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Considerations regarding the crime of usurpation of official qualities in the Romanian Penal Code

Abstract

Impersonating or acting as a public official constitutes one of the main ways to affect state authority, therefore the crime of usurpation of official qualities must be severely reprehended. But what constitutes the material element of the crime is up to debate. The article is set to analyze this material element and different ways in which the offence may be committed, to ensure the proper understanding of the criminal conduct sanctioned by the legal text.

1. Introduction

One of the attributes of the state power is to impose its authority that is to govern within predetermined limits the course of social life. State authority represents the power to impose mandatory obligations and to ensure their respect. Therefore the authority in itself represents a social value and its protection insures the effectiveness of the sovereign power of the state¹.

Protecting the authority through means of criminal law is necessary to ensure the proper development of a wide range of social relations² including the relations between the individual and the state.

In any criminal system the State tends to protect its authority from people that could in either a direct or indirect manner question it. The state and its institutions would function with difficulty if the citizens were not to respect the officials that repre-

sent or incorporate state authority³.

The crime of usurpation of official qualities prevents the abusive assumption of public duties by persons who do not have an adequate capacity. The credibility of the public function needs to be protected so that the citizens are not to be put in a position to question that in front of them sits an agent of the state and not a person who doesn't have this statute⁴.

Article 258 of the Romanian Penal Code incriminates the usurpation of official qualities as the act of

1. **Using** without right of an official capacity that implies the exercise of state authority, accompanied or followed by the fulfillment of any act related to that capacity, shall be punished with imprisonment from 6 months to 3 years or with a fine.

2. the public official who **continues to exercise** a function involving the exercise of state authority, after having lost this right in accordance to the law, shall be sanctioned with the same punishment.
3. facts provided in par. (1) or par. (2) committed by a person who **wears**, without right, uniforms or distinctive signs of a public authority, the penalty is imprisonment from one to 5 years.

The official capacity refers to a position that confers on a civil servant certain attributions or prerogatives, a certain functional competence within the state or public apparatus (for example, the official quality of prosecutor, police officer, etc.).

Unlawful use of an official capacity involving the exercise of state authority means the act by which the perpetrator illegally pretends, assumes or assigns himself an official capacity that he does not have, or from which he has been disavowed.

Although the conduct incriminated seems to be explicit, the jurisprudence offered us a chance to explore the material element of this crime, within this article and to establish if certain conducts fall within the scope of the incrimination.

¹ V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, V. Roșca, *Explicațiile Teoretice ale Codului Penal Român* – vol IV, ed. Academiei RSR, Bucharest, 1972, p. 7.

² idem

³ S. Bogdan, D.A. Șerban, *Drept Penal. Partea Specială*, ed. Universul Juridic, Bucharest, 2020, p. 205.

⁴ S. Bogdan, D.A. Șerban, *cited above*, p. 218.

2. Elements of the crime

In this respect the traditional doctrine stated on one hand that it is sufficient for the perpetrator to **pretend** he has the quality through a simple statement. For example, a person presents himself as a police officer, although he does not have this quality commits the crime of usurpation in the first form prescribed by the Romanian Penal Code.

We think that such a simple optic although it might justly sanction certain deeds is insufficient to accurately describe the act of usurpation. We think that there are some conditions that need to be accomplished simultaneously for such an activity to constitute the crime of usurpation.

First we argue that such a statement *needs to be a serious statement*, not a joke. Impersonating a public official officer can only be punished if the impersonation is a serious one. It falls out of the specter of such acts for example a theatrical impersonation, a parody or a practical joke, as they do not have the capacity to fulfill the requirements for the incriminated action.

Second it has to have an *appearance of truthfulness or worthiness*. Although we agree with the opinion that it does not need to convince or mislead⁵ the person in respect to which the crime is being committed of the fact that the perpetrator has the capacity under which he presents himself, the crime cannot be committed if there isn't at least an appearance of truthfulness and worthiness.

This condition was disputed in the doctrine⁶ as the cited authors stated that the typicality of the action is not dependent on whether or not it appears to be credible to third parties. We think that this aspect is debatable. If we refer to the need to convince or mislead such a statement is acceptable. But if we look at the mere credibility of the action we argue that such an action must have a minimal credibility, even though the perpetrator it is not able to convince others. For instance if the perpetrator presents himself to be the president of the country or attributes himself a capacity that for reasons obvious to anyone he cannot fulfill we think that such an act falls short to the prescribed requirements. A minimal credibility of the pretense is needed, even though we accept it does not have to reach its goal. If the fraudulent means used by the perpetrator constitute themselves a crime we will have a concurrence of offenses⁷.

The mere pretense is not enough. As it has been showed, this needs to be *followed by the fulfillment*

of an act related to that capacity⁸. If such an act does not follow, the perpetrator cannot be held accountable for usurpation.

In relation to the deed described under paragraph 2 of article 258 some authors observed an inconsistency in the incrimination, that derives from the fact that it appears the active subject must still be a public official when committing the crime, a fact that would justify the incrimination in the sense that if a public official loses all his qualities not just some attributes and therefore is removed from the capacity of public official, he would be punished under paragraph 1 anyways⁹.

However we think that this incrimination, although it may seem redundant, tends to sanction the person that prior to committing the deed had the capacity required by law in order to fulfill the act in question. It is true that at this point the sanctions are the same and there is an appearance of redundancy, but if they were different (a fact that in the future might occur) such an appearance would not be in question. Therefore we think that the intent of the legislator was to distinguish between people that had the capacity in the past and those who didn't and this leads us to the conclusion that a perpetrator that had the proper capacity and lost it is sanctioned under this article whether or not he is still a public official.

