aware of any criminal act performed by the members of the Government in the exercise of their function, with a view to refer them to the President of Romania. The latter decides upon the report presented by the Special Commission of Investigation and orders the communication of the resolution to the mass-media.

This amendment improves the access of the citizens to the fight against corruption and stimulates their participation to unveil the eventual acts of corruption. Especially, it gives the civil society, mass-media, the capability to get involved effectively in the fight against the corruption acts and the people involved.

At the same time, *Law 161/2003 modified Law 78/2000 for the prevention, discovery and punishment of the corruption acts*, by including new corruption infractions directed to the European funds, regarding especially their improper usage.

On the other side, the law extends the jurisdiction of the corruption acts to managers, directors, auditors, controllers, administrators to any state or privately owned company, to the Romanian officials that perform their activities in international organizations, in Romania or abroad, as well as to the foreign clerks that perform their activity in Romania. Thus, the law extends the concept of corruption to certain clerks from the private domain, according to the international practice.

Law 161/2003 brings important amendments to Law 115/1996 for the declaration and the control of the assets of officials, magistrates, people with managing and control positions and the public clerks, respectively it renders mandatory the publication of the declarations of assets of the government members on the website of the respective institution or in the Official Monitor, Part III. Also, the conclusions of the Control Commission, after the investigations, or after case, the final decisions of the instances in cases of unjustified differences of assets, are published in the Official Monitor, Part III.

This measure has the purpose to ensure a mandatory transparency of the assets of the officials, which will enable a better information of the public regarding the people leading or representing them, so an empowering of the citizens in the relationship with the state and its representatives, under the obvious condition that the latter use this right properly.

The initial form of the law was lacking several elements, as it required the declaration of the deposits or the receivables surpassing 10.000 euros. It was modified in a positive way

[6] Law no. 161/2003 regarding several measures to ensure the transparency in the exercise of the public dignities, public functions and in the business environment, the prevention and the punishment of the corruption (Modified by O.U.G. no. 40/2003, O.U.G. no. 77/2003, O.U.G. no. 92/2004, Law no. 171/2004, Law no. 96/2006, O.U.G. no. 31/2006, Law no. 251/2006 ,Ordinance no. 2/2006, O.U.G. no. 119/2006, Law no. 144/2007, Law no. 359/2004, O.U.G. no. 14/2005, Law no. 330/2009, Law no. 284/2010, O.U.G. no. 37/2011)

[7] Law 115/1999 regarding the ministerial responsibility, republished in 2007, published in the Official Monitor Part I no. 200 from 23rd of March 2007.

by the Emergency Ordinance no.40 from 2003[8] which modifies the regulation referring to the quantum, and thus obliging the Parliament members to declare „the quantum of deposits and foreign currency or national currency accounts, in the country or abroad, whose total value surpasses the equivalent of 10.000 euros"

Regarding the *conflict of interests* for the public clerks, we need to highlight the following aspects:

The definition of the legal concept of conflict of interests is limited or incomplete, because it is reduced only to the material aspects that could affect the clerk or official's decision. However, there are also personal interests of a non-material nature that could affect the objectiveness of his decision, which will not enter the „conflict of interests" category. Also, law limits itself to the immediate interests of the official or the clerk, overlooking the interests of his relatives. The definition was thus limiting, both from the quality and quantity point of view. From the quantity perspective, it does not cover the case when relatives of people close to the clerk could have interests related to his public activity and thus, could determine an alteration of the public decisions, according to their purposes. Form the quality perspective, the definition does not include the non-material interests of the clerk, which can also determine the public decisions making.

Regarding the eventual conflicts of interests of the Government members, or other members of the local and central administration, the law gives the right to any citizen to notify the Prime Minister of any such situation. Subsequently, the citizen will receive a written notification about the resolution of the complaint regarding the existence of a conflict of interests within the Government or the central or local administration.

According to art. 72 from the law, the members of the Government, state secretaries and sub-secretaries, prefects and sub-prefects are required to refrain from issuing administrative acts or concluding acts or even take part to a decision in exercising the public authority function, that bring them, their spouse or first degree relatives material advantages

The provision does not totally follow the recommendation of the European Council (2000) because it stops the incompatibility regarding the issue of administrative acts or conclusion of legal acts to first degree relatives, while the aforementioned European provision refers to family members in general.

Hence, second degree relatives are not excluded from the category of persons in whose advantage certain administrative acts or contracts could be issued or concluded, although they could have a major influence on the respective clerk.

The issue of normative acts is an exception from this rule[9].

Apparently, the exception avoids the situation when a clerk or an official cannot adopt certain normative acts due to the incompatibility generated by the inclusion of his relatives in the category of subjects of that law, and who could possibly benefit from its provisions. However, the law omits the situations when the official who has the authority to issue normative acts avails himself from the exception only in the situation when he or a close person has an advantage from it. Hence, the theory generic purpose of the law would submit itself to certain private interests, damaging the law's reason to exist.

Thus, the logical question to ask from this mix between rule and exception is: which public interest is more important, the one for which the exception was enabled or the one who owns the rule? The law does not clarify such hypothetical situation and does not find it

[8] The Emergency Ordinance no 40/2003 for the modification of Law no. 161/2003 regarding several measures to ensure the transparency in the exercise of the public dignities, public functions and in the business environment, the prevention and punishment of corruption, published in the Official Monitor no. 378 from 2nd of June 2003.

