

# THE LICENCED PSYCHOLOGIST AS PUBLIC SERVANT FROM THE PERSPECTIVE OF CRIMINAL LAW

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**Abstract:** *The Penal Code in force has introduced a number of changes regarding the active subject of corruption offenses by defining the public servant in a different manner in comparison to previous criminal code and by disclaiming the legal definition of the “clerk” notion. However, judicial practice faces difficulties in recognition of the categories of individuals that may be considered public servants, related analyses being made based on the circumstances of each particular case. Within this article I will approach the quality of public servant for the free practice psychologist, when performing works of assessment for the psychological capacity of the individuals preparing to obtain the driving license within a driving school.*

**Key words:** *clerk, public, corruption, active subject, penal.*

The activity of the licenced psychologist is regulated by the Law no 213 from 27<sup>th</sup> May 2004 regarding the practice of the profession of psychologist with the right of free practice, settlement, organization and functioning of the Romanian Psychologist College. According to this law “*The practice of the profession of psychologist is performed:*

- a) in the private sector, with a salary, or independently with a license of free practice, in compliance with this law and other regulations and rules in force;*
- b) in the public sector, where psychologists have, if applicable, the status of a public servant, teacher and other functions, in compliance with special laws and regulations of the related institution.”*

Although, through a *per a contrario* interpretation of the provisions of article 6 of the above-mentioned law it may be concluded that, psychologists who perform their activity either in the private sector, with a salary, or independently with a free practice license, are not public servants or assimilated to this category, we will further demonstrate that, in relation with the activity of assessment of the psychological capacity of the individuals who undergo training to obtain the driving license at a driving school, the provisions of article 175 paragraph (2) from the Penal Code are applicable to those psychologists.

The performance of the activity of psychological assessment is regulated generally, without detailing the methods for psychological testing, by the College of Romanian Psychologists by decision no 5 from 24<sup>th</sup> April 2015 regarding the approval of quality standards for psychological services – general part, book I, published in Official Gazette

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no 514 from 10<sup>th</sup> July 2015, which repealed Resolution no 2 from 21<sup>st</sup> March 2014 regarding the approval of quality standards for psychological services – general part, book I.

According to article 5 from Law no 213 from 27<sup>th</sup> May 2004, the licenced psychologist performs the following activities:

- a) development and implementation of tests for measuring intelligence, abilities, skills and other human characteristics;
- b) psychological testing, prevention and therapy of emotional and personality disorders as well as of maladjustment phenomena to the social and professional environment;
- c) interpretation of gathered data and preparation of necessary recommendations.

However, the free practice psychologist shall conform and comply with the Code of Ethics related to the profession of licenced psychologist.

Also, according to the Code of Ethics of the licenced psychologist approved by Resolution no 4 of the College of Romanian Psychologists: "Article 2 paragraph (5) The psychologist develops and applies assessment methods and techniques and psychological assistance for measuring intelligence, abilities, skills and other human characteristics, interprets the gathered data, diagnoses, forecasts and submits necessary recommendations, as appropriate.

By Decision no 2 from 15<sup>th</sup> January 2014 of the Romanian Constitutional Court (published in Romanian Official Gazette, part I, no 71 from 29<sup>th</sup> January 2014) it has been ruled in favour of the unconstitutionality exception of the stipulations from article I point 5 and article II point 3 from the Law amending and supplementing some regulations and of the stipulations from the sole article of Law amendment of article 2531 from penal code. In this respect, the Constitutional Court ruled that "the significance of the concept of public servant within criminal law is not equivalent to the official in the administrative law", and the notions of "public servant" and "official" have a broader meaning than the one from administrative law, due to both the character of the social relations defended by accusing socially dangerous deeds and the fact that exigencies for the defense of the public wealth and for the promotion of community interests require a better protection by criminal law.

Further, the Constitutional Court points that "within penal law, the public servant is exclusively defined according to the function held or, in other words, if he is performing the activity for a unit regulated by the criminal law, subject to a certain status or legal regime".

Also, the Constitutional Court stated that "some criteria are determinant for the inclusion or exclusion of an individual within the criminal law provisions, such as the nature of the provided service, legal grounds according to which the activity is performed or the legal relationship between the individual and public authorities, public institutions, institutions or other legal entities of public interest".

