Rivista Trimestrale di SCIENZA dell'AMMINISTRAZIONE
Studi di teoria e ricerca sociale
3/2023

Abuse of Office and the Criminal Control Over Administrative Action After the Reform of 2020

Dario Franzin
Università degli Studi di Roma Tre

Abstract

This article delves into the recent reform concerning abuse of office (art. 323 c.p.) and its implications on defensive bureaucracy. The study examines the historical context of this crime, its legislative reforms, and the significant changes introduced in the 2020 reform, emphasizing the shift towards focusing on specific rules of conduct provided by law rather than regulations. The article also discusses the potential consequences and debates surrounding this reform, including concerns about the lack of protection against the misuse of public power and its compatibility with international anti-bribery regulations.

Keywords: criminal law, criminal code, crimes against public administration, legal drafting, abuse of office, administrative law

Riassunto. *L'abuso d'ufficio ed il sindacato penale sull'azione amministrativa dopo la riforma del 2020*

L' articolo si concentra sulla recente riforma riguardante l'abuso d'ufficio (art. 323 c.p.) e le sue implicazioni sulla burocrazia difensiva. Lo studio esamina il contesto storico di questo reato, le riforme intervenute negli anni ed i significativi cambiamenti introdotti nella riforma del 2020, sottolineando i problemi relativi alla scelta di applicare la norma solo in caso di violazione di regole di condotta specifiche previste dalla legge anziché da regolamenti e fonti subordinate. L'articolo discute anche le potenziali conseguenze e le discussioni che circondano questa riforma, comprese le preoccupazioni per la mancanza di protezione contro un uso improprio del potere pubblico e la sua compatibilità con le normative internazionali contro la corruzione.

Parole chiave: diritto penale, codice penale, reati contro la pubblica amministrazione, redazione legale, abuso d'ufficio, diritto amministrativo

10.32049/RTSA.2023.3.04

1. Introduction

In recent years, abuse of office has come to the forefront of criminal law as a means of controlling the activities of the Public Administration, creating several application problems. In the last thirty years, there have been numerous reforms, most recently, during the pandemic, the Government has sought to limit the application of the crime. Despite the intentions, the result seems to bring out many perplexities.

2. Looking for a definition of abuse of office: thirty years of reforms

The crime regulated by Art. 323 of the Italian Criminal Code (from now on c.c.) – namely, the abuse of office – has a complex regulatory history. In the last thirty years it has been the subject of several reforms. The main legislative interventions, before 2020, date back to 1990 and 1997 (Manna, 2004).

The text originally drafted in the Italian Criminal Code entitled *Unnamed Abuse of Office* incriminated «the public officer who, abusing the powers inherent to his functions, commits, to cause damage to others or to procure him an advantage, any fact not envisaged as a crime by a particular provision of law».

When drafted in 1930, the structure of the crime was simple, but at the same time extremely comprehensive: the commission, with abuse of the powers inherent in the functions of a public official, of "any fact" for the purpose of causing damage to others or procuring an advantage for them: anticipated and generic protection, specific intent, qualification of illicitness entirely dependent on the abusive nature of the conduct constituted the cornerstones around which the crime was structured, and, moreover, punished with a very mild penalty, because it was designated to tackle very modest facts.

In fact, the abuse of office found itself placed between two normative "giants" that were drafted to check upon the exercise of the control of legality on administrative activity. These were, on the one hand, embezzlement by misappropriation (art. 314 criminal code) and, on the other, private interest in official acts (art. 324 criminal code): two crimes that allowed intense and penetrating forms of control on the activity of the public administration. Particularly the embezzlement might come back on the scene after the 2020 reform, but we will come back on this later.

The first intervention on this provision, with Law No. 86 of 26 April 1990, was inspired by reasons of coordination with the general reform of crimes of public officers against the Public Administration (PA).

In particular, the revision of the crime was intended to fill the "protection gaps" that could derive from the abolition of the conduct of distraction from the crime of

embezzlement and from the abolition of the crime of private interest in official deeds provided for by Art. 324 c.c.

