

UDC 343.1

*Fanni Pilisi**PhD Student**Department of Criminal Law,**Faculty of Law**(University of Pécs, Hungary)*

## **DRAWING THE LINE BETWEEN ABUSE OF AUTHORITY AND ACTIVE CORRUPTION OF PUBLIC OFFICIALS**

In most of the cases, it is not difficult to tell these criminal offenses apart. Make it simpler, in cases where the advantage concretely appears as compensation for the breach of duty, and it is sensible and provable, we can clearly say it is active corruption. When only the breach of duty occurs on behalf of getting unlawful advantage, but there is no advantage or it is unprovable, the act can be qualified as abuse of authority.

Following this train of thought, and make it even simpler, in case of corruption the dual function of the advantage that occurs on behalf of the briber and who takes the bribe is clear. On the other hand, in case of abuse of authority the advantage is «one-sided»: it can be demonstrated in favour of the public official or the third party.

Abuse of authority is committed by any public official who, with the aim of causing unlawful disadvantage or obtaining unlawful advantage a) breaches his official duties, b) exceeds his official authority, or c) otherwise abuses his position of authority.

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Passive corruption is perpetrated by a public official who requests or receives an unlawful advantage in connection with his actions in an official capacity, for himself or for a third party, or accepts a promise of such an advantage, or is in league with the person requesting or accepting the advantage for a third party on his behest. The qualified case of this crime is when the public authority a) breaches his official duties, b) exceeds his competence, or c) otherwise abuses his position of authority for the advantage.

At first sight, there is a likeness between the two facts. Both of them apply similar words, but if we examine the two facts, we can draw the line between them.

Apart from the fact that these two crimes, the abuse of authority and the active corruption of public officials mainly come to court, we can say that they endanger mostly the peaceful and impartial function of the state.<sup>1</sup>

Pál Angyal expressed his opinion in the following – yet prevalent – words: *«In case of bribery, the public official offers his own negligent conduct which for the briber gives consideration. The sense of the agreement is that the public official, breaching of public trust, will seize the transferred authority against general interest.»*<sup>2</sup> He defined abuse of authority in the following way: *«The abuse of authority as a subsidiary fact is nothing else, but breaching of duty with the intention causing damage or making profit.»*<sup>3</sup>

The danger of abuse of authority to the society appears when those who have been entrusted with fulfilling state's duties and have received increased protection in return for it take an unfair advantage of this situation to obtain unlawful advantage to themselves or to a third party or to cause unlawful disadvantage to others.<sup>4</sup>

The most serious breach of duty is said to be the effort to obtain advantage. Active corruption of public officials is arranged in the group of necessarily corruption crimes by Miklós Hollán, which means that not only the

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factual committed crime, but also the legal fact itself corresponds with the concept of corruption.

Contrarily abuse of authority falls under the group of unnecessarily corruption crimes, since the legal fact does not correspond with the concept of corruption, but the factual commission often does.<sup>5</sup>

Active and passive corruption of public officials are in the chapter of «Crimes of corruption» (former «Crimes against the purity of public life»), while abuse of authority can be found in the chapter of «Crimes related to office».

By Imre Wiener's opinion, the protected legal interest of abuse of authority was the fulfilment of public official's duty, while the legal interest of active corruption of public official was the purity of administrative sector. Although at that time the Criminal Code referred to both crimes in the same chapter, as malfeasance in office, however they were varied in their legal interest. Wiener has already explained in his treatise, that the above-mentioned two legal interests have not necessarily been place in the same chapter of title.<sup>6</sup> Abuse of public confidence was common to corruption and faithless behaviour of a public official; he explained it as a link between the two legal interests. Therefore, breach of duty and violation of purity of administrative life have damaged trust in the same way.

