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**РАЗГРАНИЧЕНИЕ ПРЕСТУПЛЕНИЯ ЗЛОУПОТРЕБЛЕНИЯ  
ДОЛЖНОСТНЫМ ПОЛОЖЕНИЕМ И ПОЛНОМОЧИЯМИ  
ПРИ ИСПОЛНЕНИИ СЛУЖЕБНЫХ ОБЯЗАННОСТЕЙ  
ОТ ПРЕСТУПЛЕНИЯ ПРЕВЫШЕНИЯ ВЛАСТИ В ДОЛЖНОСТИ  
DISTINGUISHING THE CRIME OF ABUSING POSITION AND POWER  
WHILE PERFORMING OFFICIAL DUTIES FROM THE CRIME  
OF EXCEEDING AUTHORITY IN OFFICE**

**Аннотация:** В статье анализируются правовые различия и сходства между двумя преступлениями, предусмотренными Уголовным кодексом Вьетнама 2015 года: злоупотреблением положением и властью при исполнении служебных обязанностей (статья 356) и превышением полномочий при исполнении служебных обязанностей (статья 357). Оба деяния совершаются должностными лицами, которые, действуя вопреки служебным обязанностям по корыстным или личным мотивам, наносят ущерб государственной собственности либо законным интересам физических и юридических лиц. Путём сравнительно-правового анализа исследуются общие элементы состава преступлений и подчёркиваются ключевые различия в характере и объёме злоупотребления полномочиями. Также раскрываются понятия «служебные обязанности» и «полномочия», предлагаются критерии для практической дифференциации с целью обеспечения точной юридической квалификации

**Abstract:** This article analyzes the legal distinctions and similarities between two offenses under Vietnam's 2015 Penal Code: abuse of position and power while performing official duties (Article 356) and exceeding authority while performing official duties (Article 357). Both offenses are committed by officials who, acting contrary to their official duties for selfish or personal motives, cause harm to state property or the lawful interests of individuals and organizations. Through comparative legal analysis, the study examines the common elements of the offenses and highlights key differences in the nature and extent of the abuse of power. It also clarifies the concepts of "official duties" and "authority" and proposes criteria for practical differentiation to ensure accurate legal classification.

**Ключевые слова:** злоупотребление полномочиями, превышение полномочий, служебные обязанности, государственные должностные лица, Уголовный кодекс Вьетнама

**Keywords:** abuse of power, exceeding authority, official duties, public officials, Vietnamese Penal Code.



According to Article 356 of the 2015 Penal Code, the crime of “Abusing Position and Authority While Performing Official Duties” refers to the act of a person holding a position or authority who, for personal gain or other motives, violates official duties causing property damage of VND 10,000,000 or more, or causes other damage to the interests of the State, or the lawful rights and interests of organizations or individuals [1].

Article 357 of the 2015 Penal Code defines the crime of “Exceeding Authority While Performing Official Duties” as the act of a person holding a position or authority who, for personal gain or other motives, exceeds their authority and violates official duties, causing property damage of VND 10,000,000 or more, or other damage to the interests of the State, or the lawful rights and interests of organizations or individuals.

Accordingly, the two offenses “Abusing Position and Authority While Performing Official Duties” and “Exceeding Authority While Performing Official Duties” share certain similar legal characteristics as well as distinct features, as follows:

**First**, both crimes share a common object: social relations that ensure the proper operation of state agencies, organizations, political organizations, and socio-political organizations within the realm of public service activities. Additionally, they safeguard the interests of the state as well as the legitimate rights and interests of organizations and individuals. According to the 2015 Penal Code, both offenses are committed “while performing public duties”, indicating that these crimes do not occur within the private sector or non-state enterprises and organizations.

**Second**, in terms of objective conduct, both crimes share the critical element of “violating public duties”. Accurately determining the content and scope of “public duties” is crucial in identifying the act of violation. The 2008 Law on Cadres and Civil Servants, as amended in 2019, does not provide a precise definition of “public service”; rather, it states in Article 2: “Public service activities of cadres and civil servants involve the performance of duties and powers as stipulated by this Law and other relevant provisions”. Moreover, the concept of “public service” is indirectly referenced through several legal provisions concerning “public service performers”. The 2017 Law on State Compensation Liability defines in Clause 2, Article 3: “A public service performer is a person elected, appointed, recruited, or appointed to a position within a state agency to carry out administrative management, litigation, or judgment enforcement tasks, or any other individual assigned by a competent state agency to perform tasks related to administrative management, litigation, or judgment enforcement activities” [2]. Similarly, Decree No. 208/2013/ND-CP, dated December 17, 2013, outlines measures to prevent, halt, and handle acts of resisting individuals on official duty, as prescribed in Clause 1, Article 3: “Individuals on official duty include cadres, civil servants, public employees, officers, non-commissioned officers, and soldiers of the people's armed forces assigned by competent agencies, organizations, or individuals to perform tasks and exercise powers as defined by law and protected by law to serve the interests of the state, people, and society” [3].

