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Offensive Crime in the Romanian Criminal Law

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Abstract: In the paper I examined the constitutive elements of the blackmail offense provided by the Romanian law, as well as the elements of resemblance and difference in relation to the previous law. The examination also includes references to the judicial practice adopted by the courts in Romania, as well as some opinions on the application of the more favorable criminal law, having of course some elements of differentiation between the previous and the current regulations. The novelty elements of this paper consist both in the examination carried out as well as in the considerations regarding the application of more favorable criminal law in transient situations. The work may be useful to students in faculty and practitioners in the field of law enforcement.

Keywords: Constitutive elements; more favorable criminal law; objective side; subjective side

1. Introduction

As it results from its legal content, the offense of blackmail is the deed of a person who, by compulsion, forces another person to give, do, do or do something, the perpetrator seeking non-patrimonial benefit for himself or for another.

In another way, the same offense will be retained in the situation where, by threatening to commit a real or imaginary act, compromising the threatened person or a member of his family, the perpetrator pursues the above-mentioned purpose.

As an aggravated way, the above-mentioned facts will be considered more serious and sanctioned accordingly, when the perpetrator seeks the unjust acquisition of a patrimonial benefit, even for another person.

According to the recent doctrine, "the offense of blackmail refers to acts that restrict the person's psychological liberty, which he causes by constraint to do acts that he would not have wanted to carry out, this constraint being made for the purpose of obtaining unjustly to use one who exercises the constraint. If the benefit pursued by the constraint has patrimonial character, the act of constraint will be more severely sanctioned" (Toader, 2013, p. 136).

In another, older, but up-to-date opinion, it was argued that "the social danger posed by the offense of blackmail results from the attention to the psychic liberty of the person, in order to make an unfair advantage" (Roșca, 1971, p. 323).

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Another author claims that "it is noted that the PCN, on the one hand, makes a distinction between the act of blackmail committed for non-patrimonial use and the one committed to obtain an unfair patrimonial benefit (the latter being the only aggravated form of the offense) And, on the other hand, places on the same level of gravity the basic form with the one consisting in committing the act by threatening to vitiage a real or imaginary fact, compromising the threatened person or for a family member" (Udroiu, 2014, p. 112).

2. Similarities and Differences between the Previous and the Current Regulations

The offense of blackmail was also provided in the Criminal Code of 1969 in Art. 194, with the same marginal name, but with some changes in both the legal content and the penalty limits.

Thus, in the new law the person's coercive action is criticized without expressly mentioning the ways in which the action is carried out, while in the previous law the incriminated action consists in coercion through violence and threats.

Also, in the new law a distinction is made between the purpose of acquiring a non-patrimonial or patrimonial benefit, the first being provided as a typical way, while in the second, the aggravated way of the offense, unlike the previous regulation in which both purposes are provided in The normative way type.

Another differentiation consists in the compromising act that is the object of the threatening with the vileag that must refer directly to the threatened person or to a member of his family, while in the old law, the compromising deed of deportation refers to the threatened person, Her husband or a close relative.

A last differentiation that we are referring to refers to the penalty limits that differ, in the new law for the two types of way being the one-to-five-year prison, while in the previous law the punishment provided was imprisonment from 6 months to 5 years.

In both laws, although the content of the aggravated ways differs, the punishments are identical, respectively, the prison from 2 to 7 years.

3. Examination of the Offense

3.1. Preexisting Elements

A) The legal object

The special legal object is represented by the social relations related to the person's psychic freedom.

In the doctrine it was appreciated that "adjacent are protected and the social relations that are injured or endangered by the injustice pursued by the perpetrator. These relationships may be related to the person's property (personal property) if the constraint is exercised in order to obtain material benefit that damages the victim; Or social relationships may be related to an

interest of another nature (service, family, professional, etc.), and the pursued benefit may also be moral. Thus, the sphere of social relations emerging adjacent is broader, these relationships varying according to the nature of illicit use ". (Rosca, 1971, vol. III, p. 324)

B) Material object

The offense of blackmail is, in principle, not material, since the psychological freedom of the person is a personal right.

If the perpetrator exerts physical violence on the victim, the material object will consist of the victim's body.

At the same time, "the material object of the offense must not be confused with the profit (benefit) achieved by the blackmailing; This is a consequence, not an aspect of the blackmail offense. " (V. Roșca, 1971, vol. III, p. 324).

C) Subjects of the offense

Active subject

The active subject of the offense may be any natural or legal person who has criminal capacity.

Criminal participation is possible in all its forms, namely co-authoring, instigation and complicity.

The passive subject

Passive matter may be any natural or legal person.

The plurality of passive subjects will lead to the containment of a plurality of offenses.

3.2. Constitutive Content

A) The objective side

The material element of the objective side is achieved by a coercive action in the case of par. (1) and threat, in the case of par. (2) of art. 207 C. pen.