[9] Art.72 align.2 from Law no.161/2003.

necessary to ask imperatively a required transparency of the situations that call the implementation of the exception.

There are no provisions regarding the random or systematic monitoring of the eventual conflicts of interests. The control procedure is triggered only based on a notification from a third party.

The situation is similar to the one regarding the monitoring process of the truthfulness of the declarations of assets.

An important provision is the one included in art. 75[10], which gives the right to any person that considers himself a victim in a right or legitimate interest case to address to the court, duet to the existence of a conflict of interests.

This right will give the citizen the power to fight against the situation of abuse from the administration, under the condition to be sufficiently informed about this and to act according to his right.

Regarding the incompatibility, the members of the government, secretaries and sub-secretaries are incompatible with any public or private positions, except the one of member of the Parliament. However, the law provides an exception (art. 82 align. 2) by which the Government can approve their participation as state representatives in the general assembly of the stakeholders or as members in the administrative council of the autonomous administrations, national companies or societies, public institutions or commercial societies, including the banks or other credit institutions, insurance and financial societies, in the cases when a public interest imposes it. Going over the unclear reasons of the implementation of this exception, what we need to mention is the fact that this exception is enabled without guaranties of transparency about its implementation. Thus, it would have been necessary to stipulate very clearly the requirement to make these situations and the reasons behind them public.

The prefects, sub-prefects must abide by the same incompatibility provisions as the members of the Government aforementioned.

All the officials must declare – in the moment when take over the public function – that they respect the incompatibility provisions.

In conclusion, regarding the executive, Law 161/2003 – despite bringing obvious improvements to the previous frame – contains many omissions and unclear provisions, which create room for corruption. For these reasons, the „Executive" pylon presents itself as a partially unprotected entity from the risks of corruption, especially to high and very high level.

Regarding the Justice, the law details the categories of incompatibilities addressed to the magistrates, adding a bit of precision compared to the prior regulations, provided in Law 92/1992[11]. Thus, the magistrates are forbidden to[12] :

• perform arbitrary activities in civil, commercial or other litigations;

• have the position of associate, member in the managing bodies, administration or control of civil societies, commercial societies, including banks or other credit institutions, insurance or financial societies, national companies, national societies or autonomous administrations;

• perform commercial activities directly or through other people;

• be a member of an economic interest group.

[10] Art.75 from Law no.161/2003.

[11]Law no.92/1992 for the judicial organization, republished in the Official Monitor no.259 from 30th of September 1997.

[12] Art.102 from Law no. 161/2003.

The detailing of the magistrates' incompatibilities represents a positive topic of this regulation, although such incompatibilities were generically provided in the old legislation. Moreover, they were not considered an issue in the reports of the European Commission.

The law expressly stipulates[13] the obligation of the magistrates of not subordinating to the purposes and political ideologies, which was only implied in the old law.

At the same time, the obligation of the magistrates is imposed of reporting any breach in the political or economic act of justice, by a natural or legal entity or a group of persons[14].

These two requirements, together with disciplinary sanctions for failing to complying with them, are an important step towards ensuring the independence of the magistrates' decisions. However, it is worth noticing the attempt to ensure the independence of the magistrates by taking them from under the guardianship of the executive, which had been requested for years by the progress reports of the European Commission. This can only be achieved through a fundamental law change, which is already projected and which will modify the judges' assignment, promotion, sanction and dismissal procedures.

On the other side, the law improved the necessary legal frame for the prevention and control of the corruption, and the harmonization of the national legislation with the provisions of the Criminal Convention regarding corruption of the European Council, ratified by Romania by Law no. 27/2002 and the Convention regarding the protection of the financial interests if the European Communities and its additional protocols, issues based on article K. 3 from the European Union Treaty.

The law includes dispositions concerning the incrimination of the „influence buyer", the enlargement of the range of people that perform corruption acts, infractions against the financial interests of the European Communities, the increase of the criminal liability limitation periods for the infractions of corruption and against the financial interests of the European Communities and the mandatory foundation of the complete commissions specialized in judging the facts provided in Law no. 78/2000, made out of two judges.

As a conclusion, although Law 161/2003 brings positive modifications concerning the legislature, especially the transparency, it is still marked by omissions and clear, hard to explain exceptions, which does not resolve the issue of the corruption risk within it. Apparently, the law is designed to favor the situation of the Parliament members. Subsequently, the legislature remains, even after this law was enforced, an integrity pylon with an unstable structure.

Corruption must not be regarded as a unique, separate phenomenon, it is in close connection with a series of destructive mechanisms of political, economic, normative and ethic disorder, thus proving itself to be a defiance towards the society.

The analysis of the phenomenon of corruption must be performed from multiple perspectives, not only juridical, but also criminological, sociological and psychological. The corruption appears to be „the behavior that derives from the normal duties of a public function or violates laws against the exercise of certain types of influence: bribery, nepotism, fraudulent misuse of funds".

The corruption begins by hiding or altering the reality in order to obtain results which cannot be obtained by promoting the truth and continues with hiring and promoting relatives, friends, including politically close people.

[13] Art.103 from Law no. 161/2003.
[14] Art.107 from Law no.161/2003.

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