

INSIGHTS AND REGULATORY CORRELATION BETWEEN CORRUPTION OFFENSES SPECIFIED IN THE NEW CRIMINAL CODE AND THAT CONTAINED IN LAW NO. 78/2000 ON PREVENTING, DETECTING AND PUNISHING CORRUPTION. SOME CONSTITUTIONAL REMARKS

**Silviu Gabriel Barbu, Assoc. Prof., PhD, "Transilvania" University of Braşov";
Vasile Coman, Judge – Court Pucioasa; Adelina Maria Ciobanu, Legal Adviser,
Senior Adviser DLAF Romanian Government**

Abstract: The paper aims to make a comparative analysis between the corruption offenses referred to in the Criminal Code and the similar regulation contained in the Special Law no. 78/2000 on the prevention, detection and sanctioning of corruption, with emphasis on practical aspects of the national courts and of the Constitutional Court of Romania.

Corruption has implications in all the arteries of the state structure, it influences the natural evolution of things, and in essence means abusive use to the advantage of the power itself, through the patrimonial or non-patrimonial advantages to or by those who are invested with the authority to make decisions with implications Social, economic or legal issues with respect to other persons.

In its capacity as a subject endowed with the authority to prosecute persons committing such acts, the State, through its specialized bodies, must have a prompt, professional and effective response to this phenomenon and in defense of the social value of integrity, In all cases, respecting the rights and fundamental freedoms of persons involved in the process.

The Constitutional Court drew closer to the requirements of the fundamental law certain norms contained in the legislation that is the subject of this analysis. Some decisions are briefly reviewed in this study.

Keywords: constitutional court, constitutionality, corruption, law, crime, judicial organs, integrity

I. *Introduction.* Corruption is at the forefront of threats to the rule of law, social justice and justice in any state, with multiple practical forms of manifestation, and in essence means abusive and personal advantage of power. By the nature of the power exercised by the perpetrator, there is a distinction between political, economic, social corruption, etc.

An act of corruption is often - but not necessarily - an illegal act because it is based on a violation of the moral and legal norms governing the exercise of a public office. In everyday life, however, there may be encountered situations between the legal and illegal - gray areas, leading to the emergence of divergent solutions in the practice of the judiciary, amid the insufficient regulation of the constitutive elements of the crimes of corruption, especially regarding Their objective sides. All forms of corruption are generally based on a need for the corrupt or corrupt act, needing to be satisfied faster, or effectively circumventing the stages and conditions accepted by a corrupt certain community for all who are part of it.

According to statistics and studies conducted by Transparency International, corruption is a global phenomenon that remains localized - including in 2015 - mainly in the public sector¹, eroding the principles of efficient administration and having devastating effects on the market economy and the level of poverty. The most significant acts of corruption consist mainly in the illicit transfer of assets from the public patrimony to the private patrimony, a transfer usually carried out with the complicity of some civil servants.

Representing a complex social problem, chosen as a way of manifestation, social consequences and ways of settlement, interests both public opinion and the institutionalized system of social control, corruption is conceived by honest social segments as a particularly dangerous phenomenon, capable of undermining the structures of power, effective implementation of economic reform, raising the standard of living of the population and building the rule of law².

Aware of the risks and particularly serious consequences of corruption on general and regional socio-economic development, the states of the world, individually or together, are trying to identify the most effective means of preventing and combating, first and foremost in the legislative framework. The success of the fight against corruption, however, inevitably depends on the political will to reform.

In Romania, the legal framework offers both administrative and criminal means that can be effectively used in preventing and combating corruption. In the internal legislative framework, the most important normative acts regulating the acts of corruption are represented by the Criminal Code and Law no. 78/2000 on the prevention, detection and sanctioning of acts of corruption³, the special framework law in this field.

II. *Limitations and correlations in the internal regulation of corruption offenses.* As a result of the partial reorganization of the criminal legislation, starting with the recent entry into force of the new Criminal Code of Romania⁴, it can be observed that art. 289-229 C.pen. criminalizes - in the mirror - the corruption offenses - for the first time under this name, namely active bribery (Article 289) and pasive bribery (Article 290), namely the traffic of influence (Article 291) and the buying of influence (Article 292), with particular application to members of the arbitration courts (Article 293) and to foreign officials (Article 294), or in relation to these two categories of subjects.

The structure of corruption offenses included in the new Criminal Code considered the analysis of the legislation of the European states, but also the most important international instruments in the matter: The Criminal Law Convention on Corruption, adopted in Strasbourg on 27 January 1999, ratified by Romania by Law no. 27/2002⁵, the Additional Protocol to the Council of Europe Criminal Convention on Corruption, ratified by Romania through Law no. 260/2004⁶, Framework Decision no. 2003/568 / JHA of 22 July 2003 on combating corruption in the private sector⁷.

The regulation of the corruption offenses included in the new Criminal Code is clearly superior to that contained in the old Criminal Code, which included the offenses of corruption in chapter I "Offenses of Service or in connection with the service", Title VI on "Offenses affecting activities of interest Public or other activities regulated by law. Under this heading, offenses of bribery (Article 254), bribery (Article 255), the receipt of undue benefits (Article 256), trafficking of influence (Article 257), and acts committed by

¹ See, the corruption perception index for the year 2015, worldwide, on <http://www.transparency.org/epi2015> . The study highlights the fact that corruption and conflict go hand in hand, a finding that explains why this latter phenomenon is constantly present internally and internationally.

