THE PUBLIC SERVANT – ACTIVE SUBJECT OF CORRUPTION CRIMES UNDER CURRENT CRIMINAL LEGISLATION

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Abstract

The state or the institutions of the state operate with the participation of public servants, which entails to the latters of a conduct worthy of the position they hold and of the authority enjoyed. In this sense, the criminal law has, on the one hand, the role of ensuring the prestige of public servants, and, on the other hand, to hold criminally liable those who are guilty of acts unworthy related to their activity. In this paper, we intend to identify categories of persons who may be held liable as active subjects of corruption crimes, according to current legislation in force in our country, and certain controversial aspects related to the subjects of these crimes. To better define the notion of public official from criminal law point of view, we have considered including the international and community legal documents of reference.

Keywords: *civil servants, corruption, crime, criminal law, criminal liability.*

JEL Clasification: K14, K23

1. Preliminary issues

In this paper, entitled "The Public Servant - Active Subject of Corruption Crimes under Current Criminal Legislation" we intend to analyze a problem much discussed doctrine, which generated difficulties in legal practice, namely the definition of public official for in terms of criminal law.

This paper deeply investigates including the innovations introduced by national and international regulations.

We found it necessary to emphasize progress in regulations, and also the existing problems, gaps at these new regulations, contributing to practical use of the expressed ideas.

Focused on studying the concept of public servant as an active subject of corruption and service offences as they was redefined in the current Penal Code in order to standardize the law at European level and to establish a national - European correspondence in criminal matter in the context of the integration in European Union, the aim of this research is to conduct to a conceptual analytical approach, and a transversal approach, linking the dynamic legal practices with societal evolutionary changes.

We used research methods established: documentation method, comparative method, analytical method, logical method, review of jurisprudence or the applied method, arguing my considerations on views supported in theory, on published and unpublished jurisprudence solutions, on the provisions of national and European criminal law practice. The personal contribution is reflected in each of the sections of this paper.

2. The international legal framework in matter of corruption ratified by Romania

By Art. 11 para. (1) and (2) of the Romanian Constitution it states that "the Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a party" and "Treaties ratified by Parliament, according to the law, are part of national law."

By Law no. 27/2002[2], Romania ratified the Criminal Law Convention on Corruption, adopted by the Council of Europe in Strasbourg on January 27, 1999, assuming the obligation to criminalize active and passive corruption among members of domestic public assemblies.

In accordance with art. 4 of the Convention, each party shall adopt such legislative and other measures as may be necessary to incriminate as criminal offences under its domestic law, the

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[2] Published in the Official Gazette of Romania, Part I, No. 65 of January 30, 2002.

conduct referred to in art. 2 (active corruption of domestic public officials) and art. 3 (passive corruption of public officials), if they relate to an individual member of a domestic public assemblies exercising legislative or administrative powers.

Thus, according to the text of the Convention, it shall be taken all necessary measures to criminalize as the offence, when committing intentionally, the fact to propose, to offer or give, directly or indirectly, any undue advantage to any of its public officials or individual member of a domestic public assemblies exercising legislative or administrative powers, for himself or for someone else, for he to perform or to abstain from performing any act in the exercise of its functions (active corruption) or the fact of one of its public officials to request or receive, directly or indirectly, any undue advantage for himself or another or to accept the offer or the promise of the performance or of the failure to perform of an act in the exercise of its functions (passive corruption).

In art. 1 of the Convention it is stated that the term of "public official" should be interpreted by reference to the definition of the notion of official, public official, minister, mayor or judge existing in the domestic law of the state where the person performs that function, and also in reference to how it is applied in its criminal law.

According to Article 4 - Corruption of the members of the domestic public assemblies: "Each party shall adopt such legislative and other measures as may be necessary to incriminate as criminal offence, under its domestic law, the conduct referred to in art. 2 and 3, if they relate to an individual member of a domestic public assemblies exercising legislative or administrative powers", the phrase" member of a domestic public assemblies "referring to lawmakers elected or appointed to the regional or national meetings, exercising legislative or administrative powers.

In Decision no. 2 of January 15, 2014, the Constitutional Court pointed out that the Explanatory Report to the Criminal Law Convention on Corruption[3] stated that "this category of people is also vulnerable to corruption, and recent scandals in this area, combined sometimes with an illegal financing of the political parties, have shown that it is important that it will be also prosecuted in corruption cases (paragraph 44). Regarding active corruption, the legitimate interest of combating it aims to ensure the proper functioning of the public authority, so that it perform their duties in a transparent, fair, impartial and with the respect of the public interest. In the same time, the article aims to preserve public confidence in the state authorities and to protect themselves members of a national public assemblies of possible maneuvers against them. Legitimate interest is different for passive corruption, namely when a member of a domestic public assemblies is corrupt, the Convention protects the transparency, fairness and impartiality of the decision process of domestic public assemblies and of their members in case of corruption maneuvers (paragraph 32)."

By Law no. 365/2004 it was ratified the United Nations Convention against corruption, adopted in New York on October 31, 2003, Romania assuming the obligation to criminalize corruption of domestic public officials, according to art. 15 of the Convention, along with other intentional acts such as "embezzlement, misappropriation or other diversion of property by a public official" (art. 17), "trading in influence" (art. 18) or "abuse of functions" (art. 19), illicit enrichment (art. 20)[4].

