

BRIEF CONSIDERATIONS ON THE CRIMES OF FRAUD AND BREACH OF TRUST

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Summary

Through the current criminalization of fraud and breach of trust, the legislator sought to create a punitive framework designed to provide increased protection in the context of the diversification of the means of committing these crimes.

Fraud is a crime against property that criminalises the act of misleading a person, followed by causing them harm.

Breach of trust is an offense that involves abusing the trust that one person has in another for the purpose of obtaining a financial gain.

Fraud and breach of trust have a number of elements in common, but also several distinctive features that differentiate them.

The crimes of fraud and breach of trust serve to protect social values relating to the relationships of trust that exist between people living together in society, to ensure that the property rights of others are respected and not infringed upon by means that cause them harm. Criminal law provides a degree of security for property against any acts of abuse of trust, including those committed for the purpose of obtaining financial gain from others.

The social values protected by the criminalization of these offenses are some of the most important ones, protected by both criminal and civil law.

Keywords: fraud, breach of trust, subjects, sanction.

Introduction

This study addresses the issue of the two crimes (fraud and breach of trust) by examining their typical characteristics (legal object, material object, subjects). Thus, we conducted a comparative analysis of the two crimes against property through breach of trust.

The importance of criminalizing these acts under criminal law stems from the social values protected by the legislator regarding the trust that must accompany property relations. Therefore, the establishment of these crimes has the potential to act as a deterrent for those who violate the normal conduct of property relations.

Often, questions have been raised regarding the legal classification of actions committed in contexts such as those mentioned above, namely whether such acts could be classified as breach of trust or fraud.

According to Article 244 of the Criminal Code, the crime of fraud consists of "misleading a person by presenting a false fact as true or a true fact as false, for the purpose of obtaining an unjust financial gain for oneself or for another, and if damage has been caused, it is punishable by imprisonment from 6 months to 3 years."

With regard to the crime of breach of trust, Article 238 of the Criminal Code states that "the unlawful appropriation, disposal, or use of another person's movable property by the person to whom it was entrusted on the basis of a title and for a specific purpose, or the refusal to return it, shall be punished by imprisonment from 3 months to 2 years or by a fine."

At first glance, the legal texts regulating the two offenses are comprehensive and can provide a clear and predictable definition for practitioners. However, in judicial practice we often encounter seemingly controversial situations, for which even doctrine proves ineffective.

This study was conducted because, in my opinion, the two offences have a relatively symmetrical structure, given the way they were established by the legislator. For example, in the case of breach of trust, the perpetrator has gained trust in a lawful manner and is already in possession of the property at the time of the commission of the offense, whereas in the case of fraud, the characteristic aspects appear in a distinct manner. Thus, the perpetrator takes possession of the property after gaining trust, but unlawfully, either by misrepresentation, in the typical scenario, or even "by using false names or qualities or other fraudulent means."

As we will see below, we believe that a scientific approach is needed to address an issue that is both useful and topical.

Fraud and breach of trust – differences

In the following, I will analyze the differences between the two offenses, as they have caused a series of controversies in judicial practice, where we encounter different solutions pronounced by courts for similar cases.

After conducting a brief analysis of the legal texts, we will observe the existence of numerous similarities, but especially differences, which highlight the two criminal acts.

In conducting this comparative examination, it should be noted that both the crime of fraud and the crime of breach of trust are provided for in Title II of the Criminal Code, entitled "Crimes against property," and are included in the same chapter, "Offenses against property through breach of trust."

Thus, I believe that it is necessary to conduct a thorough examination of all the characteristics of that offense in order to achieve a correct legal classification and eliminate any possible ambiguities, because, as I mentioned earlier, even if the text of the law is as clear as possible, extremely complex situations can arise in judicial practice. The lack of a thorough analysis of all the elements characteristic of the situation described may lead to the imposition of a penalty that is too lenient or, on the contrary, too harsh.

In principle, even though crimes against property are covered by very explicit criminal provisions, judicial practice has revealed increasingly varied situations that must be treated with particular care in order to prevent erroneous solutions (for example, theft can be confused with breach of trust).

If, in the case of fraud, we can have the special legal object represented by social relations referring to protection against acts of fraud [1], in the case of a breach of trust offense, this is expressed through social relations relating to property rights, which involve a legal relationship based on the trust placed by the injured party [2].

From the perspective of this first defining element, we note that the two crimes are similar, which is one of the reasons why they are included in the same chapter, the same section of the Criminal Code – the special part. This first comparison may create the false impression that the two crimes are similar in content, with the differences being mainly in the object targeted, the form of guilt, etc.

