

CIVIL SERVANT – ACTIVE SUBJECT OF SERVICE OFFENSES

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Abstract: *The distinct regulation in the Criminal Code of service offenses raised the issue of defining the notion of civil servant in this branch of law. It is unanimously accepted in doctrine and jurisprudence that the notion of civil servant in criminal law is different from that in administrative law, having an autonomous meaning. This is the reason why the legislator defined in art. 175 of the Criminal Code the notion of civil servant used in criminal law, but referring to two categories: that of “proper” civil servants and that of “assimilated” civil servants. In the case of service offenses, only the first category of civil servants, defined in art. 175 paragraph (1) of the Criminal Code, is of interest.*

Key words: *service offenses, civil servant, Criminal Code, administration*

1. Introduction

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In the case of service offenses, only the first category of civil servants, defined in art. 175 para. (1) of the Criminal Code, is of interest.

According to art. 175 para. (1) of the Criminal Code “A civil servant, within the meaning of the criminal law, is the person who, permanently or temporarily, with or without a remuneration: a) exercises attributions and responsibilities, established under

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the law, in order to exercise the prerogatives of legislative, executive or judicial power; b) exercises a function of public dignity or a public function of any kind; c) exercises, alone or together with other persons, within an autonomous entity, another economic operator or a legal person with integral or majority state capital, attributions related to the achievement of their object of activity. ”

2. Representatives of the legislative, executive or judicial power

Starting from this legal definition, in the doctrine and in the judicial practice it was noted that a civil servant, within the meaning of art. 175 para. (1) of the Criminal Code, is first of all the person who, permanently or temporarily, with or without remuneration, exercises attributions and responsibilities, established under the law, in order to exercise the prerogatives of the legislative, executive or judicial power.

In principle, this includes parliamentarians, members of the Government, judges and prosecutors, members of the Superior Council of Magistracy (Udroiu, 2019, p. 565), noting that they are active subjects of the aggravated variant of bribery, provided in art. 7 of Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption. This category does not include persons who, although employed in public institutions, do not have prerogatives related to the exercise of public power, such as the guard, the driver, etc. (Bogdan & Şerban, 2020, p. 236), because they cannot be considered as invested with the exercise of a state power.

3. Persons holding a public office

Secondly, according to the same legal definition, a civil servant is a person who exercises a public function of any kind, such as: civil servants within the central or local administration, parliamentary officials, mayors, county council presidents, police officers, etc. (Udroiu, 2019, p. 565); civil servants from institutions such as the People's Advocate, the Court of Accounts, the Presidential Administration, the Competition Council, those who hold positions assimilated to those of public dignity (Bodoroncea et.al, 2020, p. 226); active cadres of the army.

With regard to the doctor employed under a contract of employment in a hospital unit in the public health system, the High Court of Cassation and Justice held that he exercises a public function, as the concept of "public service" is closely correlated with the notion of "Public interest", both pursuing the satisfaction of the needs of general interest, based on the constitutional prerogatives that make the public interest prevail over the private one (ICCJ, CDCD, Decision no. 26/2014).

If the doctor is an employee of a private clinic there is no unitary point of view on his status as a civil servant or private servant. Thus, one author claimed that such a doctor will always be the active subject of the attenuated variant of the bribery offense, provided by art. 308 of the Criminal Code (Bodoroncea et.al, 2020, p. 227).

Another author argued that doctors with the right of free practice who work on their own in private medical offices are part of the category of assimilated civil servants (Ivan, 2016, p. 220). In a third opinion, doctors organized in individual practices cannot be private officials either; but if the doctors in the individual offices or those who have the status of employees of some legal entities exercise attributions involving the State's intervention (e.g. they issue certificates for obtaining a driving license, they issue a medical leave certificate, they provide health services under a contract with the National Insurance House, etc.) they have the quality of civil servants, according to art. 175 para. (1) lit. b) of the Criminal Code (Bogdan & Şerban, 2020, p. 255).

Although it does not directly concern the offenses of service, but the offenses of corruption, it should be mentioned here the decision of the High Court of Cassation and Justice according to which the doctor in the public health system who receives additional payments or donations does not exercise a right under art. 34 para. (2) of Law no. 46/2003 on patient rights (ICCJ, CDCD, Decision no. 19/2015).