According to art. 2 letter a) of the United Nations Convention against corruption by public officials means: "(i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined c a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in the chapter II of this Convention, "public officials" may

[3] Published in CETS no.173/1999.

[4] For details on this Convention see Ophelie Brunelle-Quraishi, *Assessing the Revelancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis,* „Notre Dame Journal of International & Comparative Law", Vol. 2, Issue 1, 2011, p. 100-166.

mean any person who performs a public function or provides a public service, as defined in the law of the State Party and as applied in the pertinent area of law of that State Party."

Romania acceded to the Convention regarding the fight against corruption of officials of the European Communities or officials of Member States of the European Union, adopted by the EU Council on 26 May 1997[5] by Decision no. 2007/751/EC, adopted in Brussels on November 8, 2007.

This Convention covers both corruption against the financial interests of the European Union and all forms of active and passive corruption of guilty officials of the European Communities or those of the Member States of the European Union or persons treated as such.

The term "national official" is in close correlation with the term of "official" or "public officer" from the law of the Member State where the person possesses this capacity, in order to implement the national law of that Member State.

The text of Article 4, called "Assimilations", states that "Member States shall take appropriate measures to ensure that its national law criminalizing corruption offences covered by Article 2 and 3 committed by or against their own minister, persons elected by parliamentary assemblies, members of the high jurisdictions or members of the Court of Auditors in the exercise of their functions are applied in the same manner as in the case of the offences committed by or against members of the European Communities Commission, European Parliament, Court of Justice and the Court of Auditors of the European Communities, in the exercise of their functions".

3. The national legal framework on the notion of public official and their criminal liability

The previous Criminal Code[6] (from 1969) defined in the General Part, Title VIII - "The meaning of some words or phrases in criminal law," legal terms "public" and "official and public official" as follows:

- Article 145: "The term" public "means all the public authorities, public institutions, institutions or other legal entities of public interest, administration, use or exploitation of public property, public interest services and goods of any kind, which by law, are public".

- Article 147: "(1) The term "public official" means any person exercising permanent or temporary, in any form, whether it was entrusted, a commission of any kind, remunerated or not, in the service of any unit of that referred to in art. 145. (2) "Official" means a person referred to in paragraph. 1, and any other employ exercising a commission in the service of other legal entities than those referred to in that paragraph."

In the current regulation of the Criminal Code, it is noted that the concept of public servant knows another definition than that found in previous legislation, that it is renounced to the notion of servant, but that includes the category of persons having the status of assimilated civil servants. However, the current Criminal Code criminalizes acts of corruption committed by arbitrators and foreign officials, and in the case of the offence committed by servants of the individuals and of the legal entities, it will be retained such offences in attenuated form[7].

According to art. 175 paragraph (1) of the current Criminal Code, the notion of public official

[5] Published in J.O.C.E. C195 from June 25, 1997.

[6] Published in the Official Gazette no. 79-79 bis of June 21, 1968, republished in the Official Gazette no. 55-56 of April 23, 1973, republished in the Official Gazette of Romania, Part I, No. 65 dated April 10, 1997. For a comment on these regulations see Dan Banciu, Sorin M. Rădulescu, *Corupţia şi crima organizată în România*, Continent XXI Publishing House, Bucharest, 1994, p. 50; Dan Banciu, *Sociologie juridică*, Hyperion Publishing House, Bucharest, 1995, p. 75.

[7] See in this regard G. Antoniu, A. Boroi, B. N. Bulai, C. Bulai, Şt. Daneş, C. Duvac, M. K.Guiu, C. Mitrache, Cr. Mitrache, I. Molnar, I. Ristea, C. Sima, V. Teodorescu, I. Vasiu, A. Vlăsceanu, *Explicaţii preliminare ale noului Cod penal*, vol. II, Universul Juridic Publishing House, Bucharest, 2011, p. 186; Theodor Mrejeru, *Infracţiunile de corupţie. Aspecte teoretice şi practice*, All Beck Publishing House, Bucharest, 2000, p. 124; Ilie Pascu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chiş, Mihaela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mirecea Constantin Sinescu, *Noul Cod penal comentat*, vol. II, Universul Juridic Publishing House, Bucharest, 2012; D. D. Popa, *Obiectul material al infracţiunii*, Universul Juridic Publishing House, Bucharest, 2010; O. Predescu, A. Hărăstăşanu, *Drept penal. Partea specială*, Universul Juridic Publishing House, Bucharest, 2012, p. 194; T. Toader, *Drept penal român. Partea specială*, 5th edition revised and updated, Hamangiu Publishing House, Bucharest, 2011, p. 147; I. Vasiu, *Drept penal. Partea specială. Cu referiri la noul Cod penal*, 5th edition, Albastra Publishing House, Cluj-Napoca, 2011, p. 125.

in terms of criminal law means the person who, permanently or temporarily, with or without remuneration: a) is carrying out the duties and responsibilities established by law, in order to achieve the prerogatives of the legislative, executive or judicial power; b) is exercising a public dignity or a public office of any kind; c) exercises, alone or with others, in an autonomous administration, in another economical operator or in a legal entity owned totally or in majority by the state or in other legal entity declared as being of public utility, duties related to the achievement of the object of its activity.