² See, A. Boroi, M. Gorunescu, I. A. Barbu, *Criminal Law of Business*, 5th Edition, Rev., C.H. Beck, Bucharest, 2011, p. 431.

³ Published in the Official Gazette no. 510 of 24 July 2009.

⁴ Law no. 286/2009, on the Criminal Code, published in the Official Gazette no. 510 of 24 July 2009 and entered into force on 1 February 2014.

⁵ Published in the Official Gazette no. 65 of 30 January 2002.

⁶ Published in the Official Gazette no. 612 of July 7, 2004.

⁷ Published in J.O.U., L Series, no. 192 of 31 July 2003.

others (Article 258), offenses which, in the absence of an express name in code, doctrine and judicial practice, were considered to be "corruption offenses".

Unlike the Penal Code in force which, in the matter under consideration, regulates exclusively corruption offenses, in art. 5 of the Special Law no. 78/2000 regarding the prevention, detection and sanctioning of corruption acts, - criminal law framework on corruption -⁸, three categories of corruption offenses are regulated, stipulating that "(1) For the purposes of the present law, corruption offenses are the offenses Provided in art. 289-292 of the Criminal Code, including when committed by persons referred to in art. 308 of the Criminal Code. (2) For the purposes of the present law, the offenses referred to in art. 10-13. (3) The provisions of the present law are also applicable to offenses against the financial interests of the European Union provided under art. 18 ^ 1-18 ^ 5, the sanctioning of which ensures the protection of the European Union's funds and resources. It is worth noting that through Art. 79 point 10 of the Law no. 187/2012⁹ for the implementation of Law no. 286/2009 on the Criminal Code, art. 17 and 18 of Law no. 78/2000, which criminalized another category of offenses, namely offenses directly related to corruption offenses.

In the analysis of the ratio between the criminalization of the crimes of corruption contained in the Criminal Code and the one contained in the Special Law, we first notice that in art. 6 and 7 of Law no. 78/2000 are currently criminalized two corruption offenses, the first of them taking the criminal sanction and the objective and subjective side of the corruption offenses in the Criminal Code in its constitutive content, plus the special quality of the active subject established in art. 1 of the Law, and the one contained in art. 7 sanction the acts of bribery and trafficking of influence committed by certain persons expressly stipulated in the norm.

A. Article 6 of Law no. 78/2000, as amended by art. 79 point 2 of the Law no. 187/2012, by a reference rule provides that "The offenses of active bribery provided for in art. 289 of the Criminal Code, passive bribery, provided in art. 290 of the Criminal Code, trafficking of influence, provided in art. 291 of the Penal Code, and purchase of influence, provided in art. 292 of the Criminal Code, shall be punished according to the provisions of those laws. The provisions of art. 308 of the Penal Code is applied accordingly. In addition, in order for an offense of the four limitative cases to fall within the scope of this law, it is cumulative that the participant in the offense be a person who performs duties or functions from those expressly provided in art. 1 of the Law no. 78/2000, respectively: a) exercising a public office, regardless of the way they were invested, within public authorities or public institutions; b) who, on a permanent or temporary basis, fulfill, according to the law, a function or task, insofar as they participate in the decision-making process or may influence them in the public services to the autonomous regies, companies, national companies, national societies, cooperative units Or other economic agents; c) exercising control duties, according to the law; d) which provides specialized assistance to the units referred to in let. (A) and (b), to the extent that they participate in, or influence, decision-making; (e) who, irrespective of their quality, carry out, control or provide specialist assistance in so far as they are involved in, or influence, decision-making on: transactions involving capital movements, bank operations, foreign exchange or Credit, placement, scholarships, insurance, mutual placement or bank accounts and assimilated accounts, domestic and international commercial transactions; f) who hold a leading position in a political party or political party, in a trade union, in an employers' organization or in a non-profit-making association or foundation; g) other natural persons than those referred to in let. A) -f), under the conditions provided by the law.

As can be seen, the analysis of this offense is necessarily related to the separate analysis of each of the four corruption offenses contained in the text and regulated in the Criminal Code, context in which it is

⁸ This qualification of the Law no. 78/2000 was expressly made by the High Court in its case-law, see Decision no. 328 of January 20, 2004 (file No. 5288/2004), quoted in Dorin Ciucan, Law no. 78/2000 regarding the prevention, detection and sanctioning of corruption acts. Comments and jurisprudence, 2nd edition, reviewed and added, The Legal Universe Publishing House, Bucharest, 2015, p. 144.

⁹ Published in the Official Gazette no. 757 of 12 November 2012.

necessary to summarize the main legislative changes brought by the new criminal law , with emphasis on the delimitations and common aspects of the two normative acts.