The Supreme Court also ruled, obligatorily, that the teacher of state pre-university education exercises a public position (ICCJ, CDCD, Decision no. 8/2017).

Also, according to another decision of our Supreme Court, higher education professors exercise a public function, whether they work in a state or private university, because higher education institutions are of public utility (Bogdan & Şerban, 2020, pp. 252-254). In the doctrine, however, it was argued that if bribery is committed in connection with duties that do not concern their teaching activity, the teacher in a private educational unit may be considered a private servant; however, the educator in a private kindergarten is not under the control of the Ministry of Education from the perspective of the services provided and is always a private official (Bogdan & Şerban, 2020, pp. 235 and 254).

A special category of civil servants is represented by the persons who provide specialized assistance to the public units, insofar as they participate in the decision-making or can influence them - art. 1 para. (1) lit. d) of Law no. 78/2000.

The consultancy activity is limited, according to our Supreme Court, to issuing opinions, offering qualified advice or indications in connection with issues concerning the consultant's specialized field, the latter not being involved in the decision or further action or in carrying it out (Bogdan & Şerban, 2020, p. 273).

A particular issue is whether they can be considered civil servants, pursuant to art. 175 para. (1) lit. b) of the Criminal Code and private persons providing public utility services. The doctrine has argued that this should also include situations in which there is an "extension of state power" (especially in terms of providing public services) exercised through individuals employed in the private sector, who will also be civil servants in the meaning of art. 175 para. (1) lit. b) of the Criminal Code (Bogdan & Şerban, 2020, p. 273).

3. Representatives of autonomous entities, economic operators or legal entities with full or majority state capital or declared to be of public utility

Thirdly, according to the same legal definition from art. 175 para. (1) of the Criminal Code, it is also a civil servant the person who exercises, alone or together with other persons, within an autonomous administration, another economic operator or a legal person with full or majority state capital or within a legal person declared as being of public utility, attributions related to the achievement of their object of activity.

Included in the scope of active subjects in this category are the persons exercising within an autonomous administration or another economic operator or a legal entity with full or majority state capital established by law, such as national companies, national companies or corporations with full or majority state capital organized according to the Companies Law no. 31/1990, attributions related to the achievement of their object of activity (ICCJ, CDCD, Decision no. 26/2014); the employees of the autonomous entities, of the National Bank of Romania or of the banking units with integral or majority state capital, but not when the state is a minority shareholder (Udroiu, 2019, p. 566); employees of a Forest District from the structure of the National Forests Authority - Romsilva (Bodoroncea et.al, 2020, p. 1224).

Regarding the possibility of a legal person to be an active subject of corruption and service offenses, no unitary point of view has been expressed in the literature.

Some authors consider that it may be an active subject of the offense of bribery, under the conditions of art. 135 of the Criminal Code, such as for example a legal entity with full or majority state capital (Ivan, 2016, p. 225), while other authors have argued that the legal entity can never be a civil servant or a direct active subject of the offense of bribery (Cioclei, 2020, p. 230).

4. Foreign officials

A special category of civil servants is represented by the persons provided in art. 294 of the Criminal Code, if, through the international treaties to which Romania is a party, it is not provided otherwise.

According to this article, this category includes civil servants or persons who carry out their activity on the basis of an employment contract or other persons who exercise similar attributions within an international public organization to which Romania is a party; members of the parliamentary assemblies of the international organizations to which Romania is a party; officials or other persons employed under a contract of employment or other persons exercising similar duties within the European Union; the persons exercising legal functions within the international courts whose competence is accepted by Romania, as well as the officials from the registers of these courts; officials of a foreign state; members of the parliamentary or administrative assemblies of a foreign state.

The Criminal Code explicitly regulated this category of civil servants only in the chapter on corruption offenses, not in the chapter on office offenses. Moreover, art. 294 of the Criminal Code states that “The provisions of this chapter apply to the following persons”, after which it indicates all the categories of officials shown above.

This indicates that the foreign officials listed in the text of the law could not be active subjects of service offenses, regulated in the next chapter, unless this possibility was regulated in other texts of the law.

If some offenses of service (e.g. embezzlement) could only be committed exceptionally by these officials because they do not have the special capacity of administrator or manager, other offenses in this chapter could be committed in the exercise of the function.

