

## The Implications of the “*Do Ut Des*” Principle on the Right to Remuneration of Public Clerks in the Light of European Regulations

Mihail-Silviu POCORA<sup>1</sup>, Monica POCORA<sup>2</sup>

**Abstract:** In the process of adapting the global social system to the competitive market economy, risk factors have multiplied and undue benefits tend to be a structural phenomenon, specialized and professional, which by the informal networks of organizations and individuals can start corrupting the decision makers at higher levels in the political, legislative, administration and judiciary area. The malignant connection with a complex of antisocial deeds, such as: large-scale fraud, embezzlement, tax evasion, increases the sizes of social danger. The underground economy, the gaps or ‘out of sync’ moments of political and normative acts, the economic malfunctions and axiological and moral mutations also feed this phenomenon. This study aims at capturing, by analysis, the incidence of improper benefits received by the public official in various states.

**Keywords:** corruption; legal right; benefits; litigation

### 1. Introduction

The rights granted to civil clerks are nothing but a means for public authorities and institutions to be able to do their duties, and exercising these rights is a duty for them. The public official has to use the position rights only according to the purpose for which they were granted, namely to serve the general interest and not at all the personal one. Being invested legally with exercising a public position, the public clerk must be granted the right to exercise his functions and this right must be seen both as compared with those addressing to public office (Vedinas, 2007), as well as in relation to public administration.

An important right of public clerks is the right to remuneration for services performed by them. In this context, we think that in order to defend the officer from the doubt of everyday life and also make his work focus on the civil service,

---

<sup>1</sup> PhD in progress, Tomis University of Constanta, 100 Petru Vulcan Street, Constanța, Romania. Tel: +40.241.558.700; +40.732.600.169. Corresponding author: silviupocora@yahoo.com.

<sup>2</sup> Senior Lecturer, PhD, Danubius University of Galati, 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. E-mail: monicapocora@univ-danubius.ro.

public clerks need to be recognized and guaranteed certain rights of material nature, which by content and significance are different from those given to an employee hired with a work contract.

In order to protect public clerks from abuses of their superiors, they have the right to complain against disciplinary measures affecting their career through legal action, in accordance with the Law on Administrative litigations. Same is the case where an administrative act of illegal authority or when unreasonably refusing to settle a claim concerning a legal right caused damages to the civil clerk.

Among the prohibitions stated, we recall that civil clerks are forbidden to directly or indirectly demand, accept or make people promise to them or for others “gifts or other benefits”, considering their public positions (Cornoiu, Diaconu & Sorescu, 2002). The violation of the above-mentioned obligation triggers the public official’s criminal liability on charges of corruption. Another obligation, related to the previous one is that of maintaining independence from private interests that should be kept under control while performing their duties (Pocora&Pocora, 2010). Of the same importance is also the requirement to have no activity outside work that comes in conflict with the duties of the public position they hold.

The conclusion is that regardless of their way of substantiation, whether they represent money, gifts and other benefits of any kind, the only thing that matters is that they can be considered a favour (Crişu & Crişu, 2006), an advantage to the official and in exchange for which, the official would be asked to perform a certain activity, relying on his status of civil clerk. The Romanian criminal law in force uses the notion of corruption to incriminate various acts aiming at profiting illegally.

## **2. Czech Law**

In the Czech criminal law - the term “corruption” is not defined. “Bribery” is usually known as corruption, as shown in Section 3, Chapter III of the Czech Criminal Code, chapter defining the crimes affecting public order. By incriminating the offenses of “bribery” in articles 160-162 of the Czech Criminal Code, it was intended to protect the integrity of public life and maintain objectivity in matters relating to the public interest of the citizens.

According to article 160 of the Czech Criminal Code, the offense of “accepting bribery” is attributed to the offender, who in relation to exercising his public order

duties, accepts bribes or encourages the promise of bribery. Such an offense is punished with up to two years imprisonment and interdiction of the right to exercise his profession. If the offender demands a bribe in order to perform any of his duties of public interest within his position, the punishment shall be imprisonment from six months to three years. If you commit such an act as a public official, the penalty is of imprisonment from one to five years.

Therefore, *the offender of "bribery"* is one who: *brings offers or promises a bribe in connection with the performance of public policy liabilities.*

According to article 162 of the Czech Criminal Code, regulating the offense of "indirect bribery", it states that anyone demanding or accepting bribes to try to influence a public clerk in using his power or because one thus influenced a public official is punished by imprisonment of up to 2 years. Also, punished by up to one year in prison, is the deed of the person who brings (mucr.cz, 2013), gives or promises bribes to another person so that the first exercises his influence on a public clerk in performing his duties or if the person already exercised influence on public officials. It is also "bribery" and is considered offense if a person gives a bribe to an intermediary in order to be handed to the public clerk, regardless if eventually the intermediary gave or not the bribery to the public official.

