Mitigating Circumstances in the Current and the New Criminal Code. Comparative Examination

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Abstract: By using the word "public", the Criminal Law refers to all public authorities and institutions and also to all legal entities of public law. Particular attention is paid to the public function and to its holder- the civil servant. It also provides the conditions that a person has to meet in order to act as a public servant. Prerogative power is an essential element in the official identification of the public servant.

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1. Public Authorities

The term "public" means all the public authorities, the public institutions and other legal entities administering or operating public property assets. Undoubtedly, whether we consider the meaning of the term "public", we will reach the conclusion that it has a multifaceted character and signifies either a community of people or something that belongs to such a community, concerning all of us.

In everyday life, this term is very commonly met. The term "public" is used in the Penal Code and in special laws, but also in non-criminal laws. In the Penal Code, the word "public" is used by the legislature to designate all the public authorities and institutions, or other entities of public law. Thus, in art.175 of the Penal Code, the term "public" is defined by the legislature. For the purposes of art.178, para.2 of the new Criminal Code, the documents emanating from public authorities and institutions are official documents. Similarly, acts and actions that come from legal persons administering and operating the publicly owned property are also official documents.

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In terms of public authorities, these are both those of Title III of the Constitution-Public Authorities and the autonomous administrative authorities, organized by organic laws. (Muraru et al., 2008, p. 592)

In Romania, the public authorities are constitutional, according to the foundation of their work. Thus, there are: the Parliament which exercises the legislative power, the President of Romania and the Government that are constitutive factors of the executive, the courts, as components of the judiciary, the Public Ministry and the Superior Council of Magistracy, as constitutive factors of judiciary power. These public authorities operate in full compliance with the principle of separation of powers provided in art.1, para.4 of the Constitution, and besides them, there are also other authorities defined by the Constitution as state authorities, which are not among the powers of the state, but act under their management. This last category includes public administration, subordinated to the Government, which consists of the ministerial and extra-ministerial administration. Ministerial Administration includes ministries and other public authorities whose leaders are part of the Government, according to the organic law, while the extra-ministerial administration consists of administrative authority established by laws and other bodies subordinated to the Government or ministries. (Vedinaş, 2006 pp. 313-315)

Among constitutional autonomous administrative authorities, the Constitution states: the Legislative Council, the Ombudsman, the Court, the Supreme Council of National Defense and Economic and Social Council. However, there are also other administrative authorities regulated by laws: the National Audiovisual Council, the Competition Council, the National Bank, the National Council for Study of Security Archives, secret services and other similar institutions.

In the Constitution(art. 120-123) there are also mentioned the local authorities, local councils and mayors, who work as autonomous territorial administrative authorities, plus the County Councils and the General Council of Bucharest, in order to accomplish the achievements of public interest.

The Constitutional Court is a constitutional public authority that is not part of any of the three branches of government, but whose main responsibility is to guarantee the supremacy of the Constitution. In the provisions of art.176 of the Penal Code are listed all the public institutions. According to the rules of constitutional law and administrative law, the concept of a public institution has a value that exceeds and doubles the public authorities. (Muraru, 2008, p. 594)

The public institution is very difficult to be distinguished from the public authority, whereas in everyday life they even merge. The public institution can be defined as a body or organization that has independent organization, established by law, (Ionescu, 2001, p. 36), being endowed with budgetary and financial responsibilities. Any public authority has its own budget and has the financial means to fulfill its tasks, so a public institution is any public authority which can be a credit. Public institution can be, however, anybody or organization which carries social, cultural, administrative activities. (Muraru, 2008, p. 594)

The legislature uses, therefore, the same definition of the term "public" in the phrase "other legal entities administering or operating public property assets."

The provisions of art.136 para.1 of the Constitution enshrine and guarantee two forms of ownership: public and private. The realization of the fundamental right of public property and its Law.213/1998 provides: "The right of public property is owned by the state and territorial administrative units of the goods which, by law and by their nature, are of purpose or of public interest." According to the same article 136, para.4 of the Constitution, Public property is inalienable, meaning that it cannot be alienated by civil legal acts. Also, according to art.136 para.3 of the Constitution of the public wealth, the air, the waters with hydropower potential of national interest, beaches, territorial waters, natural resources of the economic zone and the continental shelf, and other assets established by organic law, are the object of public property exclusively.

Analyzing the content of these constitutional provisions two criteria for determining public property can be set:

- criterion of property's destination-public or national interest (national interest riches, waters with hydropower national interest);
- criterion of the statement of law (other assets established by the Organic Law). (Muraru & Tănăsescu, 2008, p. 1302)

In accordance with the law, public property can be managed, can be leased or rented to legal entities, or can be given free use to public institutions. (Vedinaş, 2006 pp. 202-205)

We can conclude that, in the expression "public", the criminal law has held only two ways: the exploitation and the administration of public property. The term "administer" refers to the act of managing an institution or an enterprise. For the purposes of the New Criminal Code, this phrase has a more complex meaning, and

relates to planning, sourcing, marketing, etc. on public property. To exploit, according to the Explanatory Dictionary of the Romanian Language, means to value a resource, to extract a useful substance in order to achieve economic objectives. Generally, state assets are managed and operated by legal persons, being organized in corporations. Their staff can have civil servants status and documents issued by them are official papers or documents under private signature. Corporations or companies may be owned by the state or use major capital, having the management or exploitation of public property. We must point out that companies, either fully or partially subordinated to the state, are legal entities of private law, and the legislature's intention was not to refer to them since it is clearly stated in the text law(art.176, Criminal Code) "public authorities and institutions or other bodies that administer or operate public property assets."

