

Particularities of the Qualified Active Subject of Crimes against National Security and Crimes Committed by the Military

Ioan Dumitru APACHIȚEI¹, Ichim-Codrin SÎRCU²

Abstract

There are a few points of convergence between crimes against national security and those committed by the military, which result from the nature of the institutional structures in which the lawbreakers perform their duties. At the same time, the two categories of offences are relevant to the constitutional provisions on loyalty to the country and defence of the country, which are fundamental duties corresponding to the social relations protected by the rules of criminal law. Thus, the specific nature of the protected social values justifies the Romanian legislature's choice to attribute special status to the active subject of the offences in question.

Keywords: national security, military, service duties, citizenship

Fundamental duties – points of convergence between active subjects of crimes against national security and crimes committed by the military

Under the legal relations established between citizens and the State, several specific obligations arise, distinct from those that concern foreigners or stateless persons. For example, the State's legal conduct towards its citizens is different from that of the persons who do not have such status. Also, the

¹ Faculty of Law of „Alexandru Ioan Cuza” University of Iași, lawyer within the Iași Bar, e-mail: ioan.apachitei@uaic.ro.

² Faculty of Law of „Alexandru Ioan Cuza” University of Iași, Deputy first military prosecutor – lieutenant colonel magistrate within the Military Prosecutor's Office at the Military Tribunal of Iași, e-mail: sircucodrin@yahoo.com.

sovereignty itself, as a constituent element of the state, is exercised by citizens through the empowerment of representatives in the Parliament (Ionescu, 2017, p. 120-121)

There is a spiritual and interdependent connection between the citizens and the state as a result of the legal relations established by the Constitution. In this regard, it was shown that the individuals do not feel bound so much to the state, identified by its authorities, as to the national territory that reflects the idea of the permanence of a collectivity. Thus, inhabitants first identify themselves with the territory on which they are organized and then with the form of political organization.

The concept of citizenship reflects, on the one hand, the sense of belonging of a collectivity to a certain territory, and, on the other hand, solidarity with the form of the organization of the state, which the citizens legitimize to exercise public power. Understanding of the concept of citizenship, by reference to territory and state, will outline the nature of the fundamental duties that the constituent legislator provided and the Fundamental law, and that, subsequently, the ordinary legislator protects by regulating contrary acts as crimes. It is only by virtue of this quality that the citizenship duties represented by loyalty to the country and the obligation to protect it can be integrated. Thus, the current research starts from the notion of citizenship, the duties that derive from a person's citizenship status and the sanctions for acts contrary to these duties.

The fundamental duties are provided for in Chapter III of the 2nd Title of the Romanian Constitution, and regarding this study, we will focus on the provision concerning the loyalty for the country (article 54) and defence of the country (article 55).

Loyalty to the country is incumbent on all Romanian citizens but has particular implications for civil servants and the military (Balan, 2015, p. 455) At the infra-constitutional level, we can identify several provisions that take over the substance of Article 54 from the Fundamental Law; for example art. 2 para. (2) of Law no. 51/1991 *concerning the national security of Romania* (republished in O.J. no. 190 of 18 March 2014) provides for the fact that "the Romanian citizens, as an expression of their loyalty to their country, have a moral duty to contribute to national security", and art. 8 point a) of Law no. 80/1995 *regarding the status of military personnel* (published in O.J. no. 155 of 20 July 1995) provides for the obligation of military personnel to be "loyal and devoted to the Romanian state and its armed forces, to fight for the defence of Romania, if

necessary to the point of sacrificing their lives, to respect and defend the values of constitutional democracy”. Similarly, the provisions of art. 8 para. (1) point (b) of Law no. 21/1991 *on Romanian citizenship* (republished in O.J. no. 76 of 13 August 2010) states that the person applying for Romanian citizenship “proves, by behaviour, actions and attitude, loyalty to the Romanian State, does not undertake or support actions against the rule of law or national security and declares that he/she has not undertaken such actions in the past”.

Regarding the public office holders and military personnel, the final part of para. (2) of art. 54 of the Constitution provides for the obligation to take the oath prescribed by the law, this being supplemented by the commitment to respect the Constitution and laws, as well as the rights and freedoms.

