

Donations Granted Amongst “Friends” in Public Office— Kindness or Corruption?—There Ain’t No Such Thing as a Free Lunch

*By Holger Niehaus**

Abstract

When former state president C. Wulff stood accused of having received benefits from a film producer known to him for several years, he argued: “Is a politician not entitled to have friends?” Before such background, the question of where to draw the line between social life of a public servant or politician and criminal behavior arises. Are such persons subject to permanent threat of criminal prosecution if they accept invitations etc., or is it their obligation to the general public to refrain from accepting donations from persons who have interests in their decisions, even if these persons are long known friends of the public servant?

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A. Introduction

Anyone elected into public office—ranging from a high-ranking representative office, such as the prime minister of a certain German federal state, to a district administrator of a county or a city’s head mayor—will certainly come in contact with industry circuits and other interest groups, in which deviating practices compared to the public administration are often concerned. This, in particular, concerns standards of living with respect to both professional and social life. Furthermore, entry into public office does not suddenly terminate the public servant’s relationships. The public servant will likely “bring along” private and/or professional relationships to former companions into office. The resulting conflicts are well illustrated by the case of the former German Federal President Christian Wulff (“Wulff”), who in the end had to resign due to the mounting public pressure resulting from the publication of the acceptance of certain benefits while in office.

Wulff, when accused of having received benefits from a film producer known to him for several years, responded: “Is a politician not entitled to have friends?” This, at first, was assessed differently by the public. The disapproval of the receipt of benefits such as a discounted loan by a highly ranked public servant or representative of the state apparently was so severe that the Federal President, in the light of the public pressure, had to resign after only one year of service, thus making him the first president ever to resign during the history of the Federal Republic of Germany. What part of such resignation was in fact the result of the poor conduct of the accused with the allegations as well as the public press is irrelevant for the subject matter in interest though.

In terms of this incident the question arises where to draw the line between social life of a public servant or politician, and criminal behavior. Do such persons live under the permanent threat of criminal prosecution if they accept such gifts, benefits, invitations etc., or is it their obligation to the general public to refrain from accepting such donations from people who have interests in their decisions, even if the donations come from longtime friends?

B. Criminal Proceedings

The Prosecutor’s Office of Hannover (“Prosecutor’s Office”) investigated Wulff for twenty-one counts of corruption. In several cases prosecutions related to the payment of hotel and beverage expenses of the then-prime minister of the State of Lower Saxony, as well as the payment of expenses for vacations or the granting of holiday domiciles by private businessmen.¹ Prosecutors also launched investigations relating to the payment of expenses for a baby-sitter during Wulff’s visit to “Oktoberfest” in Munich.

¹ See Hans Leyendecker, 21 *Nichtigkeiten*, SÜDDEUTSCHE ZEITUNG MAG. 21 (Apr. 8, 2013).

Various of such accusations, finally, were deemed by the prosecutor not to be of any criminal relevance. It has been argued that there were no sufficient indications for the necessary connection between the execution of the office and the receipt of the benefits.² Other accusations, according to the Prosecutor’s Office, could not have been factually proven.

Finally, after having completed the investigations, the prosecutor’s office brought an accusation against Wulff that was not based on the cases in which the accused had in fact received benefits, but in which the context between the execution of the office and the receipt of the benefits could not be proved (according to the prosecutor’s office). Essentially, the accusation was based on a case in which a film producer defrayed the Presidential family’s expenses of a stay at a hotel during the Oktoberfest in Munich (costing 400 euro), the expenses of a diner (costing 209 euro), and of a babysitter (costing 110 euro). Three months later, the accused campaigned for a project of the film producer in a letter to the chairman of one of Germany’s biggest companies.³

The regional court of Hannover did not identify probable cause concerning the accusation of bribery, but allowed and opened the main proceedings concerning the minor offense of acceptance of benefits by a public official.⁴ During the laborious main proceedings numerous witnesses were heard concerning the question of who had paid which bill and how Wulff and the film producer had dealt with such matters in the past.