Article 323, in its formulation of 1990, thus incriminated «the public officer or the person in charge of a public service who, in order to procure an unfair economic advantage for himself or others or to bring to others an unfair non-pecuniary advantage - or to cause unjust damage to others, abused his office».

Despite the residual role that this crime was intended to play in the Italian legal system, the Abuse of office began to play a central role in the framework of the crimes of public officers against the PA. Abuse of office became a very useful tool for the judiciary system to control the PA action. The immediate reaction of the public officer has been extreme caution in the decision-making process, exactly the pathologic problem described as defensive bureaucracy (Padovani, 2020, p. 7).

Precisely for this reason, the limits of that formulation emerged quickly: the crime appeared to be unsuitable for selecting conducts that carry significant criminal meaning; either because of the generic nature of the conduct required (abusing the office), or because of the inadequacy of specific intent to select truly harmful facts.

For these reasons, and, therefore, to have focus on the true scope of the law, the legislator intervened again on Art. 323 c.c. with Law No. 234 of 16 July 1997 (Seminara, 1997, p. 1252).

With this reform, it has been added the necessary reference to the violation of laws or regulations or the failure to abstention in the prescribed cases to update the generic conduct of abuse that characterized the old version of the article.

Abuse of office was thus transformed from a conduct-based crime into a crime of event; after this reform, the concrete verification of the damage or the advantage was required, as an event of the crime and not only as the object of a specific intent (which instead became wilful intent). The advantage obtained by the perpetrator was then required to have a patrimonial nature.

3. Post pandemic "revolution": the 2020 reform of Art. 323 c.c.

With the press release, issued immediately after the approval of the D.L. 76/2020 by the Council of Ministers in July 2020, the so-called "Simplification Decree" converted with amendments into Law no. 120 of 11 September 2020, it was clear that there was «an organic intervention aimed at simplifying administrative procedures, eliminating and speeding up bureaucratic procedures, the digitalization of the public administration, support for the green economy and business activity».

The Decree intervened in four main areas: simplifications in the field of public contracts and construction, procedural simplifications and responsibilities, simplification measures for the support and dissemination of digital administration, simplifications in the field of business activities, the environment and green economy (Gatta, 2020). The need to reform the *littera legis* of Art. 323 c.c. is closely linked to the needs related to the COVID-19 pandemic that hit the global context last year.

In the words of the Prime Minister, the recovery of the country could only be facilitated through a relaxation of the responsibilities of public administrators; but there is more, since his declaration sends a clear message for public officers: «no more fear, it is better to unblock».

The Simplification Decree rewrites the criminal liability of the Public Officer, therefore the words «in violation of laws or regulations» are replaced with «violation of specific rules of conduct expressly provided for by law or by acts having the force of law and of which remain no margins of discretion».

Likewise, the legislative change involves only this small aspect of the rule pursuant to Art. 323 c.c., leaving unchanged the profile inherent in the non-observance of abstention in the event of a conflict of interest and the double alternative event of the unfair advantage and the unfair disadvantage that characterize the intentional fraud of public officers in the exercise of their functions or service in the act of abuse of office.

The 2021 reform is based primarily on three regulatory changes:

1) the relevance of the violation of rules contained in regulations has been excluded: the

abuse can in fact be supplemented only by the violation of rules of conduct provided by law or by acts having the force of law, i.e. from primary sources;

2) it was specified that only the non-observance of "specific" and "expressly provided" rules of conduct by the aforementioned primary sources were detected;
3) it was also specified that only rules of conduct "from which there are no margins of discretion" are relevant.

In the new formulation of Art. 323 of the Italian Criminal Code, the violation of regulations of a regulatory nature disappears but, above all, it is envisaged that the violation of primary source regulations must concern specific rules of conduct expressly provided for by law or by acts having the force of law and from which no margins for discretion remain.

