



Research Article

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The notion of state employee and person in charge of a public service in criminal offenses against state activity according to Albanian and Italian criminal legislation

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Abstract

This manuscript analyzes the notion of active subjects, public official and the person charged with public service, in criminal offenses against state activity, according to the Albanian penal code and the Italian penal code. Criminal offenses against state activity play an important role in protecting the good functioning of state activity from abuses that may come from active entities during the exercise of functional state duties. The study emphasizes the importance of determining the active subject as an essential element to determine criminal responsibility. The comparison with the Italian penal code serves to bring differences and similarities in the way both penal systems conceive the active subject. The criteria for the identification of subjects active in criminal offenses are the subject of legal determinations, as well as of criminal courts. This paper aims to contribute to the academic and professional sphere on the importance of studying active subjects in the context of criminal law. Understanding the notion of active entities in criminal law is very important, and plays a special role in understanding which entities are criminally responsible for crimes against state activity, while exercising public functions or not.

Keywords: State employee, public official, public service.

1. Introduction

The Republic of Zogu, with the decree of June 3, 1927, adopted the Albanian Criminal Code and the law "on the application of the Criminal Code". Both acts entered into force on January 1, 1929. The Albanian Criminal Code replaced the Turkish Criminal Code of 1858. With the adoption of the Criminal Code, the Albanian state had its own criminal law as the main source of criminal law. This Criminal Code is built

according to the model of the criminal codes of the European countries, specifically having as the main model the Italian Criminal Code of 1889 (Elezi, 2010). Penal Code of 1928,¹ is divided into Books, Title, and Chapters. The second book provides "*Crimes against public administration*", while the twelfth Chapter defines "Common provisions for the above chapters". The novelty of this criminal code lies in the fact that it has standardized the notion of public official or, in other words, the notion of state servant, in its article 236, which provides that: "*For the effects of the criminal law, State servants are considered:*

- *All those who are charged with public functions, whether temporary, with salary or not, in the service of the State, Prefectures, Sub-prefectures, Provinces, Municipalities, and communities accepted by the State, or of an institute established by law under the care of the State or, under the care of a Prefecture, or Sub-prefecture, Province, a Municipality, a municipality or a community as above;*
- *Notaries;*
- *Agents of the public force and summoners of the courts;*
- *For those effects, they are the same as state officials and religious people, when they exercise public functions such as arbitrators, experts, translators, witnesses, as long as the function for which they were called continuers";*

The aforementioned provision can be found in article 207 of the Italian penal code of 1889,² which is referred to as the penal code of Zanardelli. Article 207 of the criminal code provides for the figure of the public official and not the person charged with a public service. The notion of State Servant according to Article 236 of the Zog penal code and the notion of Public Official according to Article 207 of the Zanardelli penal code is the same, as we have pointed out above, because the Albanian Penal Code was drafted according to the model of the Italian Zanardelli penal code. According to the provisions of Article 236 of the Albanian Criminal Code and Article 207 of the Italian Criminal Code, the active subjects of criminal offenses "Against the public administration" are all those subjects who qualify as State Servants or Public Officials. The provision of Article 236 of the Criminal Code clearly defines that State Servants are considered all those subjects who are charged with a public function, permanent or temporary, with salary or not, exercising their duties in one of the institutions provided for in this article. This provision does not provide for the figure of the active subject of "Person charged with a public service", but from the content of the provision it is noted that "Notaries" or "Experts", are persons who exercise a public service, even though they are considered as civil servants for the effect of the criminal code, they exercise a public service activity (Papajorgji, Roshi, 2023). This Criminal Code does not divide the active subjects into "State Servants" and "Persons

¹ Official notebook no. 1, dated January 1, 1928. Approved by law dated May 28, 1927.

² For the purposes of the penal law, the following are considered public officials: 1. those who hold public functions, even temporary, salaried or unpaid, at the service of the State, the Provinces or the Municipalities, or of an institution subject by law to the protection of the State, a Province or a Municipality; 2nd the notaries; 3. the police officers and the ushers responsible for judicial order. For the same purposes, jurors, arbitrators, experts, interpreters and witnesses are equated to public officials during the time in which they are called to exercise their functions.

exercising a public service”, as the current Criminal Code in force, approved by law no. 7895, dated 01.27.1995, which in its second section provides for “Criminal offenses against state activity committed by state employees or in public service”. Unlike the penal code of 1928, which defined the active subject of the criminal offense as “State Servant”, the current penal code in force in the Republic of Albania does not define “State Employee” and “Person charged with a public service”. With the definition of these active subjects, the Doctrine was adopted considering that:

The notion of state employee for the purpose of criminal liability is those persons who have been charged with state duties in the legislative, administrative and judicial fields. The notion of an employee charged with a public service, for the effect of the criminal law, are persons charged with any public service permanently or temporarily. People who exercise a public service are those who exercise a profession such as a medical doctor, dentist, pharmacist or other professions, such as lawyers, notaries, teachers, etc. I emphasize that a legislative intervention is necessary in the Criminal Code in force, giving an exhaustive definition to the notion of a civil servant and a person charged with a public service, in order to avoid abuses that can be committed through a widened or narrowed interpretation of the notions in question. charging or not with criminal liability the subjects who do or do not share the category of State Employee or person charged with a public service (Elezi, 2007).