The phrase "fulfilment of public order activities" is interpreted by judges as meaning all the activities related to important social duties. Therefore, judges consider government and administrative bodies as having a critical function in the enforcement of public order issues. Thus, it is always necessary to prove the link between bribery and the fulfilling of duties by public officials.

According to the Czech law, currently "bribery" is considered an unjustified advantage, consisting of most of the times, in a direct benefit (either cash, or other), or in another type of benefit, such as, for example, a mutual favour. In conformity with the exercise of the state and administrative power, the current legislation does not tolerate bribery, even if it were of a very low value.

In art.163 of the Czech Criminal Code there is a provision about cause for not giving penalty. According to this text of the law, the person bringing or promising a bribe, because was asked by another person, is not punished, if he immediately denounced the offense to the prosecutor or police.

### 3. France

In France, art.435/1 Criminal Code regulates the crime of “corruption”:

“For applying the Convention on the fight against corruption of the European Communities or clerks of Member States of the European Union, signed in Brussels on 26 May 1997, the act of a Community official or of a national official of a Member State of the European Union or a member of the European Commission, the European Parliament, the Court of Justice or the Court of Auditors of the European Communities: *to request or approve, without right, at any time, directly or indirectly offers, promises, donations, gifts or benefits of any kind to perform or refrain from performing any act in relation to the function, which fall under or in connection with his mandate, or to facilitate the performance of such an act, is punished by ten-year imprisonment and 150,000 Euro fine.*”

One needs to suspect the occurrence of corruption committed by French nationals invested with public power, which are entrusted a task in the public service or public office. It is forbidden by law for such a person to accept benefits of any kind to provide, or refrain from conduct arising from his duties, tasks, or warrant, or to exercise influence, whether real or imagined, to obtain from a public body or a public administration body a fee, a job, commercial transaction or any other useful decision (legifrance.gouv.fr, 2013). It is also against the law to pay any form of benefit for purposes of obtaining any of the “features” mentioned above from a person invested with public power, entrusted with a public service mission or public mandate. The penalty is severe, with imprisonment of up to ten years.

### 4. Germany

In Germany, there is a strict regulation of corruption, especially in respect with judges, referees and German soldiers in the armed forces. “Offering bribery” is considered offense if the person offers a benefit to a clerk, in connection with the performance of his official duties, or for resolving commercial contracts. In 1997 there was a debate about the simple acceptance of an undue advantage, if it meets the conditions of the crime of “bribery”, even when it is not followed by an illicit conduct. Thus, there is a clear tendency to avoid the amplification of the criminal phenomenon by widening the scope of facts about taking or giving bribes, maybe even in a mediated form, on certain classes of persons appointed in public offices, that need to refrain from accepting any unjustified benefit.

## **5. Austria, Sweden**

In Austria, in addition to the offense of “bribery”, it is regulated the action of “prohibited intervention”; it is considered unacceptable for an officer to try to intervene in any way in matters that are not related to his duties or exercised in a manner prohibited by law.

In Sweden, ever since the Constitution of 1974, it is acknowledged the concern to prevent abuse in the public service. This provision applies especially to elected representatives and all the persons who in any way take decisions on public services or are engaged in such services. This law also refers to the people entrusted with the protection of a public interest. It is interesting that the class of people referred to by the Swedish law also includes managers and caretakers of state museums and historical monuments. The law expressly applies also in cases where the offense was committed before the offender held the public position or after he resigned or was dismissed.

If the person who received the bribe is not one of those mentioned above, the prosecutor may order the criminal proceedings against the offender only if he was reported by his employer, an interested person who filed a complaint in this regard, or whether such action proves to be of public interest.

Therefore, in some cases, corruption takes different forms. It is also considered a crime of corruption to accept illegal benefits in order to vote some way or another. This provision shall apply to persons who receive or accept a promise, or demand an unlawful advantage in exchange for the promise to vote a certain way or to refrain from voting on a matter of public policy.