The defence of the country, according to art. 55 para. (1) of the Constitution, is incumbent on Romanian citizens and constitutes both a right and an obligation. This fundamental duty evokes a moral character that exists between the state and the citizen, particularly by reference to the defence of the territory, which is closely related to the common history and the sense of belonging. The obligation to defend the country arises when Romania’s attributes of “national, sovereign and independent, unitary and indivisible state”, as set out in art. 1 para. (1) of the Constitution, is at risk.

The failure to fulfil the fundamental duties of loyalty to the country or defence of the country constitutes grounds for withdrawing the citizenship of the person who has not acquired it by birth. Para. (1) of art. 25 of Law no. 21/1991 stipulates that Romanian citizenship may be withdrawn: (a) from a person who commits, from abroad, serious acts affecting the interests of the Romanian State or damages the prestige of Romania, (b) when he/she enlists in the armed forces of another state with which Romania has broken diplomatic relations or with which it is in a state of war, (c) respectively if he/she has connections or supports terrorist groups or if he/she commits acts that create a state of danger for national security. The grounds for withdrawing citizenship represent concrete ways in which loyalty to the country or the obligations to defend the country are violated.

Based on the interdependence of rights and obligations arising between the state and the individual as a result of citizenship, the ordinary legislator has created certain regulations of a special nature, namely sanctions of a criminal nature (Safta, 2023, p. 387) In this regard, we consider the fact that some of the offences against national security can be committed only by the person who is a

Romanian citizen, such as the offences of treason (art. 394 of the Criminal Code), treason by transmitting secret state information (art. 395 of the Criminal Code), treason by aiding the enemy (art. 396 C. pen.), high treason (art. 398 C. pen.), respectively in the case of offences committed by military personnel (Chapter I of Title XI of the Special Part of the Criminal Code) (Mitrache & Mitrache, 2022, p. 155). In the case of some of the aforementioned offences, the legislator requires a double qualification of the perpetrator, for example, he/she must be both a Romanian citizen and the President of Romania or be a Romanian citizen and a military officer, as provided for in art. 1 of Law no. 80/1995, to be a military officer, the individual must also have Romanian citizenship.

The citizen's belonging to a particular state and its territory determines “strongly and decisively the formation of national consciousness” (Ionescu, 2017, p. 123), hence the strong reverberations that the notion of treason has in the collective mind. Thus, the notion of treason is seen concerning the obligation of fidelity to the country, and such a duty can only be incumbent on the Romanian citizen, thus not being able to be claimed by the foreigner or stateless person.

Special status of the offender for some of the offences against national security Considerations concerning the qualified active subject according to the Romanian criminal law

The qualified active subject, also called special or circumstantial (Mărculescu-Michinici & Dunea, 2017, p. 526), implies the existence of special conditions required by the incriminating norm. The special status of the perpetrator, that of a Romanian citizen, for some of the offences against national security, must be verified in relation to the date established as to when the offence was committed. It is irrelevant whether the individual loses Romanian nationality after committing the offence or whether he/she did not have Romanian citizenship before committing the offence.

The special status required by the incriminating rule concerns the person/persons who directly committed the act provided for by the criminal law, the perpetrator or the co-perpetrators. Thus, the condition is not to be verified with regard to secondary participants, who may be instigators or accomplices. In this case, when the law does not require a particular quality for the instigator or accomplice, the classification will be in relation to the legal qualification given to the act for the qualified active subject (Udroiu, 2021, p. 128).

The special status of the perpetrator, in relation to the current regulation provided for in art. 394 of the Criminal Code, is that of being a Romanian citizen, a condition distinct from the perspective of the criminal legislator of 1968, which incriminated the act of treason committed both by the Romanian citizen and by the person who does not have Romanian citizenship, but who resides on Romanian territory (Toader T., 2012, p. 4). In fact, from the perspective of the quality of the active subject, the form of the offence of “treason against the Motherland” existing in the 1936 Criminal Code has returned. A similar approach existed as well in regard to the provisions of art. 67 of the 1864 Criminal Code, a criminal provision about which the literature expressed some reservations, considering it very unlikely that a foreign citizen who committed the crime of treason against the country could be held liable by the Romanian state, as if he/she is not on Romanian territory it would be difficult to bring the individual before the court, and if he/she were to enter the territory of the country he would have to be expelled (Dongoroz, 1929, p. 68).

