

# CONTRACTUAL, CIVIL AND CRIMINAL LIABILITY OF PUBLIC SERVANTS

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## **Abstract**

*This paper selectively analyzes aspects of civil, criminal and criminal liability of civil servants. The work is divided into sections, namely: introductory section, contravention of civil servants, civil liability of civil servants, criminal liability of civil servants, conclusions and bibliography. The forms of liability mentioned above operate in breach of the civil servants' duties. As far as the contraventional liability is concerned, the application of contravention sanctions for the civil servant is carried out in accordance with the provisions of the framework law, Government Ordinance no. 2/2001, and in the alternative the provisions of civil law. The civil liability of the civil servant is undertaken according to the Law no. 188/1999 and the criminal liability is committed according to the criminal law, the legal framework being included in the provisions of the Criminal Code and Law no. 188/1999.*

**Keywords:** civil servant, contraventional liability, civil liability, criminal liability.

**JEL Classification:** K14, K23, K42

## **1. Introduction**

This paper aims to selectively analyze aspects of the civil, civil and criminal liability of civil servants.

Issues concerning the civil liability of civil servants, namely the features of the contraventional responsibility, the conditions in which it operates, as well as the law the applicable framework law were analyzed.

The domain and the legal regime of civil liability of civil servants that distinguishes between contractual and tort law are selectively analyzed.

As regards the criminal liability of civil servants involved in the commission of criminal offenses, the civil servant's liability for offenses committed during the service or in connection with the duties of the public office he occupies is committed under the criminal law, the legal framework being included in the provisions of the Criminal Code and Law no. 188/1999.

There are listed the principles governing the criminal law and several categories of offenses that can be committed by civil servants: crimes against the patrimony, service crimes, corruption offenses, crimes that prevent the execution of justice, offenses of forgery in documents.

Disciplinary, civil, criminal or criminal liability of civil servants is attributable to the guilty breach of service duties<sup>2</sup>. They represent the form of subjective accountability, based on fault, the absence of the subjective element determining the impossibility of their intervention.<sup>3</sup>

A doctrinal<sup>4</sup> has classified according to the criteria underlying the contouring of the legal nature, the following forms of legal liability: constitutional accountability, administrative liability, contravention, disciplinary liability, criminal liability, material liability and civil liability.

## **2. Counter-party liability of civil servants**

Although administrative accountability has begun to be addressed in various ways, it is identified with contraventional responsibility; the problem of delimiting contraventions from other administrative deviations remains difficult due to the similarity between this and the rest of the administrative deviations. Thus, the contravention is distinguished from the administrative deviation

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<sup>2</sup> See on the analysis of the types of liability of civil servants Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 416-422.

<sup>3</sup> Verginia Vedinaș, *Drept Administrativ*, the 8<sup>th</sup> edition, revised and updated, Ed. Universul Juridic, Bucharest, 2014, p. 534.

<sup>4</sup> Antonie Iorgovan, *Tratat de drept administrativ*, vol. I, Ed. All Beck, Bucharest, 2005, p. 638.

both by the administrative illicit configuration and by the sanctioning regime, the administrative deviation being not contraventional. It consists in violating guilty administrative norms or criminal law rules which, due to the limited social danger, justify the application of administrative sanctions under the Criminal Code. Contravention, on the contrary, poses as a substantial element of differentiation from the administrative deviation a higher degree of social danger, which gives it its own individuality. On the other hand, the contravention not only violates the social-juridical relations that are formed in the conduct of the state's executive activity, but also violates values that are beyond the sphere of the state administration.

From the notion of "public servant", even considered "*lato sensu*", the natural persons making up the representative organs of the state (the two Chambers of Parliament), the counties (county councils and the permanent delegations of the county councils), the cities and municipalities (local councils) who do not have the status of civil servants because they are elected representatives of the country, county, city or commune, carry out non-permanent activity, limited in time (usually 4 years) and sessions or meetings.<sup>5</sup>

According to a doctrine<sup>6</sup>, the offense is a guilty act, therefore having an illicit character, in that it attacks certain social values protected by law other than those protected by criminal law.