Analyzing the provisions of art. 175 paragraph (1) a), we find that, in this case, the legislator decided to define public servants on the basis of their membership of one of the powers of the state, irrespective of their position or institution where they work. Thus, the Romanian President, members of the Government, senators, deputies, judges, prosecutors, court clerks fall within this category. We note that court clerks are included in this category because they can not be regarded as officials with special status, but only a category of auxiliary specialized personnel, having role in the effective exercise of all activities of the courts and of the prosecutor's offices attached to them[8]. Also, the employees of the Senate, of the Deputies Chamber, of the Government and of the ministries, of the courts and of the prosecutors' offices will not be included in this article as long as their duties are unrelated to the prerogatives of that power in which they work.

Regarding the provisions of art. 175 paragraph (1) b), we note that the definition of the notion of public official is in relation to the type of the function held, respectively if it is about a dignity public function or a public function of any kind. Since they hold a public function in terms of the Law no. 188/1999, in our opinion it may be included in this category all public servants who work for the Government, for the ministries, for the authorities of the local public administration and for their subordinated institutions, public servants with special status and any other person whose status is governed exclusively by the Law no. 188/1999. It must not omit officials MPs, given that art. 4 paragraph (1) of Law no. 7/2006 stipulates that parliamentary public office is a career specific public office.

We consider that it must be criticized the legislator's decision in order not to define in the current Criminal Code the notions of public dignity function and public office of any kind, but in the absence of a legal definition, we turn to art. 37 paragraph (2) of Law no. 24/2000, which stipulates that the meaning of concepts and terms are set by the legislative act establishing them.

Following this reasoning, we can say that public dignity functions are covered by the list existing in Annex VII of the Framework Law no. 284/2010 on salaries in the public sector, and public office of any kind must be interpreted in terms of Law 188/1999, which defines public office as being all duties and responsibilities, established under the law, in pursuit of public powers prerogatives by central public administration, by local public administration and by autonomous administrative authorities (art. 2 paragraph 1), stating, in the same time, that the public servant is the person named, in the conditions of the law, in a public office (art. 2 paragraph 2).

We believe that certain categories of public officials, such as government members or judges of High Court of Cassation and Justice may circumscribe both existing provisions in art. 175 paragraph (1) a) and those in the content of art. 175 paragraph (1) b) alike.

In order to criminalize the offences committed outside public institutions, but in relation to the use, management, administration of state properties, according to art. 175 paragraph (1) c), the legislator decided that public servants in terms of criminal law are also those who work in the economic sector, respectively in an autonomous administrations, in an another economical operator or in a legal entity owned totally or majority by the state or in a legal entity declared as public utility, having duties related to the achievement of the object of its activity. In this category, the following are illustrative: Autonomous Administration for Nuclear Activities, Autonomous Administration "Official Gazette", Autonomous Administration of State Protocol Patrimony, traders or legal entities owned totally or majority by the state, which were established by law, such national companies, national societies or companies owned totally or majority by the state organized

[8] To see art. 2 paragraph (1) of Law no. 567/2004.

according to Law no. 31/1990, declared as being of public utility, having duties related to the achievement of the object of its activity.

According to article 175 paragraph (2) also it is considered public servant in terms of criminal law, the person who exercises a public service which for she was invested by public authorities or who is subject to the control or to the supervision of that authorities in pursuit of respective public service.

We believe that the reasoning of this incrimination was making it possible to hold criminally liable for committing corruption offences of those people who are self-employed, performing a public service. By analyzing the text, we see that, in order the individual to be included in this category, he must meet two conditions: first condition concerns the duties of the person and requires that she perform a service of public interest, namely by fulfillment that public service to pursue the satisfying of some needs of general interest, and the second regards the relationship with public authorities of the person who performs public service and requires that the person have been entrusted by a public authority or to be the subject of the control or supervision of a public authority regarding to the fulfillment of that public service.

We believe that the procedure of the investiture in order to carry out a service of public interest involves acquiring this quality by providing it by a public authority (for example, appointment as public notary) or by providing it by a decision of an authority (for example, the administrator and judicial liquidator appointed by the court in insolvency proceedings).

Without attempting an exhaustive enumeration of the persons who might join the category stipulated in art. 175 paragraph (2), we include:

- public notaries, who, according to art. 36 paragraph 1 of Law no. 36/1995, are appointed by the Minister of Justice, on a proposal from the Council of the Public Notaries; they are vested to exercise attributes of public authority that have been delegated by an act of the competent state authority and are subject to its control, even though these people are not proper public servants;

- bailiffs, without being properly public officials, invested, according to art. 2 paragraph (1) of Law no. 188/2000, to exercise attributes of public authority and whose coordination and control of activity are exercised by the Ministry of Justice, according to art. 4 of Law no. 188/2000

- authorized interpreters and translators, who, according to art. 2 of Law no. 178/1997, are certified in the profession and whose activity is authorized only in certain cases by the Ministry of Justice