There is no reason to explicitly regulate only the possibility of these officials committing corruption offenses, not service offenses.

5. Particular aspects regarding civil servants

Regarding the meaning of the notion of civil servant in criminal law, it is very important to emphasize that it is not equivalent to that of civil servant in administrative law, having a broader meaning than the latter (CCR, Decision no. 2 / 15.01.2014).

In administrative law, only certain persons are part of the category of civil servants, explicitly provided by the law on civil servants.

This quality is not recognized for all the persons mentioned in art. 175 of the Criminal Code, therefore the two notions are autonomous.

Also, a person, depending on the professional activity carried out *in concreto*, which is related to his criminal conduct, may in some cases be a civil servant, and in others a private official (Bogdan & Șerban, 2020, p. 234). This clarification leads to the conclusion that the only criterion for distinguishing between the two categories of officials should be the activity actually carried out, and not their classification in a public or private institution.

A condition for the responsibility of the civil servant for service offenses is that he commits the deed on the occasion of exercising his duties, and not another's. If the civil servant did not commit the act in the exercise of his duties, no service offense can be retained, even if apparently his act is related to the service.

For example, the official who hits a person who upset him when exercising his duties does not commit the offense of abusive behavior, provided by art. 296 of the Criminal Code, if the hit occurs when the official is off duty.

Another condition, related to the previous one, is that the civil servant must first of all have the competence to perform the act for which he is bribed (Udroiu, 2019, p. 570). If the official did not yet have this quality or had already lost it at the time of the investigated act, the deed does not constitute a service offense, but may constitute another crime.

The active subjects of service offenses are also civil servants irregularly or illegally invested, provided that they had the appearance of legality at the time of the crime. This situation highlights the importance of appearance in law, which makes illegally invested persons liable for illegal acts committed in the exercise of these functions.

References

- Antoniou, G., Toader, T., Brutaru, V., Daneş, Şt., Duvac, C. Griga, I., Ifrim, I., Ivan, Gh., Paraschiv, G., Pascu, I., Rusu, I., Safta, M., Tănăsescu, I., Vasiu, I. (2016). *Explicațiile Noului Cod penal* [Explanations of the New Criminal Code]. Bucharest: Universul Juridic.
- Antoniou, G. Mitache, C. Stănoiu, R.M. Molnar, I. Paşca, V. Filipaş, A. Ionescu, I. Iliescu, N. Basarab, M. (2008). *Noul Cod penal comentat*. Volumul II. [The new Criminal Code commented. Volume II]. Bucharest: C.H. Beck.
- Bogdan, S. Şerban, D.A. (2020). *Drept penal* [Criminal law]. Bucureşti: Universul Juridic
- Bodoroncea, G., Cioclei, V., Kuglay, L., Lefterache, L., Manea, T., Nedelcu, I., Vasile, F.-M. Zlati, G. (2020). *Codul penal. Comentariu pe articole*, Third edition [Criminal Code. Commentary on articles, Edition 3]. Bucharest: C.H. Beck.
- Rotaru, C., Trandafir, A.-R., Cioclei, V. (2020). *Drept penal. Partea specială II*. [Criminal law. Special Part II]. Bucharest: C.H. Beck
- Udroiu, M. (2019). *Drept penal* [Criminal law]. Bucharest: C.H. Beck
- ***High Court of Cassation and Justice, Panel for resolving legal issues, Decision no. 26/2014, www.scj.ro
- ***The Constitutional Court of Romania, Decision no. 650 / 25.10.2018, Official Gazette no. 97 from 7.02.2019
- ***High Court of Cassation and Justice, Panel for resolving legal issues, Decision no. 19/2015, www.scj.ro
- ***High Court of Cassation and Justice, Panel for resolving legal issues, Decision no. 8/2017, www.scj.ro
- ***High Court of Cassation and Justice, Panel for resolving legal issues, Decision no. 97/A din 23.03.2017, www.scj.ro
- ***High Court of Cassation and Justice, Panel for resolving legal issues, Decision no. 26/2014, www.scj.ro
- ***High Court of Cassation and Justice, Panel for resolving legal issues, Decision no. 350/30.10.2014, www.legalis.ro

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