From a different perspective it may be ascertained that the "public function" represents all duties and responsibilities established by the public authority or public institution, under the law, in order to achieve its competences, and "the public interest" is the assurance and compliance of the public institution and authorities with the rights, liberties and lawful interest of the citizens, as they are accredited within Constitution, domestic legislation and international treaties to which Romania has adhered.

Therefore, the concept of "public function" is closely connected with the notion of "public interest", both of them aiming at the fulfillment of the general interest needs, based on constitutional prerogatives that lead to the prevalence of the public interest over private interest.

Or, the public servant performs his activity with the purpose of serving public interest and thus, while on duty, the official has the responsibility of considering public interest above personal interest.

The notion of "public service" means either an activity performed for the public interest or a subdivision of an institution within the internal administration divided into departments or services.

Among the categories of public interest services there are those entities which, through their performed activity, are meant to fulfill some general interests of its community's members.

According to article 175 from the Penal Code:

"(1) Public servant, under criminal law, is the individual which, permanently or temporarily, with or without retribution:

a) has attributions and responsibilities, established by law, with the purpose of accomplish the prerogatives of the legislative, executive or judicial powers;

b) performs a function of public state or a public function of any kind;

c) carries out, alone or together with others, within a self-governed administration, an economic institution or a legal entity, state-owned or with majority state equity, duties regarding the achievement of activity performance.

(2) It is also considered public servant, under criminal law, the individual providing a service of public interest as invested by the public authority or if he performs the related public service under the control or supervision of the public authorities."

As stipulated in article 175 paragraph (2) from the Penal Code, it is not enough that the individual only perform the public activity or provide the public service, but it must be invested or controlled, if appropriate, monitored by public authorities regarding that activity or service (Bodoroncea&all, 2014, p. 368).

Additionally, appointment, control or supervision by public authorities' targets solely the performance of the public activity or the performance of the public service by the public servant and not the right to practice within the competence domain needed for the accomplishment of the public service in question. Moreover, it may be concluded that between the public authority and the person providing the public service there is no employment relationship based on individual or collective labor contract, as for the latter case, the individual would have the duty to perform under the authority of the employer and thus be included in the category of public servants as stipulated by article 175 paragraph (1) from the Penal Code – if the employer is a public entity, or by article 308 paragraph (1) from penal Code – if the employer is a private entity.

We will connect the analysis, of the public servant quality for the licenced psychologist while performing the assessment activity of the psychological capacity of the individuals who are training to obtain the driving license with a driving school, only to the evaluation activity of the psychological capacity of the individuals setting for the driving licence examination with a driving school.

As an argument, I will consider the legal regulations regarding the activity of psychological assessment for the aforementioned individuals with references to the stipulations of article 175 paragraph (2) from the Penal Code:

a) Providing a service of public interest:

A person of this kind performs, as psychologist, the service of psychological capacity assessment for the individuals training to obtain the driving licence within a driving school. The activity is regulated by G.E.D. no 195/2002, republished – Road transport code, respectively by Ordinance of the Minister of Transport no 75/2014.

Thus, according to article no 23 din G.E.D. no 195/2002, republished:

„(3<sup>1</sup>) \*) Theoretical and practical training of the persons preparing to obtain the driving license is foregone by a mandatory assessment of the psychological capacities needed for driving a vehicle, agricultural or forestry tractor or trams. The psychological assessment is mandatory for the attainment of a professional license for car and tram drivers as stipulated by this emergency ordinance.

(3<sup>2</sup>) Car and tram drivers, holders of the professional license, will be periodically evaluated in terms of psychological capacities required by the driving activity as provisioned by the law in force.

(3<sup>3</sup>) Psychological assessment is carried out under the conditions stipulated by the Ministry of Transport, Construction and Tourism, according to the law, conditions published in the Romanian Official Gazette, part I.

(3<sup>4</sup>) The psychological evaluation is performed in specialized laboratories, certified by relevant institutions.

(3<sup>5</sup>) The list of certified laboratories is set up and updated by ordinance of the Ministry of Transport, Construction and Tourism, which will be published in the Romanian Official Gazette, part I.

Performing the psychological assessment of the individuals setting for the driving license examination with a driving school is a service of public interest par excellence. There is an undisputable importance of the psychological assessment of the individuals training to drive vehicles, on domestic roads or international roads, as the Romanian state will assure, through its activity also performed by private subjects serving the public interest, the security and safety of the road traffic, the life and integrity of the citizens who are participants in the road traffic.

b) The performance of the activity is controlled or supervised by public authorities until the fulfillment of the public service.

