

NEGLIGENCE AND MISUSE OF AN OFFICIAL POSITION FAULT OR *MENS REA* OF THE CIVIL SERVANT?

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Abstract: *The topic of this paper concerns a thorough analysis of two crimes enshrined in the Romanian Criminal Code – negligence and misuse of an official position by a civil servant. Its content lies at the borderline of three areas of law: Criminal, Administrative and European Community Law. Within its first chapter the authors display a series of information regarding the concept of civil servant as perceived in several different legal systems, also comprising the European Union. Furthermore, there is an analysis of the concept of fault as opposed to „mens rea” – the criminal intent that precedes the act. Which are the main elements that differentiate these concepts, in what ways do they influence criminal responsibility and most of all, how difficult is the mission of the party on whom the burden of proof lies?- these are the questions to which the authors are bound to find an eloquent answer. The last chapter entails a practicality of the first two theoretical parts, by the analysis of the relevant national and Community case-law. The final part of the paper is reserved for some observations regarding the current legal state of the matter and stands as a conclusion for the entire framework.*

Keywords: *civil servant, negligence, misuse of an official position, fault, intention.*

JEL Classification: *K14, K23*

The purpose of this paper is to draw attention upon the gravity of the committed acts exactly by those who would have the primary obligation to respect the law, to fulfill their duties in a correct manner, to have a responsible attitude for the well functioning of the public authorities and institutions within which they unfold their daily activities.

Situated at the borderline that separates Administrative, Criminal and Community Law, the current paper is set out to perform a research upon this field from the point of view of these three areas of law. In its drafting the authors have studied the national and foreign relevant doctrine, as well as elements of case-law and legislation.

The rise of the role of public administration in the evolution of modern Romanian society determines its thorough knowledge so that on the basis of this knowledge we could establish its rational organization and efficient functioning. Therefore, it has been underlined that public administration is nothing else but the activity of some organized groups of individuals who perform this activity in order to fulfill general public interests in relation with other individuals. Regardless of the degree in which the organization of an administrative organ is satisfactory, and of the opportunity of the legislation, these remain a mere exposal, without any viability, in the absence of competitive, active individuals that are devoted to the public wellbeing, and that must be given the right to implement them.

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The responsibilities that are attributed to the ones that implement public administration, to civil servants, impose an analysis of this issue from the point of view of Criminal Law. The latter represents an extremely important regulator of public life but also in what regards individual behavior and standings. It defines the values that are important for the community, safeguarding their protection. From the drafting of Criminal legislation one can foresee the moral condition of a society, the system of values, on which the state is being edified, and the place that the individual occupies within the state and the rights that belong to him. Momentarily, the shapes of the fight against criminality take very diverse forms, comprising general measures of social prophylaxis, safety measures and punishments¹.

In order for a more complete approach of the subject, we considered necessary to discuss several aspects that are detailed within two theoretical and one applicative chapter. Thus, in the first part of this paper, we will refer to the civil service and the civil servant from the perspective of the Administrative Law, whereas later we present the two crimes as fundamental institutions of Criminal Law. The last chapter sets into practice the theoretical part of the paper by presenting relevant case-law material with reference to the two crimes – negligence and misuse of an official position, lastly laying down a conclusion upon the afore mentioned ideas.

I. Considerations regarding the concept of civil servant in different legal systems

By analyzing the relevant legal literature within this field, one can assert that the concept of civil servant more or less differs from one state to another.

At national level, the concept of civil servant is defined by Law no. 188 of 8 December 1999 regarding the Statute of the civil servant, republished². Thus, article 2 para. 2 of this Law provides that „the civil servant is the individual that is lawfully appointed in a public office”. The civil servant is defined in a close manner within the prior form of the law. The novelty brought by the new Law is the acknowledgment of maintaining the civil service status for the individual whose work relations have ended because of reasons that are not imputable to him and that continues to be a part, *ex lege*, of the relay group of the civil servants. Thus, the law expressly provides a legal state of affairs that is implicitly provided within the prior drafting of the law, by admitting the competence of the National Civil Servants' Agency to redistribute fired for reasons not imputable to them³.

In the foreign legal literature, the concept of civil servant is used with two understandings: in a more broad sense, it has the meaning of a public agent, an individual that unfolds its activity within the public field, and, in amore narrow sense that belongs to Administrative Law, the concept is used in order to determine only one category of public agents, the ones whose legal status is regulated by special provisions, that are in relation with the administration in a statutory and regulated manner⁴.

