

# Considerations Regarding the New Formula for Criminalizing the Offence of Blackmail in the Romanian Criminal Code

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DOI: [10.36348/sijlci.2020.v03i09.004](https://doi.org/10.36348/sijlci.2020.v03i09.004)

| Received: 31.08.2020 | Accepted: 08.09.2020 | Published: 13.09.2020

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## Abstract

For the correct application of any legal norm, it is necessary to clarify all the elements susceptible to interpretation, and when there are gaps in the law or violations of the fundamental law of a state or of the provisions of international documents to which a country is a party, the intervention of the legislator is necessary for remedying these aspects. For these reasons, in the present scientific approach we aimed to analyze some aspects of essential importance of the new formula for criminalizing the offence of blackmail, aspects that may generate difficulties both in terms of interpretation and application. Only a regulation correlated with the fundamental law of the country and with the provisions of the European Convention on Human Rights can meet the requirements necessary for the protection of the mental freedom of the person who represents the social value protected by the norm of criminalizing the offence of blackmail.

**Keywords:** The offence of blackmail, coercion, patrimonial benefit, non-patrimonial benefit, unjustly, legality of incrimination, ECHR jurisprudence.

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## INTRODUCTION

“Justice is the primary evaluation criterion of social system legitimacy. In the modern social system, whether it is political system, economic system or other systems, the core and main part of it is the expression of legitimacy through the legal system without exception. And when we combine the concept of “justice” with a particular legal field, it means that we use the primary criterion of “justice” as a critical or constructive tool to prove or disprove the legal system in this field” [i].

According to article 207 of the current Romanian Criminal Code, the offence of blackmail was incriminated with the following content:

1. “Coercion a person to give, to do, not to do or to suffer something, in order to unjustly acquire a non-patrimonial benefit, for himself or for another, is punishable by imprisonment from 1 to 5 years.
2. The same punishment shall be sanctioned for threatening to disclose a real or imaginary deed, compromising for the threatened person or for a member of his family, for the purpose provided in par. (1).
3. If the facts provided in par. (1) and (2) were committed in order to unjustly acquire a

patrimonial benefit, for himself or for another, the punishment is from 2 to 7 years.

## RESEARCH METHODS

The author used established research methods: documentation method, comparative method, analytical method, the logical method, examination of judicial practice or application method [ii]. “This type of study was a normative juridical with the nature of this research is analytical descriptive. This study applied a statute approach and a conceptual approach” [iii]. The conceptual approach concerns to legal norms of penal law.

## DISSCUSIONS AND RESULTS

### Aspects Concerning the Notion of Coercion Used to Define the Action of the Material Element of the Offence

The legislator of the current Criminal Code uses the term “coercion” in defining the material element of the offence of blackmail. Following its analysis in both doctrine and jurisprudence, it was found that it was used in the usual sense, according to the definition given by the explanatory dictionary of the Romanian language.

If in the previous Criminal Code, the legislator limited the commission of this offence "by violence or threat", in the new formula of incrimination this phrase no longer finds its expression precisely to increase the incidence sphere of this offence.

We note that the new criminal and criminal procedure provisions do not define the term "coercion", and this confirms, we believe, the fact that the intention of the legislator was to assign the usual meaning regarding this notion [iv]. Therefore, according to common language, coercion must be understood as the action having the effect of determining a person to do or not to do something contrary to his own will.

The offence of blackmail is limited to the sphere of the offences affecting the mental freedom of the person, as the person against whom it is committed is not deprived of liberty physically, but only of the freedom to act according to his own will, as a result of the state of fear caused by constraint.

Even if blackmail is an offence that affects only the mental freedom of the person, coercion as a material element of this crime can be both mental / moral and physical. We emphasize that regardless of which of the two forms the constraint will be exercised the condition is that it to be effective.

We specify the fact that in the circumstance in which the constraint takes the form of the physical one, this implies the exercise by the perpetrator of a physical energy strong enough that the passive subject cannot physically resist it, cannot defeat it.

