



Abuse of Position for Sexual Purposes

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Abstract: This paper includes a brief analysis of a new crime included in the Romanian Criminal Code. In the introductory part we have presented the incrimination referring to the need to incriminate it, as it is appreciated by the legislator. We have also examined, using recent doctrine, the pre-existing conditions of the crime, the constitutive content, as well as other relevant elements, the forms, modalities and sanctions provided by the law. Last but not least, we referred to some elements of similarity or difference from other crimes. The paper is part of a university course to be published in the near future. As designed, the paper can be useful to academia and practitioners in this field.

Keywords: the Romanian Criminal Code; recent doctrine; pre-existing elements; constitutive content

1. Introduction

The abusive use of the function for sexual purposes consists in the act of the civil servant (or a person exercising an assimilated function), who in order to fulfill, not fulfill, urgency or delay the fulfillment of an act regarding his duties or in for the purpose of committing an act contrary to these duties, claiming or obtaining sexual favors from a person directly or indirectly interested in the effects of that act of service.

According to the provisions of art. 299, para. (2) of the Criminal Code, the deed shall also be retained in the event that the claim or obtaining sexual favors is made by a civil servant (or a person exercising an assimilated function) who relies on or takes advantage of a situation of authority or superiority over the victim, arising from the position held.

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With regard to the incrimination of these facts, the explanatory memorandum states that “The abusive use of the function for sexual purposes is a new created incrimination, starting from the crime of sexual harassment from the current regulation, including the so-called vertical harassment, through abuse of authority, as well as new hypotheses of incrimination. The incrimination is justified by the fact that such acts are likely to affect the proper performance by the official of his duties. This deed differs from sexual harassment in the category of crimes against sexual freedom by the special legal object and the material element, although in both deeds the direct active subject may also be an official. In drafting the text, the provisions of art. 443 Spanish Criminal Code”¹.

In the doctrine it was appreciated that “The variants provided by par. (1) therefore represent the new hypotheses of incrimination. The critical examination of these provisions leads to the conclusion that, in fact, the ways of accomplishing the material element (“claiming” and “obtaining”) are also found in the content of the crime of bribery, provided by art. 289 Criminal Code. The circumstance of the “benefit”, claimed or obtained, in favor of a sexual nature (any intercourse or sexual act, among those described by the provisions of art. 218 and art. 219 of the Criminal Code), makes the incrimination from art. 299 para. (1) a special variant of the mentioned corruption crime” (Bodoroncea et al., 2016, pp. 998 and 999).

This crime is a novelty, as it was not provided for in the 1969 Criminal Code or in a special law with criminal provisions.

We specify that an incrimination similar to the marginal name „Sexual harassment” was introduced by Law no. 61/2002, being mentioned in the provisions of art. 2031 Criminal Code

In the present study we will proceed to a brief examination of this crime, with emphasis on its constitutive content.

2. The Pre-Existing Elements

2.1. The Legal Object

The special legal object consists of the social relations that are born and develop in connection with the good development of the service, which also presuppose a

¹ Criminal Code (Law no. 286/2009), Statement of reasons, preface by professor Valerian Cioclei, PhD, member of the Elaboration Commission, p. 60.

correct behavior of the civil servant meant not to harm the prestige of the unit and to lead to the resolution of the act required by law by a third party.

The doctrine stated that “Adjacent, this incrimination defends the dignity, independence, moral freedom and inviolability of the sexual life of both persons who use the services of civil servants (or other workers, in the case of the attenuated form provided by art. 308 Criminal Code), as well as persons who are employed in the same unit as the perpetrator, which thus prevents them from exercising their rights at work in a favorable climate, placing them inferior on the grounds of sex ” (Paraschiv and col., 2016, pp. 338).

Another opinion states that *the special legal object* is social relations for the formation, progress and development of which requires the proper conduct of a civil servant or any person in the service of a legal person, excluding the misuse of office or of the authority or superiority deriving from the position held, towards a person with whom he enters into service relations, in order to claim or obtain from her favors of a sexual nature” (Pascu et al., 2016, p. 575).