2. Public Servant

In legal literature, the concept of "public official" covers a wide range of meanings. In accordance with law no.188/1999 on the status of civil servants, the notion of public official means a person who has public powers and duties, performing his services to a public authority of the central government or to local authorities. Public power is, in this case, a key in civil servant identification. (Vedinaş, 2009, p. 24)

Otherwise, this broader notion of public official includes all categories of people who work in public institutions and authorities. Thus, according to this view, the ones who are considered civil servants are, in addition to those who have public powers, the persons employed in the public authorities and institutions, under an employment contract and under a labor legislation. (Lilac, 2005, p. 581)

The last acceptation of the term "civil servant", to which we add the concept of servant, is shown in art.147 of the Criminal Code, where by saying "civil servant" or "servant" we have to consider a very wide range of people, from officials exercising powers of legislative, executive and judicial, to employees who provide an activity for and under the authority of persons of private law.

Criminal law pays a special attention to public service and hence, to its holder, who is the civil servant, the reason for this being determined by the role the public servant has in the organization and delivery of public national and local services, this activity being of a real interest, for both the state and for the citizens.

Civil servants should perform their duties properly and promptly and resolve immediately the service tasks that fall within their jurisdiction. It is precisely this aspect that determines the criminal legislature to protect through legal measures the prestige of public and public servants, and to establish simultaneously penalties for unworthy acts that can cause significant damage to citizens, public authorities or even to the Romanian state. (Antony, Danes & Popa, 2002, pp. 232-233)

For the most effective protection of social relations, related to the proper functioning of public bodies, and for protecting the legal interests of citizens, the notions of "civil servant" and "the public" should best respond to all the demands. The public official means, according to art.147 Penal Code, any person who performs, permanently or temporarily, in any form, an assignment of any nature in the service of the unit referred to in art.145 Penal Code. Art.147 para.2 Penal Code defines the concept of servant in a much broader spectrum. Therefore, in the sense of criminal law, a person can have civil servant status only if he has a specific public activity, performed under the authority of a legal entity of public interest. (Mastacan, 2008, p. 6)

The concept of servant includes both the public official and the employee, as defined in labor law. In our opinion, the distinction which the legislature makes between the two concepts is quite important and necessary, as it has implications for penal treatment, depending on the perpetrator, and also for the possible existence of offenses or aggravating circumstances, depending on the quality of active subject qualified by the public servant or, where appropriate, by the official. For example, art.258 Penal Code, provides an extension of criminal liability for the offenses referred to in art.246-250 Penal Code and for those who are merely servants. In this case, the maximum penalty is reduced by one third.

Another aspect that needs to be stated is that the concept of public official in criminal law has a wider coverage than the same concept in administrative law. It is necessary to make this statement in order to outline more clearly the differences between the two concepts, which are identical as description of the shape, but distinct by the legislature.

According to the status of civil servants, the person who has access to a public official must be appointed in a solemn occasion of the administrative act of appointment and oath, have the task of fulfilling service activities involving public powers, on condition that these activities are accomplished in the service of public authorities or institutions, being afterwards paid. Criminal law requires for a person

to be a public servant one condition: the person holding the office must have a task in the service of a public authority, public institution or other legal entity of public interest. Therefore, it does not matter the nature of commission or whether it is permanent or temporary. Also, not relevant to the criminal law is the way or the title the person had been invested, appointed or elected, or whether that is gainful or not. A legislator opted for the solution of connecting the public servant with any person who performs work for a public service.

However, we cannot call public servants people who have freelance status of units referred to in art.145 Criminal Code or students who practice in these institutions. Art.175 para.1 of the new Criminal Code consider public servants the ones who hold a position of public office and the ones who occupy a public office of any kind (e.g., members of government, Constitutional Court judges etc.). According to art.175 para.1 of the new Criminal Code, it is considered a public servant the person who, alone or along with others, holds a position in an autonomous administration of another company or of another legal person declared as public utility task(e.g. employees doing business in a management or executive in the national or local autonomous administrations, national corporations, companies, associations, foundations, private legal person non-profit). Art.175 para.2 of the new Criminal Code treats the civil servant and the person exercising a public service, for which he was invested by the public authority , or that is subject to control or supervision on the fulfillment of the public service. Civil servants are considered also the individuals pursuing a profession in the public interest that requires a special enabling of the public authorities (e.g. notaries and bailiffs).

3. Conclusions

With reference to the concept of “public official” regulation, we can remark that the criminal legislature abandons an extensive interpretation of this concept, in order to let us observe the nearby similar concept of administrative law, which emphasizes the public powers, giving the new Penal Code the notion of official regulation. (Brad, 2004, p. 143)

The drawbacks of the regulation in art.175 para.1 of the new Criminal Code are quite obvious, as the legislature does not specifically set the notion of public official, therefore causing many questions to be raised. In our criminal law, we believe that there will be some changes in the future and that a clear, concise and incapable of any interpretations definition will eventually be stated, so that to put

an end to all the disputes of the doctrine and to help practitioners to make the correct classification of the facts.

4. References

Antoniu, G., Daneş, Şt. Popa, M. (2002). *Codul Penal pe înţelesul tuturor*/*Penal Code for everyone.* 7th Edition. Bucharest: Editura Juridică.

Brad, I., (2004). Câteva aprecieri referitoare la sfera noţiunii de funcţie publică de autoritate/Some considerations on the concept of public official authority. *Dreptul/The Law.* No. 3, (March 2004) pp. 136-158.

Mastacan, O. (2008). *Răspunderea penală a funcţionarului public*/*Criminal liability of public officials.* 2nd Edition. Bucharest: Hamangiu.

Muraru, I., Tănăsescu, S. (2008). *Constituţia României – comentariu pe articole/Constitution - Comment on articles.* Bucharest: C.H. Beck.

Vedinaş, V. (2006). *Drept administrative*/*Administrative Law.* Bucharest: Universul Juridic.