After Wulff rejected an offer to a close of the proceedings if the accused accepted a payment obligation (§ 153a German Criminal Procedural Code), the court in February 2014 pronounced a sentence of acquittal.⁵ The court was not convinced that the accused had even noticed the compensation by the film producer.⁶ Furthermore, the court determined that the covered hospitality expenses for dinner were “socially adequate,” and thus, dismissed criminal liability.⁷ The assumption of hospitality costs—according to the court—would have been a negligible benefit, taking Wulff’s standard of living into account.⁸

² *See id.*

³ Landgericht [LG] [Regional Court of Hannover], Reference number 40 KLS 6/13 (Feb. 27, 2014), <https://openjur.de/u/750690.html>.

⁴ STRAFGESETZBUCH [StGB] [Penal Code] § 331 (2015).

⁵ LG, Reference number 40 KLS 6/13, at paras. 1–3.

⁶ *Id.* at recital 207.

⁷ *Id.* at recital 268 f.

⁸ *Id.*

Therefore, the court was not persuaded of the connection between the execution of the office and the receipt of the benefits.

The Prosecutor's Office originally appealed on points of law but then withdrew its appeal after studying the written grounds for the verdict—which implied that the proceedings ended with a sentence of acquittal.

C. Change in Public Perception

While the popular outrage about the fact that a public officer had accepted money and noncash benefits for his and his family's private life—building a house, expensive vacations, caterings—had first been predominant in public perception, this changed significantly in the course of the ongoing criminal proceedings.

Even in legal publications, some authors spoke of a fighting press (*"Kampfpresse"*), which tried to manipulate public opinion through preset opinions (*"Meinungsvorgaben"*) and by leaving out the relevant aspects of the case (*"Weglassen des Relevanten"*). Thereby, the media were leaving the citizens to the opinion hullabaloo of the Internet (*"Meinungs-Tohuwabohu des Internet"*).⁹

The investigations by the public Prosecutor's Office of Hannover were said to have been excessive and ruthless and an acquittal, not only the mere closing of the proceedings, was owed to the defendant.¹⁰ Especially were it downright ridiculous to have conducted the investigations with such an effort for the sake of 770 Euro (or, according to a different calculation, for 400 or 370 Euro, respectively, see above). This vigorous investigation would rather impede the fight against corruption rather than promote it.

The defendant did not show that he was aware of possible misconduct, but he was always of the opinion that his behavior was legal. Furthermore, he believed that his resignation from the office as federal president had been redundant, since it had been driven by media pressure.¹¹

D. Legal Situation of Public Officers when Accepting Benefits

This affair deserves special attention not only from a legal perspective, but also with regards to the evaluation by the participants and the public. It demonstrates the

⁹ See Martin Kriele, *The Power of the Media*, 45 ZEITSCHRIFT FÜR RECHTSPOLITIK 53, 55 (2012).

¹⁰ Interview with Heribert Prantl (Deutschlandfunk, Dec. 20, 2013) (*"Wulff deserves an acquittal."*).

¹¹ See the press report about the presentation of his book *"Ganz oben Ganz unten"*, available at Beck-online: beclink 1032955.

paradigmatic problems of criminal law in the field of corruption and its acceptance in the population and the relevant stakeholders, respectively. This is of no insignificant importance, since only clear rules and a broad consensus on the rightness of punishment following violations of these laws can achieve the positive behavioral impact that criminal law and criminal proceedings seek to promote.¹² Therefore, the most important issues raised by Wulff’s trial include:

(1) Does the reprehensibility of an act or the satisfaction of all elements of an offense depend on the amount of “damage” the act caused? Is it, after all, of any meaning, if a public officer in an individual case which might be part of a series of similar events (or maybe not) accepted “merely” a supposedly minor benefit (“costs of the baby sitter”, dinner invites etc.)?

(2) Does the minor nature of a benefit depend on the standard of living (“*Lebenszuschnitt*”) of the participants? Is it, after all, of any meaning for the question if all elements of criminal corruption are fulfilled, if the participants practice a luxurious lifestyle in any case? Is it therefore the less critical, if a public officer lets private people grant him benefits, the more expensive he shapes his private life anyway?

(3) Are investigations by the Prosecutor’s Office to clear up such accusations petty-minded, possibly even an expression of social envy, and do the investigating authorities thereby misconceive the necessities within the framework of cooperation of administration, politics and economic activity?

(4) Do such investigations possibly even constitute an expression of “lack of respect” for public officials and the offices they represent—federal president, prime minister, etc.?