Unlike in our country, in Great Britain there was no clear definition of the civil servant prior to the year 1989, provided expressly in a normative act drafted at a national level. However, there is a definition that enjoys a certain authority and that is comprised in the 1987 Statistics of the Civil Service. Thus, the civil servant is defined as „a servant of the Crown that unfolds it activity on the basis of certain civil duties and who does not hold political or legal responsibilities. He holds any other responsibilities related to who's work tasks there are special provisions; a servant of the Crown who has an individual responsibility and is paid out of public funding⁵. Thus, the theory makes a clear distinction between the political role of ministers and the administrative duties of civil servants. A minister is, from a political point of view, responsible for the political organization of the department and the establishment of an efficient administration, whereas the public servant is subordinated to the minister, implementing the policy in the latter's name.

Although the definition is formulated in an ambiguous manner, without specifying the persons that hold the status of civil servants, the legal literature shows⁶ that from this definition one must exclude ministers, judges, members of the armed forces and local government.

¹ Constantin Butiuc, *Manual de Drept Penal – Partea Generală*, Ed. Universității „Lucian Blaga”, Sibiu, 2006, p. 9

² Published in the Official Journal no. 365 of 29 May 2007

³ Verginia Vedinas, *Legea nr. 188/1999 privind statutul funcționarilor publici cu modificările ulterioare, republicată. Comentată*, edition no. 3-a, Ed. Lumina Lex, Bucharest, 2006, p. 18

⁴ Agathe Van Lang, Geneviève Gondouin, Véronique Inserguet-Brisset, *Dictionnaire de droit administratif*, edition no. 2, Dalloz, Paris, 1999, p. 140

⁵ Civil Service Statistic, HMSO, 1987

⁶ J.R. Greenwood, D.J. Wilson, *Public Administration in Britain Today*, edition no. 2, Routledge, 1989, p. 86

On the other hand, the Federal Constitutional Court of Germany has stated that “the professional servant is an institution that responds to the expertise, competence and loyalty that must insure the stability of administration and to represent a element of balance in relation with the political forces that form stately-hood.”⁷

Also, within the European Community, there are agents who are bound by special legislation that constitute the law of European public service. The activity of the European civil servants is regulated by a statute. The current statute of the European civil servants has replaced the civil service statute and the legislation applicable to other agents of the European Economic Community and of the Economic Community of Atomic Energy issued by the Council on the basis of art. 212 EEC and 186 of EURATOM, which contained derogatory provisions in comparison with the ECSC Personnel Statute of 28.01.1956⁸.

Art. 24 of the Merger Treaty of 8 April 1965 imposed the creation of a regulation for the single and common personnel belonging to all the Community institutions⁹. This unification was made through the EEC, ECSC, EURATOM Regulation no. 259/68 of February 1968 published in the OJEC no. L 56 of 04.03.1968 and that was modified several times. This Regulation, together with other legal documents, are reunited in an internal document of the Communities’ called Statute and which has as a subtitle “Regulations and drafts applicable to civil servants and other agents of the European Communities.”

The definition of the concept of Community civil servant is found in art. 1 of the Statute, which provides that “it is considered to be a Community civil servant any person who was appointed under the conditions provided by this Statute, in a permanent service in one of the Community’s institutions by a written act of the authority invested with the power to appoint by this institution”. This definition sets out a difference between Community civil servants on one hand, and other categories of agents on the other, for example those hired on a contractual basis. The analysis of the definition’s text leads to the conclusion obtaining the statute of Community civil servant is determined by the issuing of an appointing document by the competent authority¹⁰.

In order to fulfill his work related duties any civil servant is obliged to accomplish his work tasks in a professional manner and with impartiality and to refrain from any deed that might cause damage to the natural and legal persons. Thus, when civil servants breach with guilt their work related duties, they will respond at a disciplinary, contravention, civil or criminal level, according to the case.