Penal Code of 1952, is a complete code, divided into general and special parts. It entered into force on 01.09.1952. As a model for drafting the criminal code, the criminal code of the USSR of 1922 and 1926, as well as the draft code of Ukraine, was taken (Elezi, 2010). The notion of the active subject of criminal offenses is provided for in the fifth part, which also includes chapter eight, which provides for “Crimes in the exercise of duty”, article 206.³ The criminal code defines the meaning of the official person by providing that: “An official person is any person appointed or elected to a permanent or temporary position in an institute, state or social enterprise. Those of social organizations who, due to the duties assigned to them, exercise economic, administrative, professional activities or other social duties are equal to the official persons. The provision in the first paragraph qualifies as an official person any person who is appointed or elected to a position, excluding from the category of official person any person who is not appointed or elected in the exercise of his duty. The second condition lies in the fact that the duty must be exercised in a state or social institution or enterprise. In any case where an individual or person cumulatively fulfills the criteria defined by the provision, then he is considered an official person for the purposes of the criminal law. Regarding the second paragraph of article 206 of the criminal code, which includes in the category of official persons or of social organizations who exercise economic, administrative, professional activities or other social duties, with the condition that these duties must be assigned by a state authority. The provision does not provide in its definition on the official person another category like that of the person charged with a public service, such an absence does not exclude from criminal responsibility the persons who exercise

³ The Criminal Code of the People’s Republic of Albania entered into force on September 1, 1952.

a public service since every person who exercises a public service is qualified as an official person according to the law of the time.

Penal Code of 1977, does not provide in any of its provisions, the notion of an official person, or a state employee as well as a person charged with a public service. The current Penal Code of 1995, entered into force on June 1, 1995⁴ and, with some changes and modifications made in the following years, is part of the legal system created after the fall of the communist regime in the late 1990s. In summary, the criminal law before the fall of the communist regime was based on the politics and ideology of the working class, and was itself an instrument of persecution of the political opponent and strengthening of the ruling party, with consequent abuses aimed at realizing these objectives. In contrast to the past, the Albanian penal code of 1995 defines a penal law suitable for a democratic system. In July 1995, Albania became a member of the Council of Europe and, therefore, ratified the European Convention on Human Rights. The changes that the criminal code underwent were radical both in the formulation of the provisions and in the legal terminology, where for the first time it is foreseen, in addition to the state employee, the category of the person charged with a public service as active subjects of criminal offenses against state activity is included. On the other hand, the Criminal Code did not provide a definition of the state employee and the person charged with a public service.

2. Active subjects under the Italian penal code

2.1 The notion of public official

Criminal offenses against the public administration in the Italian criminal system require a certain qualification from the active subject. The qualifications to which the law gives importance are those of a public official and the person charged with a public service. The 1990 reform in the criminal code brought an innovation in redefining the qualification of the public official and the person charged with a public service (Vinciguerra, 2008). Articles 17 and 18 of Law. no. 86/90 sanctifies the objective functional concept of the public official and the person charged with a public service, which makes the qualification of one or the other depend not so much on the relationship of dependence between the individual and a public body, but on the character of the activity performed, taken into account at the time of its exercise. So, the existence or not of a working relationship, permanent or temporary, between the individual and a public body is irrelevant, what matters is only that the individual in question performs, even if simply *de facto*, a public function or a public service. Before the reform (Pagliaro, 1995), in the interpretation of articles 357 and 358⁵ of the Penal Code there was an oscillation between the “subjective” concept and

⁴ The Criminal Code, approved by law no. 7895, dated 27.01.1995, entered into force on June 1, 1995.

⁵ For the purposes of criminal law, public officials are:

1° employees of the state or of another public body who exercise, permanently or temporarily, a public legislative, administrative or judicial function;