E. Legal Situation: “There Ain’t No Such Thing as a Free Lunch”

I. Minimum Amount Concerning the Value of Questionable Donations?

Due to applicable law, the acceptance of benefits by a public official “for the exercise of an office” is prohibited¹³ regardless of the value of the gift. This includes presents presented as insignificant or “socially adequate” presents. Nevertheless, it is a general principle in criminal law—reaching further than corruption—that “socially adequate” behavior cannot constitute criminal liability.¹⁴

¹² See HARRO OTTO, GRUNDKURS STRAFRECHT, § 1 MARGIN NUMBER 66 (7th ed. 2004).

¹³ STRAFGESETZBUCH [STGB] [Penal Code] §§ 331, 333 (2015).

¹⁴ See Jörg EISELE IN: ADOLF SCHÖNKE/HORST SCHRÖDER, STRAFGESETZBUCH, preliminary remarks to § 13, margin number 69 f. (29th ed. 2014).

It indeed is the question which behavior in connection with accepting benefits by a public official, if anything, can be deemed as “socially adequate”.

Administrations on the federal and state level have issued decrees establishing maximum allowable values for presents received by public officials. The decrees also determine when a public figure is allowed to participate in gratuitous entertainment.

Judging by the federal administration’s decrees, one can act on the assumption of the administration’s implicit consent if the value of the donation is below twenty-five euros. The equivalent decrees in Berlin set the value to only ten euro. Therefore, criminal proceedings—on account of the acceptance of benefits by a public official—were initiated against a teacher who had accepted a sculpture amounting to 198 Euro as a farewell-gift by her former 10th grade students. Criminal proceedings were closed in return for the acceptance of payment obligations amounting to four thousand euro (§ 153a German Criminal Procedural Code).¹⁵ The maximum permitted value of gifts, however, changes according to the individual’s particular governmental position. Berlin’s decrees, as pertaining to members of the State’s parliament, permit the representatives to accept presents valued no higher than four hundred euros. This discrepancy adds up to an amount forty times higher than the limit applicable to (other) public officials.¹⁶

Similarly, the administrative decrees of the State of Lower Saxony of 22 May 2007 regarding Section 5 IV of the Minister-Code of the State of Lower Saxony, which are applicable to the Wulff Case, permit a maximum amount of ten euro for the acceptance of presents. Beyond this limit—according to the administrative decree—the value of the gift does not eliminate criminal liability. These principles apply even then, if one would not assume in individual cases that the public official’s objectivity would be affected by the acceptance of the benefit.¹⁷

¹⁵ See *Gift of Students Accepted: Teacher Has to Pay 4,000 Euro Fine*, SPIEGEL ONLINE (Jan. 7, 2015) [hereinafter *Gift of Students*], www.spiegel.de/schulspiegel/berlin-lehrerin-unter-korruptionsverdacht-wegen-skulptur;STRAFPROZESSORDNUNG-STPO [Code of Criminal Procedure] § 153(a).

¹⁶ *Gift of Students*, *supra* note 15, at 1.

¹⁷ See Hans Herbert von Arnim, *Acceptance of benefits by the former Minister President of Lower Saxony Christian Wulff?*, 31 NEW JOURNAL FOR ADMINISTRATIVE LAW (NVwZ) 141 (2012); Hans Herbert von Arnim, *Warum der Bundespräsident nicht zurücktreten kann*, 31 NEW JOURNAL FOR ADMINISTRATIVE LAW (NVwZ-Extra), 1, 2 (2012), http://rsw.beck.de/rsw/upload/NVwZ/NVwZ-Extra_2012_03.pdf.

II. Connection Between the Execution of Official Duties and the Receipt of Benefits / Legally Protected Interests of Statutes Prohibiting Corruption

One could assume that the aforementioned—quite strict—restrictions for accepting benefits by public officials are relativized by the further precondition of criminal liability under §§ 311 and 333 German Criminal Code that the donation must be granted “for the exercise of the office.”¹⁸ In fact, the Regional Court of Hannover based its sentence of acquittal *inter alia* on the grounds that the incident lacked this nexus.¹⁹