In the EU however, there is a slight difference between the numbers of Community civil servants belonging to different states and according to the hierarchical level of office. Art. 5 of the Statute of European Community Civil Servants comprises the general norm according to which the offices that are regulated by this statute are classified, from the point of view of their nature and of the level to which they correspond to four categories settled in a reverse hierarchical order. The civil servants belonging to level A have as a task policy drafting, the preparation of legal acts’ projects and of the reports, as well as applying Community legislation. Level B corresponds to tasks such as application and framing, the individuals within this category having as attributions the receipt and analysis of the information necessary for the drafting the Community policies or to safeguard community legislation. Within level C there are those who perform secretary and archiving tasks, whereas level D corresponds to those with physical labor duties¹¹.

The citizenship of the civil servants is that of the member states to which they belong. The individuals appointed in the offices of a community institution by the written decision of the authority that has the competence to appoint, according to the Personnel Regulation are called “officials”. On the other hand, in the category of “other civil servants” we could name the temporary personnel, the auxiliary and the local staff as well as the special advisers etc¹².

⁷ Constanța Călinoiu, *Teoria Funcției Publice Comunitare*, Ed. Lumina Lex, Bucharest, 1999, p. 14

⁸ Louis Cartou, *L’Union Européenne, Traités de Paris – Rome, Maastricht*, edition no. 2, Dalloz, 1996, p. 123

⁹ Jean Boulouis, *Droit institutionnel de L’Union Européenne*, edition no. 6, Montchrestien, 1997p. 191

¹⁰ Constanța Călinoiu, (1999), op. cit., p. 17

¹¹ Eufemia Vieriu, Dumitru Vieriu, *Drept Instituțional Comunitar European*, Ed. Lumina Lex, Bucharest, 2007, p. 98

¹² Octavian Manolache, *Tratat de Drept Comunitar*, Ediția a V-a, ed. C.H. Beck, București, 2006, pp. 805-806

In this context, art. 236 of the ECT, which confers competence to the community institutions in this field must be interpreted as being applicable not only to the persons who have the statute of civil servants but also to the individuals that claim this status¹³.

With the purpose of amiable settlement of the legal disputes, the Community civil servants may notify the competent jurisdictional organs, with accept of the appointing authority through their superiors. The appointing authorities will take a decision, that will be notified to the claimant and that will be plausible to be contested in front of the Civil Service Tribunal¹⁴. This new and specialized jurisdiction¹⁵ has the competence to judge the appeals related to contentious cases regarding civil service. The CST exercises, in first instance, the competence to decide over trials between the Community and its agents, according to art. 236 of the ECT and of art. 152 of the Treaty instituting the EURATOM, understanding thus the trials between any institution and its staff.

In the case in which the appointing authority does not offer a response to the claimant, in the sense of issuing a decision within the legal term of four months, its stillness is assimilated to a decision. This can be appealed within a three months period from its expiring at the community court. On the contrary, the claim would be rejected as inadmissible¹⁶. Such a appeal bears the characteristics of an annulment plea, with all the consequences regarding the application of the rules referring to the judicial control in similar cases. On the other hand, the Tribunal may examine the possibility of an amiable understanding during in any phase of the trial¹⁷.

Regarding the criminal responsibility of civil servants in our country, Law no. 188 of 1999 regarding the Statute of the civil servant provides at article 86 para. 1 that "the civil servant's responsibility for the crimes committed during work hours or in connection with the attributions of its public office is provided by the criminal legislation". In Chapter I called "Work or work-related crimes", Title IV, there are provided the crimes that may be committed by a civil servant: misuse of an official position against private interests, misuse of an official position by limitation of rights, misuse of an official position against public interests, the qualified form to the misuse of an official position and negligence.

II. Negligence and misuse of an official position from the point of view of Criminal Law

1. Aspects regarding the social threat represented by the two crimes

It is only normal to assume that the epistemic authority with which are invested the organs of public administration and which is exercised by those who hold public offices should be used having in view the common wellbeing of individuals. Consequently, state administration should be aware of the fact that negligence and misuse of an official position represent steps towards disaster in the administrative field.

Although there are several methods of misuse of an official position, the ones that constitute a particular interest are the ones that imply the use of specialized expertise and competence of a civil servant (ironically, these are acquired thanks to or in relation with its official position) with the purpose of obtaining private gains. In this sense, the legal literature has even sustained that this type of misuse would be a form of *malpraxis*¹⁸. Moreover, any conflict of interests, in its most simple form, represents a threat to the moral integrity of a person, leading to decisions that are plausible for abuse¹⁹.