2.2. The Material Object

The material object that consists in the body of the victim will exist only in the hypothesis in which the sexual favors were obtained.

2.3. Subjects of the Crime

The active subject of this crime is qualified, his qualification consisting in the quality of civil servant or a person exercising an assimilated function.

In the case of the attenuated normative modality, provided in par. (2), the active subject must have a certain authority or superiority over the victim.

Also, in the attenuated normative modality provided in the provisions of art. 299 and art. 308 of the Criminal Code, an active subject may also be a person who performs a task in the service of a person of public interest or within any legal entity.

Authority “presupposes power, the right to issue binding provisions or to impose obedience, based on a quality or power of attorney on the line of service” (Paraschiv et al., 2016, p. 338), while *superiority* “consists in the dominant position that the author has towards the injured party, due to a superior function, to the service attributions or to the role he has in the unit” (Paraschiv et al., 2016, p. 338).

Regarding the relationship of authority or superiority between the perpetrator and the victim, they may exist in other situations than the service, such as those related to

holding positions locally or centrally (mayor, police officer, politician, administrator, doctor, etc.).

In the attenuated normative modality provided in art. 299 Criminal Code reported in art. 308 of the Criminal Code, active subject is a person in the service of a natural or legal person.

We specify that an active subject of this crime can be both a man and a woman.

The main passive subject of this crime is the state in its capacity as holder of the social values protected by the incrimination norm.

A special passive subject is the unit in which the active subject is employed, whose activity and prestige are affected by his behavior.

In the case of the standard (simple) normative modality, the adjacent passive subject is any person who “appeals to a civil servant (or another worker, in the case of the attenuated variant of the crime), in connection with the performance of an act falling within his duties” (Paraschiv et al., 2016, p. 339).

In the attenuated manner provided in par. (2) in art. 299 of the Criminal Code, the adjacent passive subject may be a person who has a situation of subordination to the active subject, in terms of employment relationships. The taxable person may be assigned to the same unit as the taxable person, or to another lower unit or to a unit which has no subordinate relationship with the unit in which the active subject of the offense is employed.

According to the doctrine “When the claim is aimed at several injured persons, there will be a competition of crimes, even if they are interested in the same act that falls within the official duties of the perpetrator” (Paraschiv et al., 2016, p. 338).

As in the case of the active subject, the passive subject can be both male and female, both men and women, and it is not necessary for them to be of the opposite sex.

Criminal participation is possible, except for co-authorship.

3. Constitutive Content

3.1. The Objective Side

The material element of the objective side of the crime is achieved through the actions of claiming or obtaining sexual favors, in order to fulfill, not fulfill, urgency or delay the fulfillment of an act regarding his duties or in order to makes an act

contrary to these duties, from a person directly or indirectly interested in the effects of that act of service.

The phrase sexual favors means “any act related to intimate life of a sexual nature, including heterosexual and homosexual acts, as well as those of sexual perversity” (Paraschiv et al., 2016, p. 340).

The phrase claims sexual favors means “insistently asking a person for sexual benefits” (Pascu et al., 2016, p. 576), and the phrase obtains sexual favors means “receiving, getting to have sexual favors of sexual nature to satisfy sexual appetite”.

Thus, if the claim consists only in the activity of the perpetrator's request, obtaining sexual favors involves a claim activity (directly or indirectly), which is accepted by the injured person. The victim conceding, which is not freely consented to, is not determined by a coercion which he could not resist, such as rape, but is motivated by his interest in solving a duty of service by the perpetrator who conditions it” (Paraschiv et al., 2016, p. 340).

It is found that in the case of the attenuated normative modality provided in par. (2) of the same article, “claiming or obtaining sexual favors is not based on the injured person's interest in an act of service of the perpetrator, but he takes advantage of his position of authority or superiority over the victim, who works for the same unit or with which they are in service relations” (Paraschiv et al., 2016, p. 340).