The definitions of these concepts vary considerably. Broadly speaking, public service is understood as “work performed by employees of agencies and organizations according to assignment or authorization to fulfill the functions and tasks of those entities”. In a more specific sense, public service refers to “state public service, with cadres and civil servants as the primary performers of public service activities in state agencies (legislative, executive, judicial), carrying out public functions and tasks prescribed by competent authorities”.

The author posits that the concept of public service referenced in the two crimes mentioned above should be understood as a public service tied to state authority, with the aim of serving the state and its people. In other words, public service is a form of power-legal activity carried out by state officials, civil servants, or other individuals when empowered by the state to execute the state's functions and tasks, as part of the broader management of social life.



From the above analysis, the violations of public service can be identified in the following manifestations:

- Acts that contradict the functions, tasks, and general requirements of state agencies and organizations where individuals with positions and powers are employed.

- Violations of principles in the performance of official duties. According to Article 3 of the Law on Cadres and Civil Servants (2008), there are five key principles to follow when performing official duties: (1) compliance with the Constitution and laws; (2) protection of the state's interests and the legitimate rights of organizations and citizens; (3) publicity, transparency, proper authority, and oversight; (4) ensuring systematization, unity, continuity, smoothness, and efficiency; (5) adherence to the administrative hierarchy and coordination. Non-compliance with these principles is also considered a violation of official duties [4, c.16].

- Acts conducted by individuals in positions of power who misinterpret the interests of their agency or organization and perform actions contrary to their official duties and the broader public interest. In such instances, the individual may not intend to harm the functionality of the agency or organization, but due to a misguided understanding of their responsibilities, they engage in actions detrimental to public service. Despite these intentions, the act still poses a risk to society and is considered contrary to public service.

- Acts contrary to the legitimate rights and interests of citizens, meaning those that do not serve the purpose of protecting these rights. There is a prevailing view that when an individual in a position of power, due to the necessity and legitimacy of production, life, or work (that is, to serve the interests of citizens), commits an act contrary to public service, such an act should not be considered criminal.

**Third**, in terms of objective consequences, both crimes establish specific outcomes in the form of: (1) Property damage amounting to VND 10,000,000 or more; or (2) other damage to the interests of the state, as well as the rights and legitimate interests of organizations and individuals. This serves as a clear manifestation of the social relations that these two crimes target. As such, both crimes include a material component, and they are only deemed complete upon the occurrence of the specified consequences.

**Fourth**, regarding the subjective aspect, both crimes are committed with direct intentional fault. The offender is fully aware that their actions exceed the scope of their assigned duties and responsibilities, are in violation of public duty, and acknowledges that these actions will result in damage to the property or interests of the state, or the rights and legitimate interests of organizations and individuals. Nevertheless, driven by personal gain or other motives, the offender consciously desires these harmful consequences to unfold.

Moreover, the motives behind both crimes are essential elements, specifically involving profit-driven motives or other personal interests. Profit motives refer to situations where the offender exploits their position, power, or authority for personal gain, whether material or non-material, that is illegitimate [5, c.29]. Other personal motives may involve actions aimed at enhancing the offender's position, reputation, or personal power.

**Fifth**, the subjects of these crimes are individuals aged 16 or older, who possess criminal responsibility and are identified as having specific subject signs. The offender must be a person holding a position or power while performing official duties. In other words, the individuals committing these crimes must be persons occupying a position or exercising power within state agencies, political organizations, or socio-political organizations in the course of their official duties. These subjects include: (1) Cadres, civil servants, and public employees; (2) Officers, professional soldiers, and defense workers in agencies and units of the People's Army; (3) Officers and managers in state-owned enterprises, as well as those managing state capital contributions in enterprises; (4) Persons assigned to perform tasks and public duties, with the authority to carry out these duties.



