

Abuse of Office

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ABSTRACT: The paper presents the topic regarding the crime of abuse of office, a crime provided by the current Criminal Code in Chap. II - *Offenses service*, Title V - *Crimes of corruption and service*. The paper presents the legal definition of this crime, its legal object, with the two aspects: special and material, the subjects of crimes and criminal participation. It also talks about the constitutive content, consisting of the objective side, the material element of the objective side, the causal link between the action or inaction provided by the legislator and the immediate consequence, the form of guilt in terms of the subjective side, and the forms, modalities, sanctions and procedural aspects of this type of crime.

KEYWORDS: abuse of office; legitimate interest; civil servant; injury; defective act

Introduction

As is well known, abuse of office appeared in the Criminal Code of 1864 and later in 1936, along with abuse of power and excess of power. Currently, abuse of office is found in the New Criminal Code, in art. 297 Chap. II - *Offenses service*.

The crime of abuse of office is one of the crimes that harm both the natural person and the legal person by the defective fulfillment of the service attributions, causing a damage or an injury of their legitimate interests. Exceeding the attributions as well as the abuse of power determined the use, without reason, of the public force.

Abuse of office is the field where many illegalities take place, leading to the disorganization of all public institutions, thus installing corruption.

An important role of this crime is played by the civil servant, who is the active subject of this crime, he being the main culprit by restricting the exercise of a person's right or by creating a situation of inferiority to him.

As a rule of this crime, the quality of civil servant must exist at the moment of committing the deed. Being a deed committed with direct intent, seeking to obtain benefits for himself or third parties, the legislator ruled that the penalty be imprisonment from 2 to 7 years and a ban on exercising the right to hold public office.

Through this punishment, the legislator seeks to protect the relations regarding a good development of the service attributions of the persons in the public domain.

The legal content of the crime of abuse of office

“(1) The act of a public employee in the line of duty, does not meet the act or fulfills improperly and thereby causes damage or harm to the rights or interests of an individual or a legal person shall be punished by imprisonment for 2-7 years deprivation of the right to hold public office.

(2) The same punishment is sanctioned act of a public employee in the line of duty, restricts the exercise of a right of any person or creates this situation of inferiority based on race, nationality, ethnic origin, language, religion, sex, sexual orientation, political affiliation, wealth, age, disability, noncontagious disease or HIV/AIDS.” (Article 297, Romanian Criminal Code).

The object of the crime

An analysis of the legal object of the crime of abuse of office calls into question the fact that, by regulation, the legislator sought to protect social relations, for whose existence and normal development, it is necessary to protect the relations regarding the proper performance of people's duties operating in the "public service" in the broadest sense, while in the case of corruption offenses, the social protection value is much wider, the legal object of the crimes in the group of corruption offenses being formed by social relations in order to whose existence and development requires the protection of activities of public interest, such as to support the authority of public institutions or public interest, as well as perennial values such as democracy, the rule of law, respect for human rights, normal economic and socio-moral development of a society, the national security of a state (Barac 2014, 14).

The material object, as a rule, does not exist. To the extent that the criminal activity is exercised over a registered good, the material object will be represented by that good or signed up. Examples: abusive confiscation of a thing, faulty wording of a document, modification of a civil status act or another public act (Cristiean 2017, 195).

Subjects of the crime

In the literature, it is justifiably stated that by the notion of subjects of crime are designated the persons involved in the commission of a crime, either by committing the deed or by bearing the consequences (Ristea 2011, 87).

Therefore, the direct active subject of the crime is qualified and can only be an official or a civil servant.

In the variant provided by art. 308 of the Romanian Criminal Code, active subject of the crime may be a person who exercises, permanently or temporarily, with or without a remuneration, a task of any nature in the service of a natural person from those provided in art. 175 paragraph 2 or within any legal entity. The quality of civil servant or civil servant must exist at the time of committing the crime (Cristiean 2017, 195).