Taking into account that public administrations benefit within the area of their specific activity of a considerable discretion, this representing *per se* an indisputable form of power, the probability of an abuse becomes even greater. Consequently, it is considered that the limitation of this margin of discretion (through legislation) diminishes the probability of the occurrence of such

¹³ CFI: C. 30/96 *Jose Gomez de Sa Pereira vs. Council*, Ord. of 11 July 1996, consid. 24, in ECR, 1996, 7/8/9 (II). "Articles 90 and 91 of the Staff Regulation (No. 259/68 – J. Of. L 56/1 of 4 March 1968, modified several times, last by Regulation No. 723/2004 Of. J. 124/1 of 27 April) regarding the appeals apply not only to those who are civil servants but also to those who claim this officet".

¹⁴ The procedure in front of this Court is regulated by Title III of the Statute of the Court, with the exception of art. 22 and 23. Auxiliary and more detailed provisions are provided by the procedure regulation, such as the Annex to the Council Decision No. 2004/752 of 2 November 2005, that became Annex no. 1 to the Statute of the Court.

¹⁵ Augustin Fuerea, *Manualul Uniunii Europene*, Ediția a III-a, Ed. Universul Juridic, Bucharest, 2006, pp. 117-118

¹⁶ Larry Terry, *Leadership of Public Bureaucracies*, Ed. M.E. Sharpe, 2002, p. 101

¹⁷ P. S. Mathijsen, *A Guide to European Union Law*, Ninth Edition, Ed. Sweet&Maxwell, Londra, 2007, p. 154

¹⁸ Larry Terry, *Leadership of Public Bureaucracies*, Ed. M.E. Sharpe, 2002, 1990, p. 101

¹⁹ Marry Ellen Guy, *Ethical Decision Making in Everyday Work Situations*, Ed. Greenwood Publishing Group, p. 74

an abuse²⁰. The heritage left behind by the misuse of an official position in the states on whose territory this practice is a constant one is that of mistrust²¹ in the official organs of the state.

On the other hand, in Great Britain the civil servants are bound not to misuse their official position or the information obtained during the course of their activity²² within this position by forwarding them to their gain or that of others. Also, they are forbidden to place themselves in a position that could be perceived as a compromise over their personal integrity and reason. The integrity of the public office is protected by universally accepted rules regarding the assignment of contracts and disposition over propriety, their breach being submitted to the control of the General Auditor. In this state the complaints regarding the duplicity in the use of discretionary powers can be investigated by the Ombudsman who is appointed by the Parliament²³.

2. Particularities of the crimes regarding negligence and misuse of an official position

Regarding the legal basis, the Romanian Criminal Code²⁴ incriminates the above mentioned crimes by the provisions of art. 315 - Misuse of an official position against private interests, art. 316 - Misuse of an official position by limitation of rights, art. 317- Misuse of an official position against public interests, art. 318 - The qualified form to the misuse of an official position and art. 319 - Negligence. A particular form of negligence is the one committed with relevance to the holding of national secret information and which has as a consequence the destruction, alteration, loss or theft of such a document, as well as the negligence that conferred the opportunity of other individuals acknowledging such an information, if the deed is of such a nature that it affects the interests of the state.

Negligence requires fault²⁵, and the latter has come to be accepted as an element that may lead to criminal responsibility, in favor of this idea being brought several arguments. It represents the opposite of the premeditated act. In other words, its presence precludes the existence of a clear intent for obtaining a certain result. Consequently, what is being punished is not the mental state but the consequence of the unsought deed. Moreover, the meaning of the terms "without reason" and "unsought" when used in the case of fault are representative for a situation in which the threat was not perceived²⁶.

The legal forms of the misuse of an official position are the following:

- Performing in a deficient manner an act related to work tasks – performing it in other conditions, circumstances, modalities or terms than the ones provided by the law.
- Knowingly unfulfilling a task within the exercise of his work related duties – the omission, the remaining in stillness, the non-performance of an act that he was obliged to perform in the virtue of his work related duties.

A special case is that of the misuse of an official position against public interests, which in the situation that it is committed with a purpose of a crime provided in sections II and III of Law no. 78/2000 is assimilated by the law with a deed of corruption. For the misuse of an official position to be assimilated with a crime of corruption it is absolutely necessary to be committed with intent or in the forms provided by Law no. 78/2000. On the contrary, one cannot talk about a deed of corruption but of a crime contest with a deed of corruption²⁷.