Thus, as regards the offense of *active bribery*, it is defined in art. 289 C. Pen., as "the act of a civil servant who, directly or indirectly, for himself or for another, claims or receives money or other benefits that do not adhere to or accept the promise of such benefits in connection with the fulfillment, non-fulfillment , expediting or delaying the performance of an act falling within his / her duties or in connection with the performance of an act contrary to these duties shall be punished by imprisonment from 3 to 10 years and the prohibition of the exercise of the right to take up a public position or to exercise the profession or the activity in the execution of which he committed the act, unlike the previous regulation (Article 254 of the previous Penal Code) which defines the offense in relation to purpose [„(...) in order to fulfill, not to perform or to delay the accomplishment of a Act on his or her duties or to act contrary to these duties ”]. The form proposed in the new Criminal Code is broader, covering all situations in which a person takes a bribe, and for the use of the offense, the element "time" - the moment when the bribe is given, as long as the act takes place in connection with the fulfillment, the non-fulfillment, expediting or delaying the performance of an act falling within the official's duties or in connection with performing an act contrary to these duties¹⁰. The amendment was made to allow for the previous distinction made by the legislator between bribery and the receipt of undue advantage (Article 256 of the Penal Code), a distinction which created difficulties in the evidentiary plane when the cartel took place before the act By the clerk, but the goods later resolved. In other words, art. 289 C.pen. Contains the regulation contained in art. 254 C.pen. (Bribery) and the one existing in art. 256 C.pen. (The receipt of undue benefits), and it is not about the decriminalization of the latter offense.

On the other hand, for the predictability of the norm, I believe that the legislator, inspired by the new text, introduces as a variant of the offense the act of "speeding up the fulfillment of an act" that is included in the official's duties, an unincriminated way¹¹ , and the act committed by an official with control duties (referred to in article 254 paragraph 2 of the Penal Code) is no longer distinctly incriminated.

At the same time, the material element of the type of offense, as regulated in para. 1 of art. 289 of the Penal Code, differs from the old regulation by excluding the criminalization of the act in the variant of "not failing to promise". However, the person to whom it is offered will commit the bribery offense if acceptance is tacit, as the text penalizes any kind of acceptance of a sum of money or other benefits, express or tacit.

Regarding the type of offense covered by Art. 289 par. 1 C.pen., it must be added that the new form of the text expressly states that the receipt of undue advantage may also be made for the benefit of a person other than the billed officer - "receives (...) for himself or for another" hypothesis that was not explicitly regulated In the previous law.

Regarding the assimilated variant of the offense in art. 289 par. 2 C. pen., we notice that the bribe is punished when committed by a civil servant assimilated to the civil servant, as defined in art. 175 par. 2 C.pen. As a person exercising a public interest service for which he has been invested by the public authorities or which is under their control or supervision over the performance of that public service. In this case, the act is an offense but only if it is committed in connection with the failure, delay in the performance of an act regarding its legal duties or in connection with an act contrary to these duties. Alin. 2 of article thus reduces the scope of the manner in which the act committed by one of the persons provided in art.175 par. 2 is incriminated, and no provision is made for the manner in which it has been committed in connection with the fulfillment and the urgency of the accomplishment of an act falling within its duties. In the doctrine it

¹⁰ See V. Dobrinoiu, M. Gorunescu, M. A Hotca and others, *The New Criminal Code commented. Special Edition*, 2nd edition, reviewed and added, Universul Juridic Publishing House, Bucharest, 2014, p. 491.

¹¹ This new motivation for the enforcement act, namely "speeding up the fulfillment of an official's duty to serve, was considered critical because it is unnecessary, while, logically, urgency means and implies the fulfillment of a service task, motivation included in The old regulation and the current regulation. In this regard, S. Bogdan, D.A. Doris, G. Zlati, *The New Criminal Code. The special part. Analyzes, explanations, comments*, The Universul Juridic Publishing House, Bucharest, 2014, p. 416.

was shown that the reason would be that the persons provided in art. 175 par. 2 C.pen. (for example, the public notary or the bailiff), due to their very special status, may charge an extra cost for carrying out an act that comes within their job duties as a matter of urgency, without thereby disturbing the confidence in the honest exercise of of service duties by the respective civil servant and, in return for a consideration (fee, etc.) that could not be of criminal relevance, puts their knowledge, experience, skills, etc. at the disposal of the person who uses their services¹². The High Court included, in this category of assimilated civil servant, the technical forensic expert because the drawing up of expertise to find out the truth and to settle the cases before the judiciary is a service of public interest for which it was invested by a public authority – the Ministry Justice¹³.

Also, art. 308 C.pen. regulates a mitigated variant of the offense by penalizing less severely (special penalty limits are reduced by a third) bribe taking if committed by a person other than art. 175 C.Pen., respectively by or in connection with the persons exercising, permanently or temporarily, with or without remuneration, an assignment of any kind in the service of a natural person as provided in art. 175 par. 2 C.pen., or within any legal person. However, it should be noted that by the Constitutional Court Decision no. 603 of october 6¹⁴, 2015, the exception of unconstitutionality regarding the provisions of art. 308 par. 1 C. pen., Finding that the phrase "or within any legal person" referring to art. 301 of the Criminal Code is unconstitutional, since the criminalization of the conflict of interest in the private environment is an unjustified violation of the economic freedom and the right to work of persons who permanently or temporarily, with or without remuneration, have a commission of any kind within to any legal person, fundamental rights provided for in article 41 par. 1 and art. 45 of the Constitution.

In the activity of adapting the punishments for the offenses incriminated in the special legislation according to the sanctioning logic of the new Criminal Code, the legislator reduced the maximum limit of the penalty for the type of offense from 15 years to 10 years and the complementary punishment that can be applied - for a period of maximum 5 years according to art. 66 par. 1 sentence I C. Pen., is merely the prohibition of exercising the right to take up a public position or to exercise the profession or activity in the execution of which he committed the deed and not any of the complementary punishments provided by art. 66 par. 1 C.pen.

