THE PUBLIC OFFICER - THE ACTIVE SUBJECT OF A CRIME

NICOLETA-ELENA BUZATU*

Abstract
The present study intends to analyze the active subject of the crime committed by an individual - the public officer, for example - during his daily duty program or with reference to the attributions he has versus the public office he holds, in the light of the regulations provided not only by the Penal Code in force but also by the future New Penal Code, as, among the important amendments it provides, the definition of the public officer is also mentioned. In the case of such a trespassing, the active subject shall hold the quality of a public officer the way this quality is regulated by the Penal Code, even if the definition is much ampler as compared to the one given by the Statute of the Public Officers. According to Art 147, paragraph 1 Penal Code, a public officer is any individual who permanently or temporarily exercises - irrespective of his/her rank or of the way this office was appointed, a paid or unpaid task of no matter what nature or importance - in the service of a department Art 145 refers to. The regulation proposed in perfect agreement with the solutions offered by other international legislations and conventions in the domain, the definition of a public officer refers to the individual who - permanently or temporarily appointed, paid or unpaid - shall exercise attributions specific to the legislative, executive or judiciary powers, a function of public dignity or a function of any other type - alone or in a group - within a self-governing management of another economic agent or of a legal person with a whole or a greater capital, or belonging to a legally declared person capital or to a legal person considered to be of public utility - attributions connected with the object of the latter's activity.

Keywords: *office, public officer, crime, responsibility, accountability.*

1. Introduction

The public officer is considered to be the juridical institution of the Public Law - in general - and of the Administrative Law - in particular; this type of institution has finally established its authority at the end of a continuous dispute between doctrine, jurisprudence and regulation.

This kind of dispute is to be met with not only in the practice of some European countries boasting with an efficient public administration, in spite of the differences existing in their specific juridical systems, but also in the Romanian doctrine, jurisprudence and legislation, irrespective of the fact that it appeared and developed as a coherent system later than in other countries, that is after the constitution of a unitary Romanian national state.[1]

The term 'public office' is frequently used in the vocabulary of the specific public law as it is connected with the activity carried on within the public administration department. Any public authority is defined by three attributes: competence, personnel, and material and financial means.[2]

The public officer is being defined by art 2, paragraph 2 of the Statute of the Public Officers[3], as the *person appointed in a public office in conformity with the law.* Yet, *the person removed from the public office and maintained in the reserve body of the public officers can keep his/her attribute of a public officer* - art 2, paragraph 2, second thesis of the Statute.

---

* Lecturer, Ph.D. candidate, Legal and Administrative Science Faculty, "Dimitrie Cantemir" Christian University, Bucharest (e-mail: nicoleta_buzatu@yahoo.com).

[1] For more details see Mircea Preda – *Administrative Law. General Part*, III[rd] edition, (Bucharest: Lumina Lex Printing House, 2006), p. 64.

[2] Ion Rusu – *Administrative Law,* (Bucharest: Lumina Lex Printing House, 2001), p. 259.

[3] Law No 188 of December 8, 1999 regarding the Statute of the Public Officers, published in the Official Gazette No 600 of December 1999, republished.

Unlike the regulation stipulated by the Statute of the public officers, the Romanian Penal Code in force grants a larger interpretation to what the public officer really means. In conformity with art 147, paragraph 1 Penal Code, a "public officer" can be *any person who permanently or temporarily, irrespective of title or of the way he/she was appointed in the office, can exercise a task of any type- paid or unpaid - in the service of a unit art 145 refers to.* "An officer" is supposed to be *the person mentioned in paragraph 1, as well as any employee who develops an activity in the service of another legal person, other than the one stipulated by the above mentioned paragraph.*

The word "public" is defined in art 145 of the Penal Code and refers to *whatever regards the public authorities, public institutions or any other legal persons of public interest, the administration, the use and the exploitations of the public goods, public services and any kind of goods that, according to the law, are considered to be of public interest.*