In what regards co-authorship, this is possible under the condition that all co-authors have the status of civil servants, and abettor or accomplice can be any person, regardless if he hold or not the status of civil servant²⁸. The main passive subject is the state, as holder of the protected social values, but in the same time the public institution, the public authority, the legal person of public or private law within which the active subject unfolds his activity²⁹, while the secondary passive subject is the citizen whose use of rights has been limited (for example, the case of a

²⁰ Montgomery Van Wart, *Changing Public Sector Values*, Ed. Taylor & Francis, 1998, p. 49

²¹ Goren Hyden, *African Politics in Comparative Perspective*, Ed. Cambridge University Press, 2006, p. 202

²² Susan Corby, Geoff White, *Employee in the Public Services: Themes and Issues*, Ed. Routledge, 1999, p. 63

²³ Anthony Wilfred Bradley, Keith Erwing, *Constitutional and Administrative Law*, Ed. Pearson Education, 2007, p. 290

²⁴ Published in the Official Journal, Part I no. of 29/06/2004, modified by GEO no. 58/2005, published in the Official Journal Part I no. 552 of 28/06/2005, GEO no. 50/2006 published in the Official Journal, Part I no. 566 of 30/06/2006, GEO no. 73/2008 published in the Official Journal, Part I no. 440 of 12/06/2008.

²⁵ Mircea Bădilă, *Drept penal. Partea Specială*, Vol. I, Ed. Altip, Alba-Iulia, 2006, p. 279

²⁶ Roach Kent, M.L. Friedland, *Criminal Law and Procedure: Cases and Materials*, Ed. Emond Montgomery Publications, 2004, p. 455

²⁷ http://integritate.resurse-pentru-democratie.org/generalitati_coruptie.php, accessed on 09.03.2009

²⁸ Adrian-Milutin Truichici, *Abuzul în serviciu prin îngrădirea unor drepturi în lumina interzicerii discriminării*, in *Revista Dreptul* no. 8/2007, 2007, p. 189

²⁹ Vasile Dobrinou, *Drept penal. Partea specială*, vol. II, Ed. Lumina Lex, 2004, p. 93

woman who is denied the right to work in a management position in a state institution although she fulfills the conditions imposed by the law)³⁰.

The misuse of an official position can be enacted within a longer period of time, therefore the acts of preparation and the attempt are possible although the crime can be committed by an omission, and knowing the fact that in the case of crimes committed through an omission the enacting within a longer period of time is not possible. The criminal law does not set out a punishment neither for the acts of preparation nor for the attempt but only for the consumed form of the crime, and the latter is consumed in the moment in which the its material element is accomplished and the threatening social consequence is produced³¹.

It is essential to bare in mind that while the misuse of an official position normally implies direct intent, the neglect of one's work related duties imposes the fault of the civil servant but this must lead to an important harm, exactly for the purpose of his protection. It is considered that due to the nature of his work the civil servant is exposed to the possibility of committing an error (due to the workload, the diversity of task etc.). Consequently, the legislator has considered that the harm must be a relevant and not an ordinary one. In this sense one must look at the essential trait of a crime, the actual social threat.

In what follows the authors shall develop this subject, underlining the difficulty met by the legal advisers in situations in which the fault of the civil servant (in the form of negligence) is clear, yet it is more difficult to prove the so-called *mens-rea*, the intent that has lead to committing the misuse of an official position.

3. Intent or fault of the civil servant?

Our view on criminal responsibility is firstly based on the mental state that accompanies or initiates the illegal act, and the assignment of criminal responsibility without a proof of such a guilty mental state raises numerous questions. Criminal responsibility is triggered for crimes committed during working hours or in relation the duties of the public office that the civil servant holds, him being bound by the criminal law³².

Within the analysis of what we call *mens rea* there is a distinction between the intent related to acts that seek a certain goal, and those who do not. A general intent regarding committing an illegal act can be sufficient in order to observe the existence of a crime, whereas in other cases besides the general intent it is also necessary a specific one with the purpose of committing an act incriminated by the criminal legislation in force³³.