Now, it is evident that the *intentio legis* was precisely intended to expel the discretionary administrative functions in their varied typology from the area of criminal relevance connected to the abuse of office. In the end, the space for a criminal control on the public functional exercise would be practically cancelled.

Similar aims of reducing the criminal response and its impact on bureaucratic action had inspired the above-mentioned reform intervention of 1997 as well: the aim was to anchor the typical conduct to the violation of laws or regulations, with the aim of binding unlawfulness to the presence of a formal illegitimacy of the deed or provision.

4. Pros and cons of the reshaped abuse of office

The exclusion of regulations appears unreasonable with respect to the commission of the offense defined in Article 323 of the Criminal Code. Specifically, within the regulations, we find conduct rules related to the exercise of Public Administration functions and services, which are at the core of "good performance" and "impartiality" as stated by Article 97 of the Constitution.

The issue of excluding regulations can be problematic practically. The heart of abuse of office involves violating specific conduct rules typically found in regulations rather than

general laws. This reform could clash with Article 97 of the Constitution due to reducing criminal liability rooted in the breach of duties of impartiality and good performance outlined in the Constitution.

Public officials cannot misuse their legally granted power to exhibit favoritism, unfair advantage or disadvantage, harassment, or discrimination in performing their duties.

Recent Supreme Court jurisprudence seems to expand the definition of conduct sources to include regulations, for integrating the offense, when violated, with a technical specification of an already fully defined behavioral precept[1].

In contrast, the text, which only penalizes violations devoid of any discretion, appears less serious and more applicable. The legislator's intention seems to align with jurisprudence and doctrine, aiming to impose criminal liability on specific, binding provisions excluding the violation of the rules of law which confer on the public administration the exercise of discretionary power"[2].

While there's room for improvement in the legislative technique, the criterion of "specific binding provisions" seems reasonable and balanced. Such provisions provide clarity and reference points, while being exempt from administrative discretion's balancing of interests.

Acts requiring technical discretion pose a unique scenario due to the role of specific knowledge. Jurisprudence currently adheres to strict interpretation, holding that violations of technical discretion rules cannot exclude norms with technical discretion.

Despite reservations about the descriptive technique in the new Article 323, the typification of failure to comply with conduct rules allows continuity with previous doctrine and jurisprudence. The reform is seen as a partial abolition crimini, applicable only to pre-reform violations of regulatory or general rules lacking specific conduct provisions or leaving discretionary margins.

1 Cass. pen., sec. VI n. 33240/2021.

2 Cass. Sec. VI, 23.02.2022, no. 13139; in the same sense, with reference to another regulatory area, Cass. Sec. VI, 8.03.2022, no. 13148; Cass. 11.11.2021, no. 1606.

5. The current relevance of the s.c. Excess of power

The limitation of criminal relevance to only those rules that do not imply the exercise of discretionary power aims to rule out the criminal relevance of actions that fit the 'excess of power', as defined by administrative law (see article 21-octies of Law n. 241/1990). This term describes a form of misuse that occurs when discretionary measures are carried out for a purpose different from the one for which the power was granted (Padovani, 2020).

This is the primary orientation accepted by the Italian Supreme Court, which, in judgment number 155 of 2011, affirmed the existence of a violation of the law not only when the conduct of a public official contradicts the rules governing the exercise of power but also when it is directed solely towards pursuing an interest that clashes with the purpose for which the power was granted. This results in the misuse of power, constituting a violation of the law as it is not exercised according to the new normative framework that allows such attribution.

The legislator appears to have achieved their objective since today, the concept of excess of power no longer seems to have criminal relevance. However, whether such a radical choice is reasonable remains debatable, as the most dangerous abuses are often hidden within the intricacies of discretion.

Firstly, it is not reasonable to assume that a judicial review of administrative discretion would automatically lead to a corresponding judicial review of administrative merit, a review that is typically prevented even by the administrative judge. The criminal judge had to ascertain whether there was genuine administrative merit, which should be beyond doubt, or whether there was a private motive behind it. Additionally, some argue that real political discretion, which concerns the merit of directional choices, is unquestionable, while administrative and technical discretion, often bound by established criteria and parameters, can be identified through specific rules found in laws or regulations (Padovani, 2020).

