"NICOLAE TITULESCU" UNIVERSITY OF BUCHAREST
FACULTY OF LAW
PHD SCHOOL

PHD THESIS

BRIBE TAKING

SUMMARY

Scientific coordinator
PhD Professor Vasile Dobrinoiu

Student - PhD Candidate
Nicolae George Octavian

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Key words: *bribe taking, corruption crimes, passive corruption, active subject, criminal code, compared law, relation with other crimes, seizure, passive subject, material object, criminal participation.*

The scope of the scientific research is an analysis on the incrimination of the bribe-taking crime.

The fight against corruption is an essential necessity within the process of the democratic development of Romania.

In its post-December history, Romania has joined several anticorruption organizations, such as the United Nations Organization Convention[1], the Criminal Convention of the European Council, G.R.E.C.O.[2], and has constantly attempted to improve the legislative framework in this field.

However, despite punctual progress, Romania is facing significant difficulties in its attempt to limit the magnitude of the corruption phenomenon.

According to the Corruption Perception Index, published by Transparency International in 2021, Romania remains one of the three most corrupt countries in the European Union.[3]

Also, the Report of the US State Department shows that in 2021, corruption and public fund embezzlement are common occurrences in Romania.

These findings mainly shows the fact that, in order to fight corruption both in the state system and in the private environment, the state needs to constantly update and modernize the applicable legislative framework, to ensure the full effectiveness of the institutions that deal with the investigation and monitoring of these crimes and to allocate the necessary material resources for the implementation of these measures.

In order to achieve the objectives proposed at the start of this scientific study, I considered using several ***research methods***, namely comparative, bibliographical, historical-teleological, logical, predictive analysis.

[1] Signed by Romania on 09.12.2003 and ratified by Law no. 365/2004, published in Official Gazette no. 903 of 05.10.2004.

[2] In French: groupe d'États contre la corruption, "GRECO".

[3] Available at https://www.transparency.org.ro/sites/default/files/comunicat_de_presa_ti-romania_cpi_2021.pdf.

The comparative analysis was used especially in the chapter dedicated to comparative law, in which I analyzed the incrimination of the bribe-taking crime from the perspective of foreign legislations.

The historical-teleological method was used in the chapters in which I presented the historical evolution of the incrimination of the bribe-taking crime.

The logical method was used for structuring the legal reasoning presented in the paper.

The bibliographical method was considered in order to present an overview of the research theme and subsequently I identified the most relevant sources. The in-depth documentation and analysis of the existing materials from the doctrine in this field represent an essential step in this scientific research.

The predictive analysis method was used to identify any legislative inconsistencies and irregularities, and that is why I formulated *lex ferenda* proposals, in order to improve the current legal framework.

I developed the theme of the paper in eight chapters; the first 7 refer to the legal institutions that are relevant in this field, in a multidisciplinary approach, in which I tried to incorporate criminal law aspects, criminal procedural law, compared law and aspects related to jurisprudence, and the last one is dedicated to conclusions and *lex ferenda* proposals.

Thus, **in Chapter I**, entitled "General considerations regarding corruption", I attempted to approach the matter of international and national law instruments for fighting corruption. The content of these instruments was analyzed from a criminal perspective.

Regarding international law instruments, I analyzed the regulations drafted and adopted by U.N.O. and those adopted on European level.

The United Nations Convention against corruption represents a global landmark in fighting this phenomenon.

Romania ratified the U.N.O. Convention against corruption by Law no. 365/2004.[4]

Within the European Council, the attempt to prevent and fight the corruption phenomenon both in the public sector and in the private sector has represented a constant preoccupation.

Continuing the legislative and institutional progress in this direction, by Resolution (99) 5[5], adopted by the Committee of Ministers, the Group of States that fight against Corruption (GRECO) was created. Romania is a founding member of this international organization.

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[4] Law no. 365/2004 for ratifying the United Nations Convention against corruption, adopted in New York on December 31, 2003, published in Official Gazette no. 903 of 05.10.2004.

[5] Resolution (99) 5 of the Committee of Ministers of 01.05.1999, published in Official Gazette C, no. 120 of 01.05.1999.

The main aim of GRECO is to improve the capabilities of fighting the corruption phenomenon by monitoring the implementation of international legislative acts in the field of fighting the corruption phenomenon, by promoting and increasing the efficiency of international cooperation instruments and by monitoring the compliance with the 20 guiding principles.