Related to the subjective side, the legal literature³⁴ has constructed a dominant opinion according to which the crime is committed only with direct intent and not with indirect one due to the fact that within the structure of the objective side it is included (as an essential request) a certain mobile that qualifies the guilt³⁵.

For example, in the case of misuse of an official position by limitation of rights, the mobile is the impulse, the tensed state of the author that determines him to differentiate among individuals based on criteria such as: nationality, race, sex or religion. In this particular case, indirect intent is possible as a form of guilt due to the fact that animated by such a motivation the civil servant may accept the threat imposed to his work relations without necessarily pursuing this end³⁶.

In what regards this crime, generally, due to its nature it does not have a material object, the act of the civil servant is not triggered against material values. However, the crime may have a material object – just like the misuse of an official position against private interests, in situations such as the ones in which the limitation of the rights of a citizen or the creation of an inferior position is accomplished by acts against goods belonging to him³⁷.

The misuse of an official position – a form of corruption

³⁰ Gheorghe Nistoreanu, Alexandru Boroi, *Drept penal. Partea specială*, Second Edition, Ed. All Beck, 2002, p. 266

³¹ Adrian-Milutin Truichici (2007), op. cit., p. 191

³² Ioan Santai, *Implicații ale incidenței legii contenciosului administrativ asupra statutului funcționarului public*, Revista Dreptul, year XII, Third Series, no. 5/2001, 2001, p. 106

³³ Pickard Goldman, *Dimensions of Criminal Law*, Ed. Edmond Montgomery Publications, 2002, p. 696

³⁴ Ioan Molnar, *Abuzul în serviciu prin îngrădirea unor drepturi* în *Drept penal partea specială*, by Gh Nistorescu ș.a., Ed. Europa Nova, 1997, p. 327

³⁵ S. Kahane, *Abuzul în serviciu contra intereselor persoanelor*, în *Explicații teoretice ale Codului penal Român. Partea specială*, vol. IV, de V. Dongoroz ș.a. Ed. Academiei, 1972, p. 82

³⁶ Horia Diaconescu, *Considerații cu privire la infracțiunea de abuz în serviciu prin îngrădirea unor drepturi* Revista Dreptul, year XIII, Third Series, no. 6 of 2002, p. 111

³⁷ idem

In some cases corruption is defined exactly a misuse or the incorrect use of an official position of a civil servant³⁸. Alto, it represents a sign of social, economic, cultural, political and moral collapse. This may be observed in several forms, among which one can count the misuse of an official position, bribery, discrimination, breach of the law, and legal interpretations done so that they would serve for private gains³⁹.

Political corruption represents a special case and it constitutes a violation of public interests or values through a misuse of an official position enacted by the means of a public office and having as a goal fulfilling private interests. But corruption is not necessarily tied to official power⁴⁰, due to the fact that there are cases of corruption in the private field belonging to companies and organizations.

The misuse of an official position by corruption represents, first of all, the use of the official status of the civil servant with the purpose of obtaining private gains, at an individual or collective level against public wellbeing, breaching regulations and moral considerations, and by direct or indirect participation of one of the civil servants. In a more simple definition, it can be considered a partisanship that threatens stately-hood⁴¹.

Both corruption and fraud imply a misuse of an official position regarding the individual that should act in favor of the common wellbeing and without taking in consideration his private interests. Most of the moral dilemmas do not have their starting point in the bad faith of those involved but in the inherent complexity of the civil servant status, a position in which instinct and the established practice do not help in establishing a hierarchy between the priorities that are in a continuous competition⁴².

III. The relevant case-law of the national and European courts⁴³

The provisions of art. 248 and art. 248¹ of the Criminal Code regarding the misuse of an official position against public interests and the qualified form to the misuse of an official position have been subjected to the control of the Constitutional Court in various cases⁴⁴, the latest ones being those of 2003, 2007, 2008. Thus, through Decision no. 294 from July 8, 2003⁴⁵, the Constitutional Court rejected as ill-founded the exception of unconstitutionality of the provisions of art. 248 of the Criminal Code, but through Decision no. 832 of October 2, 2007⁴⁶ and Decision no. 767 of June 24, 2008⁴⁷, the Constitutional Court rejected as ill-founded the exception of unconstitutionality of the provisions of art. 248 and art. 248¹ of the Criminal Code.