Jurisprudence has recently taken the view that the protected legal interest of active corruption of public officials is the purity of public life, but properly the trust in the administrative body, the public officials and their lawful procedure that are the legal interests of abuse of authority at the same time. Without a doubt, both of the crimes violate the objective, legitimate action of the administrative body. Although the legislator has not placed the two crimes in the same chapter, their protected legal interest is still the same; however, active

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corruption of public officials protects purity of public life, and impartial, unimpressionable action of administrative body and public officials as well. <sup>7</sup>

In my opinion, their actual position is right, since active corruption of public officials is without a doubt a crime of corruption, and not more than passive corruption of public officials could be regarded as malfeasance in office, still structurally, it is better placed among crimes of corruption.

### *Criminal conducts*

Criminal conducts of abuse of authority are a) breaching ones official duty, b) exceeding ones official authority, and c) otherwise abusing ones position of authority.

In Wiener's treatise both exceeding official authority and otherwise abusing position of authority are stated to be a form of breaching of duty.

Wiener have pointed out why had been necessary to extend the scope of criminal conducts, which have been demonstrated, among others, by a verdict of the Metropolitan Court. The Court pronounced that *«those conducts which constitute the basis of verification of guilt have not fallen under the accused' official duties or actions»*; therefore, the defendant had been released from the charge of abuse of authority by the appeal court, since lack of criminal offence. At the same time, Wiener has pointed out that the guilt of the accused could be verified based on the currently operative act. <sup>8</sup>

This tracheotomy of criminal conducts wholly covers any breach of duty committed by public official.

#### *a) Breaching of official duty*

By József Földvári's words a proper breach of duty occurs, when a public official does not follow a concrete duty that is defined in some of the statutes or in some written or oral orders of his superior. Breach of duty, in a wider sense, occurs when a public official breaches a general rule, a rule that is obligatory for every public official in every occasion. <sup>9</sup>

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Examining this form of the criminal conduct, we should go back to basics, that is to say rights and obligations of a public official are laid down by statutes, organizational statutes, regulations, orders etc. It is essential that in this case the public official acts on his scope of duty and authority, however he acts contrary to the rules which apply to him as well.

*b) Exceeding ones competence*

This form occurs relatively rarely. Typically those conducts belong to this form, when belong to the act of the public official does not belong to his – either his own or his office's – official duties, or when the public official though does his duties, but he has no authority to that concrete act.<sup>10</sup>

*c) Otherwise abusing ones position of authority*

This phase means that the public official does his official duties in contradiction with social purposes, but technically, he seems to act in a legal way. Such an act belongs to here, which is neither considered as competence exceeding, nor contrary to any rules, however it is comprehended as taking socially inappropriate advantage by the possibilities of position.<sup>11</sup> On the one hand, acting on behalf of the public official's own interest, or using official duties unlawfully could be mentioned here, on the other hand we can refer to the unlawful use of official connections and power for his own purposes as well.<sup>12</sup>

A defendant – who was a professional staff member of the police – was found guilty in the above mentioned point in his private case, in which he was the accuser, the offended party, because he had logged in the national register and had a look at the data of his private case. The defendant had been aware of the fact, that his act had not belong to his service duty, it had been out of his authority, that is to say it had been unlawful, had served private interests.

The way the defendant had acted – he had taken advantage of his official position – had made the situation much easier for him, which had been the unlawful advantage that had been the basis of his criminal liability.<sup>13</sup>

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A significant criterion of corruption and thus active corruption of public officials as well is keeping secret in favour of both active and passive briber. Just the same could be told about abuse of authority if both parties are interested in it, that is to say it is about obtaining advantage, and is not about causing disadvantage.<sup>14</sup>

The key issue for both crimes is advantage. Advantage is some kind of a new situation, which is more favourable for someone than his prior state, before the crime was committed. Advantage could be financial or personal. By Angyal's above quoted monograph, finding out what is deemed as advantage always depending on the circumstances from case to case. Definition of advantage includes any kind of gain, realization of any wish or request, either financial, moral, emotional or sensual it is.<sup>15</sup>

Referring to active corruption the most common type of advantage is financial, both pecuniary and benefits by means other than money as well<sup>16</sup>, while mentioning abuse of authority personal kind of interest (favour) is a more typical type of advantage.