This assumption, however, is questionable. The statute²⁰ explicitly does not require that the present be donated as a service in return—*quid pro quo*—for a certain act of ministrations. In fact, a general connection between the execution of the office and the receipt of the benefits is sufficient. This appears to be consistent because § 331 of the German Criminal Code is designed to protect the general public’s faith in the integrity and impartiality of the public office.²¹ This faith, however, may already be impaired by a public official’s acceptance of presents if the donor evidently has economic or other personal interests in the exercise of an office by the favored public official. But, this connection would arguably exist if, for example, a businessman grants a flat rate loan to the prime minister and who participates in official journeys abroad.²² The same situation occurs when a public official—only months after receiving compensated hospitality costs by a film producer—promotes the film producer’s new project in a letter to a company chairman who may consider sponsoring it.

For this reason, criminal liability for corruption does not require someone’s actual damage. For example, criminal liability does not require that public authorities need to pay exaggerated costs by reason of a disadvantageous contract concluded by the favored public official. The harm to the general public’s faith in the integrity and impartiality of the public service may arise merely through a public official’s acceptance of a gift *per se*, regardless of any actual injury.

¹⁸ STRAFGESETZBUCH [StGB] [Penal Code] §§ 331, 333.

¹⁹ Landgericht [LG] [Regional Court of Hannover], Reference number 40 KLs 6/13, recital 268 (Feb. 27, 2014), <https://openjur.de/u/750690.html>.

²⁰ STRAFGESETZBUCH [StGB] [Penal Code] § 331.

²¹ See Bundesgerichtshof [BGH] [Federal Court of Justice] May 11, 2001, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 47, pp. 22, 25; THOMAS FISCHER, STRAFGESETZBUCH, § 331, annotation 2 (63rd ed. 2015).

²² See Hans Herbert von Arnim, *Acceptance of benefits by the former Minister President of Lower Saxony Christian Wulff?*, *supra* note 17.

III. Considerations upon the Circumstances of the Wulff Case and upon the Investigations by the Prosecutor's Office

Applying the aforementioned considerations regarding corruption, it appears to be completely consistent that the Prosecutor's Office of Hannover imposed investigations on C. Wulff and accused him of the offence of acceptance of benefits by a public official. Furthermore, the Prosecutor's Office was legally obligated to act due to the existence of probable cause.²³ Closing the proceedings due to insignificance of the accusations,²⁴ on the contrary, would have been evidently inappropriate given the existence of a substantial public interest in clearing up the accusations; whether and to what extent one of the highest representatives of the country accepted personal benefits by persons who had personal interests in the way the public official exercises his office. Similarly, there is a substantial public interest in punishing public officials in violation of criminal corruption statutes. It appears to be absurd if the same politicians and media representatives who regularly complain about lowered voter turnouts on elections evenings and about increased alienation between voters and representatives in parliament and administrations, as well as about the general public's lost faith in the integrity of their representatives, claim such activities to be bagatelles and the investigations to be narrow-minded, if not even to be disproportionate intrusions into the legal rights of the public official.

F. Inevitableness of Amalgamation of Public Office with Private "Friendly Turns"?

It could be argued that social intercourse of public officials, particularly high-ranked representatives and functionaries, would be disproportionately restricted by the aforementioned rules. But this point of view has to be objected to.

I. Legal Status of a Public Official / "Grooming" or "Sweetening"

No one is forced to aspire to a public office, or to accept it. But if one chooses to do so, there is an obligation to follow the rules specific to the particular public office entered into, not seldom with great effort and by driving out competitors. If one considers these rules to be narrow-minded or mistaken, everyone is free either not even to aspire to such a public office or to resign and work in the private sector, where such rules do not apply.

That being said, a public official *can* maintain and share friendships; she is only prohibited from gaining benefits from these "friends"—and only in cases where these "friends" have private interests in her decisions as a public official. There is a significant difference between the two transactions! If the public official obviously is not able to recognize the

²³ STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure] § 170.

²⁴ *Id.* at §§ 153, 153(a).

difference, this inability raises serious concerns with regard to the legally protected good that Section 331 German Criminal Code is designed to protect—the faith of general public in the integrity and impartiality of the public service.