The same doctrine<sup>7</sup> also mentions that civil servants are liable for contravention when they have committed a contravention during and in connection with their duties.

Another doctrinal identifies contravention as representing the civil servant's committing law-abiding antisocial deeds as contraventions.<sup>8</sup>

Thus, the features of contravention liability are characterized by:

- offenses regulated as such by law fall into a category of illicit acts, which may or may not be violations of an administrative law report;
- is, in principle, a liability of the individual; organizational structures, as a legal person, are also exceptionally sanctioned;
- the legal regime is set up on a common law - Government Ordinance no. 2/2001<sup>9</sup> on the legal regime of contraventions;
- contravention sanctions may not be deprived of their liberty.

Thus, the offense committed by a civil servant in this capacity and in the exercise of his or her duties or in connection with the service, which poses a social danger and is provided and sanctioned as such by normative acts constitutes an offense and, as a consequence, entails its contravention.

In order for the civil servant to be liable for contravention, the following conditions must be fulfilled:

- the offense or deviation must meet the constitutive elements relating to the object, subject, objective side and subjective side;
- the offender's deed is a deviation from the rules governing the hierarchical subordination report;
- contravention may also be related to the exercise of public servant's competence;
- both the active subject and the passive subject are subjects of administrative law;
- the notification, the finding and the application of the contraventional sanction and the complementary measures are made after the procedure provided by the Law no. 188/1999<sup>10</sup> supplemented by some specific regulations of the Government Ordinance no. 2/2001, and in the absence thereof the provisions of the Civil Procedure Code<sup>11</sup>;
- there are general conditions for administrative liability;
- there is no lawful cause for the contravention of the offense and contravention;

<sup>5</sup> Valentin I. Prisăcaru, *Tratat de drept administrativ român*, Ed. Lumina-Lex, Bucharest, 1993, p. 159.

<sup>6</sup> Dana Apostol Tofan, *Drept Administrativ*, vol. II, 3<sup>rd</sup> ed.", C.H. Beck Publishing House, Bucharest, 2015, p. 361.

<sup>7</sup> Dana Apostol Tofan, „*Drept Administrativ*, Vol. I, 3<sup>rd</sup> ed. ”, C.H. Beck Publishing House, Bucharest, 2015, p. 425.

<sup>8</sup> Verginia Vedinaș, *op. cit.*, 2014, p. 535.

<sup>9</sup> Ordinance no. 2/2001 on the legal regime of contraventions published in the Official Gazette, Part I no. 410 of July 25, 2001.

<sup>10</sup> Law no. 188/1999 on the Statute of civil servants, republished in the Official Gazette, Part I no. 365 of May 29, 2007.

<sup>11</sup> The Civil Procedure Code republished in the Official Gazette, Part I no. 247 of 10 April 2015.

- the authority that establishes and sanctions the offense committed by the civil servant is expressly empowered by law to do so;
- the finding of the offense committed by the civil servant is made by the following categories of finding agents:
  - hierarchical heads, when expressly empowered by law;
  - certain authorities or their agents, specialized in various fields;
  - control authorities.

In the doctrine, the offense is the act committed with guilt, established and sanctioned by law, ordinance, by Government decision or, as the case may be, by decision of the local council of the commune, city, municipality or sector of Bucharest, of the county council or of the General Council of the Municipality of Bucharest<sup>12</sup>.

As a rule, the finding of contraventions committed by the civil servant is made on the basis of the control right, which may be from inside or outside, and the application of contravention sanctions for the civil servant is carried out in accordance with the provisions of the framework law, Government Ordinance no. 2/2001 and, in the alternative, the provisions of civil law, in the case of the determination of the damages, the remedies against the act of finding contraventions are regulated by the framework law.