In the new regulation of the offense of bribery, by Law no. 187/2012 implementing the new Criminal Code, some of the aggravated variants provided for in the previous regulation in Law no. 78/2000, while others have been reformulated in the law or transposed into the Criminal Code. Concurrently with the repeal of the similar provisions of art. 8¹ and 8² of the special law, the act of taking bribes committed by foreign officials was regulated in art. 294 C. Pen., which extends the application of the offense to another category of persons, namely jurors from a foreign court. The provisions of art. 9 of the Law no. 78/2000, which criminalize the acts of corruption governed by this law, committed in the interest of a criminal organization, association or group or of one of its members, or to influence negotiations of international commercial transactions or international exchanges or investments.

The offense of *passive bribery* is regulated by art. 290 C.pen. in a version almost identical to that contained in the previous Penal Code, provided in par. 1 that "the promise, offering or giving of money or other benefits, under the conditions shown in art. 289, shall be punished by imprisonment from 2 to 7 years ". Due to the fact that the incriminated actions relate to the conditions for committing the bribery offense, the above mentioned modifications are in principle also valid in the comparative analysis of the bribe giving, with the following additional observations in the case of the offending offense. As a consequence of the elimination of the criterion "time" from the content of the offense, the new regulation also criminalizes the

¹² See V. Dobrinoiu, M. Gorunescu, M. A Hotca and others, *op. cit.*, p. 492.

¹³ See I.C.CJ, The Complaints Committee, Decision no. 20/2014, file no. 22/1/2014 / HP / P (www.scj.ro), published in the Official Gazette no. 766 of October 22, 2014.

¹⁴ Published in the Official Gazette no. 845 of november 13, 2015.

act of the one who offers the public servant after the act, as a sign of thanks for the work done, an act that was not incriminated in the previous regulation; as in the case of bribery, the legislator stipulates correlatively and explicitly that the giving of undue advantage may also be made to the benefit of a person other than the billed officer, a hypothesis that was not explicitly regulated in the previous Criminal Code.

A change to the old regulation also occurs with regard to the provision for the refund of the bullion if the bribe denounces the deed. If in the Old Code the benefits were returned in case of denunciation of the deed, no matter the moment they were given, in art. 290 par. 4 C.pen. It is stipulated that the money, valuables or any other given goods are returned to the person who gave them, if they were given after the denunciation. If the goods were given prior to the denunciation, the denouncer benefits from the cause of non-punishment, but not from the provision for the return of the goods, which will be confiscated in the latter case¹⁵.

With regard to the offense of *traffic of influence*, the current regulation contained in art. 291 par. 1 C.pen. manages to correlate with the offense of bribery regarding the behavior of the civil servant in relation to the exercise of his duties, expressly broadening the sphere of the influence of the trafficker of influence: to fulfill, not to fulfill, to urge or to delay the fulfillment of an act falling within the duties service or act contrary to these duties. Unlike the old regulation, the new Code brings an important change in terms of the constitutive content of the offense, by adding a new conditionality. Thus, in the new regulation, the deed will be typical if the trafficker has or influences or believes that he has an influence on a civil servant and promises to cause the civil servant to conduct the conduct requested by the buyer of influence, correlating thus the similar motivation already exists in the content of the crime of buying influence. It was considered that this reformulation of the objective side is related to the recent experience of the Romanian judiciary in the sense that any claim of influence, even without the minimal appearance of a real act of corruption, has been qualified as infighting. By qualifying trafficking in influence as a preparatory act of a "proper act of corruption, the same authors point out that through this amendment the legislator wanted to point out that only the training act that is sufficiently close to harming social value should be penalized¹⁶.

Another change is that even in the case of influence traffic, the aggravated version of art. 9 of the Law no. 78/2000, and the sanctioning regime is milder in the new regulation, which, in fact, sanctions all corruption offenses (except for bribery) between the same special limits of the main punishment: prison from 2 to 7 years. In addition, the sanction is differentiated according to the quality of the person whose influence is trafficked: a civil servant or assimilated to him, or a person from art. 308 C.pen.

As regards the crime of *buying influence*, it is for the first time criminalized in the Criminal Code, in art. 292 par. 1 C. pen., which states that "the promise, offering or giving of money or other benefits, for himself or for another, directly or indirectly, to a person who has influence or gives the impression that he has an influence on a civil servant, for to cause him to perform, not to perform, to urge or to delay the performance of an act falling within his duties or to act contrary to these duties, shall be punished by imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights". In order to avoid parallelism in regulation, the crime of buying influence was inspired by the lawmaker in the Special Part of the new Criminal Code, in a variant of criminalization similar to the one in the previous regulation, with the elements of differentiation shown in the crime analysis active bribery, passive bribery, and traffic of influence. The offense of acquiring influence was previously regulated in Art. 6 ind. 1 of the Law no. 78/2000, which provided that "the promise, offering or giving of money, gifts or other benefits, directly or indirectly, to a person who has the influence or gives the impression that he has an influence on an official, does not do an act falling within his / her job duties, he / she shall be punished by imprisonment from 2 to 10

¹⁵ In general, regarding the peculiarities of confiscation in the case of corruption offenses, see Gina Negruț, *Measure of confiscation in the case of corruption offenses*, Legal Universul Publishing House, Bucharest, 2014.