In the regulation presented by the New Penal Code, in agreement with the solutions regarding other international legislations and conventions in the domain, the "public officer" will be the *person who - permanently or temporarily, with or without payment -: a) exercises attributions specific to the legislative, executive and juridical power; b)exercises an office of public authority or of any other public nature; c) exercises solely or within a group - in the case of a self-governing management company, in the case of an economic agent or in the case of a legal person having total or greater official capital or in the case of a legal person known to be of public interest - attributions connected with the carrying out of their respective purposes. Still, with respect to the penal law, a public officer is also considered to be that person who exercises a public office service for which he/ she was appointed by the public authorities, or who is subjected to the control and supervision of these public authorities until the fulfillment of the respective public service.*

Consequently, different from the Statute - in the vision of the Penal Law - for the condition of a public officer to exist, it is not relevant the title of his task, neither the way of his being appointed in the office, but it is sufficient that the active subject of the transgression to generate such a task in the service of a public authority, public institution or another legal person of public interest.

2. Paper content

The importance of the public officer for a present time Romanian developing state of law resides in the fact that in his/her quality of an instrument through which the administration achieves its attributions and public authority prerogatives, the public officer is the one who, after Romania's adherence to the European Union, will substantially contribute to turn into practice the values of the European Union, to guarantee the fundamental rights of the citizens - among which the right to a good administration and the right to a good governance.[4]

The transgression is a behavior act forbidden by the incriminatory norm, an act committed by a person, breaking his/her own obligation of not committing it, against the social value whose titular a person is. Such persons involved in a juridical report of a penal conflict are subjects of a transgression.

In other words, the subjects of the transgression are those individuals involved in the commitment of a crime, by either committing the act or by bearing its consequences derived from the very transgression.[5] The specialized literature makes a distinction between the active and the passive subject of a transgression.

The natural person shall also meet a series of general, cumulative conditions, such as: *the required legal age* from which a person can appear in a penal court is 14; *responsibility* - that is the

[4] Verginia Vedinaş – *Considerations on the Draft of Law for the Modification and Completion of Law No 188/1999 regarding the Statute of Public Officers,* in RDP no. 2 (2006), p. 68.

[5] See Constantin Mitrache and Cristian Mitrache – *Romanian Penal Law. General Part* VII[th] edition, (Bucharest: Universul Juridic Printing House, 2009), pp. 120; Costică Bulai – *Penal Law. General Part* (Bucharest: All Printing House, 1992), p. 81.

person's ability to conscientiously coordinate his/her will in connection with the above mentioned conditions;[6] *the free will and action* - meaning that the person could have had the opportunity to freely decide the committing of the deed.

As the New Penal Code stipulates, the active subject of a transgression is the natural or legal person who commits a transgression and is asked to respond in front of a penal court. Art 135, paragraph 1 of the New Penal Code stipulates: "*Any legal person - with the exception of the state and of the public authorities - is demanded to appear in a penal court for the transgressions meant to achieve the activity in view, or those committed in the name of the legal person's interest*." Any transgression makes the committer become a subject of the respective transgression, or a transgressor proper. Any person who commits a transgression - an already committed one or a punishable attempt to which he is a participant as either the author or the accomplice or instigator - is considered to be either an active subject of the transgression or a transgressor, as stipulated by art 174 of the New Penal Code.

The name of an active subject of a transgression characterizes his/her anti-legal attitude that breaks the provisions of the law and the social discipline with his/her dangerous behaviour and creates an irreducible conflicting situation that makes him/ her responsible in front of the penal court.[7]

The active subject for whom a special condition is necessary to be carried out is called a qualified active subject or a circumstantiated active subject.

The existence of certain transgressions is conditioned by the quality of the active subject of the transgression, alongside with the fulfillment of the other conditions, among which: office abuse against the interests of the person, office abuse in obstructing certain rights, office abuse against public interests, office negligence, abusive behaviour, negligence in keeping state secrets, conflict of interests, receiving or offering bribe, denunciation of professional secrets, fraudulent management, dilapidation, stealing or destroying documents, forging official documents, defalcation of funds, etc. In the case of all these transgressions, the active subject shall be a public officer, as stipulated by the Penal Code, even if the area is much larger that the one delimitated by the Statute.