As a state authority within the transportation domain, the Minister of Transport, in compliance with the regulations in force, carries out the following main tasks, directly or through technical specialized entities, subordinated public institutions, units operating under its supervision or certified companies: 57 issues rules regarding mandatory psychological assessment foregoing theoretical and practical training of the individuals preparing to obtain the driving license and professional certification for vehicles and tram drivers and also rules for the authorization of psychology laboratories that perform these assessments according to the regulations in force.

The reference rule is the ordinance of the Minister of Transport no 75/2014. In appendix no. 5, entitled “The methodology of organizing and conducting the theoretical and practical courses of the individuals preparing to obtain a driving license”, in chapter

II “Training conditions” it is stipulated that:

ART. 7

(1) For preparing to set for the driving licence examination with a driving school, the applicant shall submit to the authorized office a written request accompanied by the following documents:

- a) identification document, in copy;
- b) driving license, in copy, if appropriate;
- c) medical certificate mentioning capability;
- d) document for the mandatory assessment of the psychological capacity, original copy;
- e) criminal record in copy or an affidavit to attest the inapplicability of the legal provisions regarding forbiddance to attend the exam for obtaining the driving license, original copy;
- f) in the case of foreign citizens, a notary statement proving that they do not possess another driving license issued by a foreign authority or that their right to drive was not suspended, withdrawn or cancelled.

According to the Interior Minister’s Ordinance no 268/2010, the examination procedure for obtaining the driving license requires that:

“ART. 6

(1) On the date of the file examination and on the date of the setting for the exam, the applicants must comply, as law requires, with age conditions, medical requirements, must prove fulfillment of the conditions stipulated in article 3 paragraph (1) and accomplishment of theoretical and practical training organized by driving schools and shall not be in any situation mentioned in article 24 paragraph (6) of the emergency ordinance.

(2) Registration for the IT application examination and exam attendance are conditioned by the presentation of the examination file which must contain the following documents:

- a) application form, signed by the applicant, provided in Appendix 1, which records also the affidavit of the applicant, written under the sanctions stipulated by article 326 of the Criminal Code, showing compliance with one of the conditions mentioned in article 3 paragraph (2);
- b) tuition sheet, the model is provided in Annex 2, issued by the driving school where the applicant completed the theoretical and practical training courses and containing the recording of the medical favourable notice “apt or driving vehicles from the category...”, according to the category for which the examination takes place; the document issued by the authorized medical assistance unit, which certifies the capability of the applicant to drive, is stored by the driving school hosting the applicant’s training;
- c) valid criminal record issued by the departments of the Romanian Police according to the law in force;
- d) copy of the valid identification document;
- e) proof of payment of the taxes and charges needed for obtaining the driving license.

In comparison with the above-described procedure, it can be noticed that without the document of mandatory psychological capacity assessment, in original copy, presented by an individual undergoing training to obtain the driving license with a driving school, neither the related training can be performed nor can the application be filed for the exam

to obtain the driving license, issued by the Department of license and vehicle registration within the Ministry of the Interior, through its territory units.

Under these circumstances, the public authority in this field exerts a mediated control over the activity of psychological assessment for obtaining the driving license, and the Ministry of Transport supervises the activity of psychological evaluation, given that, according to G.E.D. 195/2002, republished, “Psychological assessment is performed within specialized laboratories within authorized institutions. The list of authorized and specialized laboratories is set up and amended by ordinance of the Minister of Transport, Constructions and Tourism, published in the Romanian Official gazette, part I.”

In conclusion, the act of the licenced psychologist to issue favourable psychological notice mandatory for the enrolment of an individual in the driving school, breaching its legal and professional duties, as stipulated by article 5, 7, 17 in Law no 213 of 27<sup>th</sup> May 2004 on exercising the profession of licenced psychologist, setting-up, organization and functioning of The Romanian College of Psychologists in conjunction with the regulations included in article 2, 8 and 19 from the Licensed psychologist’s code of ethics, meets the constitutive elements of the offence of “abuse in office” ruled by article 297 paragraph 1 from the Penal Code related to article 13<sup>2</sup> from Law no 78/2000.

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