## **6. United Kingdom, Northern Ireland**

In the United Kingdom and Northern Ireland, a wide range of offenses is covered under the category of “corruption of public clerks”. The Act of 1889, dealing with corrupt practices of government bodies, classified as criminal offenses the conduct of any member, officer or employee of a local administrative body, *to request or to accept gifts as an incentive or reward for carrying out any activity in relation to the tasks of public order.*

## 7. Switzerland

In Switzerland, according to the legislation, “offering bribery” and “accepting bribery” are punished only in those cases where the person who was bribed or the one that demanded a bribe is an official engaged in a public organization, a person named in a legal position, magistrate, and expert under oath, translator, interpreter or member of the armed forces. The punitive measures are particularly strict when applied in cases of “accepting bribery” in connection with solving formal problem illegally. By comparison, the penalties are less severe when after accepting bribes, the matter at stake was not solved illegally.

## 8. Slovakia

In Slovakia, the government approved in 1995 the anti-corruption program “Clean Hands”. As a result, they increased penalties for “bribery”. There were introduced articles in connection with the offense of “accepting bribery” (art. 160) and the offense of “indirect bribery” (art. 162), provisions regarding the impeachment of people who obtained considerable or excessive benefits. In addition, they included in art. 168, paragraph 1, the actual offenses of “bribery” and “indirect bribery”.

## 9. U.S.A

In the United States of America, it is prohibited by law for a public official of the Federal Government to *demand* or accept “bribes”. The same law prohibits all people to give, offer or promise “bribe” to a public clerk.

Given all of the above, we come to the conclusion that most modern states have adopted in the legislation the phenomenon of “corruption”, recognizing the high degree of social danger posed by such deeds. Hence, it is imperative their controlling and penalizing by creating an appropriate regulatory framework, of effective anticorruption bodies at the institutional level, not to mention also taking measures of education.

Currently, in Romania there is a heightened concern about this phenomenon, showed in the creation of specialized bodies, increased penalties, cooperation with other countries and international bodies (Mathias 2009). In this regard, on 27 January 1999, the Permanent Representative of Romania to the Council of Europe signed with representatives of other 18 Member States, *the Criminal Law Convention on Corruption*, adopted on 4 November 1998, as part of the 103 -

Session of the Council of Europe Committee of Ministers. The provisions of this document supplement those of the European Union Convention in May 1997 and the Convention on the OECD (Organisation of Economic Co-operation and Development) in December 1997.

## 10. Conclusions

The involution of the firmness of social reaction is the consequence of incoherent policies to prevent and control corruption, a stiffening of the ineffective scheme to combat it, mainly by criminal means. The effective action against corruption is not possible if there are discrepancies between the legal definition of corruption and the social perception and public opinion on this phenomenon. Often, it is public opinion that seems to focus more on the scale and intensity of corruption than the authorities responsible for preventing and controlling corruption.

Preventing and combating corruption should work through a determined, uncompromising, law-abiding activity, observing human dignity and the presumption of innocence, under the gaze and control of civil society. Corruption cannot be stopped outside the crime phenomenon seen globally, fighting also against its corresponding offenses like: embezzlement, fraudulent management, theft, abuse of office, fraud, drug trafficking, in one way or another.

## 11. References

Cornoiu, D.; Diaconu, D. & Sorescu, Gh. (2002). *Culegere de practica judiciara in materie penala pe anul 2000, Curtea de Apel Pitesti/Reports of criminal jurisprudence in 2000, the Court of Appeal Pitesti*. Bucharest: Rosetti.

Crișu M. & Crișu, C-tin. (2006). *Jurisprudența în materie penala a Inaltei Curti de Casatie si Justitie, Curti de Apel si Tribunale 1990-2005, Curtea de Arges/Criminal Jurisprudence of the High Court of Cassation and Justice, Court of Appeal and Tribunals 1990-2005, Curtea de Arges*. Pitesti: Juris Argessis.

Mathias, Nell (2009). Contracts obtained by means of bribery: should they be void or valid?. *European Journal of Law and Economics*, Springer, Vol. 27(2), pp. 159-176.

Pocora, M. & Pocora, M.S. (2010). *Critical reflections on special seizure in matter of corruption offenses*. AIJJS.

Vedinas, V. (2007). *Deontologia vieții publice/Deontology of public life*. Bucharest. Universul Juridic.

\*\*\* [legifrance.gouv.fr](http://legifrance.gouv.fr). [www.legifrance.gouv.fr/wAsped/RechercherSimple](http://www.legifrance.gouv.fr/wAsped/RechercherSimple).

\*\*\* [mucr.cz](http://www.mucr.cz). [http://www.mucr.cz/korupce/program/english/zprav4\\_4.html](http://www.mucr.cz/korupce/program/english/zprav4_4.html).