In the hypothesis of exercising the psychic constraint, this presupposes the commission of an act resulting in the fear of the passive subject that, later, he will bear himself or a person close to him an evil whose result will be a damage.

In view of the above, we express the opinion that the new variant of criminalization of the offence of blackmail covers any form of coercion, regardless of the way in which it was exercised, by which a person is determined "to give, to do, not to do or to suffer something, in order to unjustly acquire a non-patrimonial benefit, for oneself or for another", without the clarity, precision and predictability of the norm being affected by the new wording.

Moreover, we consider it auspicious that the legislator of the current Criminal Code has abandoned the use of the phrase "by violence or threat", which, in the old regulation, unjustifiably limits the incidence sphere of the offence of blackmail.

We consider that the renunciation of the use of the phrase "by violence or threat" increases the area of incidence of this offence without affecting in any way the possibility of determining the material element.

### **Aspects Regarding the Nature of the Benefit Pursued by the Perpetrator when Committing the Offence**

The offence of blackmail incriminates both committing the deed in order to acquire a non-patrimonial benefit, and its committing when the pursued benefit is of patrimonial nature. Paragraph (3) of Article 207 of the Criminal Code provides for the aggravated variant of the offence of blackmail, which involves committing the acts described in the first two paragraphs in order to gain unjustly a patrimonial benefit.

We note that, in the previous criminal legislation, in the case of the offence of blackmail, the benefit pursued was not differentiated according to its nature, unlike the current situation in which the legislator chose to more severely sanction the act committed in order to obtain unjustly a patrimonial benefit for oneself or for another person, given that neither the Criminal Code nor the Code of Criminal Procedure define anywhere the notions of "non-patrimonial benefit" and "patrimonial benefit". Since the criminal law does not define the notions of "non-patrimonial benefit" and "patrimonial benefit", it follows that the intention of the legislator was precisely to give them "the meaning that results from the ordinary meaning of the words that compose them" [v].

In our opinion, even if these terms do not have a definition within the meaning of criminal law, their meaning does not involve difficulties of understanding, especially since they are widely used in the current language and in addition, in this case, they are used with their own meanings, according to the definition given by the explanatory dictionary of the Romanian language.

By "patrimonial benefit" we mean that the respective benefit has a direct quantifiable character in money. Obviously, on the contrary, the meaning of the phrase "non-patrimonial benefit" can only be interpreted as an invaluable gain in money.

Of course, any legal provision must meet, among other things, the criterion of predictability in order to be applied. If an interested person is not fully clarified about the consequences that may result from a given act, although the rule meets the criterion of predictability, he may turn to a specialist for assistance [vi].

It is necessary to specify that the Constitutional Court of Romania analyzed by Decision [vii] no. 603 of October 6, 2015, if the notion of "patrimonial benefit" concerns any type of patrimonial benefit or only the improper patrimonial benefit. In this regard, the Court first recalled that, by Decision [viii] no. 2 of January 15, 2014, regarding the introduction in the content of the offence of conflict of interests provided in par. (1) in article 253 ^ 1 of the Criminal Code of 1969, of the notion of "undue material benefit", it was established that the provision of the condition of undue material benefit obtained is unfounded, in relation to the special legal object of this offence, respectively social relations regarding the good development of the service activity, activity that cannot be realized in the conditions of fulfilling some acts in violation of the principles of impartiality, integrity, transparency of the decision and supremacy of the public interest in the exercise of public dignities and functions. In the same decision, the Court also stated that the conflict of interests can not only involve obtaining undue material benefits, but also obtaining any kind of benefit, as the incrimination does not seek to sanction situations in which legal rules are violated which give grounds and justification for obtaining material benefits, but of situations in which the impartial exercise of the duties of a civil servant could be affected. For the reasons set out in this decision, in Decision no. 603 of October 6, 2015, the Court held that the provisions of article 253 ^ 1 of the Criminal Code of 1969 were taken over in article 301 of the Criminal Code in force, so that the notion of patrimonial benefit from the content of article 301 par. (1) of the Criminal Code considers any type of patrimonial benefit and not only the undue patrimonial benefit.