2° any other person who exercises, permanently or temporarily, free of charge or with pay, volun-

the “objective” concept of the public official and the person entrusted with a public service. According to the first, the determining factors of the public qualification were the public character of the institution and the nature of the function attributed to the individual based on the employment relationship, therefore, it was automatically concluded that the possession of a special official qualification includes the quality of a public official or a person charged with a public service. However, according to the objective conception, the nature of the employment relationship is not decisive, but the objective circumstance of exercising a public function or a public service, regardless of the existence of the employment relationship with a public body. Article 357 of the Criminal Code,⁶ defines that public officials are those who exercise a public legislative, judicial or administrative function. From the comparison with the previous legislation, it appears that the new one has eliminated any reference to the type of employment or remuneration relationship, between the state or another public body and the individual (Antolisei, 1997). What matters is the objective exercise of the function. Regarding the legislative public function, it can be said that it has to do with the activity aimed at producing acts that have the force and value of laws and therefore refers not only to national parliamentarians, but also to regional parliamentarians and provincial councilors of the autonomous provinces of Trento and Bolzano, endowed with legislative power. The legislative function also includes the functions performed by the members of the council of ministers during the issuance of legislative decrees and emergency decrees. The public judicial function, on the other hand, includes both the judicial function in the strict sense and the prosecution function, but also includes the subjects called to cooperate with the prosecutor, i.e., experts, consultants and translators. In defining the characteristics of the public administration function, the second paragraph specifies that this function, regulated by the rules of public law and authoritative acts, is characterized by the formation and manifestation of the will of the public administration or by its performance through authoritative and certifying powers. The determining criteria are alternative, which means that the presence of only one of the aforementioned criteria is sufficient to give the nature of a public administrative function. The external determination of the administrative function in relation to activities without public importance is traced through the use of a formal criterion which refers to the nature of the discipline and which is tarily or by obligation, a public, legislative, administrative or judicial function.

Art. 358. *Notion of the person in charge of a public service.*

For the purposes of criminal law, they are people entrusted with a public service

1° employees of the State or of another public body, who provide, permanently or temporarily, a public service;

2° any other person who provides, permanently or temporarily, free of charge or for remuneration, voluntarily or by obligation, a public service.

⁶ Art. 358 CC. (new text) – Concept of the person in charge of a public service.

For the purposes of criminal law, those who, in any capacity, provide a public service are in charge of a public service. A public service must be understood as an activity regulated in the same forms as a public function, but characterized by the lack of the powers typical of the latter, and with the exclusion of the performance of simple orderly tasks and the provision of merely material work.

divided into two sub-criteria, in the sense that the administrative function which is regulated by the rules of public law (the first sub-criterion) and by authoritative acts (the second sub-criterion) is defined as public. The internal boundary between public function and public service, i.e., public administrative function, is defined as an activity characterized by the formation and manifestation of the will of the public administration or as a further criterion, as an activity characterized by the performance of authoritative powers or certification authorizations (Fiandaca and Musco, 2002).

2.2 The notion of a person charged with a public service

The definition of the person charged with a public service according to the article. 18 of Law no. 86/1990, which amended Article 358 of the Criminal Code, highlights the objective functional profile, eliminating, unlike the previous formula, any reference to the type of relationship that exists between the state or another public body and the person providing a public service, in fact, emphasizing objective performance data (Fiandaca and Musco, 2002). Article 358 of the Criminal Code does not specify whether it is necessary for him to form or express the will of the Public Administration, since the law is limited to his obligation to perform an activity characterized by the lack of typical public function powers, without saying whether only authoritative or certifying powers or even the powers to form or express the public will should be missing. However, it is believed that a public service is an activity regulated by the rules of public law and/or authoritative acts and does not mean either the manifestation of the will of the Public Administration, nor the exercise of authoritative powers, nor certification authorizations, nor the performance of duties in law enforcement, nor the provision of purely material work (Vinciguerra, 2008).

3. Conclusion

The research shows that in the Albanian penal system starting from 1928 to 1995, the year in which the current penal code was adopted, the penal code has undergone many essential changes in the general part and in the special part, especially the provisions on crimes against state authority committed by state employees. It is worth emphasizing the fact that the penal code of 1928, inspired by the Italian penal code of 1889, provided for the notion of a public official, otherwise known as a state servant. A legal definition of a state servant comes for the first time in the Albanian criminal system. Also, the penal code of 1952 provides a definition of the Official Person, which is somewhat different from the definition given by the penal code of 1928. The changes that the penal code of 1952 underwent in 1977 brought about the repeal of the provision which provided for the notion of the official person. The change of the system at the end of the 1990s, from the Communist Regime to the Parliamentary Republic, brought, among other things, the abolition of the penal code with the adoption of the penal code of 1995. The changes in the penal code are essential, in the general part and in the special part, but the legislator of that time did

not provide for the notion of public official in any provision. The only change from the previous criminal codes, apart from the state employee, is the appearance for the first time of the terminology of the person in charge of a public service, in the part of criminal offenses against state activity.

The definition of the notions of the state employee and the person charged with a public service, is given by the penal doctrine which refers to the definition of the public official and the person charged with a public service according to the definition of the Italian penal code. In these conditions, an emergency intervention in the criminal code is necessary, for the definition of the notions of active subjects of criminal offenses against state activity committed by state employees and persons charged with a public service. In order to avoid any abuse of the notion of the official person as well as the person charged with a public service, we must accept the definition given by the Italian penal code as long as there is no such definition in the Albanian penal code and as long as the penal doctrine refers to the notion according to the Italian penal code.

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