When *the active subject* of the crime is the civil servant, the legal person cannot be criminally liable, because he cannot have that quality. It was noted in judicial practice that when the active subject is the person provided in art. 308 of the Romanian Criminal Code, he can be employee and the liability of the legal person. The solution is wrong. Even in this situation, the legal person cannot be criminally liable for the crime of abuse of office, because it presupposes the existence of service relations, or the legal person cannot exercise official duties (Rotaru, Trandafir and Cioclei 2016, 271).

Criminal participation is possible in all its forms, co-authorship, complicity and instigation. For the existence of co-authorship, it is necessary that all perpetrators have the special quality required by the incriminating text. Complicity and instigation are possible regardless of the quality of the participants (Cristiean 2017, 196).

The main *passive subject* of this crime is the public institution, the public authority, the legal person, the civil servant provided in art. 175, paragraph (2) of the Romanian Criminal Code, for which the active subject works, because their prestige, their reputation suffer.

The adjacent passive subject is the person whose legal interests were harmed by the perpetrator (Popa n.d., Academia.edu).

The objective side

Observing the construction of the norm contained in art. 297 of the Criminal Code, we find that the material element of the crime also absorbs inactions - does not perform an act - and actions - performs an act in a defective manner.

The doctrine fixed the content of the two phrases, starting from the legal definition of the crime and taking into account the jurisprudence established in the application of the text, which has, as we have shown, a very long life in Criminal law (Dongoroz et al. 1972, 82).

The material element of the objective side may be the non-fulfillment of an act or its defective fulfillment and the restriction of the exercise of a right (Cristiean 2017, 196). The expressions used by the norm are synthetic expressions that include situations, such as: violation or non-compliance with the obligations imposed by legal provisions, exceeding the service attributions, abusive use of the service attributions (Dongoroz et al. 1972, 82).

The use of such synthetic expressions corresponds to the language of law, characterized by generality. The European Court of Human Rights itself has acknowledged that “due to the general nature of laws, their wording cannot be absolutely precise, so that in any system of law, including Criminal law, there are inevitably elements of judicial interpretation, whereby the legislative ambiguities are elucidated” (Bârsan 2010, 578).

The existence of the crime requires the fulfillment of the following essential requirements:

- The action or inaction relates to an “act”, that is to say to an official’s duty
- The civil servant or official is in the exercise of his/her duties, namely to carry out activities related to his/her duties included in the job description or to carry out certain provisions received from the hierarchical heads, in accordance with the law;
- The performance of the action must be in a defective manner, namely the act or operation must have been performed differently than was required
- The non-fulfillment of the act consists in the omission of the perpetrator to carry out the operation to which he was obliged according to the law or the job description.

The immediate consequence of the action/inaction, which constitutes the standard variant provided by paragraph 1, consists of two consequences, respectively a damage or injury of the rights or legitimate interests of a natural person or of a legal person. It is about those damages that harm the legal interest, namely the interest recognized by law to a person.

In the doctrine, it was stated that, although the harm of a person’s legal interests involves any violation, any harm, be it physical, moral or material, to the interests protected by the Constitution and the laws in force, according to the Universal Declaration of Human Rights, the range of interests to which the legal text refers, being very broad (with reference to the regulations established by the Criminal Code of 1968), for the deed to be a crime it is required to present a certain gravity, otherwise there is no social danger of a crime, the deed being able to attract as a case, either the administrative responsibility or the disciplinary responsibility, but in no case the criminal responsibility (Dobrinioiu and Neagu 2011, 193).

In the aggravated manner provided by art. 309 of the Criminal Code, the immediate consequence of the crime consists in the production of particularly serious consequences (Cristiean 2017, 198). In order for the material element to complete the objective side, a causal link is necessary between the activity carried out by the perpetrator and the immediate consequence.