Through the Rising from March 10, 2003, pronounced in File no. 234/2002, the Court of Mangalia referred to the Constitutional Court the exception of unconstitutionality of the art. 248 from the Criminal Code.

The exception was invoked by the applicant Maria Daniela Silvia, investigated for misuse of an official position against public interests, negligence, forgery and use of forgery, provided in art. 248, art. 249 para. 1, art. 288 para. 2 and art. 291 of Criminal Code.

Within the motivation of the exception of unconstitutionality, its author claims that the text of these articles violates the fundamental right regarding the protection of private property which provides that this must be protected equally by the law irrespective of the subject. The differential indictment – obviously most serious – of the crime of misuse of an official position against public interests and in the situation where the result of the deed consist in a tort regarding the private

³⁸ Peter Villiers, *Police and Policing: An Introduction*, Ed. Waterside Press, 2009, p. 161.

³⁹ Rick Sare, Dilip Das, *Political Corruption: International Perspectives*, Ed. Lexington Books, 2005, p. 190.

⁴⁰ Junichi Kawata, *Comparing Political Corruption and Clientelism*, Ed. Ashgate Publishing, 2006, p. 10.

⁴¹ Hope Kempe, *Development in the Third World: From Policy Failure to Policy Reform*, Ed. M.E. Sharpe, 1996, p. 130

⁴² Noel Preston (1994), *Ethics for the Public Sector: Education and Training*, Ed. Federation Press, 1994, p. 47.

⁴³ The decisions of the Court make references old numbering of the articles of the Criminal Code, before June 2004.

⁴⁴ Decision of Constitutional Court (DCC) no. 11 from 08/03/1994, published in the Official Journal (Of.J) no. 126 from 23/05/1994; DCC no. 50 from 18/05/1994, Published in the Of.J no. 333 from 01/12/1994; DCC no. 36 from 27/04/1994, published in the Of.J no. 36 from 17/02/1995; DCC no. 93 from 17/10/1995, Published in the Of.J no. 281 from 04/12/1995; DCC no. 35 from 27/04/1994, Published in the Of.J no. 339 from 07/12/1994; DCC no. 38 from 27/04/1994, Published in the Of.J no. 36 from 17/02/1995; DCC no. 15 from 06/02/1995, Published in the Of.J no. 296 from 22/12/1995; DCC no. 178 from 17/12/1998, Published in the Official Journal no. 77 from 24/02/1999, DCC no. 139 from 05/11/1999, Published in the Of.J no. 540 from 04/11/1999, DCC no. 124 from 26/04/2001, Published in the Of.J no. 466 from 15/08/2001, DCC no. 178 from 17/12/1998, Published in the Of.J no. 77 from 24/02/1999.

⁴⁵ DCC no. 294 from 08/07/2003, Published in the Of.J no. 571 from 08/08/2003.

⁴⁶ DCC no. 832 from 02/10/2007, Published in the Of.J no. 730 from 29/10/2007.

⁴⁷ DCC no. 767 from 24/06/2008, Published in the Of.J no. 574 from 30/07/2008.

property, violates art. 41 para. 2 of the Romanian Constitution which provides an equal protection of private property irrespective of the subject.

The Court of Mangalia states that the exception of unconstitutionality is ill-founded due to the fact that its author tries to obtain the changing of the legal frame from a crime sanctioned more seriously (art. 248 from Criminal Code) into a less serious one (art. 246 from Criminal Code). In this situation, the public interests were the ones who have been affected by the way in which the applicant fulfilled her attributions and not her personal interests, this is due to the fact that it is made reference to the public fund of the Town hall and the applicant is a civil servant employed to a public institution, position which imposes o certain professional conduct and an increase exigency in administrating the public funds.

According to art. 30 para. 1 of Law no. 47/1992, republished, the rising of intimation was communicated to the presidents of the two Chambers of the Parliament and Government in order to express their opinions on the exception of unconstitutionality which was invoked. Moreover, according to the provisions of art. 19 from Law no. 35/1997, with subsequent amendments, it was solicited the point of view of the Ombudsman („In case of an intimation regarding the exception of unconstitutionality of the laws and ordinances which make references to the freedoms and rights of the individuals, Constitutional Court will ask the Ombudsman point of view”.)

The Government considered that the exception of unconstitutionality is ill-founded because the crime of misuse of an official position against public interests provided in art. 248 of the Criminal Code is a crime related to service and not one against patrimony.