### 3. Civil liability of public servants

The scope and legal status of civil liability is subject to civil law, which distinguishes between tort liability and contractual liability. The basis of civil liability is the illicit conduct that may take the form of a civil or contractual offense, its constitutive elements being the following:

- the existence of damage as a result of the unlawful conduct;
- a causal relationship between the deed and the injury;
- fault or error - not every act obliges you to repair, but only what is a mistake.

The Civil Code distinguishes between tort liability and contractual liability as forms of civil liability, although these forms represent diversity in the unity of civil liability.

In the doctrine it was revealed that the patrimonial liability of civil servants intervenes if they caused by their acts or deeds certain prejudices either to the public authority or institution of which they are part or to another natural or legal person of public or private law.<sup>13</sup>

Contractual liability implies unlawful conduct in relation to the legal rules governing a pre-existing contract between the victim and the author, while tort liability refers to unlawful conduct in relation to the legal rules addressed to all members of society.

The exercise of functions in the public administration can cause material damage to natural or legal persons, this prejudice of third parties may also occur in the case of the exercise of the civil service under the law, but it can also happen when the public office was faulty or not has been fulfilled, and these situations may result in damages under the law.

The Civil Liability of the Civil Servant shall be undertaken in accordance with Art. 84 of Law no. 188/1999, in the following situations:

- for damages caused by the patrimony of the public authority or institution in which it operates;
- for non-repayment in due time of the amounts unduly paid;
- for damages paid by the public authority or office as a principal to third parties, on the basis of a final and irrevocable court decision.

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<sup>12</sup> Dana Apostol Tofan, *op. cit.*, vol. I, p. 425.

<sup>13</sup> *Ibidem*, p. 426.

Although the public function is performed by competent persons, faulty performance of the public function or failure to do so, when it causes damage to third parties, it is natural to be imputable to those who are guilty of causing damage<sup>14</sup>.

#### 4. Criminal liability of civil servants

The most serious form of legal liability for civil servants is the criminal one, interfering with acts of particular social danger, called crimes, and the civil servant's liability for offenses committed during the service or in connection with the duties of the public office which it occupies under the criminal law, the legal framework being included in the provisions of the Criminal Code<sup>15</sup> and Law no. 188/1999.

Criminal liability can be defined as the very criminal coercive relationship, born as a result of committing the offense between the state on the one hand and the offender, on the other hand, a complex report whose content forms the law of the state as a representative of the society of to hold the offender, to apply the sanction prescribed by the law and to compel him to execute it.

The civil liability of a civil servant occurs for offenses committed during the service or in connection with the duties of the public office he or she occupies<sup>16</sup>.

Thus, penalties of criminal law differ from each other by some characteristic features: criminal sanctions have a repressive character, predominantly preventive character, criminal sanctions act post-delict.

The commission of the offense is the sole ground for the criminal liability of the civil servant, which implicitly implies the commission of a criminal law act and, from a subjective point of view, his guilt in committing the deed. Criminal liability is governed by certain principles which, although closely linked to the principles of criminal law, are nevertheless of a specific nature, such as:

- The principle of legality, in the area of criminal liability of a civil servant, presupposes that the occurrence, development and settlement of the criminal legal relationship must take place on the basis of and in strict accordance with the law;
- The offense is the sole basis of criminal liability, it is a principle mentioned in the Criminal Code, which presupposes that criminal liability is based only on committing an offense, an act provided by the criminal law, committed with the guilt required by law and which presents the concrete social danger of a crime;
- The principle of humanism, reveals that criminal responsibility uses instruments that, by their nature and content, do not lead to the humiliation and degradation of the human being; on the contrary, they envisage methods leading to re-socialization;
- The principle of personal criminal liability presupposes that criminal responsibility rests only with the civil servant who committed or participated in the commission of an offense as an instigator or complicit, and can not intervene for the deed of another;
- The principle of uniqueness, according to which a civil servant who has committed an offense can only be held criminally liable;
- The principle of inevitability implies that any civil servant committing an offense must be criminally responsible, with the civil servant's criminal liability being an inevitable consequence of the commission of a crime;
- The principle of individualisation, according to which the civil liability of a civil servant must be differentiated according to the gravity of the offense, its quality, in order to ensure both the correct sanction and the general and special prevention;

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<sup>14</sup> On the tort liability of civil servants in the case law of the Constitutional Court see Cătălin-Silviu Săraru, *Legea contenciosului administrativ nr. 554/2004. Examen critic al Deciziilor Curții Constituționale. 2004-2014*, C.H. Beck Publishing House, Bucharest, 2015, p. 276-281.