¹⁶ See, S. Bogdan, D.A. Doris, G. Zlati, *op. cit.*, P. 417.

years, which has been abrogated by art. 79 point 3 of the Law no. 187/2012 implementing the new Criminal Code.

By transposing the crime of buying influence where it was the place, respectively in the new Criminal Code, the inequities in confiscation existing in the previous special regulation will be removed, and Decision no. 59/2007 given by the High Court in an appeal in the interest of the law regarding the scope of the provisions of art. 61 par. 4 of the Law no. 78/2000 will no longer be topical. Thus, in the case of the special confiscation of the goods offered to buy the influence, in the case of denunciation of the deed before the notification of the judicial bodies, the provisions of art. 292 par. 2 and 3 of the Penal Code, in the sense that it will operate the cause of non-punishment of the perpetrator¹⁷, but the money, the values or other assets will be returned to the person who gave them only in the situation when they were given after the denunciation to the prosecution.

As regards the offense of *active bribery, or pasive bribery committed by or in connection with the members of the arbitration tribunal*, it is criminalized in art. 293 C. pen., which states that "the provisions of art. 289 and art. 290 shall also apply accordingly to persons who, on the basis of an arbitration agreement, are called upon to give a ruling on a dispute to be resolved by the parties to that agreement, regardless of whether the arbitration procedure is carried out under the law Romanian or on the basis of another law". From the wording of the law, it follows that the legislator has understood to leave out the crimes of trafficking and buying influence over these people. The text of art. 293 C.pen. is not a proper text of criminalization, but only a text that extends the application of bribery and bribery and to individuals involved in litigation by internal or international arbitration.

The acts of bribery and bribery committed by a member of an arbitration tribunal or in connection therewith were not incriminated in the previous Criminal Code, these provisions being introduced as a result of ratification by Romania through Law no. 260/2004¹⁸ of the Additional Protocol to the Council of Europe Criminal Convention on Corruption, adopted at Strassbourg on 15 May 2003.

A further clarification of this offense was made by art. 243 of Law no. 187/2012 implementing the new Criminal Code, provided that the provisions of art. 293 of the Criminal Code applies regardless of whether the members of the arbitration courts are romanian or foreign.

B. Art. 7 of the Law no. 78/2000 regulates a common aggravating form of passive bribery and trafficking offenses, providing that "*acts of bribery and trafficking of influence committed by a person who: a) perform a public dignity function; B) is a judge or prosecutor; c) is a criminal investigating authority or has the attributions of establishing or sanctioning contraventions; d) is one of the persons mentioned in art. 293 of the Criminal Code, shall be sanctioned with the punishment provided in art. 289 or 291 of the Criminal Code, the limits of which are increased by a third*". It is the second offense of corruption governed by this law, and the purpose of this incrimination is that because of the specific attributions of justice or their position within the state authorities, the acts committed by these categories of persons pose a greater social danger in report on the facts committed by other categories of civil servants. That is why this aggravated variant was reformulated and extended by Law no. 187/2012, the old regulation stipulating that the act of bribery is punished if it was committed by a person who, according to the law, has the attributions of finding or sanctioning contraventions or finding, prosecuting or judging the offenses¹⁹.

¹⁷ In order to encourage the denunciation of corruption, by art. 19 from O.U.G. No. 43 of April 4, 2002 on the National Anticorruption Department, a special cause of reduction of punishment was regulated, meaning that "the person who has committed one of the crimes assigned by this emergency ordinance within the competence of the National Anticorruption Directorate and denounces during the prosecution Facilitates the identification and prosecution of other persons who have committed such offenses *benefits from the halving of the limits of the punishment provided by the law.*"

¹⁸ Published in the Official Gazette no. 612 of July 7, 2004.

¹⁹ In the doctrine it was shown that, for reasons of consistency and coherence in regulation, this aggravated form could and should have been included in the new Criminal Code as a distinctly aligned art. 289 C.pen. It was considered to be

Although the text does not expressly provide for additional punishment for the prohibition of certain rights, the court may apply it in the conditions of art. 67 par. 1 Penal Code, respectively if the principal sentence established is the imprisonment or the fine and the court finds that, in view of the nature and gravity of the offense, the circumstances of the case and the person of the offender, this punishment is necessary.

Regarding the active subject of this offense, if in the case of the persons from lit. B) and c) of art. 7 the text is clear, it is necessary to specify the person exercising a function of public dignity, also used in art. 175 lit. b) thesis I C. Pen. In this respect, in art. 16 par. 3 of the Romanian Constitution stipulates that public, civil or military functions and dignities may be occupied, under the law, by persons having Romanian citizenship and domicile in the country. However, in the absence of a framework regulation for this category of persons occupying or hold public dignities, in doctrine²⁰, it was shown that this professional category should be considered in relation to the provisions of Law no. 284/2010 regarding the unitary salary of the staff paid out of public funds²¹. For the purpose of this normative act, a "public dignity function" means the public function which is dealt with by mandate obtained directly, through organized or indirect elections, by appointment, according to the law. The specialized literature distinguishes between public dignitaries elected according to the provisions of the Constitution, positions of public dignity appointed according to the law, public dignitary functions elected within the bodies of the local public authority, respectively functions assimilated to the functions of public dignity²².