According to the criminalization rules in the current Criminal Code, fraud (Article 244) has other similarities with breach of trust (Article 238), but, as a first difference, this offense requires that the active subject have come into possession of the property on the basis of a preexisting title and not on the basis of misleading the passive subject [3], and the transfer of the property into the possession of another person is carried out on the basis of a legal title, but subsequently, in bad faith, the perpetrator converts his temporary possession of the property into full ownership, behaving abusively as the owner and causing damage to the person who entrusted the property to him [4].

We note that, in the case of the crime of fraud, possession will be achieved through the use of fraud, the injured party being misled by means of fraudulent maneuvers, and in the case of the crime of breach of trust, possession will initially be obtained by obtaining the expression of legal consent from the passive subject of the crime.

Assessing the characteristics of the two offences is essential for conducting a comparative examination that highlights the specific, distinctive features of acts that may constitute breach of trust or fraud, so that they are not confused and can be more easily recognized when there are difficulties of interpretation.

In order to identify the elements of the crime of breach of trust, as compared to the act of fraud, the movable property belonging to another person must be held by the perpetrator under any title (deposit, mandate, loan for use, lease of the item, pledge, etc.); if the property is not held by the perpetrator but is in the possession of another person or is property that has been involuntarily removed from a person's possession, the act of appropriation does not constitute the crime of breach of trust but theft (if done by theft), appropriation of found property (if the property was found) or fraud (if the property was taken by deception or misrepresentation) [5].

Furthermore, among other things, I believe it should be pointed out that the material object is a similar element for both crimes, since both concern, in principle, tangible movable property, namely property rights expressed in documents with monetary value or even energy that has economic value [6]. At the same time, even assets considered immovable under civil law may form the material object of both crimes if the asset is, in fact, a

movable asset to be incorporated into an immovable asset. In such a case, accession takes effect, with the legislator developing a legal institution that is not relevant to criminal law, as accession is specific to civil law.

In my view, the essential distinction arises as a result of a double protection established by the legislator, first of a quantitative nature and then from a qualitative perspective. This perspective could be an argument for the fact that, in the case of breach of trust, the material object may be represented by tangible movable property that is entrusted for a specific purpose and on the basis of a specific title, while in the case of fraud, the material object is more diverse, including, in addition to those mentioned above, intangible assets and even documents of patrimonial value.

Unlike fraud, legal literature indicates that the material object of breach of trust may be a movable tangible asset that is entrusted with a specific title and for a specific purpose. Thus, according to the opinion expressed in doctrine, the asset must be entrusted with a title different from that expressing ownership, because if the right of ownership were also transferred at the same time as the asset, it would not be logical to ask the owner to hand over the asset that belongs to him. For the same reasons, a loan for consumption cannot be the subject of the crime of breach of trust, because when it is granted, an agreement is concluded which stipulates that the same goods that were transferred will not be returned at maturity [7].

Another perspective outlined in doctrine shows that, in the case of fraud, it is irrelevant whether the material object is represented by an individual asset determined or individualized by the parties, because any asset of economic value can lead to a financial gain for the perpetrator, along with causing damage to the passive subject. It is possible that even the provision of a service, following misrepresentation, could constitute the offense of fraud. Thus, legal protection in this situation plays a more quantitative role, attempting to protect any asset with economic value.

The difference is somewhat understandable, since in the case of the crime of breach of trust there is, in principle, a relationship of trust between the perpetrator and the victim, whereas in the case of the crime of fraud, this relationship is absent, with recent judicial practice highlighting examples where the offender and the injured party do not know each other, do not meet, and do not establish a specific relationship.

Therefore, while fraud does not require a pre-existing legal relationship, breach of trust presupposes the existence of a legal relationship without any misleading activity. The most telling example in this regard is offering a sum of money to be exchanged for foreign currency at a bank where the perpetrator claims to have connections and will obtain a better exchange rate, after which they run away with the money, without returning anything to the injured party, constitutes the crime of fraud, not breach of trust [9].

The distinction between the two offences can also be made from the perspective of the immediate consequence. In this regard, in the case of the offence of breach of trust, the immediate consequence is not conditional on the occurrence of damage, which must exist at the moment when the owner or possessor loses control of the property [10].

Therefore, in the case of the crime of breach of trust, the commission of the act is not conditional on the occurrence of damage to the passive subject's assets. On the other hand, the situation is different in the case of the crime of fraud, which requires the occurrence of damage to the victim.

In the case of fraud, the immediate consequence involves the fulfillment of an essential requirement, which consists in causing economic damage to the victim's assets [11]. There must be a link between the financial loss suffered by the victim of the crime and the enrichment of the perpetrator, which must be manifested by a reduction in assets or loss of income, which must be permanent or at least temporary.