Thus, the Criminal convention regarding corruption was adopted in 1999[6], a referential legislative act in the fight against corruption.

In Romania, the Criminal convention regarding corruption was adopted by Law no. 27/2002.[7]

Regarding national-law instruments, I detailed the fact that, in the democracy consolidation process, Romania adopted legislative measures that are necessary for improving and increasing the efficiency of the actions of preventing and fighting corruption.

Thus, in supplementing the incrimination cases provided by the Criminal Code, other legislative acts which regulated the fight against corruption were adopted.

The most important legislative act of this type is Law no. 78/2000 for preventing, discovering and punishing corruption deeds[8].

In **Chapter II**, with the title "Evolution of the incrimination of the bribe-taking crime", I presented in a detailed and scientifically-substantiated manner historical references regarding the evolution of corruption deed incrimination and, especially, of the bribe-taking crime.

The study comprised the history of crime incrimination in the European cultural space, and I approached incrimination in Ancient Greece, the Roman Empire, the Ottoman Empire, the Tsar Empire or of France in he Napoleonic Age.

In the Romanian space, I approached the documents and legislative acts to which corruption crimes refer. In this manner, I identified and analyzed legislative acts in the medieval age of the Romanian States, and continued throughout history, until the Criminal Code was adopted in 1968.

In **Chapter III**, entitled "Analysis of the crimes of bribe taking and receiving undue benefits in the 1968 Criminal Code", I analyzed the constitutive elements of the "passive corruption" crimes from the former Criminal Code, in relation to the opinions expressed in the doctrine and the relevant jurisprudence.

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[6] Adopted in Strasbourg on 27.01.1999.

[7] Law 27/2002 for ratifying the Criminal convention regarding corruption, adopted in Strasbourg on 27.01.2002, published in Official Gazette no. 65 of 30.01.2002.

[8] Law no. 78/2000 for preventing, discovering and punishing corruption deeds, published in Official Gazette no. 219 of 18.05.2000.

Also, in this chapter I analyzed the legislative modifications regarding passive corruption crimes.

The central aspect of the paper is **Chapter IV**, entitled "Legal regulation of the bribe-taking crime".

In this chapter we aimed at presenting in detail the constitutive elements of the bribe-taking crime, provided by the Criminal Code.

The chapter contains 4 sub-chapters, entitled: "General considerations", "Legal content", "Pre-existing conditions" and "Constitutive content".

In this chapter I treated in a comprehensive manner aspects which constitute practical-application difficulties, such as those regarding the existence of a material object in case of the bribe-taking crime, the possibility of committing the bribe-taking crime by a legal entity, the legal classification of an intermediary's deed in the bribe-taking crime, the relation between the bribe-offering crime and the bribe-taking crime, the unequivocal nature of the claims formulated by the public servant, the ascertained or ascertainable nature of requested benefits, the moment of consuming the bribe-taking crime if money are received in instalments, the nature of undue benefits, the existence of a disproportion between the benefit obtained by the public servant and the action carried out by him/her, the applicable guilt form, etc.

Controversial aspects, both in the doctrine and in jurisprudence, were carefully analyzed, and the arguments on which are based were provided, as well as the identified legal solutions.

At the same time, in this chapter I analyzed the evolution and autonomous nature of the notion of "public servant", and I discussed in detail the case of professional categories such as: enforcement officers, notaries public, licensed translators, interpreters, judicial technical experts, mediators, psychologists, insolvency practitioners, official receivers, banking officials, attorneys at law, physicians, teachers, etc.

Chapter V, entitled, "Crime forms and other aspects" presents the versions of this crime, the applicable sanctions and its forms. This chapter details aspects such as punishment individualization and the application of the seizure institution.

Chapter VI, entitled "Relation with other crimes" presents the delimitation between the bribe-taking crime and the crimes of abuse of office, fraud, blackmail, traffic of influence and the abusive use of an office for sexual purposes.

In this chapter I presented and explained the doctrine and jurisprudence controversies regarding the relation between the bribe-taking crime and the abuse-of-office crime, provided under art. 297 par. 1 of the Criminal Code related to art. 13^2 of Law no. 78/2000.

In **Chapter VII**, dedicated to compared law, I presented the manner in which the bribe-taking crime is regulated in other European states.