The reason for which the current legislator has limited the scope of persons susceptible to commit the crime of treason to the category of Romanian citizens is explained through the fact that treason represents a violation of the fundamental duty to be loyal to the country, and such obligation can fall within the responsibility of the Romanian citizen (Toader T., 2012, p. 7). This legislative operation, which was carried out with the adoption of the current Criminal Code, should not be understood as a decriminalization of the crime, as committing the action as provided for by the incriminating rule by the foreign or stateless person will be classified per art. 399 Criminal Code as a hostile action against the state. Thus, in the hypothesis mentioned above, we are in a situation where not meeting *in concreto* the requirements for the special qualification determines the possibility of classifying the act in another, distinct, incriminating rule (Mărculescu-Michinici & Dunea, 2017, p. 527) (Udroiu, 2021, p. 129).

What is relevant for the fulfilment of the special quality required by the incriminating rule is that the offender has Romanian citizenship at the time of committing the incriminated act, being irrelevant if he/she also has the citizenship of another state. In this hypothesis, art. 399 Criminal Code becomes inapplicable as if the Romanian citizen also has the citizenship of another state, he cannot be considered a foreigner in relation to Romania.

Some particularities lie in relation to the crime of high treason, as it is provided for in the Criminal Code, which is the first incriminating norm that

represents an infra-constitutional application of the provisions of art. 96 of the Constitution on the impeachment of the President of Romania. The condition referred to in the text of the incrimination is that the offender must be a Romanian citizen, as well as the President of the country, Prime Minister or another member of the Supreme Council of National Defence (Boroi, 2022, p. 824).

With regard to the above issues, the hypothesis of high treason committed by the interim president was also put forward – that the provisions of art. 96 of the Fundamental Law should apply to him/her. Among the many opinions expressed in the specialised literature, one that we refer to concerns the interpretation of art. 99 of the Constitution, which states that the interim President can only be subject to political responsibility for serious acts that violate the constitutional provisions, and therefore not subject to high treason.

The content of the incriminating rule is represented by art. 398 of the Penal Code also refers to the members of the Supreme Council of National Defence, as being able to be active subjects of the offence. In this regard, we have into consideration art. 5 para. (3) of Law no. 415/2002 (published in O.J. no. 494 of 10 July 2002), which lists the following members of the Council: “the Minister of National Defence, the Ministry of Internal Affairs, the Minister of Foreign Affairs, the Minister of Justice, the Minister of Industry and Resources, the Minister of Public Finance, the Director of the Romanian Intelligence Service, the Director of the Foreign Intelligence Service, the Chief of the General Staff and the Presidential Adviser on National Security”.

With regard to the category of active subjects of the offence of high treason, we underline that by Governmental Emergency Ordinance (GEO) no. 224/2008 (published in the O.J. no. 899 of 31 December 2008), the legislator amended the provisions of art. 5 para. (2) of Law no. 415/2002, which mentions the members of the Supreme Council of National Defence, in the sense that the Vice-President of the Council was also going to be the President of the Senate.

This legislative option was shortly criticised based on an objection of unconstitutionality, which is why the Court adopted the Decision of the Romanian Constitutional Court no. 1008/2009 (published in the O.J. no 507 of 23 July 2009) in which the Court established that the aforementioned provisions are contrary to the provisions of para. 6 of art. 115 of the Constitution, a provision which violated the regime in fundamental institutions.

Some controversial aspects in the specialised literature regard the possibility of committing the crime of high treason as accomplices, in the sense

that this form of criminal participation would not be possible when the act is committed by the Head of State. As far as we are concerned, the categories of active subjects referred to in the text of the incriminating provision are in line with Chapter 3 of Law no 415/2002, which indicates how the Council is organised and functions, and therefore the categories of members of the Council. Thus, we consider the indication of the President of Romania in the text of the incriminating rules of art. 398 of the Criminal Code is intended to achieve a correlation with the constitutional provisions that govern the indictment of the Head of State. Therefore, we consider that the offence of high treason can be committed as accomplices by any of the members of the Supreme Council of National Defence, for example by the Head of State and the Prime Minister.