At the same time, in a situation where the passive subject of the crime of fraud does not suffer any damage, as only the act of misleading has been carried out, it follows that the act has not been consummated, the objective aspect not having been fulfilled, which means that the crime remains in the form of an attempt to be punished as such.

The causal link in the case of the crime of breach of trust results from the materiality of the act, which does not need to be proven because the incriminating actions and the immediate consequence are directly related [12].

For the offense provided for in Article 244 of the Criminal Code, the causal link between the material element and the immediate consequence must be proven, based on the factual circumstances of the offense, more precisely on the occurrence of the material element by misleading the victim in order to obtain a financial advantage from the victim. In this sense, the damage must be the result of the fraudulent action used by the active subject with the aim of misleading the victim and obtaining financial advantages for themselves or for another person, as stated in the text of the law.

We note that, although at first glance there is a temptation to assume that the causal link results *ex re*, in such a case a thorough examination must be carried out in order to establish a link between the criminal activity and the immediate consequence.

The form of guilt characteristic of the crime of breach of trust is direct intent or indirect intent, which implies, among other things, that the perpetrator is aware of the consequences of their actions, acts knowingly, and seeks to cause harm by appropriating the movable property handed over by the victim[13].

A detailed analysis of the characteristic elements of the subjective aspect is necessary, as this analysis reveals a distinctive element that can serve as a basis for a fair legal classification.

Therefore, with regard to the subjective aspect of the crime of fraud, this is the direct intention qualified by purpose [14]. This consists of obtaining a financial gain for oneself or for another, having a direct connection with the immediate consequence of the crime.

By adopting such an attitude, the perpetrator shows that they are fully aware of the socially dangerous result of the criminal activity, showing contempt for the danger created, knowing the risk and trying by all means at their disposal to bring it about.

At the same time, we are in the presence of direct intent, as the perpetrator acts knowingly, seeking to cause damage to the passive subject's property by misleading them, by altering aspects that characterize reality, or by using fraudulent means.

Legal literature also indicates that these offenses cannot be considered concurrently with regard to the same object. Thus, it is inconceivable that the same property could be in the actual possession of both the perpetrator and the injured party, nor could the same property be voluntarily surrendered and then stolen. The second rule is that the nature of the perpetrator's initial activity will be taken into account; if the refusal to return the property was decided by the perpetrator with the aim of misleading the victim, and the contract by which the property was handed over was only a means of deceiving the victim, the offense of fraud will be retained. If the decision to deprive the victim was made after the property came into the actual possession of the perpetrator, the act will be classified as the crime of breach of trust. The refusal to return the property in this case is not an act of interversion of possession by the perpetrator [15].

Therefore, a complex analysis of the form of guilt with which the perpetrator acts is required, since in most cases the distinctive element may be represented by the subjective aspect and the legal classification may be influenced in an erroneous manner.

From the above, it follows that the crime of breach of trust is a complex offense that can sometimes be confused with the crime of fraud, which takes many forms. However, if an in-depth examination of the criminal investigation or trial framework were carried out, the distinction between the two crimes could be made under optimal conditions.

Conclusions

This scientific study shows, among other things, that fraud and breach of trust are two different forms of property crime, with the common element of obtaining an unjust material gain. While in the case of fraud the perpetrator relies on deceiving the victim, in the case of the other crime it is a matter of betraying the trust placed in them.

In the context of strengthening current criminal legislation, the subject of crimes against property, which is a field whose specific nature requires constant effort to adapt legislation to new criminal methods, has undergone minimal changes from a regulatory perspective, these changes mainly referring to systematization.

Therefore, even though it was recommended that the relationship between the crime of fraud and that of breach of trust be resolved in order to avoid uncertainty regarding solutions in judicial practice, this aspect was not included among the new legislative elements. Moreover, I believe that it would be very difficult for the legislator to find a more concise wording that would leave no room for contradictory practical interpretations, so it is up to the judicial authorities and even legal doctrine to identify and clarify those cases where uncertainty remains.

The legislator's task is to provide an incriminating text that is, among other things, clear and does not allow for confusion. Comparing the elements presented above, we can conclude that, although the legal norms incriminating the two offences are sufficiently well defined and do not contain identical elements, in judicial practice, confusion may arise when classifying an act as a crime against trust in relation to property rights.

Thus, we will continue to deal with different solutions regarding the treatment of these crimes, and certain aspects concerning specific legal issues that describe these crimes and which have received contradictory solutions will sometimes be resolved through the promotion of extraordinary appeals.

As this study shows, the problem of confusing the crime of fraud with that of abuse of office is not a new issue in criminal law, as it was also encountered under the old Criminal Code. However, due to a lack of interest in providing a legislative framework adapted to the new socio-legal reality, some courts continue to confuse the two crimes, which is why we encounter and will continue to encounter contradictory solutions regarding them.

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