



## The Unfulfillment or the Defective Achievement of Office Duties according to the New Criminal Code. Comparative Examination. Critical Comments

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**Abstract:** The aim of the research consists of the examination of the provisions of the New Criminal Code relating to the unfulfillment or the defective achievement of office duties, a comparative examination of the current provisions and building critical comments that would help improve the legislation in the matter. The paper continues further research in this area, which was published in national and international journals or conference proceedings. The concrete results of the research focuses on examining the new provisions on active and passive subjects of crime, to defining the railway accident, as comparative examination and some critical observations as well. The value of the research can be useful to practitioners in this field, theorists and to the Romanian legislator. The research consists of critical remarks and proposals for improving the content of the type offense and the completion of the aggravated variant.

**Keywords:** offense; type variant; aggravated variant; railway accident

### 1. Introduction

After the advent of railway transports the Romanian legislator insisted on defending the fundamental values that could be harmed by the railway transport complex activity. Among the values identified by the legislator we mention: life, physical entities' body integrity and health, transported goods, goods owned by railways transport companies or rail infrastructure, including: locomotives, carriages, railroad and other facilities, buildings, etc.

The first incriminations of such acts appear from the second half of the XIX<sup>th</sup> century, in the Criminal Code of 1864 in article 370 and 371. These incriminations regarded only certain acts or omissions by persons unaware of the railway system and it did not aim at the effective activity of the employees in the system.

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Later, given the record of railway events involving human casualties and / or significant financial damage caused as a result of breaches of office duties by the employees of the railroad, the legislator has incriminated such acts as well.

These first incriminations were provided in the Law on Police and railway exploitation in Romania since 1870.<sup>1</sup>

However the legislator of the time had in view only some facts that regarded the mechanics of locomotives or train drivers who left their posts while driving or were “in a state of drunkenness”. We discover that there were not considered other professions specific to railway traffic and transportation, only the mechanic and the train conductor, which otherwise, at that time, they were the most popular.

The first indictment which envisages the railway officials who fail to fulfill their duties, occurs with the adoption of the Charles II Criminal Code, where the article 362 provides that “*an official from the railway or any person employed in the service of this institution, which does not fulfill the office duties, or works against his duties and thereby expose to danger the persons or goods presented in article 359, shall be punished with correctional imprisonment from 5 to 8 years, and in the case of article 360, the punishment is harsh imprisonment from 7 to 12 years and civic degradation from 4 to 8 years. These penalties can increase by an additional 3 years in the case of article 361 paragraph 1.*”

We can say that the origin of the text of article 329 of the New Criminal Code and article 274 of the current Criminal Code is in the text of the article 362 of the Charles II Criminal Code.

## **2. General Examination of the Offence Provided in the New Criminal Code**

### **2.1. The Legal Content**

According to the provisions of article 329 of the New Criminal Code, (1) *Failure to fulfill the office duties or their defective achievement by the employees who manage the railway infrastructure or transport operators, intervention or maneuver by rail, shall be punished with imprisonment from one to five years.*

(2) *If the offense resulted in a railway accident, the punishment is imprisonment from 3 to 10 years.*”

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<sup>1</sup> Published in the Official Monitor no 71 of January 31<sup>st</sup>, 1870.

To present most accurately our opinions on how it is incriminated this act, we will examine briefly the aspects on the active subject and passive subject of the crime, and those on the objective side and the aggravated version.

## **2.2. Active and Passive Subject**

By examining the legal content of the offense, it results that in order to have the quality of active subject of this crime, it is necessary to fulfill the following conditions:

- the physical entity concerned would meet the general conditions required by law, respectively those related to age, responsibility, freedom of will and action;
- the regarded person would have the quality of the employee of one of the following legal entities:
  - the company that manages the railway infrastructure;
  - an operator of cargo or passengers' transport;
  - an operator performing activities specific to railway intervention transport or rail maneuver;
  - specific tasks of office service of the person concerned must be directly related to traffic safety on the rail.

We mention that the absence of one of the listed conditions will lead directly to the absence of criminal liability of the active subject for this offense and even to the inexistence of the offense.

Unlike the active subject, given the specifics of this crime, the scope of the passive subjects vary depending on how committing the crime, namely the type variant or the aggravated variant. Thus the type variant provided under article 329 paragraph (1) of the New Criminal Code, the passive subjects of this crime can only be operators of transporting goods or passengers and operators that perform specific tasks of intervention or maneuver by rail.

In the aggravated version the scope of passive subjects widens, as it may occur at legal (other than those referred to at the type variant) and physical entities.

Among the legal entities, other than those mentioned in the variant type, we mention the company (society) that manages the railway infrastructure, because following a railway accident there can be destroyed or damaged goods belonging to this company, such as: installations, railways line, buildings etc.

In the category of passive subjects, the physical entities, we mention those who suffered personal injury, damage to health or were killed in a railway accident. The physical entities which were assigned to transport goods that were destroyed or damaged as a result of committing the crimes in the type or aggravated variant, cannot be passive subjects of this crime.

### **2.3. The Objective Side**

The financial element of the objective side consists of an inaction (omission), identified by failure of fulfilling the duties, or an action (commission) which amounts to achieve those specific office tasks in a defective way by the active subject of the crime.