The objective conduct for the crime of “Abusing position and power while performing official duties” revolves around the misuse of the assigned position and power to breach official duties. In other words, the offender exploits their designated position and power as a "means" to commit the crime. There is no need for the offender to engage in additional actions or deceptive practices during the performance of their duties, as their behavior inherently violates official duties by contradicting the tasks they were entrusted with.

In contrast, the objective conduct for the crime of “Abusing power while performing official duties” involves actions that exceed the scope of the assigned duties and responsibilities, resulting in a violation of official duties and causing harm to the interests of the state, as well as the rights and legitimate interests of organizations and individuals [6, c.49]. This means that a person in a position of authority has arbitrarily performed actions that fall within the authority of a superior or another individual. These unauthorized actions, which are beyond the limits of one's assigned authority, constitute a violation of official duties. In other words, these acts represent a second form of violation of official duties. While Article 357 of the 2015 Penal Code does not specify the forms of abuse of power while performing official duties, based on both theory and practice, these can be summarized as follows:

- (1) Performing an action within the authority of a superior that is illegal or against official duties;
- (2) Performing an action within the authority of an individual in a different sector;
- (3) Performing an action within the authority of a collective body;
- (4) Acting without the required conditions, such as demolishing an illegal structure before the decision has come into effect;
- (5) Committing other illegal actions.

For an individual committing abuse of power while performing official duties, power is not a "means" for committing the crime. Rather, the offender inherently lacks the authority to perform certain public duties, but exceeds the limits of their authority, thereby violating public duties.

In the case of the crime of “Abusing position and power while performing public duties”, the offender does not violate regulations concerning authority. However, in the process of handling official tasks, the offender breaches specific rules or regulations assigned to those tasks. Thus, in proving the crime of “Abusing position and power while performing public duties”, two issues must be established:

- (i) The offender must still perform the work within the scope of their authority and assigned position (no violation of authority);
- (ii) During the execution of the assigned task, the offender must have violated the regulations governing how that task should be performed (a violation of the content of authority).

To prove these two elements, it is necessary to compare the actual performance of the individual's duties with the legal provisions regarding how those duties should be carried out. From this comparison, it can be assessed whether the offender has exploited their position and authority while performing their official duties, and whether this exploitation resulted in damage.

In contrast, the crime of “Abuse of power while performing official duties” is characterized by a violation of the authority assigned to perform official duties. This violation can occur in terms of either the scope or the content of the authority, or both. During the execution of official duties, the offender may exercise improper authority (a violation of the scope of authority), which leads to an incorrect implementation of the content of their duties. Alternatively, the offender may exercise improper authority (a violation of the scope of authority) but still correctly perform the content of their duties [7]. In both instances, the offender's actions are considered contrary to official duties. This represents the key distinction that separates this crime from the crime of “Abusing position and power while performing official duties”, where the offender exercises the correct scope of authority but violates the content of their duties.



To determine the objective behavior involved in the crime of “Abuse of power while performing official duties”, it is necessary to examine the legal provisions governing the authority to perform official duties by individuals in positions of power. By doing so, one can assess whether the offender's actions are correct or in violation of their assigned authority. The authority, functions, and duties of individuals in positions of power at various levels and sectors are specifically outlined in legal documents and subordinate legislation (such as resolutions, decrees, circulars, regulations, and decisions). Therefore, when evaluating the crime of “Abuse of power while performing official duties”, it is essential to rely on these legal documents to clearly determine whether the accused has acted beyond the scope of their assigned responsibilities and duties.

Additionally, it is important to differentiate the behaviors outlined in these two crimes from the act of failing to perform or inadequately performing assigned duties and responsibilities. In cases where an individual, despite being assigned specific tasks and powers, neglects to fully perform their duties, this constitutes a sign of the crime of “Neglect of duty causing serious consequences”, as stipulated in Article 360 of the 2015 Penal Code.

Furthermore, in both crimes mentioned above, while the offender may have personal gain as a motive, this does not involve the appropriation of property. In these instances, the offender's actions, though contrary to official duties, are motivated by personal benefit, rather than an intention to unlawfully appropriate the property of others. This distinction further separates these crimes from the offense of “Abuse of position to appropriate property” and the crime of “Fraudulent appropriation of property”, the latter of which is aggravated by the circumstance of “Abusing position and power to commit a crime” [8].

The conceptual overlap between the two crimes leads to confusion in law enforcement and adjudication. It is essential for judicial bodies to apply rigorous analysis of authority, procedures, and assigned functions to ensure accurate crime classification. Clear legislative guidelines or judicial interpretations are needed to differentiate between procedural violations within authority and those stemming from authority overreach.

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