



Is the teacher is a person with a public function? On the margin of a legislative error

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Abstract

Aim: The study presents the controversial legislative amendment that has made it controversial from 1 January 2024 whether teachers can be considered as public servants.

Methodology: The study uses logical, taxonomic and historical analysis.

Findings: In the light of this, it is difficult to identify which persons fall into this category. It is difficult to determine which persons are considered to be performing a public duty. However, teachers, as their work as lecturers and educators is a fundamental national value, should be included, regardless of whether this is explicitly stated in other legislation.

Value: The study concludes that the judiciary is justified in considering teachers as performing a public task even if there was a period between 1 January 2024 and 10 May 2024 when the Public Education Act did not explicitly state this.

Keywords: legislation, interpretation, public function, teacher

The legal framework for the category of person entrusted with public functions

The activities of primary and secondary school teachers (as well as kindergarten teachers) have long been considered a public function by the domestic legal

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system. According to Section 3/A (1) of Act CXCV of 2011 on Public Finances, public function is a statutory public or municipal function. The original Article 66(2) of Act CXC of 2011 on National Public Education (hereinafter: Act on Public Education) made this framework provision more concrete in relation to teachers in public education by stating: *'A teacher, as well as a staff member directly assisting in the work of education and teaching, is a person with a public function in relation to the activities of the child and pupil in the context of the educational work of nursery schools, schools and colleges, and the provision of specialised educational services.'* A similar provision was already contained in Article 16 (3) of Act LXXIX of 1993 on Public Education, according to which *'A teacher is a person performing a public function for the purposes of criminal law protection in connection with their activities in the context of educational work in kindergartens, schools and colleges.'*

As far as criminal law provisions are concerned, the explicit legal protection is provided by the offence of violence against a person performing a public function (Article 311 of Act C of 2012 on the Criminal Code – hereinafter: the Criminal Code). Previously, Article 230(f) of Act IV of 1978 on the Criminal Code (hereinafter referred to as the old Criminal Code), as amended by Article 8 of Decree-Law No. 17 of 1985 on the entry into force of Act I of 1985 on Education, as of 1 September 1986, contained a provision that a person who commits violence against a teacher or educator as provided for in Article 229 of the old Criminal Code is liable for violence against a person entrusted with public functions.

Since the aim of this short study is not to provide a detailed description of the concept of a person entrusted with public functions and the more detailed legal-historical aspects, current legislation, judicial practice and criminological aspects of the criminal offence of violence against a person entrusted with public functions (for the latter, see Nagy, 2011), about the offence under Section 311 of the Criminal Code, it is only reasonable to note that the existing criminal law also contains a referring/referencing disposition (Nagy, 2010), in which the criminal law protection of a person entrusted with a public function is defined by referring back to the offence of violence against an functionary (Section 310 of the Criminal Code), as follows: *'Anyone who commits the offence defined therein against a person entrusted with a public function shall be punished under Section 310.'* In addition, a provision of relevance to criminal law is the concept of a person entrusted with a public function, which is nowadays formulated in the Final Part of the Criminal Code, among the interpretative provisions, and which is nowadays difficult to review [Section 459 (1) 12. (i)], according to which a person performing public functions is *'in the case*

defined in the Act on National Public Education, a teacher and an employee directly assisting in the work of education and teaching, in the case defined in the Act on Vocational Training, a teacher; and in the case defined in the Act on National Higher Education, a lecturer; teacher and scientific researcher of a higher education institution.'