Given the fact that the incriminating provision requires a special quality of the offender, we consider that the failure of one of the offenders to fulfil these qualities at the time when the crime was committed determines the establishment of a different classification for the concrete act committed by him/her, in which sense the provisions of art. 394-397, respectively art. 399 and 400 of the Criminal Code will be taken into account.

Considerations concerning the qualified active subject according to the legislation of other EU member states

Unlike the Romanian legislator's approach regarding the duties of loyalty and fidelity for the state that is required from the Romanian citizen who commits the crime of treason, the Italian legislator (art. 241, 243, 245 Italian Criminal Code) does not require such a condition to be met, the aforementioned crimes could be committed by an Italian citizen, as well as a person with the citizenship of another state. In this regard, the Italian literature appreciated that the necessity to maintain peace in Italy has priority in relation to the quality required from the offender (Albertini, 2008, p. 30).

We consider that some additional mentions are essential, for example, the provisions of art. 242 of the Italian Criminal Code also provides for the condition that the offence be committed by an Italian citizen. The texts of the incriminating rules laid down by the Italian legislator must be interpreted in the light of the provisions of art. 4 of the Italian Criminal Code, which states that, for the purposes of the criminal law, stateless persons who reside in Italy are to be regarded as Italian citizens. Moreover, art. 242 of the Italian Criminal Code states that a person who for any reason has lost the citizenship of the Italian State shall

be assimilated to an Italian citizen (Albertini, 2008, p. 22). This way of regulation aims to ensure greater protection by diversifying the categories of persons who are likely, from the point of view of criminal law, to be authors of the incriminating rules.

For comparison we will also consider the provisions of art. 581 and 592 of the Spanish Criminal Code that incriminate forms of the crimes of treason (Toader T., 2018, p. 616, 618). Thus, the Spanish legislator required that the offender has the special quality of citizen only in relation to the first of the two incriminating rules, and, in relation to the second incrimination, the active subject is uncircumscribed (Combo del Rosal & Quitanar Diez, 2004, p. 1144, 1159).

Similarly, the Spanish legislator provided that the offender must be a citizen of Spain also in the case of the incriminating rules provided in art. 582, 583 and 594 of the Spanish Criminal Code, which have a correspondence in the content of the incriminating text found in art. 396 of the Romanian Criminal Code.

Not all the criminal codes of the EU Member States contain incriminating rules which lay down the special condition that the offender must be a Head of State. In this regard, we note that Portuguese criminal law criminalises various offences which are prejudicial to Portugal's national security by employing special legislation. Thus, we have in mind Law no 34/1987 (published in *Diário da República* no. 161 of 16 July 1987). Art. 3 of the law states that the offences in question may be committed by a person in a public office, which expressly includes the President of Portugal. The acts criminalised by the above-mentioned law are set out in art. 8 to 27, including treason against the country, attacks against the Fundamental Law, and so on, which correspond to those set out in art. 394 et seq. of the Romanian Criminal Code.

Considerations regarding the quality of military personnel mentioned in the Romanian Constitution and in Chapter I of Title XI of the Special Part of the Criminal Code (Crimes committed by the military art. 413-431)

Considerations concerning the quality of the military according to the Romanian legislation

Globally, the past few years have been marked by major events (the Covid-19 pandemic and the war in Ukraine), which have brought forward again the importance and the defining role of the social category of the military, regardless

of the military structure they belong to, as the most appropriate human resource in crisis management. We consider that the periods of the states of emergency and alert during 2020-2022 were eloquent in this regard. The combat capability of the military in the armed forces is maintained by the way in which each member is motivated to carry out his/her service duties and the manner in which unlawful acts against this capability are deterred. The offences provided for in art. 413-431 of Title XI, Chapter I of the current Criminal Code represent one such means of deterring and maintaining discipline among the military, given that “the discipline is the soul of an army”, as George Washington inspirationally said.