- technical judiciary expert (High Court of Cassation and Justice – the Complete for unraveling of some points of law in criminal matters, by Decision no. 20 of September 29, 2014, stated that he is "a public servant in terms of art. 175 paragraph (2) of the Criminal Code")

- the judicial administrator and liquidator, according to Law no. 85/2006, as a result of designation by judicial bodies in order to pursue duties of public interest

We express the opinion that the mediators and lawyers (according to art. 39 paragraph (1) of Law no. 51/1995 in the exercising of the profession, lawyers are protected by law and may not be assimilated unless they are certifying the identity of the parties, the content or the date of an act) can not be assimilated to the public servants. It is true that, according to art. 4 paragraph (1) of Law no. 192/2006, mediation is an activity of public interest, but mediators' investiture and their activity control are made by a private authority, not by a public authority, as it is provided in the text of art. 175 paragraph (2).

If for the General Part of the Penal Code, the legislator has regulated public servant and assimilated public servant as active subjects of corruption offences, in the Special Part of this Code, legislator has provided also other categories of active subjects of corruption crimes.

In Decision. 2 of January 15, 2014, the Constitutional Court stated that by corroborating art. 175 and 176 of the Criminal Code, "it results that the public servant is the person exercising permanent or temporary, in any form, no matter how she was invested, an assignment of any kind, remunerated or not, in the service of a public authority, public institution or of an any other legal entity of public interest." It was also stated here that "the meaning of the notion of public official in

criminal law is not equivalent to that of an official in administrative law[9]. As it was pointed out in legal literature, criminal law concepts of "public official" and "official" have a broader meaning than that of administrative law, due to both the character of social relations protected by the criminalization of socially dangerous acts and that the requirements of defending property and those of promoting community interests require the best possible protection by criminal law. The criminal law doctrine also notes that penal law defined public servant solely by function that he has or, in other words, whether the public servant works in service of a unit determined by the criminal law, subject to a certain status and legal regime. That is, the criminal law refers to the concept of "public authority", which according to the provisions of Title III of the Romanian contains, in addition to public administration (central specialized and local), and Parliament, the President of Romania, Government and the judiciary authority (the Courts, the Public Ministry and the Superior Council of Magistracy)."

Studying the existing provisions into national law by reference to those laid down in International Treaties that Romania has ratified, we might say that internal rules in combating corruption and abuse of functions committed by public servants comply with international rules. Also, the terms "official" and "public official" are equivalent to "public agent", "member of domestic public assemblies", "national official" or "public officer" which there are mentioned in international documents considered.

However, with the entry into force of the Law amending and supplementing certain acts and unique article of Law amending art. 253¹ of the Criminal Code, the situation changes, as we shall see below.

The provisions of Art. I point 5 and art. II point 3 of the Law amending and supplementing certain acts (the criminal Code of Romania, republished in the Official Gazette of Romania, Part I, no. 65 of April 16, 1997, as it was amended and supplemented, and Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, no. 510 of July 24, 2009, as it was amended and supplemented) provides the following:

- Article I point 5: <After paragraph (2) of art. 147 it is introduced a new one, paragraph (3), as it follows: “There are exempt from the provisions of art. 147, Romanian President, deputies and senators, and people who are self-employed operating under a special law and that are not funded by the state budget, these respond criminal, civil or administrative in accordance to the special laws provisions under which they operate, and in accordance to the provisions of common law, by respecting the provisions of this paragraph.">;

- Art. II point 3 <In art. 175, after paragraph (2) it is inserted paragraph (3) as follows: "There are exempt from the provisions of art. 175, Romanian President, deputies and senators, and people who are self-employed operating under a special law and that are not funded by the state budget, these respond criminal, civil or administrative in accordance to the special laws provisions under which they operate, and in accordance to the provisions of common law, by respecting the provisions of this paragraph.">

Therefore, by modifying art. 147 of the previous Criminal Code, there were significantly limited the category of subjects of criminal law fell within the definition of "public official" or "official", precisely the President of Romania, deputies, senators and anyone who would be self-employed operating under a special law and which wouldn’t be financed from the state budget. So, they could not be held criminally liable for offences of service, corruption or any other offence for which the law stipulated the condition that the active subject to have a public servant or official.

By changing art. 175 paragraph (1) of the current Criminal Code, which defines public official as the person who, permanently or temporarily, with or without remuneration, exercises attributions and responsibilities established by law, in order to achieve the prerogatives of the

[9] According to Article 2 paragraph (2) first sentence of Law no.188/1999 on the status of public servants: "public servant is the person appointed according to law in a public office", and according to art. 2 paragraph (1) of the same law, “public function means all attributions and responsibilities established by law in order to achieve public power prerogatives by the central administration, local administration and autonomous administrative authorities.”

legislative[10], executive[11] or judicial power, reach, practically under paragraph (3) newly introduced, to exempt precisely these topics, with categories of subjects that would be self-employed, operating under a special law and which wouldn't be financed from the state budget.