The problem

According to the preamble of the Act LII of 2023 on Teachers' New Career Paths (hereinafter referred to as the Careers Act), *'The aim of a teacher is to enable the mental and intellectual development of the children they educate and teach, and to help children and students to become committed and valuable members of the Hungarian nation through their educational work. In order to achieve these goals, the teacher shall endeavour to perform their duties in accordance with general ethical standards and in the interests of the rights and interests of the child and pupil.'* Thus, on the basis of this declaration, the legislator has clearly expressed the public functions of teachers. Notwithstanding this, Section 171 (5) (9) of the Careers Act repealed the provisions of the Act from 1 January 2024. Article 66 of the Act on Public Education, together with the provision already cited, according to which a teacher, in the performance of their duties, is a person entrusted with a public function. According to Article 28 of the Fundamental Law – in addition to the Preamble already cited – the primary point of orientation for the application of the law is the justification of the proposal for the creation or amendment of the given legislation. However, the Minister's explanatory memorandum to this repealing provision of the Careers Act merely stated that it was *'Repeals to ensure regulatory consistency'*. On the basis of the primary grammatical interpretation, case law has concluded that the intention of the legislator was that teachers should no longer be regarded as persons with public functions in the criminal law sense. All this seemed to be deducible from the decision of the Curia BJE (Criminal Law Unit) 5/2018, which is still applicable, according to the operative part of which *'In cases where the background legislation on persons listed in Section 459 (1) 12 of Article 459 (1) of Act C of 2012 on the Criminal Code (hereinafter: Criminal Code) provides for the public nature of the criminal defence only, the person entrusted with a public function cannot be the perpetrator of the offence under the Criminal Code. The offence of assault committed by a person entrusted with a public function in the course of the performance of their duties within the meaning of Section 302 of the Criminal Code and the offence of assault committed by*

a person entrusted with a public function within the meaning of Section 302 of the Criminal Code shall not be a criminal offence. Therefore, if the teacher is not subject to a higher degree of criminal liability, then, according to this position, they are not entitled to a higher degree of criminal defence.

Legislative interpretations and legislative response

According to reports in the press, the official interpretation of the courts was that teachers were no longer considered to be persons entrusted with public functions as a result of the amendment (URL1). According to the court letter cited in the article, the provision of the Criminal Code has lost its legal basis, so that teachers and other school staff *'cannot be considered to be persons entrusted with public functions'* for criminal law purposes (URL1).

However, the legislature noticed the problem and amended Section 36 of Act XXV of 2024 on the Amendment of Acts Supporting the Performance of Tasks in the Internal Affairs Sector and Section 66 (1) of the Act on Public Education on 11 May 2024 according to which *'A teacher and a staff member directly assisting in educational work is a person entrusted with public functions in relation to their activities in connection with children and pupils in the context of nursery education, school and college education and teaching work, and the provision of specialised educational services.'*

The problem of grammatical interpretation is therefore solved. However, there were also conflicting opinions in the press about the back modification. In the view of the Prosecutor General's Office, *'the status of teachers as persons entrusted with public functions has been settled'*, which formulation implies that the Prosecution shared the view of the courts that teachers could not be reassured that they were persons entrusted with public functions in the period between 1 January and 10 May 2024 (URL2). On the contrary, the Ministry of the Interior argued in a statement that *'contrary to what has been reported in the press, teachers and those employed in jobs directly supporting the work of educators and teachers are still persons entrusted with public functions. The Criminal Code classifies them as persons entrusted with a public function for the purposes of assessing offences committed against them, where it can be established that they are connected with the performance of a public function. The temporary deletion of a paragraph from the Act on Public Education from 1 January 2024 does not mean that teachers, as persons entrusted with these functions, have lost their status as persons entrusted with public functions. The regulatory coherence between the Act on Public Education and the Criminal Code continued to*

exist after 1 January 2024, and teachers continued to be considered as persons entrusted with public functions between 1 January 2024 and 10 May 2024. In order to prevent possible difficulties in the application of the law and to ensure the continuous and uniform application of the law, the legislator amended the Act on Public Education with effect from 11 May 2024 so that the provision on the status of teachers and persons supporting the teaching and learning profession as persons entrusted with public functions is again included verbatim in the rules of the Act on Public Education.’ (URL3).