The Romanian soldier must be a fighter, with the culture of a fighter, a professional of arms, with the determination of a fighter, with the spirit of sacrifice and the courage of a warrior. In peacetime, the Romanian military must be prepared for combat, but also to be of use to society in humanitarian missions, peacekeeping, reconstruction, and helping members of the community in need.

Society sees the military as a social role model. For this role model to continue to exist, the military must also be a law-abiding man who fulfils this duty with the responsibility of one for whom the profession of arms is an honour. In any society or professional group there is a segment of criminality, and the military is unfortunately no exception, even if the phenomenon of military crime is much lower than in the civilian environment (Rotariu, 2020, p. 62).

At the same time, the analysis of art. 54 and 55 of the Fundamental Law also lead to the conclusion that, for the military, loyalty to the country and its defence are the main social and moral values that guide their entire activity, the military oath implying a commitment to supreme sacrifice for the defence of the country.

No provision of the Constitution, the Code of Criminal Procedure or the Criminal Code defines the scope of the notion of military, although this notion has implications in constitutional law, criminal law (active subject of the offences provided for in art. 413-431 of the Criminal Code) and criminal procedural law (Romanian Constitutional Court Decision no. 302/2007, absolute nullity of breaches of the rules of material competence or according to the person's status).

According to the definition in the Explanatory Dictionary of the Romanian Language, the term “military officer” applies to any person who is a member of the armed forces or who is serving a military service.

In the absence of a definition of military status in criminal or criminal procedural law, the general rules governing the concept of “military” to which we can refer are those governing the status of military personnel, namely Law no. 80/1995 *on the status of military personnel* (published in the O.J. no. 155 of 20 July 1995) and Law no. 384/2006 *on the status of soldiers and ranked professionals* (published in the O.J. of Romania, Part I, no. 868 of 24 October 2006).

Thus, according to art. 1 para. (1) of Law no. 80/1995 *on the status of military personnel* (published in the O.J. no. 155 of 20 July 1995), military personnel are Romanian citizens who have been granted the rank of officer, military master or non-commissioned officer, under the conditions laid down by law. The status of active military personnel is also maintained while they are released from their duties in order to undergo various forms of training in the interest of the service, as well as when they are made available for classification or transfer to the reserve or retirement, for cases of illness established by Government decision, while they are in captivity.

Given the fact that the status of military personnel on the term is no longer explicitly included in the scope of the active subject, it should be pointed out that this category of military personnel continues to exist under certain conditions established by law.

Thus, according to art. 3 para. 5 of the Law no. 446/2006 *on the preparation of the population for defence* (published in the O.J. no. 990 of 12 December 2006), when a state of war is declared or when a state of siege is established, the fulfilment of military service as a military officer on term becomes compulsory for men aged between 20 and 35 who fulfil the criteria for military service as set out in art. 7-8 of the law. In this context, military personnel on term may also be active subjects of the offences provided for in art. 413-431 of the Criminal Code. Similarly, military personnel who are concentrated and mobilised, although they too are not included in the list of active subjects of the offence, have this status from the date of concentration to the date of deconcentration or demobilisation, according to art. 18 of Law no. 446/2006 *on the preparation of the population for defence* (published in the O.J. no. 990 of 12 December 2006).

Furthermore, according to art. 4 of Law no. 80/1995 *on the status of military personnel* (published in the O.J. no. 155 of 20 July 1995), military personnel may be in one of the following situations:

- a) in active service, when they hold a military position. Persons having Romanian nationality and residing in the country may be officers, military masters or non-commissioned officers on active service;
- b) in reserve, when they do not hold a military position, but meet the conditions laid down by law for being called up for military service as concentrated or mobilised reservists, and, if necessary, as active military personnel;
- c) in retirement, when, according to the law, they can no longer be called up for military service.

According to art. 5 of Law no. 80/1995 *on the status of military personnel* (published in the O.J. no. 155 of 20 July 1995), officers, military masters and non-commissioned officers in active service are professional military personnel. The profession of officer, military master or non-commissioned officer is an activity designed to ensure the functioning, improvement and management of the military body in peacetime and wartime. Similar provisions can be found in Law no. 384/2006 *on the status of soldiers and ranked professionals* (published in the O.J. of Romania, Part I, no. 868 of 24 October 2006), which refers to the provisions of Law no. 80/1995 concerning the military status.