In the doctrine it has been considered that the material element refers to "constraining a person by any means to give (delivering a good), to do (to adopt a certain behavior or to act in a certain sense), not to do (the omission to adopt a certain behavior Or to act in a certain way) or to suffer (bearing a patrimonial or non-patrimonial damage) "(Udriou, 2014, p. 112).

Since the law does not expressly provide the means by which the victim's coercion is achieved, it follows from the interpretation of the text that this (constraint) does not only cover violence or threats but also other means.

In the older doctrine, it was argued that "constraining a person means a force (oblige) to a thing which he would not willingly do" (Rosca, 1971, vol. III, p. 325).

The same author claims that in the case of blackmail, the constraint must meet two conditions:

- the coercive action must be capable of causing a state of fear under whose control the person subjected to coercive action can no longer react morally in the sense of effective opposition to the perpetrator's claims;

- the coercive action must be taken in order to obtain a certain behavior on the part of the constrained person (to give, to do, not to do or to suffer) (Rosca, 1971, vol. III, p. 325).

Therefore, coercion "can be exercised, under para. (1) through a physical or psychological constraint. To constrain a person is to force them to do or not do anything against their will. Regarding the essence of the offense consisting of the violation of the moral freedom of the person, the coercion must be of the nature of producing the one against whom a state of fear is exerted, because only in this way the deed impairing the moral freedom of the person will constitute an offense against that freedom, Respectively the blackmail offense. Physical constraint can consist of any act through which a foreign force acts on the person to defeat his physical resistance. This foreign force can be the physical energy of the perpetrator or another energy put into action by him. He does not care about the means or form of violence. The blackmail absorbs in its contents only those acts of violence that cause physical suffering, which do not exceed the intensity of those referred to in art. 193 par. (1) C. pen. And punishable within the limits prescribed for offense or other violence. If the use of violence causes the victim to suffer traumatic injuries or the health of the victim is affected, the rules relating to the offense competition shall apply.

Psychological constraint implies that the perpetrator performs an act likely to inspire the victim to fear that in the future he or any person close to him will incur an evil consisting of committing a criminal offense or detrimental act having the art. 206 C. pen. Constraint must be effective. For example, it was considered that when the defendant asks the injured party to reimburse money and clothing for the return of lost documents to the injured party, there is no element of constraint, the main component of the objective side of the blackmail offense, and, consequently, This crime can not be detained, a solution that is also being applied under the new regulation "(Toader, 2013, vol. III, pp. 137-138).

In judicial practice it was decided that the act of the accused, acting as the chief police chief - a person exercising a public office within a public institution - to compel the person against whom a criminal complaint was filed for acts of violence, Threatening to change the legal framing in an attempt to commit a crime of murder, to pay a sum of money to the person who has filed the criminal complaint meets the constitutive elements of the blackmail offense provided in art. 194 par. (1) C. pen. Related to art. 131 of the Law no. 78/2000.

In another case, it was decided that according to art. 194 par. (1) C. pen, the blackmail offense is the compulsion of a person, through violence or threat, to give, do, do or do anything if the act is committed to unjustly gain a benefit for himself or herself for another.

Therefore, the defendant's act of constraining the injured party by threatening his death and his family members to give him a sum of money in order to acquire this amount of money unjustly meets the constitutive elements of the blackmail offense provided in Art. 194 par. (1) C. pen. For the existence of the blackmail offense, it is not necessary for the injured party to

indict the amount of money claimed, the constitutive elements of the offense being met even if the amount of money was not actually given because the blackmail is an offense directed mainly against The moral freedom of the person, the freedom infringed by the simple fact of her constraint to give, to do, not to do or to suffer anything against her will.

Essential requirements. The doctrine was noted that the offense will exist under the constraint of the active subject is to determine the victim to give, do not do or suffer something.

To give something "means to perform an act of remission, self-filing. In judicial practice, it was considered that the offense exists where the accused claimed money for not reporting people you surprised by stealing goods store. In this situation, the blackmail offense complies with the omission of the referral.

To do something means to act in a certain way at the request of the person who exercises the constraint, such as signing an act, evacuating a room or a building, etc.

Doing nothing is to refrain from an act, from an action, for example, not to make a complaint, not to start a trial, not to participate in a competition for posting a post, etc., omission alleged by the constraint.

To suffer something involves the imposition of material or moral damages, such as the loss of money, the acceptance of a humiliating situation, etc. The offense of blackmail exists regardless of whether the constrained person satisfies the perpetrator's claim or not" (Toader, 2013, vol. III, p. 138).

In judicial practice, it was decided that, from the point of view of the material aspect of the objective side of this crime, it is necessary to prove the existence of a coercive action - by violence or threat - by the perpetrator, a kind of fear, under the control of which the person forced to Can no longer react and opposes effective resistance to the claims of the perpetrator. However, the threats of the attorney that "will remove them from the building if they do not pay the amount of EUR 37,000 are not in the nature of an actual coercive act that meets the above requirements.