In Decision No. 2 of January 15, 2014 on the unconstitutionality of the provisions of art. I point 5 and art. II point 3 of the Law amending and supplementing certain acts and unique article of Law amending art.253¹ of the criminal Code, the Constitutional Court held that "Beyond the obvious deficiency in compliance of the legislative technique norms and the legal nonsense of art. 175 as a whole, the new provisions are unclear, leading to confusion in the interpretation and application of the law. Regarding the amendment in both codes on the exclusion of persons who work in a profession as self-employed, under a special law that are not funded by the state budget, in the field of incidence of criminal responsibility in relation to these offences having qualified active subjects, the Court holds that the rule is unclear and subject to interpretation. Thus, the self-employed professions are organized and carried out only under the law, the status of the profession and under the code of conduct, having the status of autonomous functions that are exercised in offices or clinics, within professional associations established under the law. For example, it could fall into this category, lawyers, public notaries, mediators, doctors, pharmacists, architects, independent experts and insolvency practitioners, without any clear legislation on all professions classified as liberal. Note that some of the above persons may have under provisions of art. 147 paragraph (2) of the Criminal Code the status of "official" when they are employees in a legal entity and therefore can be active subjects of corruption or service offences. Also, some of the persons exercising the liberal professions are considered "public servants" under article 175 paragraph (2) of the new Criminal Code, when, while operating under a special law and are not financed by the state budget, they exercise a service of public interest and are subject to the control or to the supervision of a public authority. The Court notes that the exclusion of persons exercising the liberal professions in the field of incidence of criminal responsibility in relation to criminal offences of corruption and service does not represent an objective criterion according to which the legislator can justify intervention. That is, the Court considers it essential for the inclusion or exclusion of persons from the incidence of the criminal provision are criteria such as type of service provided, the legal basis under which that performs the activity or the legal report between the person concerned and the public authorities, public institutions, institutions or other legal entities of public interest."

Thus, by limiting the concept of "public official" or "official" as a result of the exclusion of categories of subjects about which we have previously spoken, it is eliminated their criminal responsibility in the circumstance they would commit criminal acts which for the penal law provides the existence of a qualified active subject as a public servant or official.

In the same decision, the Constitutional Court has held that, while the new regulations stated "the criminal, civil or administrative liability of these persons in accordance with special laws under which they operate, as well as with common law, in compliance with this paragraph", however "in terms of criminal liability, the reference to the special law and to the common law is an illusory one". Thus, in case of the President of Romania, he fulfills prerogatives and exercises competences under the Constitution and other laws, through the presidential administration, public institution to the President by virtue of the regulations for organization and functioning of the Presidential Administration. Senators and deputies are elected representatives of the Romanian people, exercising their mandate in the service of the people, under the Constitution, under the Law no. 96/ 1996 on the Statute for Deputies and Senators and their rules of organization and functioning. But the laws governing the criminal liability of the President of Romania, respectively of the deputies and senators are those stipulated in the Criminal Code, which is, moreover, common law in this matter. However, while the reference to common law by the modifier law is done "in compliance

[10] Senators and deputies are the persons exercising attributions and responsibilities established by law in order to achieve the legislative prerogatives.

[11] Romanian President exercises attributions and responsibilities established by law in order to achieve the prerogatives of executive power.

with this paragraph", which excludes all people mentioned above from the field of incidence of the term "public servant"/"official", in particular the reference to provisions of the Criminal Code will have no object.

We consider it necessary to mention here the Constitutional Court Decision[12] no. 1611 of December 20, 2011, where it held that "the exception was generated by the fact that in the case before trial, the mayor, as a distinct law subject, chosen after a local suffrage, is considered part of the notion of public official or other official, and he may be prosecuted for committing offences which for the Criminal Code also requires such a qualification". It is noted that in this case the, Court ruled indirectly on the field of incidence of the notion of "public servant" in criminal matters, estimating that by the notification concerning the unconstitutionality of law it was intended "any amendment by the Constitutional Court of the meaning of the concept of public official or other official in terms of criminal law, through its incidence circumstantiation, in order to exclude local elected representatives from the quality of active subjects for the offenses of corruption or service". On this occasion, the Court held that "given the scope of the powers provided under the competence of the Mayor, par excellence has connotations of public power, it appears justified the mayor's quality of active agents for the offenses of service or in connection with the service and for the corruption. Otherwise, it can be concluded that the mayor is above the law and can not be investigated and punished for committing offences against public interest activities, such as for example the abuse in service against public interests, taking bribery, receiving undue benefits of forgery and others, which would be incompatible with the rule of law ".

Since the purpose of the law aims to ensure the necessary legal framework for that who are holding a public function to perform their legal duties objectively and impartially, in compliance with legal rules in force and with the principles of transparency of decisions and integrity in order to satisfy the public interest and not the achievement of personal interest with the consequences of harming the public interest and declining public confidence of the citizens in state institutions, we express the view that limiting the term "public official" or "official" as a result of the exclusion of the categories of subjects about which we have previously spoken determine important issues of unconstitutionality.

Thus, by exempting from the provisions of art. 147 from the previous Criminal Code and from the provisions of art. 175 of the Current Criminal Code of an elected positions are violated both provisions of art. 11 paragraph (1) and (2) of the Constitution and those set out in the United Nations Convention against Corruption, which requires the criminalization of corruption of domestic public officials (art. 15), and other facts, such as those contents art. 17 (embezzlement, misappropriation or other diversion of property by a public official), art. 18 (trading in influence) or art. 19 (abuse of functions). However, the exemption from the provisions of art. 147 of the previous Criminal Code and from the provisions of art. 175 of the current Criminal Code of senators and deputies, there are violated the provisions of art. 11 para. (1) and (2) of the Constitution and art. 4 of the Criminal Law Convention on Corruption, which stipulates the obligation to criminalize corruption of members of domestic public assemblies.

