Difference between the Offense of Abuse of Duty and Violation of Rules at Work

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Abstract: The paper analyzes and compares the criminal offense of abuse of office and violation of rules at work. In order to distinguish between these two criminal offenses, the unifying decision no. 3 dated 02.11.2015, of the joint colleges of the high court that deals with issues related to the competition of criminal offenses and the criteria that must be considered when we are before the competition of qualifying circumstances. The main principles that distinguish between these two offenses are analyzed: lex specialis derogat legi generali, interpretation of norms according to the purpose of the legislator, the principle of absorption, *lex consumens derogat legi consumptae*, prohibition of trial twice for the same criminal offense, no one can try more than once for the same offense. Particular attention has been paid to comparative aspects to see if these issues are addressed in the legislation of other states.

Keywords: abuse of duty; criminal offense; criminal fact; competition of criminal offenses

1. Introduction

The picture of the criminal offense of abuse of duty provided for by Article 248 of the Criminal Code is found in Chapter VIII "Crimes against state authority", Section II titled, "Criminal offenses against state activity committed by state employees or in public service. ", while the figure of the criminal offense provided by Article 289 "Breach of the rules at work", is found in Chapter VIII, Section III entitled "Criminal offense against public order and security". The object of these criminal offenses is the same.

Abuse of duty provides as a necessary main element of the objective side the action or inaction in violation of the law and only as a consequence damage.

We note that even the criminal offense of violating the rules at work, from the objective side, the crime is committed by action or inaction that has to do with the violation of the rules of protection at work, technical insurance, technical discipline, hygiene and insurance by fire as well as in not taking measures to respect and implement them (Elezi, 2016, p. 504).

For the reason that the objective aspect is the same for both criminal offenses, in this case both criminal offenses cannot be applied to the same criminal fact (abuse of duty and violation of rules at work), either in the same proceeding or even in different proceedings because they would violate the principle of *ne bis in idem.*

In the following, you have the arguments for the application of the criminal offense of violating the rules at work versus that of abuse of duty when it comes to the same criminal fact.

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It is precisely the importance of the rules at work that has pushed the legislator to foresee a special figure of the violation of the rules at work, which is essentially a form of abuse of duty.

2. The Position Held by the Supreme Court

Regarding the competition of criminal offenses, the United Colleges of the Supreme Court have held this position:

"Regarding the question of the competition of the qualifying circumstances, in order to verify the absorption of the norm that provides for the general qualifying circumstance, in relation to the one that provides for a special qualifying circumstance, it is necessary that the latter contain all the elements of the criminal offense provided by the general norm, in addition to other specific elements. So, in relation to the application of qualifying circumstances or not, in the case of the qualification of a criminal activity, the principle *lex specialis derogat legi generali* will be applied first, and then the other principles elaborated by the doctrine"[1].

The position of the United Colleges of the Supreme Court is also applied in relation to the criminal offense of violating the rules at work, (Article 289 of the Criminal Code), where this offense is *lex specialis* in relation to the criminal offense of abuse of duty (Article 248 of the Criminal Code) which is a general law not only in relation to the violation of the rules at work, but also to other criminal offenses related to the performance of duty where the legislator has explicitly provided for them in the Criminal Code.

Another argument in favor of the application of the provision provided by article 189 of the Criminal Code, would be the interpretation of the norms according to the intention of the legislator. Based on such an interpretation criterion, we note that article 289 of the Criminal Code, which provides for the criminal offense of violating the rules at work, defines a higher punishment sanction than article 248 of the Criminal Code, which provides for the sanction for the criminal offense of abuse of duty. In these conditions, the legislator wanted to provide a special protection to the rules related to work, production, service, defined in the law, in the acts of the Council of Ministers or in the relevant regulations of technical insurance, technical discipline, of protection at work, etc. and for this reason it has provided for them in a special way in article 289 of the Criminal Code, in the event that these issues were not regulated in a specific manner, then the provision provided for in article 248 of the Criminal Code would be applied.