Finally, it is necessary to refer here to the Ministerial Explanatory Memorandum to Section 36 of Act XXV of 2024 on the Amendment of Acts Supporting the Performance of Tasks in the Internal Affairs Sector, which states that ‘A person entrusted with a public function under Section 459 (1) 12 (i) of Act C of 2012 on the Criminal Code (hereinafter: the Criminal Code) is a teacher and an employee directly supporting the work of education and teaching in the case defined in the Act on National Public Education. Prior to 1 January 2024, Act CXC of 2011 on National Public Education (hereinafter: Nkt.) provided – in Article 66 (2) – for the sectoral designation of the above-mentioned provision of the Criminal Code by means of a flexible reference. However, Act LII of 2023 on Teachers’ New Career Paths repealed the relevant provision of the Nkt. with effect from 1 January 2024, while at the same time maintaining in force Section 62(1) of the Nkt., which contains the duties of teachers. The essence of the regulation prior to 1 January 2024 was only to express that the persons concerned are entitled to increased protection and increased liability for certain facts in connection with their activities related to children and pupils. With the above amendment, the legislator’s aim was simply to ensure that the quality of the person entrusted with a public function – and the specific criminal law protection and increased liability associated with it – could be clearly established in relation to the public function performed by each teacher. Thus, the Nkt. explicitly includes the duties of teachers for this purpose [Article 62 (1)], which they necessarily perform by carrying out their activities in connection with children and pupils. Along the same line of reasoning, employees who directly support the work of educators and teachers [Art. 27 (2), (5) of the Nkt. This interpretation is further strengthened by the designation of Chapter 44 of the Nkt. as »Public functions of public education«, according to which teachers and staff directly assisting in the work of public education are clearly performing a public function, i.e. they are persons entrusted with a public function. On the basis of the above – also taking into account the fact that the Criminal Code does not rigidly refer to Article 66 of the Nkt. and leaves the filling of the concept with content to the sectoral law – teachers and employees directly assisting in the work of teaching and education

will continue to be considered as persons entrusted with public functions after 1 January 2024, and the regulatory coherence between the Nkt. and the Criminal Code will continue to exist. However, based on the feedback from the legal practitioners, the regulatory solution chosen by the legislator – since it does not refer expressly to the Criminal Code – may create uncertainty in the application of the law. Therefore, in order to prevent possible difficulties in the application of the law, the Proposal reiterates the previous provision expressis verbis in order to ensure continuity and consistency in the jurisprudence.'

Questions and possible answers

The key question of the present study is therefore to decide whether teachers could be considered to be performing a public function in the time period indicated, and to draw the criminal law consequences of this depending on whether the answer is in the affirmative or negative.

In line with the position of the Ministry of the Interior, the above-quoted Ministerial Explanatory Memorandum makes it clear, with detailed justification, that teachers are to be considered as persons entrusted with public functions for the period between 1 January and 10 May 2024. This reasoning is therefore certainly orienting; however, the Explanatory Memorandum is not part of the legal text, despite the quoted Article 28 of the Fundamental Law. If, on the other hand, the legislator deletes a definition in the sectoral legislation, which had hitherto been explicitly stated, to the effect that a teacher is a person entrusted with a public function in the performance of their duties, the position of the courts and the public prosecutor's office, which takes a contrary view, cannot be considered to be open to challenge from all points of view. On the basis of the primary grammatical interpretation, which was based on the repeatedly cited provision of the Criminal Code in the relevant definition of a person entrusted with a public function, the amendment of the Act of 1 January 2024 on National Public Education has indeed rendered it void, so the solution that would automatically maintain the previous – and more disadvantageous for the perpetrator – interpretation, ignoring the amendment, seems to go against the principle of legality (*nullum crimen sine lege certa*, Article 1 of the Criminal Code). All the more so since, as we have seen, the legislator has not provided any substantive justification for this amendment. If, therefore, the courts interpret the Criminal Code on this basis, on a strictly textualist basis, such offences committed against teachers in the period from January to May cannot be considered as violence against a person entrusted with a public function.

It is important to underline, however, that the concept of persons entrusted with public functions in criminal law is very complex and, as we have seen, not without casuistry, and while in some cases the sectoral background norm explicitly states that such persons are persons entrusted with public functions, in other cases this is not the case.

Thus, it does not refer explicitly to the capacity of a person entrusted with a public function, for example:

- Act CXL of 2021 on national defence and the Hungarian Defence Forces,
- Act CLXV of 2011 on Civil Guard and the Rules of Civil Guard Activity.