There are two opinions in the specialised literature and the judicial practice on the military status of the active subject of offences committed by military personnel.

The first opinion is that “military” should be understood as meaning both active and retired military personnel, and isolated court decisions supporting this view, such as Decision no. 367/RC of 16 October 2020 in case no. 9312/193/2019 of the High Court of Cassation and Justice – Criminal Section appeal in cassation, unpublished, which states the following: “The High Court holds that the criminal procedure law uses the term military, without distinguishing between active or reserve military, the jurisdiction of the military courts being drawn by the status of military, without other conditions or exceptions”.

A systematic interpretation of the provisions of the Constitution, the Criminal Code and the special laws on mobilisation and war could also lead to the conclusion that concentrated or mobilised reservists also carry out activities of a military nature and that the duties of active military personnel with regard to the defence of the country apply to them.

Thus, according to art.185 of the Criminal Code, wartime means the duration of mobilisation of the armed forces or the duration of the state of war.

According to art. 11 of Law no. 446/2006 *on the training of the population for defence* (published in O.J. no. 990 of 12 December 2006), the status of officer, military master or non-commissioned officer in active service is obtained under the conditions laid down by law, and according to art. 13, volunteer soldiers and non-commissioned officers are recruited, selected, trained and carry out their activities per the law.

Three other articles of the above-mentioned law state the following:

“Art. 16. (1) Volunteer reservists may be concentrated or mobilized, as appropriate, for:

- a) training and peacetime and/or emergency missions;
- b) supplementing the forces intended for defence when a state of siege is established when mobilisation or a state of war is declared.

(2) In the situation referred to in para. 1(a), volunteer reservists shall be concentrated based on the order of the minister/head of the institution to which the unit in which the reservist is assigned is subordinated.

(3) Reservists may, at the request of the institutions responsible for defence and national security, participate for a determined period in training or missions, based on their agreement, occupying positions in military structures. During this period, reservists shall have the rights and obligations laid down by law for the category of personnel corresponding to the temporary post held.”

“Art. 17. Reservists may be concentrated or mobilized, as appropriate, for training, to carry out missions and to supplement the institutions responsible for defence and national security, or mobilized at work, according to the law.”

“Art. 18. (1) Concentration, for this law, means:

- a) the calling up of volunteer reservists for training and performance of missions;
- b) the call-up of reservists from the mobilization reserve for training, the performance of missions and the filling of institutions with duties in the field of defence and national security during the state of siege.

(2) Upon the declaration of mobilisation or a state of war, reservists from the operational reserve and the citizens referred to in art. 3(5), incorporated, shall be considered mobilized, and the military service shall be extended until the date of demobilization.

(3) The military service as a concentrated soldier shall begin on the date of concentration and end on the date of de-concentration, and as a mobilised soldier shall begin on the date of mobilisation and end on the date of demobilisation.”

Consequently, if the criterion for the jurisdiction of military prosecutors based on the offender's status as a serving military officer is the holding of military posts, the same reasoning should apply at least to reservists concentrated or mobilised during a state of siege, mobilisation or war.

What matters is the date of actual attainment of military status, respectively the date of loss of military status through reserve or retirement, during which time the person in question has active military status.

The second opinion is that “military” should be understood only as active military, not as military in reserve or retired, and several court decisions supporting this perspective, such as Decision no. 384/RC/2016 of the High Court of Cassation and Justice – Criminal Section appeal in cassation, available on the website www.iccj.ro: “In the case of military personnel, the legislator understood that this competence according to the person's quality is drawn from the military functions exercised. The fact that military reservists enjoy some of the rights conferred on military personnel (not all of them) does not constitute a sufficient argument to contradict the previous conclusion on personal jurisdiction.” This view is also reflected in the following legal texts relating to military personnel:

- Art. 56 para. (4) of the Criminal Procedure Code provides that “in the case of offences committed by military personnel, criminal proceedings must be conducted by the military prosecutor”;
- Art. 101 of Law no. 304/2004 *on the administration of justice* (republished in the O.J. no. 827 of 13 September 2005) reads as follows: “when the person under investigation is an active military person, criminal proceedings shall be conducted by the military prosecutor, regardless of the military rank of the person under investigation”;
- Art. 112 of Law no. 304/2022 *on the administration of justice* (published in the O.J. no. 1104 of 16 November 2022) reads as follows: “when the person under investigation is an active military person, criminal proceedings shall be conducted by the military prosecutor, regardless of the military rank of the person under investigation”.