The social danger of the criminal offense committed by the active subject, when he does not respect the rules related to work, production, service, defined in the law, in the acts of the Council of Ministers or the relevant regulations of technical security, technical discipline, protection at work, etc., the criminal offense and violation of the rules at work provided by Article 289 of the Criminal Code will be applied, absorbing the dangerousness of Article 248 from Article 289 of the Criminal Code. The same position is also held by the United Colleges of the Supreme Court in another case where they state that: "the criminal offense of bank robbery provided for by Article 136 of the Criminal Code will be applied, absorbing the dangerousness of Article 135 from Article 136 of the Criminal Code".

Based on the general principle of prohibition of trial twice for the same criminal offense, no one can be tried more than once for the same legal offense. This principle is applied not only in criminal procedure, but also in substantive criminal law. Based on this principle, it is prohibited to prosecute a person twice

[1] Vendimi Unifikues nr. 3, dt. 02.11.2015, i Kolegjeve te Bashkuara te Gjykates se Larte, paragrafi nr.49. Available at: https://www.gjykataelarte.gov.al/web/Kolegji_Penal_10678_1.php (Accesed: 10 February 2022).

for a fact that constitutes a criminal offense, for which a final court decision has been given that has become irrefutable. Also, according to this principle, the attribution of more than one legal violation related to the same fact to the same person is prohibited. That is, it is prohibited to attribute more than one violation of the criminal norm to the same fact, when the violation of the norm is sufficient, in relation to the violated legal relationship and contains the elements of the criminal offense for the imposition of a criminal penalty in a proportional measure[1].

In the case of competing criminal norms, the fact that it is considered a criminal offense seems to be provided by two or more criminal provisions, but in reality, we have a single offense and the provisions on joining criminal offenses do not apply. In these cases, the different provisions that provide for the same fact as a criminal offense, either exclude each other, or absorb each other, for the reason that the legal relationship that has been violated is protected by the criminal provisions that provide for the same fact as a criminal offense. To resolve the issue of the correct application of the legal norm, and as a consequence, the correct legal definition of the criminal offense provided for by the applicable norm, in the case when at first sight (*prima facie*), at the same time it seems that they act more than one criminal provision, as logical and legal criteria for solving this issue from the doctrine, the following principles have been elaborated: **1**) the principle of specialty (*lex specialis derogat legi generali*), **2**) the principle of subsidiarity (*lex primaria derogat legi subsidiariae*), **3**) the principle of absorption (*lex consumens derogat legi consumptae*)[2].

1) Based on the principle of specialty, when two legal norms regulate the same subject, the special norm is applied, which has priority and avoids the general norm, this in accordance with the general legal criterion for resolving disputes *lex specialis derogat legi generali*. The specialty report exists when the constituent elements of a (general) criminal norm are all present in another (special) norm, which, in addition to them, also contains some more specific elements that qualify the second norm, special in relation to the first norm. The general norm is completely contained in the special norm, the latter has a wider content and includes the first (type and species relationship), therefore the violation of the special norm (as a larger norm) logically includes the violation of the norm of general (lower rate), so only the special rate will apply. The greater the presence of specifying elements constituting an incriminating criminal norm, the narrower is the field of action and its application, in relation to the general norm, the latter having fewer circumstantial elements that limit it the scope of the general norm, which consequently finds a wider application. Since the general norm has a broader scope than the special one, a fact that constitutes a criminal offense that falls within the scope of the special norm will also fall within the scope of the general criminal norm. However, if we were to apply both criminal norms, the effects would be doubled and the principle of not being judged twice on the same fact would be violated. Therefore, only one incriminating norm will be applied, the special one, because the general norm will be included by the special norm[3].

The basis for applying this principle rests on the fact that we are dealing with the same subject, that is, with the same object; that is, with the same legal relationship protected by the incriminating criminal norm.