Corruption in reality is not conducted by placing a case full of money or an Aston Martin in front of the public official with a request to perform a certain official act in the interest of the donor. Rather there is a longer period of “grooming” or “sweetening” while the donator campaigns for the affection and the supposed friendship of the public official, which is—obviously—completely unbiased by the official position of the public official. This “Grooming” may include shared vacations, dinners, events, etc. Where public officials lack sensitivity for such interrelations and dismiss the acceptance of presents by persons who have interests in the execution of their office as a friendly turn, such behavior only substantiates the necessity and proportionality of a prosecutor’s investigations.

II. “Since God has Given us the Papacy, let us Enjoy it.”²⁵

The same rationale applied to the acceptance of presents applies to the field of the—presumed necessary—participation of public officials in events of all kinds, exercising the “representation” of the authority or even the general public. What interest would the general public of the state of Lower Saxony have in sending high public officials to a series of events called “North-South-Dialogue” which evidently doesn’t lead to any results and was likely never intended to do so? In fact, what was declared to be a process of communication for the interest of the public, has simply been a party, whose only purpose was the maintenance of physical wellbeing of the participants. What interest would the general public have in being “represented” by a large number of high public officials attending soccer games—sitting in privileged seats—during the Soccer World Championship in 2006?²⁶

In fact, the acceptance of such valuable benefits is clearly not necessary in the public figure’s successful representation of the general public and serves to undermine the general public’s trust in public officials. The same is true concerning the maintenance or making of political contacts and connections. Even if such connections are made during, for example, sporting events: Why should this not be possible in the course of their official duties and outside luxurious hospitality or events? And if they *are* the only forums in which connections can be made: Why is this the case and in what respect is such a maintenance of contacts of use for the general public?

²⁵ Remark attributed to Pope Giovanni di Lorenzo de Medici (“Leo X,” 1475–1521).

²⁶ See the “*Claassen-case*”: Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 14, 2008, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2008, 3580.

III. Interdependence of Acceptance of Benefits and Standard of Living of the Persons Involved?

For the abovementioned reasons, the relevance of benefits concerning criminal liability under Section 331 German Criminal Code does not depend on how high the standard of living of the persons involved is, apart from the circumstance that such a high standard of living does not support the conclusion that the public official would not be impressible by presents and other benefits. In any case, the (according to press releases²⁷) complete debt financing of Wulff's private home does not support the conclusion that benefits valued at several hundred or thousand euros would have been obviously irrelevant for him.

As described above, before an actual act of corruption is performed, there is usually a period of time of "grooming" and—apparently altruistic—contact maintenance. It is precisely a characteristic of this ("grooming") period of the process of corruption that during this period of time no donations of a worth are granted that increase the assets of the public official noticeably. The purpose of these donations is to create the illusion of personal bounds. Especially such mechanism caused the legislator to penalize such forms of "grooming" and "sweetening" by Section 331 of the German Criminal Code. It would be contrary to the *ratio legis* if criminal liability depended on whether or not the benefit matches with the standard of living of the public official.

In addition, the public understanding for the reasoning that a prime minister is allowed to gain benefits such as luxury vacations, luxury events, etc. while a teacher who accepts a farewell present worth 198 euros from her school class, would be deemed to have committed a criminal offence, can be considered to be quite limited.

G. Need for Legislative Action? Concluding Remarks

Definite rules are required to ensure acceptance of criminal law on corruption by the general public and by all circles involved.

The Wulff criminal proceedings showed that current laws only imperfectly meet these requirements.

Corruption is not a minor offense and does not become one if the benefit gained by the public official in the individual case is not very substantial.

Criminal law on corruption is intended to protect the general public's faith in the integrity and impartiality of the public service.

²⁷ See *Personal Loans: Wulff Resists Deception Allegation*, SPIEGEL ONLINE (Dec. 13, 2011), <http://www.spiegel.de/politik/deutschland/privatkredit-wulff-wehrt-sich-gegen-taeschungsvorwurf-a-803353.html>.

Against this background, criminal investigations against Wulff were justified. It would mean to misjudge the abovementioned legally protected good and the mechanism of corruption (“grooming”, “sweetening”) if the actions which led to the investigations were trivialized and the prosecutor’s investigations are declared disproportionate.

The sentence of acquittal by the Regional Court of Hannover is open to reservations. Since the Prosecutor’s Office has withdrawn its appeal against the verdict, further sensitization of public official’s actions will be the task of further legal development and also of media reports regarding these contexts.