After studying a significant number of legislative and legal acts relating to military status, we are in a position to support a different point of view, in the sense that “military” must be understood as active military and reserve military during the period in which they are concentrated or mobilised because they carry out activities with a military specificity, applying to them the duties of active military with regard to the defence of the country, including the respect for the orders and the rights of active military (pay, food allowance and so on). Reservists who do not comply with the order to go to the concentration camp commit the offence provided for in art. 435 of the Criminal Code – the failure to report for induction or concentration, and not the offence of insubordination – art. 417 of the Criminal Code, which is committed by an active military officer who refuses to carry out an order in connection with service duties.

Regarding the notion of the military in the Constitution, we consider that it refers to both the active military and the military in reserve or retired, in both forms Romanians have to fulfil the fundamental duties of loyalty to the country (art. 54) and defence of the country (art.55) as citizens and then as military.

Moreover, it should also be noted that there are persons who do not have the status of military personnel, although they are included in some structures of the Ministry of National Defence, the Ministry of Internal Affairs, or other military structures. Thus, students of military high schools are eligible under art. 120 para. 1(m) of the “Instructions on the organisation and functioning of national military colleges” of 13 October 2014 (approved by Order no. M 110/2014 of the Minister of National Defence, published in the O.J., Part I, no. 770 of 23 October 2014) awarding of/promotion in honorary military ranks, which do not confer military status³.

There are also persons who are not military, although they are assimilated to them: according to art. 25 of Law 195 of 6 November 2000 *on the establishment and organization of the military clergy* (published in the O.J., Part I, no. 561 of 13

³ Grades are honorary and are awarded by unit order on the day of the annual (semester) school report prior to leaving for vacation as follows: (a) top student: to students in the 10th grade; to class leaders in 9th grade at the end of the first semester; (b) corporal student: students in the 11th grade and class XI and class leaders in 10th grade; (c) sergeant student: to students in 12th grade and ranked/class leaders/female student responsible for the women sector, of 11th grade; (d) sergeant-major student and warrant officer student: to students substituting instructors in 12th grade; (e) warrant officer-major student: responsible for the lower/upper cycle, substitute of the deputy commander; (f) assistant warrant officer student: the student substituting the college commander, from 12th grades.

November 2000) military chaplains are assimilated to the officer corps, as follows:

- a) assimilated to the rank of major: category I garrison chaplains and assistant chaplains;
- b) assimilated to the rank of lieutenant-colonel: category II garrison chaplains;
- c) assimilated to the rank of colonel: category III garrison chaplains, chaplains of the Bucharest garrison, chaplains in the religious assistance section;
- d) assimilated to the rank of brigadier-general: inspector general and head of the Religious Assistance Unit. These do not have military status either, even though they benefit from military salaries and pensions.

Considerations regarding the military status in the legislation of other EU Member States

Section 114 of Chapter VII of the Criminal Code of the Czech Republic clarifies the general notion of military, specific and special subjects. It should be noted that in this legislative notion, in relation to the military offence committed only by the offender or accomplice must be a military officer, the instigator may be a person who does not have this status. Furthermore, the content of the notion of the military is unequivocally established. Where the Criminal Code provides for a special characteristic, quality or function, of the offender for a crime, the offender or accomplice can be only the person that meets this characteristic, quality or function. The offender or accomplice, in case of a military crime provided by Chapter 12 of the Special Part of this Code can be only a military officer.