We also appreciate that “the deed has a criminal feature, even when, initially, the injured person adopted a provocative behavior to determine the perpetrator to perform his duties, if the claim or obtaining sexual favors was based, in the end, conditioning, mental pressure practiced by the author. This solution would be necessary considering the fact that, many times, victims can adopt provocative attitudes precisely due to the resistance encountered from the beginning by the author, in performing the tasks” (Paraschiv et al., 2016, pp. 340).

Also, “the requirements for the existence of the crime are met even if obtaining sexual favors was not preceded by an express request of the perpetrator, but by his conduct, not to fulfill his duties to the detriment of the injured party, or by the attitude towards the person over whom he has authority or superiority, he determined the victim (maybe even suggesting) to offer him those favors in order to solve his interest or to have a proper environment at work” (Paraschiv et al., 2016, pp. 340).

Essential requirements. For the existence of the crime, it is necessary that the incriminated action be carried out by a civil servant (within the meaning of the criminal law) who is in the exercise of his duties.

The second essential requirement refers to the need for the act in question to be able to be performed within the duties of the active subject, to fall within the competence to perform the active subject.

The last essential requirement refers to the need for the victim to be directly or indirectly interested in the effects of that act.

The immediate consequence is to affect the prestige of the unit in which the perpetrator works and to achieve the honor and independence of the victim in terms of his sexual life.

The causal link results *ex re* (results from the materiality of the acts committed).

3.2. The Subjective Side

The form of guilt with which the active subject acts is the direct intention qualified by purpose.

In the doctrine there is also the opinion according to which the crime can be committed with indirect intention which will be retained in the hypothesis that “the perpetrator obtains sexual favors to commit an act contrary to his duties, accepting the initiative of the person requesting the conduct” (Paraschiv et al., 2016, p. 341).

4. Forms, Modalities, Sanctions

4.1. Forms

The acts of preparation and attempt are not sanctioned.

In the normative modality, the consummation of the crime takes place when the active subject claims the favors of a sexual nature, under the conditions expressly provided in the incrimination text (as well as for the purpose mentioned there).

In the attenuated normative modality provided in par. (2) the offense is committed when obtaining sexual favors, after the perpetrator has benefited from sexual favors.

Both in the case of claiming and obtaining sexual favors, there may be a moment of exhaustion, which is identified with the last action of this kind performed by the

active subject, in which case the perpetrator will be responsible for committing the continuing crime.

4.2. Modalities

The examined crime presents a *standard (simple) normative modality* and *two attenuated normative modalities*.

The standard normative modality is mentioned in the provisions of art. 299, para. (1) of the Criminal Code, to be retained when the civil servant who, in order to fulfill, not to fulfill, to hasten or delay the fulfillment of an act regarding his duties or in order to perform an act contrary to these duties, he claims or obtains sexual favors from a person directly or indirectly interested in the effects of that act.

The first attenuated normative modality is provided in the provisions of par. (2) of the same article and shall be retained in the event that the civil servant claims or obtains sexual favors, provided that he prevails or takes advantage of a situation of authority or superiority over the victim, arising from the position held.

The second attenuated normative modality will be retained in the hypothesis in which the incidence of the provisions of art. 308 para. (1) Criminal Code, respectively when the incriminated deeds are committed by or in connection with the persons who exercise, permanently or temporarily, with or without a remuneration, a task of any nature in the service of a natural person provided in art. 175 para. (2) or within any legal entity.

4.3. Penalties

The sanction provided by law in the case of the standard normative modality is imprisonment from 6 months to 3 years and the prohibition of exercising the right to hold a public office or to exercise the profession or activity in the execution of which he committed the deed.

For the first attenuated normative modality, the sanction provided by law is imprisonment from 3 months to 2 years or with a fine and the prohibition of exercising the right to hold a public office or to exercise the profession or activity in the execution of which he committed the deed.

In the case of the attenuated normative modality provided in art. 299 of the Criminal Code, referred to in art. 308 of the Criminal Code, the punishment limits are reduced

by one third, keeping the complementary punishment of prohibiting the exercise of the right to hold a public office or to exercise the profession or activity in the execution of which he committed the deed.