The term unjustly is used in relation to the method of obtaining, respectively coercion, having in this context the meaning of incorrect or illegal.

The form of guilt with which the deed can be committed is the direct intention qualified by the pursued purpose, respectively the unjust acquisition of a benefit for oneself or for another person. It is irrelevant whether the purpose pursued, namely the effective acquisition of the patrimonial or non-patrimonial benefit, has been achieved or not. It is only important that the perpetrator takes it into account when committing the act.

It does not matter whether the intended benefit is legally due or not, as this offence seeks to sanction the unjust or illegal way in which it is sought to be acquired.

It does not matter for the incidence of the offence if the benefit comes from a person other than the one on whom the coercion was exercised, because by criminalizing blackmail, the legislator sanctions the

coercion exercised in order to obtain an unjust benefit, not harm the passive subject.

In our opinion, the addressee of the incrimination rule regarding the act of blackmail contains all the necessary elements in order to be able to determine his conduct in accordance with the relevant criminal provisions.

We consider that the text of this last paragraph does not raise problems as to the clarity, precision and predictability of the rule, as it is easy to understand the intention of the legislator to criminalize any way in which a person commits the offence of blackmail in order to obtain an unjust benefit.

### **Aspects Regarding the Risk of Discrimination on the Basis of the Sanctioning Regime**

It could also be invoked that the new regulation of the blackmail offence creates discrimination on the criterion of the disproportion of the sanctioning regime, according to the pursued benefit is of patrimonial or non-patrimonial nature. Indeed, it is noted that the perpetrators of this crime will suffer different legal consequences, in the sense that those who commit the act in the aggravated form provided for in paragraph 3 will be more severely punished than those who will commit the act under the standard form of this offence regulated in the first paragraph. But in the conditions in which committing the offence of blackmail for the purpose of obtaining patrimonial benefits has a higher degree of danger regarding the social value protected by the incrimination norm, than committing the same deed for the purpose of acquiring non-patrimonial benefits, we consider justified the legislator's decision to sanction more gently committing the deed in the latter circumstance.

In the process of drafting the law, it is imperative that depending on the social realities, the legislator to incriminate deeds of a certain gravity, committed over time, facts that raise the issue of risk and fear that they could repeat, endangering or even harming social values that must be protected by criminal law [ix].

Moreover, the Constitutional Court of Romania ruled in the pronounced decisions that "the principle of equality before the law implies the establishment of equal treatment for situations that, depending on the purpose pursued, are not different. That is why he does not exclude but, on the contrary, presupposes different solutions for different situations. Consequently, a different treatment cannot only be the expression of the exclusive appreciation of the legislator, but must be rationally justified, respecting the principle of equality of citizens before the law and public authorities" [x].

At the same time, the Constitutional Court also stated that “the principle of equality does not mean uniformity, so if equal treatment must correspond to equal situations, legal treatment can only be different in different situations. In this sense is the jurisdictional practice of the Court, as it results from the decisions no. 70/1993, no. 74/1994 and no. 85/1994, in accordance with the constitutional practice of other countries, as well as with the practice of the European Court of Human Rights. In general, it is considered that the violation of the principle of equality and non-discrimination exists when differential treatment is applied to equal cases, without objective and reasonable motivation, or if there is a disproportion between the purpose pursued by unequal treatment and the means used. In other words, the principle of equality does not prohibit specific rules, in case of a difference of situations. Formal equality would lead to the same rule, despite the difference in situations. That is why the real inequality, which results from this difference, can justify distinct rules, depending on the purpose of the law that contains them. That is why the principle of equality leads to the emphasis on the existence of a fundamental right, the right to difference, and the extent to which equality is not natural, to impose it would mean the establishment of discrimination. At the same time, it should be noted that the fundamental rights enshrined in the Constitution cannot be viewed in isolation, but in a natural, logical correlation” [xi].