[1] Vendimi Unifikues nr. 3, dt. 02.11.2015, i Kolegjeve te Bashkuara te Gjykates se Larte. Available at: https://www.gjykataelarte.gov.al/web/Kolegji_Penal_10678_1.php (Accesed: 10 February 2022).
[2] Vendimi Unifikues nr. 3, dt. 02.11.2015, i Kolegjeve te Bashkuara te Gjykates se Larte. Available at: https://www.gjykataelarte.gov.al/web/Kolegji_Penal_10678_1.php (Accesed: 10 February 2022).
[3] Vendimi Unifikues nr. 3, dt. 02.11.2015, i Kolegjeve te Bashkuara te Gjykates se Larte, paragrafi nr.29. Available at: https://www.gjykataelarte.gov.al/web/Kolegji_Penal_10678_1.php (Accesed: 10 February 2022).

From the above, the rate provided for in Article 248 of the Criminal Code is a general rate and the violation of the rules at work provided for in Article 289 of the Criminal Code is a special rate and this rate will be applied against that of abuse of duty and both cannot be applied because we are dealing with the same criminal fact[1].

2) The principle of subsidiarity is based on the presence of a functional relationship between two criminal norms related to the protection of a legal relationship that is protected at different levels of infringement or forms of infringement. According to this principle, a primary norm takes precedence when it protects at a higher level the legal relationship that is protected at a lower level by a secondary norm. So, the criminal fact provided according to the secondary norm, completes and is absorbed by the fact provided as a criminal offense by the main norm, finding priority in the implementation of the main norm. In this case, the competition of criminal norms is resolved in favor of the main norm. Therefore, only if the fact that constitutes the criminal offense does not fall within the scope of the main norm, the secondary norm will be applied. The interaction report in this case can be considered as a hierarchical report, where one norm (primary) foresees the priority of its implementation, in relation to the other norm (secondary). This second one applies only when the first (main) norm is not applicable. According to this principle, the application of one norm at the same time for the same fact excludes the application of the other criminal norm, in the case of the protection of legal relations that are protected progressively and escalated from a lower level to a higher level. As an example for this case, the criminal norm that provides for the crime of intentional serious injury with the norm of the crime of intentional minor injury, related to the person's health, can be cited. The principle of subsidiarity intervenes to cover a space left by another norm, or when two or more norms protect the legal relationship to different degrees. The basis for the presence of this general principle in the Albanian Criminal Code is also found in the provision of typical legal clauses: "when (the fact) does not constitute another criminal offense", as well as in the interpretation of the norm in relation to the legal relationship[2].

The principle of subsidiarity is applied in the relationship between the criminal offense of abuse of duty (Article 248 of the Criminal Code) and the criminal offense of violating the rules at work (Article 289 of the Criminal Code). From the relationship between these criminal acts, the criminal act of abuse of duty is subsidiary in relation to the criminal act of violating the rules at work.

3) The principle of absorption, according to which when more than one norm refers to a certain uniform field of the legal relationship, only that norm that "includes" in a complete and exhaustive manner the illegality of infringements should be applied, prevailing over other rates. This is because the implementation of the first more serious criminal norm, for the same fact, consumes the content of the lighter criminal norm. In the absorbing report, the absorbing norm includes within itself the criminal fact of the consumed norm and is applied in the case when the content of one norm is wider and it also includes the content of the other norm, that is, when it is gradually passed from a norm that provides for a criminal offense assigned to another more serious one[3].

According to this principle, the absorptive norm has a punitive provision on a scale and to such a degree that it completely exhausts the social dangerousness of the criminal fact provided for by the other norm considered easier. In this case, the simultaneous application of the absorbed norm that provides for the

[1] Vendimi Unifikues nr. 3, dt. 02.11.2015, i Kolegjeve te Bashkuara te Gjykates se Larte. Available at: https://www.gjykataelarte.gov.al/web/Kolegji_Penal_10678_1.php (Accesed: 10 February 2022).
[2] Vendimi Unifikues nr. 3, dt. 02.11.2015, i Kolegjeve te Bashkuara te Gjykates se Larte, paragrafi nr.30. Available at: https://www.gjykataelarte.gov.al/web/Kolegji_Penal_10678_1.php (Accesed: 10 February 2022).
[3] Vendimi Unifikues nr. 3, dt. 02.11.2015, i Kolegjeve te Bashkuara te Gjykates se Larte, paragrafi nr.31. Available at: https://www.gjykataelarte.gov.al/web/Kolegji_Penal_10678_1.php (Accesed: 10 February 2022).