3. Aggravated circumstance

The norm incriminates as an aggravated circumstance the wearing, **without right**, of uniforms or bearing distinctive signs of a public authority.

For a proper understanding of this circumstance we need to establish the meaning of the notion without right and whether it can be interpreted in the sense of as prescribed by law or a custom, a usual circumstance?

In our analysis in order to present our arguments we will refer to a case we have encountered in practice: a collaborator of the police identified a flagrant offence and informed a policeman. He watched the search that followed and for the purpose of hiding his identity the police officer offered him a mask and a vest that resemble the ones worn by a police officer.

The Prosecutor's office qualified the simple participation of the collaborator to the search procedure as an act related to the capacity of a police officer. Furthermore he argued that in doing so he

⁵ T. Toader, *Drept Penal Partea Specială*. Ed. Hamangiu, Bucharest, 2008, p. 228.

⁶ S. Bogdan, D.A. Șerban, *cited above*, p. 219.

⁷ T. Toader, *cited above*. Ed. Hamangiu, Bucharest, 2008, p. 228.

⁸ S. Bogdan, D.A. Șerban, *cited above*, p. 219, T. Toader, *cited above*, p. 228, C. Rotaru, A.R. Trandafir, V. Cioclei, *Drept penal Partea Specială II*, ed. C.H. Beck, Bucharest, 2020, p. 21, R. Bodea, B. Bodea *Drept Penal Partea Specială*. Ed. Hamangiu, Bucharest, 2018, p. 299.

⁹ S. Bogdan, D.A. Șerban, *cited above*, p. 220.

was an effective contributor to that search and fulfilled police duties in an aggravated manner given the fact that he wore the mask and the vest.

The notions of informant and collaborator are referred to in the Romanian Criminal procedure Code in articles 149 (informant) and article 148 (collaborator) respectively.

The doctrine defined the informant as a person that provides the authorities with data and information that he knows as a result of his daily interactions (sometimes mere rumors) not on a constant basis¹⁰.

The collaborator is that person who is not part of the judicial bodies and who acts under their coordination to obtain data and information. However he although the collaborator has a legal status it is not that of a policeman.

We think that the situation presented offers some particularities and we argue that the deed cannot be qualified as usurpation.

Firstly, the simple presence of the collaborator (participation) to a search does not constitute in itself an act of impersonating the policeman. In accordance to the Romanian Criminal Procedure Code a witness does exactly the same – he participates to this procedure. Nevertheless he is not considered to be an agent of the state as such agent would not be able to have this capacity. Although it is true that the collaborator has no police attributes, the mere presence is not in itself a crime as this type of action does not meet the legal standard imposed on the material element.

In our opinion for this crime to be committed there needs to be *an effective act* done by the perpetrator. This act needs to be *circumscribed to the capacity* in question, and it needs to be *effectively fulfilled* even if the result might not be a proper one or the one expected

Secondly, the aggravated form of the offence can be retained only if the conditions of paragraph 1 or 2 are met¹¹. This means that the simple wearing of clothing without falsely exercising the authority does not meet the criteria for engaging criminal liability.

Thirdly the wearing refers to original uniforms of the public official and not clothes that resemble or induce that idea. The reason behind this logic is that the uniform in itself incorporates the authority just as the fulfillment of an act does. If the perpetrator tries to mislead the party by wearing similar clothes we argue that the aggravated circumstance is not met. Such an act falls within paragraph 1 of article 258, and constitutes only the means through which the perpetrator induces the idea that he has the required capacity.

Furthermore we need to analyze if the act of disguising the informant falls within the notion of wearing, without right a uniform? In respect to the material typicality¹² of the crime in theory we would support this idea as a lack of intent does not mean that the material act is not met in relation to the incrimination in its abstract form.

Furthermore we need to establish if the right to wear a uniform can be granted by a public official such as was the case of the policeman in the example described above. We argue that the answer is a negative one, as this right is a juridical notion not a factual one and it derives from the law, not from an act of an authority. Only the law has the capacity to stipulate the conditions of wearing a uniform, and the fact that a public official agrees or encourages such an act constitutes a crime in itself and not a reason for excluding criminal liability.

4. Conclusions

We argue that a simple wearing of certain items of clothing without performing act of usurpation constitutes a reason for of the offence rendering such an act to be unpunished on the grounds of the lack of typicality not of the lack of intent.

The action of usurpation implies performing an effective act therefore the mere presence of a party does not satisfy the conditions of typicality of this crime

The *right* to wear uniforms in the context of the aggravated circumstance is given only by the law and cannot be granted by the action of an individual.

Although the collaborator has a legal status it is not that of a policeman. This does not mean that he should not be allowed to be part of criminal procedures, so therefore we argue that there is a need to set a legal frame relating to his activity

The act that constitutes an usurpation needs to be *to be a serious statement*, and to have an *appearance of truthfulness or worthiness*.

¹⁰ M.Suiian, *Aspects regarding the use of undercover investigators and informants*, Penalmente Relevant, no. 2/2016, p. 20.

¹¹ In the same sense S. Bogdan, D.A. Șerban, *cited above*, p. 221.

¹² Defined in doctrine as the situation in which there is a correspondence between the action executed by the perpetrator and the abstract action incriminated by the criminal norm. See F. Streteanu, D. Nițu, *Drept Penal. Partea Generală*, ed. Universul Juridic, Bucharest, 2020, p. 264. A part of the doctrine considers that the typicality also refers to the subjective aspect of the crime. See M. Udroui, *Drept Penal. Partea Generală*, ed. C.H.Beck, Bucharest, 2017, p. 79.