5. Additional Explanations

5.1. Some Procedural Issues

The criminal investigation is carried out by the officers and agents who have the attributions of criminal investigation bodies of the judicial police, under the supervision of the prosecutor from the prosecutor's office attached to the court in whose district the crime was committed.

Jurisdiction in the first instance belongs to the court in whose district the deed was committed.

Assuming that the criminal investigation is carried out by a prosecutor from the D.I.I.C.O.T. or D.D.A., the jurisdiction in the first instance belongs to the court notified by the prosecutor's indictment.

Depending on the quality of the active subject (senator, deputy, judge prosecutor, etc.), the competence to prosecute belongs to the prosecutor and the competence to judge in the first instance may belong to the notified court of appeal or to the High Court of Cassation and Justice.

5.2. Similarities and Differences in Relation to Other Crimes

5.2.1. Sexual Harassment

The difference between the two offenses consists in the fact that regarding the offense provided in art. 299 para. (2) Criminal Code, the object of criminal protection consists in the service relations that presuppose the correct exercise by the civil servant (private) or assimilated of his function, the sexual freedom representing the object of the criminal protection in a subsidiary way.

At the same time, sexual harassment (art. 2031 of the Criminal Code of 1969) “implies normal working relationships (horizontal harassment), while the abusive use of the function for sexual purposes (art. 299) presupposes relations of authority or superiority (vertical harassment). Other differences are related to the lack of the requirement regarding the qualification of the active subject in the case of the crime

of sexual harassment or of the repeated character of the act of execution in the case of the crime provided by art. 299 Criminal Code” (Bodoronca et al., 2016, p. 1002).

5.2.2. Taking Bribes

Recent doctrine has argued that the crime of sexual abuse is “a special variant and, at the same time, attenuated of the crime of bribery, due to lower sentence limits (from 6 months to 3 years in prison), compared to the basic crime, taking bribes (sanctioned from 2 to 7 years)¹.

At the same time, the ways of achieving the material element are restricted to those of claiming or obtaining (receiving) the undue benefit and only in conditions of precedence in relation to the act of service in question. However, the essential difference is given by the limitation of the content of the notion of “good claimed or obtained” (“favors”) only to the sphere of sexual relations or acts” (Bodoronca et al., 2016, p. 1002).

5.2.3. Abuse at Work

In relation to other offenses of service or corruption, the offense of abuse of office has a subsidiary feature in which case “the abusive exercise of the function for the purpose of acquiring a sexual benefit may be included in the provisions of art. 297 para. (1) Criminal Code only when the claim of such favors is made after the fulfillment of the act under the conditions provided by the text (obviously, however, if the other elements of this crime are made, and it cannot be included in the bribery” (Bodoronca et al., 2016, pp. 1002).

6. Conclusions

As we mentioned in the introductory part, the abusive use of the function for sexual purposes is a new incrimination in the Romanian criminal law. Through this new incrimination, the legislator wanted to sanction the deeds that harm the social relations regarding the good performance of the service attributions by a public, private official (assimilated to them). This deed differs from sexual harassment in the category of crimes against sexual freedom by the special legal object and the

¹ We specify that the punishment provided by law in the Criminal Code in force is imprisonment from 3 to 10 years and the prohibition of exercising the right to hold a public office or to exercise the profession or activity in the execution of which the act was committed. In the Criminal Code of 1969 in the wording republished by Law no. 6/1973, the punishment provided was imprisonment from 3 to 10 years and the prohibition of certain rights.

material element, although in both deeds the direct active subject may also be an official.

As noted in the recent doctrine, the legal consequences of this incrimination consist, on the one hand, in the fact that in order to achieve the material element of the objective side, the incriminated action must be performed before or at the same time in relation to the activity to be performed. active, and on the other hand in that claiming or obtaining sexual favors after performing the act will not meet the constitutive elements of the crime provided in the provisions of art. 299 para. (1) Criminal Code. In the latter case, it is possible to retain the offense of abuse of office, provided that the other elements specific to that offense are met, both objectively and subjectively, or another offense against the physical integrity or liberty of the person.

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