Regarding the socially dangerous consequence that occurs, it differs depending on the type or aggravated variant. Thus, in the type variant, the result consists in endangering the traffic safety of transportation means, intervention or maneuver by rail, and in the aggravated variant in producing a railway accident as defined in the content of article no 333 of the New Criminal Code.

In order to determine the offense, it is necessary to establish the existence of a causal link between the action or inaction of the active subject and the socially dangerous consequence that was produced, that is jeopardizing the safety of transport means, railway intervention or maneuver, or the occurrence of a railway accident.

We will not insist upon the examination of the objective side, as this is not the subject of our paper. In this context, we wish to point out however that aggravated variant of this offense, that is railroad accident, there will be, regardless of the destroyed or damaged goods, the means of transport, rolling stock or railway installations. We specify that the destruction or degradation of property entrusted to transport, regardless of their value, cannot meet the constitutive elements of the offense in its aggravated variant.

### **3. Comparative Examination**

Against the background of structural changes in the organization and operation of the railway traffic and transportation, and some critical remarks made in the doctrine of the recent years, the legal content of the offense suffered important

changes, in relation to the current provisions.

A first modification aims at prioritizing this crime in relation to that committed at fault. Thus, this offense committed with intent is referred to in article 329, while the offense committed at fault is provided for in article 330 of the New Criminal Code. The current Criminal Code, putting them in the special chapter is different, in that it was given a priority to the offense committed at fault.

Another change concerns the enlargement of the area of active subjects of the offense that, according to the new regulations they may be employees of the company that manages the railway infrastructure, employees of transport and passengers transport, employees of companies that handle the rail or employees of intervention on the rail companies.

The current regulation provides only one type of active subjects of the crime, that is those who may be employees of the railway. (Rusu, 2009, p. 198)

By another amendment it widens the area of passive subjects of the crime, which may be, those companies that carry out transport activities of goods or passengers (their means of transport, i.e. locomotives and wagons) and companies performing intervention or maneuver activities on the railway (equipment used by these companies, respectively, railcars, plows, cranes and so on).

The current legislation provides only one passive subject, that is the means of transport of railways (Rusu, 2009, p. 163).

In the New Criminal Code it renounces at two aggravated variants of offense, that is the disturbances in the transport activity on railway and the railway disaster, the only aggravated variant being the railway accident. Under the current regulations, there are three aggravated variants, respectively the disruption in transportation activity by rail, railway accident and railway catastrophe. (Rusu, 2009, p. 202)

One last change that was made by the legislator of the New Criminal Code refers to punishment limits. Thus in the new Criminal Code there are established sentences between one and five years of imprisonment in type variant and 3 to 10 years in prison in the aggravated variant (railway accident).

In the current Criminal Code the limits of punishment are structured on three levels, namely imprisonment from 6 months to 3 years in the simple variant and from 3 to 7 years imprisonment or 7 to 15 years in prison, mentioned in the two aggravated variants.

#### 4. Critical Remarks

No doubt that the new incrimination is superior to the existing one, as there were considered also the new changes to the organization and functioning of the current system of railways transport.

These changes and additions which are included in the New Criminal Code were requested primarily by the doctrine, which noticed a series of inconsistencies in the current text, with the organization and operation of the rail traffic and transportation. In other words, although rail transportation stops working in a unitary system since 1998, the legislator has not made changes imposed by the emergence of new active and passive subjects of the offense.

We believe that each time writing criminal law rules to protect certain social values it must be carried out in the context of evaluating specific activities in the field, the essential condition being the identification of the most important social values in the field. Despite the progress, we find that the regulation of the New Criminal Code has not taken into consideration all the necessary elements, or more, all the important social values that needed to be defended through criminal law rules.

A first aspect that we need to point out is related to passive subject physical or legal entity entrusted to transport various goods, which are then destroyed or damaged as a result of a railway accident.

We note that in the definition of railway accident, the passive subjects are only companies or companies who are equipped with only transport means, rolling stock and railway equipment. We believe it is imperative that in the scope of the passive subjects it should be included also the physical entities entrusted to transport goods, which are subsequently degraded or destroyed in a railway accident.

Another observation regards the way in which it is defined the railway accident where there is no provision to limit the caused damage, leading to the conclusion that the offense in its aggravated variant will exist also under the situation where there is a loss of several hundred lei. We believe that it should be provided a minimal prejudice. The definition content use of the railway accident of the “means of transport” and “rolling stock” is inappropriate, as the phrase *rolling stock* includes in the specific technical language all means of transport.

A final observation that considers the type variant of the offense concerns the inclusion in the category of passive subjects of the crime also the company that manages the railway infrastructure.

## 5. Conclusions

The new regulation is in our opinion a breakthrough in terms of defending undoubtedly the most important social values of the traffic area and rail transport. This time there were considered the new changes in the complex task of traffic and rail transport. The most important changes concern the broadening of the area of active and passive subjects of the crime, an activity that took into account the companies and companies that engage in specific transport activities, handling, intervention or those managing the railway infrastructure. However this research leads to the conclusion that this text should be supplemented, according to the above observations.

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