The legal ground is given by art 140 Penal Code that provides that whenever the penal law makes use of the terms includes in Title VIII of the Penal Code, their meaning derives from these articles. In practice the exceptions of non-constitutionality of the dispositions included in art 147 of the Penal Code were abolished, but not rejected by the Constitutional Court.

In as far as the Administrative Law is concerned, the public officer is considered to be the person who was appointed in a public office. The person whose office attributions ceased - from imputable reasons - still keeps the quality of a public officer, continuing to be a member of the public officers reserve body. In its addenda, Law No 188/1999 presents a list of all public offices, although it is far from being exhaustive. On the other side, some norms that regulate the activity of certain categories of persons do not grant them the quality of public officers, as for example the teachers; still, in the view of the penal law, all these categories are considered to be public officers. The Labor Law does no longer make a difference between employee and officer, as in the period between the two World Wars. The employee is the natural person who works on the ground of an individual labor contract. [8]

The quality of a public officer involves the existence of an office responsibility - as a factual case - or, is the consequence of a concluded labor contract with a unit, in the virtue of which the subject exercises his/her real office attributions. His/her responsibility can be permanent or temporary; what it matters is the fact that the respective person shall become part of the work team of

[6] George Antoniu – *On the Transgressor, the Transgressing Act and Culpability*, in RRD no. 8 (1969), p. 80.

[7] Alexandru Boroi – *Penal Law General Part. In the Light of the New Penal Code* (Bucharest: C.H. Beck Printing House, 2010), p.152.

[8] Răzvan Popescu – *Elements of Penal Law,* (Bucharest: Universul Juridic Printing House, 2008), p. 108.

one of the units provided by art 145 and subject to the inner order rules regulating the organization and the discipline of the respective activity.[9]

In order to define the quality of a public officer, the title of his/her duties or the modality of his/her being appointed (appointment, repartition, election or contest) is not relevant.

It is sufficient for the active subject of a transgression to exercise a certain duty in the service of a public authority, public institution or of any legal person of public interest. At the same time, there is not at all relevant the validity of the labor report, and there is not necessary any labor contract or appointment in the office; it is sufficient for his/her exercise the respective office be a factual reality related to the required attributions. In such a case, the tacit or expressed agreement of the unit-staff is compulsory in as far as the person can exercise the attributions of the respective office.[10] Those persons who have certain duties within one of the units art 145 refers to, have the quality of being public officers irrespective of their being paid or not.

By considering art 2, paragraph 2, these I and II we draw the conclusion that in the conception of the Statute, the persons who hold offices by nomination have not the quality of public officers and, consequently, they are not applied the provisions of the Statute. In the same way, the provisions of the Statute are not applied to all persons appointed in a public office, because art 6 enumerates a series of categories of persons who, although belonging to the public authority or to administrative public institutions and are appointed in the office, they are not considered to hold the public offices, and so, they do not have the quality of a public officer.

For example, the magistrates, the teachers, the employees working in the cabinets of the high officials in the basis of their personal proposals and agreement (secretariat, protocol, administration, maintenance, supply, guardianship as well as other categories) and employed in the personal apparatuses of public authorities and institutions, but who do not exercise public authority prerogatives, are not submitted to the regulations of the Statute of Public Officers.