By public function "of any nature", in the sense of art. 175 par. 1 lit. b) the second sentence of C. Pen., must be understood any public office, exercised under the law, in the service of specialized central public administration bodies (ministries, inspectorates, etc.), local public administration bodies (communal authorities, districts, prefectures, etc.) as well as in other public institutions or legal entities governed by public law²³. This category also includes auxiliary staff - whether special or not, operating in an entity of the mentioned (for example, specialized auxiliary personnel from the judiciary, military personnel, police officers, civil servants with special status in the penitentiary administration system). In this context, we mention that by Decision no. 26/2014²⁴ of the The Complaints Committee, the High Court of Cassation and Justice held that the doctor employed under a contract of employment in a hospital unit in the public health system has the status of civil servant in the sense of the provisions of art. 175 par. 1 lit. b) thesis II C.pen.

At the same time, the Constitutional Court has established that the scope of the notion of civil servant in criminal law is not equivalent to that of an official in administrative law. According to criminal law, the concepts of civil servant and official have a broader meaning than that of administrative law, due both to the nature of the social relations defended by the criminalization of socially dangerous acts and to the fact that the requirements of defending the act and promoting the interests of the community impose the best possible protection through the means of criminal law²⁵.

The Constitutional Court had the opportunity to pronounce several times through the exception of unconstitutionality on the provisions of Law no. 78/2000 regarding the prevention, detection and sanctioning of corruption acts as a whole, as well as, in particular, the provisions of art. 1, art. 6 and art. 7, but also other

impractical at least that the deed in the basic form be criminalized in the Criminal Code, where it has a maximum visibility and an aggravated form is created in a special law. It seems that the tradition before the new Criminal Code, of a "parallel" system of sanctioning corruption offenses (Criminal Code - Law No. 78/2000), could not be entirely abandoned. See, S. Bogdan, D.A. Doris, G. Zlati, *op. cit.*, p. 417.

²⁰ See, C. Duvac, *The Concept of Civil Servant in the Light of the New Criminal Code*, in Dreptul (magazine) no. 1/2011, pp. 104-105.

²¹ Published in the Official Gazette no. 877 of 28 December 2010.

²² Broadly see V. Dobrinoiu, M. Gorunescu, M. A Hotca and others, *The New Criminal Code commented. The general Part*, 2nd Edition, reviewed and added, Universul Juridic Publishing House, Bucharest, 2014, p. 800-801.

²³ See, C. Duvac, *op. cit.*, p. 109.

²⁴ Published in the Official Gazette, no. 24 of 13 January 2015.

²⁵ Decision of the Constitutional Court no. 2 of 15.01.2014, published in the Official Gazette, no. 71 of January 29, 2014.

texts in the law. In this respect, we recall Decision no. 1127 of September 13, 2011²⁶, by which the Court rejected as unfounded the objection of unconstitutionality of the provisions of Law no. 78/2000 regarding the prevention, detection and sanctioning of corruption acts as a whole, as well as, in particular, the provisions of art. 1, art. 6 and art. 7 par. 1 of the Law no. 78/2000, stating that the regulation that is the object of the exception does not constitute an incrimination by analogy, as wrongly argued by its authors, but a legal regulation of criminal liability through an explanatory legal norm that does not violate the provisions of art. 23 par. 12 of the fundamental law and art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Referring to Decision No. 1455 of November 4, 2010²⁷, rejecting an objection of unconstitutionality of the same provisions, the Court reiterates that the analogy, as a legal institution, is placed within the scope of law as an argument of interpretation rather than Of the legislative process. The use of this notion to characterize the rule laid down by the legislature leads to a contradiction in terms, since the analogy involves the absence of the rule and, consequently, the freedom recognized by a public authority - exceptionally and not in criminal matters - to establish itself, To resolve a case, taking as a way to another solution pronounced in another regulated framework. However, the contested legal provision expressly provides that the designated offenses are punishable according to the Criminal Code in which they are incriminated²⁸. On the same occasion, the Court has also held that the principle of the lawfulness of criminality and the lawfulness of the penalty require the provision of both the act and the punishment. From this perspective, considering the provisions of Law no. 78/2000, it can not be concluded that the law did not provide for the deed or punishment. Thus, the provisions criticized contain sufficient evidence to consider that they are "*foreseeable*"²⁹ and sufficiently clear in defining the deed and its illicit purpose.

The Court has also emphasized that the constitutional principle of equality has no significance for uniformity, with the possibility of introducing different legal rules for situations which are different if it is reasonably and objectively justified, and this is also one of the obligations, the positive procedural rules of the state in the view of the European Court³⁰. However, Law no. 78/2000 is a special regulation, derogating from the common law, which establishes measures for the prevention, discovery and sanctioning of corruption acts and applies to a category of persons clearly circumscribed by a lawmaker from the first article of the law. The different legal status of these persons, in view of the purpose pursued by the legislator by the provisions of Law no.78 / 2000, justifies the establishment of a different legal treatment. Thus, and since the provisions of the criticized law apply without privileges or discrimination in all situations involving persons as stated in Article 1 of the law, violation of the principle of equality of rights or the principle of uniqueness, impartiality and Equality of justice³¹.