The Constitution is mandatory under the provisions of art. 1 para. (5) of the Basic Law, which excludes the possibility of the Parliament to criminalize or, conversely, to decriminalize certain antisocial offences, if this way there are violated constitutional provisions. In this respect, we mention Constitutional Court Decision[13] no. 62/2007, where it is stated that "Parliament could not define and establish as a criminal offense without thereby infringing the Constitution, facts in which content would fall discriminatory elements of those set of art. 4 para. (2) of the Basic Law. Similarly, Parliament can not proceed to eliminate criminal legal protection of values with constitutional status. Regulatory freedom that Parliament has in these cases is exercised by regulating the conditions of criminal liability for acts affecting antisocial values provided and guaranteed by the Constitution".

[12] Published in the Official Gazette of Romania, Part I, No. 106 of February 9, 2011.
[13] Published in the Official Gazette of Romania, Part I, No. 104 of February 12, 2007.

If the legislator considered it appropriate criminalization of corruption including when they were committed by senators, deputies and even by the President of Romania, by the Law amending and supplementing certain acts and unique article of the Law amending art. 253¹ of the Criminal Code, basically this acts were decriminalized, and this happens quite unreasonable and unjustified in the context of prevention and combat corruption manifested among public servants are as necessary as are the safeguards and guarantee of their integrity and in the exercise of public prerogatives and duties. Disclaimer criminal liability of the deputies, senators and of the President of Romania for all actions under criminal law conditioned for the existence of the offence by the quality of the active subject of being a public servant or official seriously affect criminal protection of social values extremely important.

Corruption is the strongest threat to democracy and to rule of law institutions, with severe consequences on human rights, on equity and social justice. However, corrupt phenomenon leads nationally to economic decline and to destabilize democratic institutions. Therefore, not only, Romania tried and, we believe, largely succeeded to take a series of legislative measures aimed at all levels of state authorities and institutions in order to prevent and combat corruption.

In Decision no. 2 of January 15, 2014, the Constitutional Court pointed out that if "his presidency and parliamentary mandate are defined as dignity public positions as referring provisions of art. 16 para. (3) of the Constitution and of the law, the persons that are occupying these functions, also exercise attributions and responsibilities established under the Constitution and under the law in order to achieve the power prerogatives that they were vested at the highest levels in the Romanian state. Therefore, given the duties within the competence of the elected functions exempted from the provisions of art. 147 of the previous Criminal Code and from the provisions of art. 175 of the new Penal Code, which, par excellence, have connotations of public power, it is justified their vocation to the quality of active subjects of the service offences and corruption offences. However, enshrining at normative level the impunity cause of these people on offences against fundamental institutions of the rule of law, the legislator regulates a distinct legal system creating for them a privileged status comparatively with other persons exercising functions and public dignities, and which remain within the notion of "public official". This way, paradoxically, the legislator extracted from the incidence area of criminal responsibility, just people who occupy representative positions in the state and exercises real powers prerogatives, people whose criminal acts produce serious consequences on the functioning of public authorities, on the decision making process concerning the general interest of society, and not least on public confidence in the authority and prestige of state institutions. "

The Court also found that << if such actions were not being discouraged by criminal law, they would lead to violation of fundamental values protected by the Criminal Code, values in terms of constitutional status as the rule of law, democracy, respect for the Constitution and laws, which are enshrined in art. 1 par. (3) and (5) of the Basic Law among the supreme values. On the other hand, the Court finds that the distinct legal status, privileged in terms of criminal liability, is against the principle of equality in rights of the citizens, enshrined in art. 16 para. (1) of the Constitution, which states that "all citizens are equal before the law and before the public authorities, without any privilege or discrimination." Moreover, the provisions of art. I point 5 and art. II point 3 of the Law amending and supplementing certain acts contradict also art. 16 para. (2) of the Constitution. Indeed, to the extent that certain law subjects are excluded by virtue of a legal provision adopted in their consideration and applicable only for them, the incidence of a legal regulations being common law, statutory provisions at issue disregard the constitutional principle according to which "no one is above the law". In addition, privileged legal status created for persons occupying elected offices exempted under art. 147 of the current Criminal Code and under the provisions of article 175 of the new Criminal Code contravenes also to the provisions of art. 11 paragraph (1) of the Constitution, according to which "the Romanian State pledges to fulfill in good faith its obligations as deriving from the treaties it is a party.”>>

So, the Constitutional Court upheld the unconstitutionality of the provisions of art. I point 5 and art. II point 3 of the Law amending and supplementing certain acts and unique article of the

Law amending art.253¹ of the Criminal Code and found that these provisions are unconstitutional in relation to the formulated complaints, violating art. 1 para. (3) and (5), art. 11 para (1) and art. 16 paragraph (1) and (2) of the Romanian Constitution.