6. The "comeback" of the embezzlement through diversion

As already pointed out, art. 323, in the form of abuse for patrimonial purposes to the advantage of others, was intended to 'replace', the embezzlement by diversion.

However, the abrogate scope of "misappropriation" would have been limited only to hypotheses concerning the arbitrary use of a public asset for a purpose other than that established, but still public; which could not be properly understood as "appropriation", but, previously, had often been rigorously brought within the scope of the incrimination, raising the controversy from which the reform then arose.

The application of the crime in the Court of law, however, oriented itself differently, given that with the suppressive reform of embezzlement by misappropriation an abuse of office characterized by the patrimonial purpose of unfair advantage in favour of third parties was introduced. This new provision seemed, in fact, to correspond punctually to the offense already included in art. 314 cp.

The new crime was thus considered to be the legitimate heir of a part of the application field of embezzlement by misappropriation. But it appears evident that, once that art. 323 c.c. has disappeared, it will now be necessary to consider the "old" embezzlement as an option to fight that kind of abuse characterized by the discretionary handling of money or the discretionary allocation of public resources to third parties.

Thus, the abuse of assets, canceled by the legislator in 1990 will come back on stage stronger than before.

Administrators and politicians dealing with public money will no longer have their sleep disturbed by the nightmare of imprisonment from one to four years threatened by art. 323 c.c., but by that of imprisonment from four to ten years, imposed by art. 314 and following. (Padovani, 2020, p. 8).

Probably bureaucracy will be even more defensive knowing these risks.

7. Concluding remarks. What is the future of the abuse of the office?

The legislator of 2020 did not pay sufficient attention to grasp the empirical-criminological essence of the abuse of office. The typicality of the new case of Art. 323 c.c. has been dealt with through a more radical elimination process compared to the 1997 mini-reform scheme. This choice sets the stage for a potential "clash" of interpretation with the Supreme Court, which does not seem to accept such a drastic reduction of crime. However, a valuable opportunity to reshape the offense has been missed along the way. The reframing of the norm should have aimed at freeing it from the requirement of law violation and shifting its focus towards the pure misuse of power, seen as a significant distortion of the public function, with considerations of its aims and objectives. This would create a more practical and less formal tool to address actual abuses (Pisani, 2021).

Last but not least, on June 15, 2023, the Italian Council of Ministers approved a draft law initiated by the Minister of Justice, containing a proposal to repeal Article 323 of the Penal Code. Repeal implies that if the text becomes law with the approval of both branches of Parliament, the behaviors described in the norm will no longer carry criminal significance.

The decision, which is radical in nature, to eliminate the criminal relevance of behaviors related to Article 323 appears to mark the culmination of the process of reducing the scope of what is deemed criminally relevant.

What are the consequences of this decision? Early commentators are divided into two different positions. On the one hand, proponents of the repeal of Abuse of Office argue that the crime only negatively impacts bureaucracy, as mentioned earlier (the so-called abuse of signature), and considering the high number of trials initiated each year, only a few lead to convictions (Madia, 2023).

On the other hand, other scholars contend that the new law might result in a problematic lack of protection against specific misuse of public power (such as competition for selecting university professors). They also argue that the new law might contradict the European legal framework on anti-bribery regulation. In fact, the official proposal for a European directive on the fight against corruption, presented on May 3, obliges Member States, in Article 11, to

consider abuse of office as a criminal offense. It is defined as follows: "the performance of or failure to perform an act, in violation of laws, by a public official in the exercise of their functions, for the purpose of obtaining an undue advantage for that official or a third party." The Directive proposal essentially reproduces a provision of the UN Convention against Corruption (Article 19), ratified by Italy and 188 other nations (Gatta, 2023).

This is another episode in the long "saga" of Abuse of Office in Italian Criminal Law; we will have to wait to see whether this will be the final one.

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