²⁶ Published in the Official Gazette no. 808 of 16 November 2011. The same is the Decision no.202 of 10 February 2011, published in the Official Gazette of Romania, Part I, no.188 of 17 March 2011.

²⁷ Published in the Official Gazette of Romania, no. 23 of 11 January 2011.

²⁸ In the same sense, the Court has also ruled in other decisions regarding the objection of unconstitutionality of the provisions of art. 6 of the Law no.78 / 2000 on the prevention, detection and sanctioning of corruption, namely: Decision no. 1.007 of July 7, 2009, published in the Official Gazette of Romania, no. 547 from 06.08.2009, Decision no.48 of 24 January 2006, published in the Official Gazette of Romania, no.162 of 21 February 2006.

²⁹ In Decision no. 1455/2010, the Court states that the predictability and predictability of a rule presuppose that the addressee has a representation of such a quality by virtue of which it is bound to shape its conduct. Therefore, the fact that the legal provisions criticized apply to all persons exercising control powers, according to the law, has undoubtedly an unambiguous meaning, and the legislator is not obliged, in order to conspire the constitutional character, to make an exhaustive enumeration thereof. In the same vein, the Court also held in its Decision no. 234 of 19 february 2009, published in the Official Gazette no. 216 of 03.04.2009.

³⁰ For an analysis of the importance and limits of the positive obligations of the state in the case law of the European Court of Human Rights, see Nathanaël Olivier Pétermann, *Les obligations positives de l'Etat dans jurisprudence de la Cour européenne des droits de l'homme*, Stampfli Editions SA , Berna, 2014, pp. 145-195.

³¹ In the same vein, the Court also stated in its Decision no. 1.457, dated 4 November 2010, published in the Official Gazette no. 23 from 11.01.2011; Decision No. 361 of 24 April 2012, published in the Official Gazette no.371 of 31.05.2012.

In relation to the field of the official's duties and with regard to some of the corruption offenses and assimilated to them, some constitutional aspects, in the light of the Constitutional Court (*aka*, CCR) Decision no. 405/2016 (roughly similar reasoning also applies to the CCR Decision No 603/2015 on the offense of conflict of interest) were brilliantly highlighted by Professor Adrian Hotca in a recent legal study, in which he very surprisingly interpreted the main directions of interpretation³². Thus, the author points out that in the recitals of Decision no. 405/2016, the Constitutional Court held that "failure to perform or misconduct of an act must be considered only by reference to service duties expressly governed by primary law - laws and ordinances of the Government. This is because the adoption of secondary regulatory acts that come to detail the primary legislation is done only within the limits and according to the rules that they order. (...) Criminal illicit is the most serious form of violation of social values, and the consequences of criminal law enforcement are among the most serious, so the establishment of safeguards against arbitrariness by clear and predictable rules by the legislator is mandatory. Prohibited conduct must be imposed by the legislator even by law (understood as a formal act adopted by Parliament under Article 73 para. (1) of the Constitution, as well as a substantive law, issued by the Government, by delegation Legislative acts provided for in article 115 of the Constitution, respectively ordinances and emergency ordinances of the Government) can not possibly be deduced from judges' judgments, which could substitute the legal norms. In this respect, the constitutional litigation court held that in the Continental system the jurisprudence does not constitute a source of law so that the meaning of a rule can be clarified in that way, because in such a case the judge would become a legislator (Decision no. 23 of 20 January 2016, published in the Official Gazette of Romania, Part I, No. 240 of 31 March 2016, paragraph 16). (...) At present, any act or inaction of the person circumscribing the qualities required of the active subject, irrespective of the seriousness of the deed, may fall within the scope of the rule of incrimination. This finding leads the Court to have reservations in considering that this was the will of the legislator when he criticized the act of abuse in the service. This is all the more so since the Court finds that the legislator has identified and regulated at extra judicial level the levers necessary to eliminate the consequences of acts which, according to the current regulation, may circumvent the commission of the abuse of service, do not show the degree of intensity required A criminal penalty". The author, who was rightly questioned in our opinion, concluded that "from the point of view of the legal nature, the decisions of admission given by the Constitutional Court produce the same effects, even if it does not find the unconstitutionality of some legal provisions, but only extract the *venom of unconstitutionality* from the provisions under the control of the Constitutional Court."

From the point of view of the legal effects of a constitutional nature, Prof. Hotca rightly stated that, in any case, any allegation of an act alleged to have breached his duty to perform his duties would be liable for the criminal liability of the active subject only if the non-observance of these duties occurred in violation of the law, in the sense established by the Constitutional Court in Decision no. 405/2016 (simple and urgent laws and ordinances). Thus, the failure or misconduct of service duties can not be taken into account in terms of mentions or obligations found in Government Decisions, Ministerial Orders, Internal Regulations and Regulations, Codes of Ethics, Internal Procedures, Methodological Norms, Job Descriptions Etc. This decision is necessary given that, by Decision no. 405/2016, the Constitutional Court found that the phrase "*fails to meet*" in the provisions of Article 246 of the previous criminal code and of art. 297 par. (1) of the Penal Code in force can be interpreted only in the sense that the fulfillment of duty is performed "*in violation of the law*".