4. The doctor – public official in terms of criminal law

A much discussed issue in doctrine, that caused difficulties in judicial practice was the interpretation of art. 175 of the Criminal Code when a doctor performs his duties in a state sanitary unit or in a state hospital is prosecuted under the accusation of taking bribery criminalized by art. 289 paragraph (1) of the Criminal Code.

We believe that the difficulty of this interpretation was due, on the one hand, because of the fact that art. 375 paragraph (2) of Law no. 95/2006 on healthcare reform, with subsequent amendments, expressly stipulates that doctors are not public officials, and, secondly, that on the list of public functions governed by Law no. 188/1999, those functions were not found. These issues are likely to generate opinion that the doctor could not be classified as stipulated by art. 175 para. (1) b) sentence II of the Criminal Code. At first glance, we might be tempted to fall into the category referred to in art. 175 paragraph (2) of the Criminal Code, because apparently both requirements in this respect would be met, namely the creation of a public service (art. 2 of Law no. 95/2006) and exercising attributions under the control and supervision of the Medical College of Romania and of the Ministry of Public Health, according to art. 373 of Law no. 95/2006.

According to article 176: "the term public means all the public authorities, public institutions and other legal entities that manage or exploit publicly owned property."

Public function means the whole complex of attributions and responsibilities that an authority or a public institution it established under the law to carry out its competences. Public interest includes ensuring and enforcement of the public authorities and institutions of civil rights and freedoms as they were enshrined in the Basic Law, the entire domestic legislation and international treaties signed by our country. It follows that both concepts aimed at satisfying the public interest on the basis of constitutional provisions. Because the activities of public servants are to the fulfillment of the public interest, in exercising its position it is required for him to consider the public interest above private interest.

The notion of "public service" means an activity performed in the public interest or a subdivision within an institution related to internal administration divided into sections, services etc. Services include public entities whose activities have to meet certain general interests of citizens.

According to art. 1 and 2 of Law no. 95/2006 on healthcare reform, as amended and supplemented, health is a major social area, and public health assistance means organized effort of society to protect and promote the citizen’s health, component of the public health system. Interpreting the provisions of Law no. 95/2006 in the context described above, it results that the doctor’s activity is to accomplish a service of public interest.

The active subject of the crime of taking bribery is public official in terms of criminal law, respectively of art. 175 of the Criminal Code, which is why no other non-criminal regulatory act such as Law no. 95/2006 on healthcare reform can not remove criminal regulation. Therefore, the provision that "the doctor is not a public servant" in the wording of art. 375 paragraph (2) of Law no. 95/2006 on health reform is not such as to exclude doctors from public officials in terms of the criminal law. In our opinion, that provision only relates to "the nature of the medical profession and obligations of the doctor to his patient."

Although persons assimilated to public servants are not proper public servants, they can achieve attributes of public authority that have been delegated through an act of the competent state authority, being under the control of that authority. In Decision no. 2/2014, Constitutional Court stated that "some of the people exercising liberal professions are considered as" public servants "under art. 175 paragraph (2) the new Criminal Code, when, while operating under a special law and without being financed by the state budget, exercises a public service of public interest, they are subject to control or supervision of a public authority ". It follows that a person exercising powers

outside the public system, not engaged in a state unit can join under provisions of art. 175 paragraph (2) of the Criminal Code in the above-mentioned conditions. Hiring a doctor at a state hospital or sanitary units, under salary is not the same with its investment by a public authority for the exercise of a service of public interest, nor that he would be controlled or supervised by that public authority. Medical College in Romania, is representing a public authority (Ministry of Health), but does not invest doctor in exercising a public service nor exercise control or supervise public service by the doctor. According to Law no. 95/2006, College only allow their freedom to practice the profession of doctor, controlling and supervising a liberal profession, that of a doctor. So doctor employed in a state hospital does not exercise on investiture by a public authority or under the control or under the supervision of a public service, but only realize their duties in a public health system. Consequently, although the doctor operates under a contract of employment in a hospital belonging to the public health system, we believe that it can not be categorized as assimilated public servants, as art. 175 paragraph (2) of the Criminal Code involves, besides the person must perform a service of public interest, to be invested by a public authority or be subject of the control or of the supervision of this authority on the fulfillment of its public service said. Or, as we have seen above, none of these two alternately conditions are not met.

According to art. 175 paragraph (1) c) of the Criminal Code, a person who permanently or temporarily, with or without remuneration "exercises, alone or with others, in an autonomous administration, in another economical operator or in a legal entity owned totally or majority by the state, attributions related to achieving the object of its activity" may hold a public servant in terms of criminal law. From this article, it appears the conditioning the quality of public servant from the exercising the attributions "in an autonomous administration, in another economical operator or in a legal entity owned totally or majority by the state." According to Law no. 95/2006 on healthcare reform, state sanitary units and hospitals entitled as legal entities are not capital legal entities, nor hold capital. Therefore, they can not be autonomous administrations, traders or legal entities owned totally or majority by the state and, consequently, the doctor that works in a hospital unit of the public health system can not be categorized as public servants referred to in art. 175 para. (1) c) of the Criminal Code.