Credit, interest-free loan, bogus employment, remittal, discount purchasing all fall under the category of financial advantage.<sup>17</sup>

Proper assessment is often not an easy task when talking about the latter case, namely discount purchasing. Let us see an example of it.

A public official (policeman), named 'A' is asked by his close acquaintance, who deals with cars, named 'B', to look up the personal data of the currently registered keeper of a certain motor-car, to check whether the plate number of the car has been changed or not, and to have a look whether the car has been listed in the Schengen Informational System or not. 'A' complies with the above mentioned requests, enters the Vehicle Register and gives 'B' the requested pieces of information.

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With all these acts, 'A' has committed abuse of authority and he would be called to account by these.

What happens if a year later 'A', the public official would like to purchase a motor-car, he contacts 'B', the dealer, who considering their long friendship and the services 'A' has given him, gives 'A' a large discount.

In this case, active corruption of public officials has already been committed by 'B' since subsequent advantage, which had been given to 'A' for his prior official services, realizes the crime of abuse.

The above mentioned crime could hardly be proved, but it shows us that the two crimes are quite close to each other, their facts are sometimes the same and only depends on the evidences which crime is deemed to be committed.

Providing or accepting the possibility to earn some money<sup>18</sup>, employing him as a consultant<sup>19</sup>, awarding him or establish sexual relationship with him etc. all belong to personal interests.

In my opinion, favour, which is the most common kind of advantage of abuse of authority, belongs to personal interest as well, for example querying data from different types of databases as a favour and forwarding it for family members or friends ensures them advantage, because the requested data is reached anonymously and out of turn.

The following one is a case in point. The main point of the fact is that the defendants in the first, second and third degree breached their duties, when they lent their cell phone to the defendant in the fourth degree who had been restrained in the detention room. For their breach of duty the defendant in the first degree was promised to get HUF 30-35,000, the defendant in the second degree was promised to get some food and other stuff, the defendant in the third degree did not accept anything from the defendant in the fourth degree. Therefore, the defendants in the first and the second degree were called to account for felony of passive corruption of public officials because of accepting

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the promise of an unlawful advantage. The defendant in the third degree was called to account for the felony of abuse of authority.<sup>20</sup>

The most important difference between the advantages of the two crimes, which determines them as well, that in case of abuse of authority the advantage or disadvantage should be the result of the act of the crime, that is to say the advantage should be in a casual relation with the act of the crime.<sup>21</sup> Contrarily, in case of corruption of public officials the advantage is the consideration getting for the act of the crime.

Another important difference between the two crimes is that when talking about abuse of authority the advantage appears at the perpetrator's *or* a third party's side, while it appears at the public official's *and* the third party's side when talking about corruption of public officials.

#### ***Matter of «unlawful» and «accumulation»***

Unlike in the former Criminal Code, in the existing law term of «unlawful» is not included in the fact of the crimes. I still submit that, according to the former practises, examining the lawfulness or unlawfulness of the advantage is still indispensable. Acts that are authorized by law, or if the given advantage is common, or the gifts are usual and customary, therefore are acceptable by the society, all these would not be qualified as crimes. All these could only be stated if the confidence placed in the impartiality of the official authority would not be injured by means of the advantages.

Regarding to unity and accumulation, we should start up with opinion of jurisprudence which says that abuse of authority is the most common type of facts, and other malfeasance in office – thus passive corruption as well – have special criminal conducts.<sup>22</sup> By this, abuse of authority could never become a crime accumulated with other malfeasance in office, the accumulation is always quasi-accumulation, and we should always apply the facts that have special acts.