In the case of par. (2) of art. 207 C. Pen., The material element is accomplished by a action of threatening the victim by giving a real or imaginary fact, compromising the threatened person or for a family member.

We note that this time, besides the psychological freedom of the person, the social relations regarding the honor or dignity of the person are also affected. The threat action may be aimed at rendering real facts such as committing or participating in committing a crime, involving the victim in illicit activities of any kind (for example, committing tax evasion facts). Because the law does not distinguish, the threat may also concern other past or present activities of the victim, which are related to the current life, even in some intimate aspects.

The concrete action of deportation may be accomplished against other persons, by any means.

There will be no such offense when the facts that are the subject of the threat (real or imaginary) have been brought to the attention of public opinion, without any other novelty elements (Udroiu, 2014, p. 121).

Concerning the concrete actions by which the victim's threat is carried out, we refer to the examination of the material element of the threat offense, made in the previous section.

Essential requirements. The threat action must have as its object the rendering of a real or imaginary fact, compromising the threatened person or the person threatened or for a member of his / her family.

By the phrase of giving meaning is meant an action by which the active subject brings to the knowledge of other persons, by any means of that real or imaginary act.

This real or imaginary act must be such as to harm the honor, dignity, profession, and reputation of the person to whom it relates.

In judicial practice it was noted that the act of the defendant who, in his capacity as a journalist, threatened the injured party with the vitiating of compromising facts for his image and his family, requesting him a sum of money not to publish an article in this sense, meets the constitutive elements of the blackmail offense. It constitutes complicity to the offense of blackmail the act of repeatedly transmitting the requests and threats of the author, facilitating his activity, in order to determine the victim to remit the amount of money claimed. To make a compromising act known is to bring it to the attention of others. He does not care if the is done in a certain way. Also, it is irrelevant if that deed is real or imaginary. It must be compromising for the threatened person or for a close relative.

In another case, it was decided that in order to be able to withhold the offense of blackmail, the following conditions must be met cumulatively: existence of constraint in order for the injured party to give, do, do or do something if the act is committed Unjustly gained a benefit for himself or for another, and the constraint is made by threatening to condemn a real or imaginary act, compromising the threatened person, a spouse or a close relative. In the present case, the offense of blackmail is carried out by all its constitutive elements: the injured party R.M. was forced to conclude an alienation contract by threatening to start criminal investigations for the tax evasion offense.

The immediate consequence is a state of danger that is created on the victim's psychic freedom.

Between the action of constraint and the state of danger, the existence of a causal link must be established.

Both doctrine and judicial practice have highlighted the differences between blackmail and robbery.

One of the authors, insisting on the differences between blackmail and robbery, points out that "if the injured person surrenders the constraint exerted by the perpetrator, there must be a period of time between the exercise of the constraint and the victim's activity of giving Do, do not do or suffer anything; Unlike robbery (crime against the patrimony), in the case of an aggravated blackmail crime aimed at obtaining a patrimonial benefit (a crime against freedom), the danger is future and it is necessary to have a period of time between coercion and surrender of the requested asset" (Udroiu, 2014, p. 117).

In this respect, it has been decided in the judicial practice that the two offenses are distinguished by the fact that the principal legal object of the robbery is the patrimony of the person, while the main legal object of the blackmail is its moral freedom. Also, in the case of robbery, the practice of violence or threat is, as a rule, simultaneous with the taking of the good, whereas in the case of blackmail the violence or threat is exerted for the purpose of later acquiring an unfair advantage.

The same issues mentioned above also arise in relation to the link between rape and blackmail.

Thus, if, by constraint (of any kind) or threat the perpetrator requires a person to carry out a sexual act of any kind with him, and the victim succumbs immediately, it will be the responsibility of the author to commit the rape, not the offense Of blackmail. If the same actions concern the future maintenance of a sexual act, the deed will meet the constitutive elements of the blackmail offense.

As mentioned in the examination of the offense of deprivation of liberty illegally, if the release of a person deprived of liberty under the law requires a patrimonial or non-patrimonial benefit, the two offenses will be detained in a real contest (deprivation of Freedom illegally and blackmail).

B) Subjective side

The form of guilt with which the active subject of the offense acts is only the direct intention, qualified by the aim pursued by the perpetrator.

According to the doctrine, "the legislator understood to criminalize the injustice of seeking to profit, so that the blackmail offense exists even if the benefit is just" (G.) Would have been due to the perpetrator if he obtained it justly, that is to say, in a lawful way" (Toader, 2013, vol. III, p. 140).

The mobile has no legal relevance regarding the existence of the crime, being important in the process of individualization of the criminal law sanction made by the court.