It does not expressly state that defenders and legal representatives are persons entrusted with public functions, but it is stipulated in Article 144 (3) of Act LXXVII of 2017 on the activities of lawyers that *'The Bar shall perform public functions related to the professional management and representation of the interests of those entitled to practice law, the security of legal transactions related to the activities of lawyers, and the public functions specified in its statutes.'*

Finally, a more common solution is for the background norm to state *expressis verbis* that the victims covered by the Act are persons entrusted with a public function for the purposes of criminal law. For instance:

- according to Article 55 of Act LV of 1996 on the protection, management and hunting of wildlife *'A professional hunter employed under this Act and performing his duties shall be considered a person entrusted with public functions for the purposes of the Act on Criminal Code'*;
- pursuant to Paragraph (5) of Article 10/A of Act XXXIV of 1994 on the Police *'A school guard is a person entrusted with public functions for the purposes of the Criminal Code Act, and the right to take measures and use coercive means under this Act is granted exclusively in the course of performing the duties specified in the guard's instructions on the territory of the educational institution'*;
- according to § 9/E of the Act I of 1988 on Road Traffic *'The road inspector and the operator inspector according to Article 20/A shall be considered as persons entrusted with public functions for the purposes of the Criminal Code Act'*;
- pursuant to Article 35 (3) of Act CCIV of 2011 on National Higher Education *'A person employed as a lecturer or teacher, an academic researcher in connection with their activities related to students in the course of their educational duties is a person entrusted with public functions for the purposes of the Criminal Code Act'*;

- pursuant to Section 47 (2) of Act LXXX of 2019 on Vocational Education and Training, *‘An instructor shall be considered a person entrusted with public functions in relation to their activities in connection with the students or persons participating in the training in the course of the provision of vocational education and training.’*

From a legal certainty point of view, it would seem that it is in any case more appropriate for the sectoral standard to specify the nature of the person entrusted with the public function. However, as we have seen, the protection under the Criminal Code cannot necessarily be provided only in this way. On the basis of the above, I consider my own opinion to be summarised below.

The conclusion that can be drawn from the Ministerial Explanatory Memorandum, which retroactively modifies the place of the Act on Public Education, and from the position of the Ministry of the Interior, is based on a legal interpretation. Because the Criminal Code’s statement that *‘in the case specified in the Act on National Public Education’* does not (only) mean that when the Act explicitly, by definition, mentions this. For example, just as the Act on the Police does not state that ‘a police officer is an authoritative person’, yet, pursuant to Section 459 (1) 11 (k) of the Criminal Code and Section 1 (2) (d) and (5) (a) of Act XLIII of 2010 on Central State Administration Bodies and the Status of Members of the Government and State Secretaries, they are nonetheless considered to be undisputedly authoritative persons.

Also on the basis of the principles of *argumentum a minore ad maius* and *ad absurdum* (Geller & Ambrus, 2019), a teacher was considered to be entrusted with a public function between 1 January and 10 May 2024.

This is because, as we have seen, the Criminal Code explicitly defines the ‘teacher in the case provided for by the Vocational Training Act’ as a person entrusted with a public function, in accordance with the provision of the Vocational Training Act. Therefore, if such a teacher is a person entrusted with a public function, it would be contrary to the intention of the legislator not to consider teachers – who, in principle, have recently been promoted to a ‘higher status’ (see salary increases, career paths, etc.) – as such.