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However, according to jurisprudence, formal aggregation is concrete, and the criminal act is qualified as abuse of authority, if the act not only violates purity of administrative life, but also involves violation of other protected legal interests.<sup>23</sup>

The protected legal interest of active corruption of public officials is the purity of public life, but in a narrow sense, it is the trust in the administrative body and in the public officials, which are the legal interests of abuse of authority at the same time. However, active corruption of public officials also protects purity of public life and unimpressionable and impartial action of administrative body and public officials.<sup>24</sup>

By all these, the two crimes could never adjudicated as multiple counts of offenses, and active corruption of public officials should always be applied as special facts.

According to the above, comes up the questions, if abuse of authority could be qualified or not as a residue crime after an unproved suspicion of corruption. Since in practise, if the advantage – as a consideration for breaching duty – cannot be proved, the felony of abuse of authority is usually established in most cases, because breaching duty is undoubted, and also the fact that the public official gives advantage to a third party through his act. The answer is without a doubt positive.

On the basis of all these the following types of cases can be distinguished:

- The public official requests an unlawful advantage, accepts the advantage or the promise of such an advantage and for that he breaches his official duty → Passive corruption of public officials by breaching official duty

- If the unlawful advantage received for the breach of duty is not provable (so receiving any unlawful advantage for breaching official duty by the public official cannot be proved) → Abuse of authority

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- If breaching of duty cannot be proved → Passive corruption of public officials

- The public official breaches his official duty with the aim of obtaining unlawful advantage → Abuse of authority

Summing up the above, corruption of public officials can be laid down to be a more serious form – quasi-aggravated case – of abuse of authority. Verifiable corrupt relations are obviously abuses of authority at the same time, however – as codifiers have already recognised – they require stricter criminal action. Proper classification and demarcation are partly dogmatic questions; they almost entirely depend on evidence. Therefore abuse of authority – facing the practise of former decades – may said to be rather a «subsidiary» fact of passive corruption of public officials, not only a competing fact with such a crime.

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### ***Пілісі Ф.***

#### ***Размежування зловживання владою та активної корупції серед публічних посадових осіб***

Подано авторський проект про злочини, пов'язані зі службою. Метою роботи є розмежування зловживання владою і активної корупції серед публічних посадових осіб (коли це відбувається шляхом порушення своїх службових обов'язків). Автор зазначає про дилему правових питань, описує кримінальну поведінку, і описує неправомірну вигоду, що з'являється *в результаті* зловживання владою, а з іншого боку виступає як *підкуп*, отриманий для вчинення злочину, коли йдеться про корупцію державних чиновників – на прикладі деяких прецедентів.

***Ключові слова:*** кримінальне право, неправомірна перевага, корупція.

### ***Пилиси Ф.***

#### ***Разграничение злоупотребления властью и активной коррупции среди публичных должностных лиц***

Представлен авторский проект о преступлениях, связанных со службой. Целью работы является разграничение злоупотребления властью и активной коррупции среди публичных должностных лиц (когда это происходит путем нарушения своих служебных обязанностей). Автор отмечает дилему правовых терминов, описывает криминальное поведение, и неправомірну вигоду, что появляется *в результате* злоупотребления властью, а с другой стороны выступает как *подкуп*,

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полученный для совершения преступления, когда речь идет о коррупции государственных чиновников – на примере некоторых прецедентов.

**Ключевые слова:** уголовное право, неправомерное преимущество, коррупция.

*Pilisi F.*

***Drawing the line between abuse of authority and active corruption of public officials***

The author's project is about crimes related to office. The guideline of the treatise is to draw the line between abuse of authority and active corruption of public officials (when it is committed by breaching his official duty). The author writes about the dilemma of legal matters, explains the criminal conducts, and describes «*advantage*» – which appears as a *result* in case of abuse of authority, but on the other hand appears as a *consideration* getting for the act of crime when talking about corruption of public officials – by presenting some precedent cases.

**Key words:** criminal law, illegal advantage, corruption.