4. Transitional Situations. Applying More Favorable Criminal Law

The comparative examination of the provisions contained in the two codes and the special law highlights the following more favorable assumptions of criminal law:

A) If the coercion of a person to give, to do, not to do or to suffer, committed for the purpose of gaining a non-patrimonial benefit, the deed meets the constitutive elements of the offense in the manner provided by art. 194 par. (1) of the old law and art. 207 par. (1) C. pen., The penalty limits between the two regulations being different (imprisonment from 6 months to 5 years in the old law and the prison from one to 5 years in the new law), the more favorable criminal law may be any of these.

Thus, if the court seeks to apply a punishment directed to the minimum prescribed by law, the more favorable criminal law will be the old law, which stipulates a lower minimum, and if it

is directed towards the application of a punishment oriented to the special maximum, the law in force.

If the court retains an attenuating circumstance, the more favorable criminal law will be the old law, and if it retains an aggravating circumstance, the more favorable criminal law will be the new law.

If the provisions of the special law apply, the limits of punishment also differ, in the old law being a prison sentence of 2 to 7 years, and in the new law one year and four months to 7 years and four months. The more favorable criminal law will be the old or new law, depending on the above.

B) When detaining the same act, but for the purpose of acquiring a patrimonial benefit, the deed meets the constitutive elements of the blackmail offense provided in art. 194 par. (1) C. pen. Of 1969 and art. 207 par. (3) C. pen. Because the penalty limits differ (imprisonment from 6 months to 5 years in the old law and the prison from 2 to 7 years in the new law), the more favorable criminal law may be any of the two.

Thus, if the court seeks to apply a punishment directed to the minimum or maximum prescribed by law, the more favorable criminal law will be the old law, as the penalty limits are lower.

If the court retains an attenuating or aggravating circumstance, the more favorable criminal law will be the old law.

If the provisions of the special law apply, the penalty limits also differ, in the old law, being between 2 and 7 years of imprisonment, and in the new law the imprisonment is 3 to 9 years and 4 months. Given the penalty limits, as a rule, the more favorable criminal law will be the old law.

C) If the act of threatening to deport a real or imaginary act of compromise for the threatened person, for her husband or for a close relative, for the purpose of acquiring a patrimonial benefit, the deed meets the constitutive elements of the blackmail offense provided for in art. . 192 par. (2) C. pen. Of 1969 and art. 207 par. (2) and (3) C. pen. In this situation, where the penalty limits are the same (imprisonment from 2 to 7 years), if no aggravating circumstances are taken, the law in force will apply.

If the pursued benefit is non-patrimonial, the limits of punishment differ, in the sense that the old law imprisonment is from 2 to 7 years, and in the new law the prison from one to five years. Given the limits of punishment, as a rule, the more favorable criminal law will be the new law.

If mitigating or aggravating circumstances are taken, the more favorable criminal law will be the old law.

If the provisions of the special law apply, the penalty limits also differ, in the old law being a prison sentence of 2 to 7 years, and in the new law the imprisonment from 3 years to 9 years and 4 months. More favorable criminal law will, as a rule, be the old law because the minimum and maximum limits are lower.

D) In the doctrine, it was appreciated that "if the act of threatening to deport a real or imaginary demeaning act for the persons who have established similar relations with those of the spouses or between the parents and the children, if they cohabit with The person threatened, for the purpose of acquiring a patrimonial benefit (for example, the concubine of the threatened person), according to C. pen., Will be classified under the provisions of art. 194 par. (1) C. pen. (Imprisonment from 6 months to 5 years) and according to the new law in the provisions of art. 207 par. (2) and (3) NPCs (2-7 years). Given the limitations of punishment, the provisions of C. pen. Are more favorable. If, in the above-mentioned hypothesis, the intended benefit is non-patrimonial, the more favorable law will be also C. pen., But only if the court is directed to the special minimum, because the deed will be framed in the provisions of art. 207 par. (2) (1-5 years) according to the NCP, which provides only the specially higher minimum" (Udroiu, 2014, p. 123).

In all circumstances, the more favorable criminal law will be applied only in relation to the court's decision to apply the criminal law sanction directed to the minimum or maximum provided for in the rule of incrimination, with some particularities aimed at restraining aggravating or attenuating circumstances or the incidence of the special law, Where the special quality of the active subject is considered.

5. Conclusions

Statistics show that the blackmail crime in Romania is a crime whose rate is quite high compared to other states.

The new regulation came with a number of modifications and additions, but also with the maintenance of provisions that have proven to be effective over time.

In addition to the actual examination of the constitutive content of the offense, I attempted to capture some interpretations on the application of the more favorable criminal law under the provisions of Art. 5 par. (1) C. pen.

The examination of several variants of more favorable criminal law enforcement proves to be useful both in didactic, but especially in judicial practice.

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