Professor Hotca's remarks have an indisputable accuracy and, at the same time, have an important role in the correct interpretation of the incriminating rule through the decision of the constitutional court, following two essential lines of interpretation: at the construction level of the criminal norms, the principle of

³² See, Mihai Adrian Hotca - Abuse in Service after Publication in the Official Gazette of the Constitutional Court Decision no. 405/2016, on <https://juridice.ro/essentials/834/abuzul-in-serviciu-dupa-publicarea-in-monitorul-oficial-a-deciziei-curtii-constitutionale-nr-4052016>, consulted on 10 April 2017.

the lawfulness of the criminalization and the legality of the punishment (which are collectively considered together) is enshrined in Article 23 paragraph 12 and Article 73 paragraph 3 letter h) of the Romanian Constitution and these two require a certain strict way of drafting criminal incriminating legal norms, including under the aspect of the punishments provided by the law. Thus, the constituent has determined that only by an organic law the offenses, punishments and their execution regime are regulated, namely that no punishment can be established and applied only under the conditions and under the law. As such, all the constitutive elements of an offense must be found in a normative act having the force of organic law, and the court, in order to pronounce a conviction and punish, must circumscribe only the typical nature of the criminal law (in the wider sense of this decision of the constitutional court) the state of fact, therefore, to identify in a law (law as a legal act of the Parliament or simple ordinance of the Government or emergency ordinance, both adopted by legislative delegation, according to art. 115 of the Constitution) the complete incriminating text, from the framework regulation to the last normative detail. In the absence of this explanatory reasoning of the Constitutional Court, there is an inadmissible opening to arbitrariness, at the judge's discretion, which would lead to interference of the judge with the legislative attributions, that would confer unconstitutionally to the court and normative role, which violates the principle The separation of powers in the state enshrined in Article 1 para. 4 of the Constitution. More specifically, for a panel of judges, non-compliance with rules of the internal regulations would constitute an offense, whereas for another panel of judges violation of the same regulation would have the legal nature of a disciplinary misconduct, the second being the right one, as the maximum limit of legal liability that could be committed.

III. *Conclusions on the incriminating rules analyzed.* With the entry into force of the new Criminal Code, the legislator expressly recognized, for the first time in the content of the Criminal Code, the category of corruption offenses, which have their own names, and, as stated, emphasizes that the legislator affirms and recognizes symbolically that the phenomenon of corruption is one of the central issues of Romanian society.

As we have seen above, following the logic of most European criminal codes, the legislator decided to explicitly enshrine in the new Criminal Code a distinct chapter (Chapter I) of corruption offenses, which are thus highlighted as the most important offenses in Title V of the Code. The novelty elements are, in part, systematization, and others to change the approach to the protection of social values specific to these rules of incrimination.

By this approach, the provisions under discussion in the previous Criminal Code and in the Special Law no. 78/2000, while responding to the requirements of clarity and predictability of the criminal law, according to the European and constitutional jurisprudence in the matter.

BIBLIOGRAPHY:

V. Dobrinoiu, M. Gorunescu, M. A Hotca and others, *The New Penal Code commented. The general Part*, 2nd Edition, revised and added, Universul Juridic Publishing House, Bucharest, 2014.

V. Dobrinoiu, M. Gorunescu, M. A Hotca and others, *The New Penal Code commented. The special part*, 2nd Edition, revised and added, The Universul Juridic Publishing House, Bucharest, 2014.

Gina Negruț, *The measure of confiscation in case of corruption offenses*, Editura Universul juridic, Bucharest, 2014.

Dorin Ciucan, *Law no. 78/2000 regarding the prevention, detection and sanctioning of corruption acts. Comments and jurisprudence*, 2nd edition, revised and added, The Legal Universe Publishing House, Bucharest, 2015.

S. Bogdan, D.A. Doris, G. Zlati, *The New Criminal Code. The special part. Analyzes, explanations, comments*, Universul Juridic Publishing House, Bucharest, 2014.

A. Boroi, M. Gorunescu, I. A. Barbu, *Criminal Law of Business*, 5th Edition, Rev., C.H. Beck, Bucharest, 2011.

**Iulian BOLDEA, Cornel Sigmirean (Editors), *DEBATING GLOBALIZATION. Identity, Nation and Dialogue*
Section: Social Sciences**

St. Deacon, *Constitutional Law*, Edit. C.H. Beck Bucharest, 2013;

St. Deaconu, *Political Institutions*, C.H. Beck, Bucharest, 2015;

I.Muraru, E.S. Tanasescu, *Romanian Constitution. Comment on articles*, Edit. Hamangiu, Bucharest 2008;

I.Muraru, N.M. Vladoiu, A.Muraru, S.G. Barbu, *Constitutional Litigation*, Hamangiu Publishing House, Bucharest 2009;

T.Toader, M.Safta, Romanian Constitution. *Decisions of the Constitutional Court, C.E.DO decisions, C.J.U.E. decisions, related legislation*, Edit. Hamangiu, Bucharest 2015;

Nathanael Olivier Pétermann, *Les obligations positives de l'Etat dans jurisprudence de la Cour européenne des droits de l'homme*, Stampfli Editions SA, Berna, 2014;

C. Duvac, *The Concept of Civil Servant in the Light of the New Criminal Code*, in Dreptul Magazine no. 1/2011;

Www.ccr.ro (Constitutional Court of Romania).

Www.scj.ro (High Court of Cassation and Justice).