(2) Where the Criminal code provides for a special characteristic, quality or function of the offender, it is sufficient that this special characteristic, quality or function to be represented by the legal person on whose behalf the offender is acting. This provision also applies if: a) the conduct of the offender occurs before the legal person was established, b) the legal person was established but its establishment does not meet the conditions of validity, or c) the legal act that authorises the right to act on behalf of the legal person is not valid and ineffective. (3) The organiser, instigator or person who facilitates the offence under subsections (1) and (2) may also be a person who does not possess the

respective characteristic, quality or function. (4) In cases where this Code refers to a member of the military, he/she shall be understood as referring to (a) a serving member of the military, (b) a member of the military who is not in the performance of his/her duties, if he/she is in uniform, (c) a member of the security forces for the offences of insubordination (Section 375), insubordination due to fault or neglect (Section 376), insulting a member of the military (Section 378), insulting a member of the military by use of violence or threat of violence (Section 379), insulting a military person of the same rank with violence or threat of violence (Section 380), striking a superior officer (Section 381), violation of the sentinel's consignment (Section 381), violation of the guard consignment or other duties (Section 390) and identifying, supporting and promoting a movement aimed at suppressing human rights and freedoms – Section 403 (2) (c), or (d) a war prisoner. (5) Where this Code refers to military service or military duty, these mean the service or duty of persons referred to in subsection (4)⁴.

In Chapter VIII of the Criminal Code of the Republic of Croatia entitled “Meaning of Expressions in this Act”, art. 87 para. 2 contains the meaning of the term “military”: “Military person is the active military person, a soldier on active duty, a soldier on the term, a reserve military person and a cadet, a civil servant and an employee seconded in function to the Armed Forces of the Republic of Croatia”⁵.

References

- Albertini, B. (2008). *Dei delitti contro la personalità dello Stato*. Preluat de pe https://www.repository.unipr.it/bitstream/1889/923/1/i_delitti_contro_la_personalità_dello_Stato.pdf
- Balan, M. (2015). *Drept constituțional și instituții politice. Vol. 1. Teoria generală a statului și a constituției. Constituția română în context european*. București: Hamangiu.
- Boroi, A. (2022). *Drept penal. Partea specială. ed. a 6-a*. București: Ed. C.H. Beck.
- Combo del Rosal, M., & Quitarar Diez, M. (2004). *Drecho penal espanol. Parte Especial*. Madrid: Ed. Dykinson S.L.
- Decizia nr. 18A/2018 (Înalta Curte de Casație și Justiție, Secția penală).

⁴ <http://codexpenal.just.ro/downloads/Cod-Penal-UE-RO.pdf>, p. 608.

⁵ <http://codexpenal.just.ro/downloads/Cod-Penal-UE-RO.pdf>, p. 870.

- Dongoroz, V. (1929). *Drept penal. Partea specială. Noțiuni generale și infracțiuni contra siguranței exterioare a statului (Articolele 66-75 Cod penal)*, vol. I. București: Ed. Curierul Judiciar S.A.
- Ionescu, C. (2017). in C. Ionescu, & C. (Dumitrescu, *Constituția României. Comentarii și explicații*. București: Hamangiu.
- Mărculescu-Michinici, M.-I., & Dunea, M. (2017). *Drept penal. Partea generală. Curs teoretic în domeniul licenței (I)*. București: Ed. Hamangiu.
- Mitrache, C., & Mitrache, C. (2022). *Drept penal român. Partea generală*. București: Universul Juridic.
- Rotariu, I. (2020). *Infrațiunile contra capacității de luptă a forțelor armate*. București: Ed. Militară.
- Safta, M. (2023). *Drept constituțional și instituții politice. Vol. I. Teoria generală a dreptului constituțional. Drepturi și libertăți. ed. a 8-a*. București: Ed. Hamangiu.
- Toader, T. (2012). *Drept penal român. Partea specială. ed. a 7-a*. București: Ed. Hamangiu.
- Toader, T. (2018). *Codex penal. Codurile penale ale statelor membre ale Uniunii Europene, Vol. V*. București: Ed. C.H. Beck.
- Udroiu, M. (2021). *Sinteze de Drept penal. Partea generală. Volumul I, ediția 2*. București: Ed. C.H. Beck.