Therefore, equality before the law does not imply a uniformity of the legal provisions, ignoring certain aspects, such as the existence of circumstances likely to aggravate the committing of a deed provided by the criminal law. Consequently, the sanctioning treatment differentiated when the circumstances of committing an act are particularly dangerous for the social value protected by the rule of incrimination cannot be interpreted as discrimination, but, in correlation with other legal provisions, only as a special regime of protection established in order to ensure respect for all the fundamental rights concerned.

In addition, it must be borne in mind that, according to the Romanian Constitution, the Parliament is the only legislative power of the country and that it has the exclusive competence to regulate by organic law the crimes, the punishments and the regime of their execution. By virtue of these constitutional attributions, the Parliament is free to assess, in addition to the social danger according to which it is to establish the legal nature of the incriminated deed, also the conditions of legal liability for this deed. Consequently, the incrimination of the facts and the imposition of the punishment for them fall within the competence of the Parliament and are based on criminal policy reasons, the Parliament having, in this respect, a discretionary margin, insofar as it does not unduly affect the fundamental rights of the person.

### **Aspects Regarding the Principle of Predictability of the Offence of Blackmail in Relation to the Interpretation of Article 7 of the ECHR through the Jurisprudence of the European Court**

In the following, we will analyze by reference to the jurisprudence of the European Court of Human Rights, whether the provisions could be interpreted as inconsistent with the provisions of Article 7 of the ECHR, on the legality of incrimination and punishment.

When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability [xii]. The European Court also stated that these qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries [xiii].

Of course, laws must be of general application that the wording of statutes is not always precise and one of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. In this regard, The European Court stated that many laws are inevitably couched in terms which, to a greater or lesser extent are vague, and their interpretation and application are questions of practice [xiv]. Consequently, in any system of law, however clearly drafted a legal provision may be, including a criminal law provision, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances [xv]. So, taking into account the principle of general applicability of the laws, the role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain [xvi]. We can not forget also that it is a firmly established part of the legal tradition of the States party to the Convention that case-law, as one of the sources of the law, necessarily contributes to the gradual development of the criminal law [xvii]. According to all these, The European Court, stated that article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen [xviii].

All these aspects were retained by the Constitutional Court of Romania in a series of decisions [xix]. In addition, the Court, in reference to the case law of the European Court referred to above, has established that the provisions of Article 207 paragraphs (1) and (3) of the Criminal Code correspond to the principle of legality of incrimination regulated both in the Romanian Constitution and in Article 7 of the

ECHR. We consider that the provisions of Article 207 of the Criminal Code are sufficiently accessible, precise and predictable in their application, which is why it cannot be argued that they are contrary to the principle of legality [xx].

## CONCLUSIONS

Following the study, we find that both the term coercion and the expression "in order to unjustly acquire a patrimonial benefit" are unambiguous and, consequently, it cannot be stated that it could generate arbitrary and uneven interpretations at the level of the courts or that it could lead to abuses by the judiciary.

The non-definition of the expressions "non-patrimonial benefit" and "patrimonial benefit" used in the incrimination norm does not have as effect the ambiguity, imprecision and unpredictability of the text of the blackmail offence and, consequently, it cannot be contrary to the principle of legality of incrimination provided in Article 7 of the ECHR. Given these, it cannot happen that different solutions are pronounced at the level of the courts, such as to generate discrimination between the persons who are responsible for committing such an offence.

Due to the increased danger, we consider that the legislator's option to establish a harsher criminal penalty for blackmail committed for the purpose of obtaining a patrimonial benefit than the one committed for the purpose of obtaining a non-patrimonial benefit is fully justified, regardless of whether the perpetrator obtained those benefits or not, by committing the crime in question. We express our opinion that, also from the perspective of this aspect, the provisions of article 207 of the Criminal Code are in line with the principle of equal rights, as the principle in question concerns the recognition of equal rights between citizens, and not the identity of legal treatment in case of application of measures, regardless of their nature [xxi].

Therefore, we are of the opinion that the criminal protection of the person's mental liberty in case of blackmail, ensured through the provisions of Article 207 of the Criminal Code, is adequate, necessary, balanced from the point of view of the sanctioning regime and proportionate to the seriousness of the facts described in the three paragraphs.

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