The subjective side

The form of guilt for the standard version of the crime of abuse of office is direct or indirect intent. In the species variant, the form of guilt is the direct intention because the action by which a situation of inferiority is created for a person, must be committed on the basis of race, nationality, ethnic origin, language, religion, sex, sexual orientation, political affiliation, wealth, age, disability, chronic non-communicable disease or HIV/AIDS infection. If in the standard variant, the motive and the purpose represent external factors, factual elements that can contribute to a fair judicial individualization of the deed, in the species variant the motive constitutes an essential requirement of the subjective side, being an essential, intrinsic element of the crime.

Forms, modalities, sanctioning regime and procedural aspects

The preparatory acts are not incriminated. Attempted crime of abuse of office is not punishable. The crime is consumed instantly, at the moment of performing the action-inaction. The norm of incrimination provides two normative modalities for each variant, which correspond to the action-inaction that constitutes the material element. The crime can be presented in different factual ways, generated by the circumstance in which the abuse in the service took place. The sanctioning regime consists of imprisonment from 2 to 7 years and a ban on exercising the right to hold public office. The criminal action is initiated ex officio (Dungan n.d.).

Conclusions

Abuse of office is one of the offenses that cause damage or injury to a natural or legal person, the act being committed intentionally, there is no abuse of office through fault. According to art. 297 of the Criminal Code, the action or inaction refers to the duties of the service that fall within the competence of the perpetrator and represent a criminal social danger.

We note that for the existence of this crime, the direct active subject must be a qualified one, in our case - the official or civil servant as well as the direct active subject.

As regards the performance of an act, it must be performed in a defective manner, otherwise than it should have been; at the same time, the non-fulfillment of the act must consist in the omission of the perpetrator to perform the duty of service imposed on him. The legislator also presents the option provided by paragraph 2 of the Criminal Code, regarding race, wealth, age, chronic illness, etc.

The punishment provided by the legislator is imprisonment from 2 to 7 years, and as a complementary punishment, the prohibition of the right to hold a public office.

References

- Barac, L. 2014. *Drept penal. Partea specială, Curs universitar (Criminal Law. Special Part, University course)*. Bucharest: Universul Juridic Publishing House.
- Bârsan, C. 2010. *Convenția europeană a drepturilor omului, comentariu pe articole (European Convention on Human Rights, commentary on articles)*. Bucharest: C.H. Beck Publishing House.
- Codul penal (Criminal Code). 2018. Bucharest: Universul Juridic Publishing House.
- Cristiean, V. 2017. *Drept penal. Partea specială II (Criminal Law. Special Part II)*. Bucharest: Universul Juridic Publishing House.
- Dobrinioiu, V., Neagu, N. 2011. *Drept penal. Partea specială (Criminal Law. Special Part)*. Bucharest: Universul Juridic Publishing House.
- Dongoroz, V., Kahane, S., Oancea, I., Fodor, I., Iliescu, N., Bulai, C., Stănoiu, R., Roșca, V. 1972. *Explicații teoretice ale Codului penal roman, Partea specială (Theoretical explanations of the Romanian Criminal Code, Special Part)*. Bucharest: Academiei Publishing House.
- Dungan, Petre. n.d. "Abuzul în serviciu în noul Cod penal (Abuse of office in the new Criminal Code)." *Drept.uvt.ro*. Accessed on October 2nd, 2020. <https://drept.uvt.ro/administrare/files/1481045738-prof.-univ.-dr.-petre-dungan.pdf>.
- Popa, Andrei Nicolae. n.d. "Infrațiunea de abuz în serviciu reflectată în jurisprudența CCR și a altor curți constituționale (The offence of abuse of office reflected in the jurisprudence of the RCC and other constitutional courts)". *Academia.edu*. Accessed on October 2nd, 2020. <https://www.academia.edu/35387072/>.
- Ristea, I. 2011. *Drept penal. Partea generală (Criminal Law. General Part)*. Bucharest: Universul Juridic Publishing House.
- Rotaru, C., Trandafir, A.-R., Cioelei, V. 2016. *Drept penal. Partea specială II (Criminal Law. Special Part II)*. Bucharest: C.H. Beck Publishing House.