According to provisions of art. 308 para. (1) of the Criminal Code, those persons who "exercise permanent or temporary, with or without remuneration, a commission of any kind (...) in any legal entity" can be active subjects of corruption and service offences. We should mention that not all state sanitary units and hospitals were organized as legal entities. There are also units that do not have legal personality. So, if we assume that the doctor could be the active subject of the corruption and service offences under art. 308 para. (1) of the Criminal Code, we would create an unjustified difference in treatment between doctors from state sanitary units or hospitals having legal personality and doctors from such a unit which has no legal personality. In other words, the doctor of a state sanitary unit or hospital organized as a legal entity may be held criminally liable for committing an offence of corruption, while the doctor a similar unit, but which has no legal personality, should be exempted from criminal liability when committing corruption. Therefore, in our opinion, art. 308 para. (1) of the Criminal Code can not be incident to the doctor working within the public health system, as these provisions create an unjustified inequality treatment between doctors who pursue their duties in state sanitary units or hospitals having legal personality and doctors who pursue their duties in such units without legal personality, by the fact that that criminal liability is conditioned, in this case, by the activity in an entity with legal personality or within a legal entity.

On the other hand, we can not support that it was desirable to bring out of the illicit criminal area the offence of taking bribery when it is committed by a doctor that pursue his duties within the public health system, given that health was quantified as "a vulnerable sector to corruption and requires specific solutions", in the EU Anti-corruption Report findings or if we consider that, at European level, countries like Great Britain criminalize the act of bribery committed in all functions of a public nature. The fact that the medical profession is part of the group of liberal professions is not likely to exempt doctors from criminal liability if they commit a corruption offence and we refer

especially to the offence of taking bribery, knowing that many patients have faced and continue to face situations where medical act is conditioned by money or other benefits.

It is therefore imperative that the criminal law can be incident and if doctors exercising their duties in any state sanitary unit or hospital.

High Court of Cassation and Justice gives us in this case the solution, by Decision 26 of December 3, 2014 published in Official Gazette no. 24 of January 13, 2015, where it states that, on the one hand, "The provisions of art. 175 para. (1) b) sentence II of the Criminal Code and art. 289 para. (1) of the same Code, and, on the other hand, art. 2 of Law no. 188/1999 on the status of public and art. 375 para. (2) of Law no. 95/2006 on healthcare reform, as amended and supplemented, although it regulates different situations and purposes, not exclusive one to another. Thus, the first two legal provisions mentioned above are considering a report of substantive criminal law, doctor being an active subject of the crime of taking bribery, and the other two regulations indicated concern a report of administrative or civil law, whose subject has rights and specific requirements established by law. In conclusion, the doctor with employee contract working in a state sanitary unit or hospital in the public health system is a public servant in the sense of the provisions of art. 175 par. (1) b) sentence II of the Criminal Code."[14]

5. Conclusions

Following the proposed scientific approach, we express the opinion that the public servant as an active subject of corruption offences in national law is consistent with EU provisions, as showing that Romania is an active participant in the fight against corruption.

Consequences for the normative evolution of the regulations adopted for combating corruption and for combating corruption acts in justice, we note progress by bringing to court numerous corruption offences committed at high level and at the same time, in many of these cases existing conviction decisions. But all this progress made by Romania in controlling this phenomenon, corruption is still very high, constituting a threat to national security, given that corruption is the means that allows organized crime groups to infiltrate both in the public sector and private sectors.

In our opinion, measures against corruption should not be only legislative. Given the essential role of the judiciary in combating corruption, these measures must relate to strengthening of magistrate's integrity, reducing the risk that they may be corrupt and also judicial system protection. Measures adopted to determine also a greater accountability and integrity among public servants, remarking here often the inconsistency of the senators and deputies in integrity issues or promoting changes to the Criminal Code in terms of limiting the application of criminal law in the matter of corruption.

We also consider that the legislation on probation is quite lenient with active subjects of corruption offences, sometimes such acts being extremely difficult to prove.

Maybe, sometimes, it is being better if national courts would enjoy a larger appreciation freedom, in order that the application of the letter of law to be made in full consonance with the spirit of the law, in other words, for that the letter of law not to remain dead.

In order to ensure the prevention of corruption, we believe that in the Member States it is necessary to be created bodies and effective policies for the prevention of corruption, that the recruitment and employment of officials and other public officials to be based on efficiency, transparency, objective, appropriate remuneration, being also necessary the introduction of codes of conduct within the institutional and legal systems.

[14] Decision of the High Court of Cassation and Justice no. 26 of December 3, 2014, for case no. 7932/102/2012 on requesting preliminary rulings to solve the principle of how to interpret the provisions of art. 175 of the Criminal Code, that if the surgeon employee with an employment contract for an indefinite period in a hospital in the public health system, indicted on charges of taking bribery offence provided by art. 289 paragraph (1) of the Criminal Code are classified as public servants referred to in art. 175 paragraph (1) c) of the Criminal Code or public servants under art. 175 paragraph (2) of the Criminal Code.

Also at European level is necessary to adopt anti-corruption policies more efficient, adapted to national requirements of each Member State, monitoring and evaluation of progress of Member States in the fight against the phenomenon of corruption, of course, respecting the principles of sovereign equality and territorial integrity, and the principle of non-interference in internal affairs of other states.

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