The existence of the misuse of an official position against public interests is conditioned by the generation by the civil servant of a significant disturbance in the course of a unity referred in art. 145 of the Criminal Code (“Extremely serious consequences means material tort higher than 3.000.000.000 lei or a very serious disturbance caused to one of the unities referred in art. 159 or to another natural or legal person”.) or to a public or private legal person.

The arguments of the applicant relating to the distinction between public and private property do not present any interest for the qualification of the deed as crime provided in art. 248 from Criminal Code, this is due to the fact that the crime exists even if a tort was not produced.

The Ombudsman considered that the exception of unconstitutionality is ill-founded because the significant disturbance in the course of an organ or of a public authority, public institutions or another legal person of public interest or the generation of a tort in the patrimony of all these has, in general, higher negative social consequences, without making any differences regarding the aspect that the goods which caused the tort belong to the state or to another subjects.

The presidents of the two Chambers of the Parliament did not communicate their points of view regarding the exception of unconstitutionality.

The Court, analysing the rising of intimation, the points of view of the Government and of the Ombudsman, the report drafted by the judge – rapporteur, the conclusions of the prosecutor, the legal provisions invoked by the applicant in relation with the provisions of the Constitution but also the provisions of Law no. 47/1992, asserted that:

The reference made to a tort caused to the property of the passive subjects of the crime does not have the significance of conveying this crime with a double legal nature, one as a work-related crime ant the other as a property-related one, the deed remaining one that is work-related, but describes one of the two immediate alternative consequences provided by the law – the first being „a significant disturbance of the well functioning of the organ, institution or unity – in order for the deed to be considered a crime.

Consequently, the more serious sanctioning of the misuse of an official position against public interest crime is an option of legislative policy which is the exclusive competence of the Parliament, an option which cannot be censored by the Constitutional Court.

By its Decision no. 767 from 2008, Constitutional Court adds that even if we admit that art. 248 from Criminal Code provides the protection of the property, it can be observed that the text does not make any differentiation between public and private, the abuse of the civil servant penalized in the same way, without any importance if the torts regard the public or private property of an entity provided in art. 145 from Criminal Code. In this situation, the arguments of the applicant in the motivation of the exception of unconstitutionality in the sense that through its content art. 248 from Criminal Code violates the constitutional principle of the equal protection of the private property, irrespective of the subject cannot be accepted.

Even if the exception of unconstitutionality was rejected, the legislative considered that this problem has as a consequence the replacement just in a few months, once with the elaboration of the new Criminal Code, of the expression “the misuse of an official position against public interests” with the one of “misuse of an official position against general interest”. The argument which is the base of this modification is that the new expression is less susceptible of being contested in a similar way as the one presented in this case.

Regarding the case law in the field of misuse of an official position, Civil Servant Tribunal⁴⁸ solved only a few cases in this sense which tangentially deals with some aspects related to the misuse of an official position of the civil servant.

Resuming all the arguments exposed in the content of this paper, some conclusive opinions can be stated. The reason for which this topic will always represent a current issue is that in certain circumstances, negligence and the misuse of an official position can seriously affect the state of legality, balance and economic and social stability. In this sense, the newest evolutions in the field of case law and doctrine with direct impact on the discussed problem demonstrates an augmentation of the degree that it conveys to the social threat represented by the four forms of the misuse of an official position. The high number of Constitutional Court decisions regarding this problem suggests that, in present, the shape in which this crime is provided is still susceptible to be argued. On the other hand, a frequent element is represented by the difficulty which is felt by the party that is obliged to prove that a misuse of an official position has been committed. Thus, if negligence can be demonstrated in a relatively easy way by the simple identification of the civil servant's guilt, the reasoning of an abuse is rather burdensome, being difficult to indicate the elements that constitute the so called *mens rea*, the manifested intention to commit a crime. This fact is even more relevant to the fact that the analyzed phenomenon cannot be regarded from a unilateral perspective, observing only the situation of Romania, but being necessary a monitoring of the entire European system, to which we have been reporting for the last couple of years.

⁴⁸ TFP: Case F-119/06, *Kertens vs. Commission*, Decision of 8 May 2008; Case F-74/06, *Longidinis vs. CEDEFOP*, Decision of 24 April 2008.