Furthermore, if the teacher were not considered to be entrusted with a public function, they would not be entitled to the heightened criminal protection under Section 311 of the Criminal Code. It would also run counter to the perception that denies the teacher’s status as a person entrusted with a public function, and to Act LXXIV of 2020 on certain legislative amendments necessary to eliminate and prevent violence in schools, which includes violence against a person entrusted with a public function in the list of offences under Article 16 of the

Criminal Code that can be committed by persons aged 12 to 14. According to the Ministerial Explanatory Memorandum to § 6 of the Amending Act, *'In order to ensure the criminal liability of persons who do not blatantly observe the rules of social coexistence, especially for the safe work of teachers, employees directly assisting in the work of educators and other professionals assisting in the work of educators, it is necessary to amend the provisions of the Criminal Code concerning the age of criminal liability. The legal policy objective can be achieved by amending the provision in the Criminal Code, Chapter IV, Grounds for excluding or limiting criminal liability, under the subheading »Childhood«. In the case of violence against an authority or a person entrusted with public functions and their supporters, the perpetrators will be punishable from the age of 12 if they have the necessary discernment at the time of the offence to recognise the consequences of the offence.'* If, on the other hand, the teacher was not a person entrusted with a public function, then the 12–14-year-olds would not be able to commit such acts against them either, which is completely contrary to the legal policy objective of the justification and thus also goes against the teleological (legal harmonic) interpretation (Szomora, 2009).

Therefore, it is not from the explicit regulation (or lack thereof at that time) in Article 66 of the Act on Public Education, which was not in force in the first months of 2024, but from a complex interpretation of the Act, that the quality of a teacher as a person entrusted with a public function should be derived. For example, under the interpretative provision of the Act on Public Education, under Section 14a(e), among other things, the provision of boarding facilities is a core public education function. This, combined with Section 62(1)(a) of the Act on Public Education (duties of a teacher), leads me to the unconcerned conclusion that, for example, if a teacher who imposes disciplinary sanctions exercises a sub-aspect of the educational work (sanctioning a student who is misbehaving), they are ultimately, in the absence of an explicit provision, entrusted with a public function.

However, it is to be expected that some courts and prosecutors will continue to take the view that offences committed between 1 January and 10 May 2024 do not constitute violence against a person entrusted with public functions. Several anomalies should be expected in this context. For example, according to Section 2 of the Criminal Code, which provides for the temporal effect, if the prosecution has not brought charges for such an offence committed in 2023 (or earlier) by 10 May 2024, then even if a 'lighter criminal law' was in force during those four months, the possibility of prosecution for violence against a person entrusted with public functions is reopened under the repealed provision of the Act on Public Education. The same could be the case if the offender was convicted in the

first instance during the period in question, for a lesser offence (e.g. assault), but appealed against the decision and the court of appeal will give its decision after 10 May. Another fundamental problem will be the different classification of the acts committed during this period: if the investigating authority has sent the file to the prosecution with a proposal for indictment on suspicion of violence against a person entrusted with public functions, but the prosecution has not charged the offence, but only, for example, assault or coercion, the indictment will have to be amended at the trial stage. This is a problem of legal certainty that absolutely requires a rapid remedy. In my opinion, it could also raise the need to reintroduce the principle of the ‘lightest criminal code’. As Károly Csemegi’s Code (Article 2 of Act V of 1878 of the Hungarian Penal Code on Crimes and Misdemeanours) wisely and presciently stated: *‘If, in the interval between the commission of the offence and the sentencing, laws, practices or rules different from one another have come into force: the least severe of these shall apply.’* (Békés, 2005).

Summary

Legislation responding to our increasingly fast-paced world is, of course, following a similarly accelerated pace. It is therefore not surprising that legislative anomalies can arise on certain issues. However, in the context of the rule of law, and especially in the area of criminal law as an ultima ratio, it is necessary to be as careful as possible to legislate in accordance with the principles of the rule of law, otherwise legal uncertainty and legislative situations that violate the need for predictability may arise, as in the case of the issue discussed in this study. In addition to the use of complex legal interpretation tools, questions can also be raised which would entail the reintroduction of certain provisions of the old legislation which are not covered by our criminal law today but which are worth considering.

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URL1: *Kiszivárgott egy bírósági levél, alapjaiban változhatott meg a pedagógusok helyzete.* <https://index.hu/belfold/2024/05/15/oktatas-pedagogusok-birosag-iskola/>

URL2: *„Ha a Tisza Párt felhatalmazást kap” – Magyar Péter 21 pontba szedte ígéreteit.* https://nepszava.hu/3235505_magyar-peter-igeretek-lista-felhatalmazas

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