<sup>15</sup> Penal Code published in the Official Gazette, Part I no. 510 of 24 July 2009.

<sup>16</sup> Dana Apostol Tofan, *op. cit.*, vol. I, 2015, p. 427.

- The principle of prescriptive law, according to which criminal liability, as a means of achieving the rule of law through coercion, in order to be effective must intervene promptly, as close as possible to the moment of committing the offense.

According to art. 17 of the Criminal Code, the offense as the sole basis of criminal liability, constitutes the act of social danger, committed with guilt and provided by the criminal law, the general provisions of this article being applicable whenever a civil servant violates his provisions.

Regarding the offenses stipulated in the Criminal Code, which can be committed by civil servants, we mention: crimes against the patrimony, service crimes, corruption offenses, crimes that prevent the execution of justice, crimes of forgeries in documents.

#### 4.1. Crimes against the patrimony

Crimes against the patrimony can be:

The *deception*, which consists in misleading a person by presenting as true a false act or as a liar of a true deed, in order to obtain for himself or for another unjust material benefit and if a loss is caused;

The *embezzlement*, consisting in the appropriation, use or trafficking of a civil servant, in his/her interest or for another, of money, values or other assets he/she manages or administers.

#### 4.2. Service offenses

As far as service offenses are concerned, they may be:

*Abuse in the service against the interests of persons* is the act of a civil servant who, in the exercise of his or her job duties, knowingly does not perform an act or performs it in a defective manner and thereby causes injury to the legal interests of a person;

*Abuse in service by restricting certain rights*, consisting in the imprisonment by a civil servant of the use or exercise of the rights of any citizen, or the creation of inferiority situations on the grounds of nationality, race, sex or religion;

*Abuse in the service of public interests* is the act of a civil servant who, in the exercise of his or her office duties, knowingly does not perform an act or performs it in a defective manner, and thereby causes a significant disturbance to the goodwill of an organ or institution; it damages her heritage.

*Abuse in service in a qualified form* consists in committing the facts provided in art. 246, 247, 248 of the Criminal Code, with particularly serious consequences.

*Negligence in the service*, consisting in the fault of a civil servant in a service duty, in failing to perform it or by failing to do so, if a significant disturbance has been caused to the goodwill of an organ or state institution or damage to its patrimony or an important injury to a person's legal interests.

*Abusive behavior*, consisting in the use of offensive expressions of a person, by a public official in the exercise of his or her duties, or of hitting or other acts of violence.

*Negligence in keeping state secrets*, consisting in negligence resulting in the destruction, alteration, loss or circumvention of a document constituting state secret, as well as the negligence that has given someone else the chance to find such a secret, if the deed is likely to prejudice the interests of the state.

Regarding corruption offenses, the Criminal Code regulates the following offenses: conflict of interest, bribery, bribe giving, receiving undue benefits and trafficking of influence.

Law no. 78/2000<sup>17</sup> on the prevention, detection and sanctioning of acts of corruption classifies the acts of corruption in four categories: corruption offenses, crimes assimilated to corruption offenses, offenses directly related to corruption offenses and offenses against the financial interests of the European Communities.

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<sup>17</sup> Law no. 78/2000 on the prevention, detection and sanctioning of corruption acts published in the Official Gazette, Part I no. 219 of May 18, 2000.

*Conflict of interest* is incriminated by art. 253 of the Criminal Code and consists in the act of a civil servant who, in the exercise of his duties, performs an act or participates in making a decision directly or indirectly making a material benefit for himself, his spouse or a relative or a cow to the second degree or for another person with whom he has been in a commercial or employment relationship for the last 5 years or from which he has benefited or benefits from services or benefits of any kind.