There are commentaries within the doctrine in connection with the definition of the public officer as reported to certain categories of professions - liberal professions - as: lawyers, notaries, doctors, etc. Mention shall be made that a distinction shall be made between those lawyers who have only the quality of being members of the Bar - on the ground of which they are enabled to exercise the profession of a lawyer - and those lawyers elected in the leading staff of the Bar. In the meaning of the legal provisions, only the latter category can be considered active subjects of office transgressions. As for the doctors, the penal doctrine considers - corroborating the provisions regarding the medical assistance with the penal provisions - that only those doctors who work in the State sanitary network are public officers, as stipulated in art 147, paragraph 1, of the Penal Code. As for the quality of a public notary to be considered a public officer, the penal doctrine underlines the fact that although they exercise services of public interests, they are in the service of neither public nor private unit.[11]

The New Penal Code[12] opted for the assimilation of the natural persons who exercise a profession of public interest that requires a special qualification from the part of the public authorities and which is submitted to their control (notaries, bailiffs, etc). Although these persons are not public officers proper, they are invested with a public authority, granted to them by a State competent authority and are submitted to their control; this justifies for their being assimilated to the category of

---

[9] Ilie Pascu and Valerica Lazăr – *Penal Law. Special Part,* (Bucharest: Lumina Lex Printig House, 2004), p. 314.

[10] Olivian Mastacan – *The Penal Responsibility of the Public Officer,* 2nd edition, (Bucharest: Hamangiu Printing House, 2008), p. 28.

[11] Olivian Mastacan – *op cit.,* p. 30.

[12] See the Justifications of the New Penal Code.

public officers. As it resides from the content of the special part, then when certain incriminations are not compatible with the statute of the above mentioned category, or when their being confronted with a certain incriminating text was not meant, it was particularly provided the non-appliance of the text regarding the above mentioned persons.

3. Conclusions

If correlating all branches of Law, one can underline the fact that a public officer - in the light of both penal and administrative law - excludes the quality of an employee. The penal law term about the public officer includes both the public officer proper and the employee who exercises an office task that is, that of a private officer. So, the Penal Law includes all persons who perform any kind of activity on the ground of an individual labor contract or work-report; the definition of a public officer includes all the persons who exercise a public task in the frame of public authorities, public institutions or legal persons of public interest, irrespective of the way they were appointed or of their being paid or unpaid. The definition of the public officer given by the Administrative Law is not to be confounded with the one given by the Penal Law which is much ampler. The Penal Law, for example, admits the status of a public officer for certain persons, irrespective of the conditions imposed by the Administrative Law; the Administrative Law speaks, for example, about a "legal appointment" as compared with the Penal Law that speaks about the "indifferently how he/ she was appointed." The Administrative Law presupposes competence and a certain authority, as compared to Penal Law that presupposes only a "no mater what task." The Administrative Law requires that the person should be a member of the administrative body, while the Penal Law admits "any person," that is unsalaried.

References

- George Antoniu – *On the Transgressor, the Transgressing Act and Culpability*, in RRD no. 8 (1969).
- Alexandru Boroi– *Penal Law General Part. In the Light of the New Penal Code* (Bucharest: C.H. Beck Printing House, 2010).
- Costică Bulai – *Penal Law. General Part* (Bucharest: All Printing House, 1992).
- Olivian Mastacan – *The Penal Responsibility of the Public Officer,* 2nd edition, (Bucharest: Hamangiu Printing House, 2008).
- Constantin Mitrache and Cristian Mitrache – *Romanian Penal Law. General Part* VIIth edition, (Bucharest: Universul Juridic Printing House, 2009).
- Ilie Pascu and Valerica Lazăr – *Penal Law. Special Part,* (Bucharest: Lumina Lex Printig House, 2004).
- Mircea Preda – *Administrative Law. General Part*, IIIrd edition, (Bucharest: Lumina Lex Printing House, 2006).
- Răzvan Popescu – *Elements of Penal Law,* (Bucharest: Universul Juridic Printing House, 2008).
- Ion Rusu – *Administrative Law,* (Bucharest: Lumina Lex Printing House, 2001).
- Verginia Vedinaş – *Considerations on the Draft of Law for the Modification and Completion of Law No 188/1999 regarding the Statute of Public Officers,* in RDP no. 2 (2006).
- Law No 188 of December 8, 1999 regarding the Statute of the Public Officers, published in the Official Gazette No 600 of December 1999, republished.
- Law No 286/2009 regarding the New Penal Code of Romania, published in the Official Gazette No 510 of July 2009.
- The Penal Code of Romania.