other criminal offense for the same fact, would turn into an excessive and disproportionate measure of punishment for the perpetrator of the criminal offense, if the other criminal norm were also applied together. The basis of the principle of absorption can be found in the definition provided for in Article 1/c of the Criminal Code, in which the term "the right to assign guilt and punishment" is used, this term is broken down in more detail in the second paragraph of the Article 47 of the Code, which foresees the elements that the court must take into account in determining the penalty for the criminal offense, always serving the principle of justice in determining the penalty and its proportionality[1].

The same legal logic was followed by the Supreme Court, when it analyzed the crime of smuggling by employees related to customs activity, Article 175 of the Criminal Code if it competes with the abuse of duty provided by Article 248 of the Criminal Code. The Supreme Court in the unifying decision said that: "From what was said above, it is concluded that the figure of the crime of smuggling by employees related to customs activity, provided for by Article 175 of the Criminal Code, is a variant of the figure of the general crime of abuse of duty, provided by its Article 248, which is carried out in a specific field of state activity such as that of customs, and therefore these two crime figures cannot compete with each other".[2]

3. Comparative Aspects with the Legislation of other Countries

Romania, abuse of duty has a subsidiary character in relation to other criminal offenses where the subject is a public servant. We will face the criminal offense of abuse of duty only if it is not foreseen by any other criminal provision (Toader, 2010, p. 265).

An almost identical approach also results in the definition made by the Portuguese legislator, specifically in article 382 of the Portuguese Criminal Code, where the definition of the criminal offense of abuse of duty is given and where the sanction is provided, which is applied to this offense if a more serious penalty is not is applied based on another legal norm, it results from a study carried out by the National Union of Judges from Romania (2017).

In Italy, the Court of Cassation, section VI, with the decision dated October 7, 2008, no. 42801, held the position that the behavior of the public servant that is in conflict with a criminal law will not be classified as abuse of duty, but the classification will it is done according to the relevant criminal offense. Abuse of duty in this case will be considered as an aggravating circumstance according to article 61, point 9 of the Italian Criminal Code. In this case, the Court found the absorption of abuse of duty from the offense of personal injury (resulting personal injury) according to Article 61 point 9 of the Criminal Code (Lattanzi & Lupo, 2010, p. 311).

4. Conclusions

The very provision of Article 248 of the Albanian Criminal Code provides that this provision will be applied only if it does not constitute another criminal offense.

In the Albanian jurisprudence, this has been shown, where the United Colleges of the Supreme Court have stated that the criminal offense of abuse of duty does not compete with the criminal offense of

[1] Vendimi Unifikues nr. 3, dt. 02.11.2015, i Kolegjeve te Bashkuara te Gjykates se Larte, paragrafi nr.31. Available at: https://www.gjykataelarte.gov.al/web/Kolegji_Penal_10678_1.php (Accesed: 10 February 2022).

[2] Vendimi Unifikues nr. 1, dt. 12.03.2002 i Kolegjeve te Bashkuara te Gjykates se Larte. Available at: https://www.gjykataelarte.gov.al/web/Kolegji_Penal_10678_1.php (Accesed: 10 February 2022).

smuggling, where one of the arguments is related to the fact that it is forbidden for the same fact to attribute more than one violation of the criminal norm.

Even in the legislation of some countries and foreign jurisprudence, the same legal technique is used as it is used in the provision that provides for the abuse of the duty according to the Albanian legislation.

Although until now the United Colleges of the Supreme Court have not analyzed the criminal offense of abuse of duty in relation to the criminal offense of violating the rules at work, what we can say is that they cannot compete and the priority in implementation will be always the criminal offense of violating the rules at work.

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