*Taking bribe* is criticized by art. 254 of the Criminal Code, being the act of an official who directly or indirectly claims or receives money or other benefits that do not accept or accept the promise of such benefits, or refuse to do so, in order to fulfill, not to fulfill or delay the fulfillment of an act with regard to his or her duties of service or in order to act contrary to these duties.

*Bribing* is incriminated by art. 255 of the Criminal Code and consists in promising, offering or giving money or other benefits to a public official directly or indirectly for the purpose of determining whether to perform an act in respect of his or her duties or to act contrary to these duties or to delay the fulfillment of an act regarding the duties of the service.

*Receipt of undue benefits* is incriminated in art. 256 of the Criminal Code and consists in the receipt by an official, directly or indirectly of money or other benefits, after having performed an act by virtue of his or her function and to which he was bound by it.

*Trafficking in influence* is incriminated in art. 257 of the Criminal Code, and consists in receiving or claiming money or other benefits, or accepting promises, of gifts, directly or indirectly, for oneself or for another, committed by a person who has an influence or to believe that he has influence over an official to determine whether or not to do an act that falls within his job duties.

According to art. 10 of the Law no. 78/2000, on the prevention, detection and sanctioning of corruption acts, are crimes assimilated to corruption offenses:

The intentional establishment of a value diminished in relation to the real commercial value of goods belonging to the economic operators to which the state or a local public authority is a shareholder, committed in the context of the privatization or forced execution, reorganization or liquidation proceedings, or on the occasion of a commercial transactions, or goods belonging to the public authority or public institutions, as part of an action for their sale or enforcement, committed by those who have management, management or management duties.

Granting credit or subsidies in violation of the law or credit rules, not legally settling the contractual destination of loans or subsidies or non-payment of overdue loans.

Use of credits or grants for purposes other than those for which they were granted.

Among the offenses that impede the performance of justice we mention: the omission of the judicial bodies to be notified, consists in the act of the public servant who, knowing the offense related to the service in which he performs his duties, fails to immediately notify the prosecutor or the criminal prosecution body, according to the law.

Regarding the offenses of forgery in the writings, we mention: false material in official documents, intellectual false and use of forgery.

*False material in official documents* consists of forgery by counterfeiting of writing or underwriting or by altering it in any way likely to produce legal consequences.

*Intellectual falsification* consists of falsifying an official document on the occasion of its drawing by an official in the exercise of his duties, by attesting facts or circumstances inappropriate to the truth or by knowingly failing to insert some data or circumstance.

*The use of forgery* is the use of an official document or private signature, knowing it is false, in order to produce legal consequences.

Different procedural aspects may arise for the commission of an offense by a civil servant, such as crimes against humanity, forged offenses, corruption, etc., whereby the person in charge of appointment may order the suspension of the civil servant, and if the court orders payment, the civil servant may resume his activity in the previously held public position.

If the conditions for criminal liability are not met, and the civil servant's deed may be considered a disciplinary offense, the competent discipline committee will be notified.

## 5. Conclusions

The results of this selective study are useful to students, master students and law practitioners. The study selectively analyzed aspects of civil, criminal and criminal liability of civil servants. It analyzed the legal regime of contraventions, the features of contravention liability, as well as the general conditions for administrative liability.

The basis of civil liability is the unlawful conduct which may take the form of a civil or contractual offense, its constitutive elements being the existence of damage as a result of the unlawful conduct, of a causal relationship between the deed and the damage, as well as the fault or fault - to repair, but only that which is a mistake.

Criminal law sanctions differ from each other by some characteristic traits: criminal sanctions have a repressive character, predominantly preventive character, criminal sanctions act post-delict.

The commission of the offense is the sole ground for the criminal liability of the civil servant, which implicitly implies the commission of a criminal law act and, from a subjective point of view, his guilt in committing the deed.

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