The study of legislative acts, specialized jurisprudence and doctrine has led to *lex ferenda* proposals, which I will briefly present below:

Regarding corruption-fighting measures, I believe that it is very important to have legal provisions regarding the incrimination of corruption crimes.

However, it is as important to have institutions mandated with applying the legal provisions regarding corruption crimes, operating in an efficient and impartial manner. Essentially, discouraging corruption crimes is also related to the perception on the capability of the judicial system to impose dissuasive sanctions.[9]

The complexity of the cases regarding the bribe-taking crimes and the difficulties encountered within the punishment individualization process leads to the conclusion that it is useful and necessary for the High Court of Cassation and Justice to update the “Guidelines[10] regarding the judicial individualization of the punishments applied for corruption crimes".

Aspects such as establishing and analyzing punishment quantification criteria, punishment goal, crime committing circumstance, bribe size or value, the position held by the person who receives the bribe, the pecuniary damage, damages that cannot be valued in money[11], the chances of identifying the authors of the crime, are all elements that require a complex and balanced assessment.

The practical usefulness of using such sanction individualization guides, albeit considering the optional nature of the guidelines established thereby, is shown by the judicial experience of states with a consolidated democratic system.[12]

Such a guide, constantly updated, would constitute a very useful instrument in the sanction individualization process and would increase, in our opinion, the trust in the activity of judicial bodies.

I believe that it is really important to adopt the Law regarding the protection of public-interest whistleblowers, transposing EU Directive 2019/1937 of 23.10.2019. It is also necessary to review the internal procedures used by the institutions that have attributions in this field.

As shown in the section dedicated to the analysis of the constitutive content of the bribe-taking crime, in the literature there is a debate regarding the option of the lawmaker of

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[9] In this regard, see European Commission, Fight against corruption, European Half-year - Theme Chart https://ec.europa.eu.

[10] Available at http://old.csm1909.ro/csm/linkuri/21_12_2009__29319_ro.pdf.

[11] For example, citizens’ trust in state authorities is affected.

[12] For example, USA Federal Sentencing Guide, available at https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf.

incriminating the deed in case of persons assimilated to public servants, according to art. 289 par. 2 of the Criminal Code, only in the following methods: “non-compliance, compliance delay or performing an action against these legal duties".

I believe a *lex ferenda* proposal should be made, which would remove the legislative omission regarding the de-facto methods of receiving, claiming, accepting a promise in order to *implement* or *accelerate* the implementation of a service as provided under art. 289 par. 2 of the Criminal Code.

Another matter in which I believe that, *lex ferenda*, the lawmaker could intervene, by amending the incrimination text, s that of the person who provides assistance to the author of the bribe-taking crime after the crime-consuming moment.

According to art. 264 of the 1968 Criminal Code, this conduct could be classified as favoring the criminal, in the alternative method of the assistance provided to the criminal for obtaining the crime product.

However, the current criminal regulation no longer provides the possibility of retaining the crime of providing assistance to the perpetrator, as in case of this crime, provided under art. 269 of the Criminal Code, the lawmaker did not incriminate the assistance provided to the perpetrator in order to obtain the crime product.

Considering the social danger of this type of conduct, and its frequency in judicial practice, I believe that, *lex ferenda*, an intervention by the lawmaker in order to incriminate this behavior is necessary.

I believe it is necessary to formulate a *lex ferenda* proposal in order to regulate the lobby activity in Romania.

I believe that ensuring the decision transparency and adopting a legislative draft regarding the lobby activity[13] would significantly contribute to the fight against corruption.

Thus, these measures would also achieve a clear delimitation between the conduct allowed by law and those circumscribed to the incrimination from the corruption crime category.

Overall, the PhD thesis aims at a detailed analysis of incriminating the bribe-taking crime.

The study was conducted with the intention of not circumventing any of the matters that are important for this matter. The proposed solution are based on legal arguments derived from national and Western legislation and from national or foreign jurisprudence. I do not

[13] See Elena Simina Tănăsescu (coordinator), *Lobby în România vs. Lobby în U.E.*, European Institute of Romania, Bucharest, 2015, available at http://ier.gov.ro/wp-content/uploads/publicatii/Studiu_Lobby_site.pdf.

claim that this is a comprehensive or infallible paper. However, I hope that this thesis constitutes a useful tool for law theoreticians and practitioners.

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