Subjects and Some Procedural Aspects in the Case of the Crime of Forgery in Official Documents - Critical Opinions

Bogdan Bîrzu[1]

Abstract: In this paper, we have examined the crime of forgery in official documents regarding its subjects (assets and liabilities), with reference to some aspects concerning the jurisdiction in the first instance. Given that this crime was also provided for in the previous law, the examination also considered a comparative view of the two incriminations, highlighting some elements of differentiation and identity between them. Last but not least, we also considered the formulation of critical opinions that may be useful from the perspective of making changes in the structure of incrimination. The study can be useful to the legislator, practitioners and students of the profile faculties in the country. The paper will be included in a university course to be published by a recognized publishing house in the country.

Keywords: The active subject; the passive subject; the prosecutor's office; the court

1. Introduction

The crime of false material in official documents is provided in the provisions of article 320, Criminal Code in a typical and aggravated way.

This consists in the act of a natural or legal person who by forging the writing or the subscription or by altering an official document in any way creates an untrue document, which is meant to be used as a true official document.

Therefore, it can be considered that this offense is committed by an unlawful act of making or amending the contents of an official document, so that it has, at least apparently (at first sight), the properties and probative effects of a document officially true "(Vintilă Dongoroz, line1972, p. 423).

In the event that one of the incriminated actions is committed against a person who has the quality of civil servant in the exercise of his/her duties, the deed will be considered as more serious and will be sanctioned accordingly.

According to the provisions of the law, tickets, vouchers or any other printed matter producing legal consequences are assimilated to official documents.

Attempt in the case of this crime is punishable.

In connection with this crime, the doctrine of the second half of the last century noted that "it is a social danger because it seriously undermines the trust that people place in official documents, documents that, in today's conditions of social life, are indispensable for the formation and the normal development of

[1] Senior Lecturer, PhD, Danubius University of Galati Romania, Address: 3 Galati Blvd., 800654 Galati, Romania, Corresponding author: bogdan.birzu@univ-danubius.ro.

social relations. Without the full defence of the public's trust in all official documents, social relations would be extremely embarrassed, their pace would drop to a low level, because when official documents would no longer inspire confidence they would have to resort to cumbersome de facto verifications and there will be continuous and serious hesitations for the formation of any social relationship producing legal consequences" (Dongoroz et al., 1972, pp. 423-424).

We mention that at this moment the crime under examination is also provided in other special laws with criminal provisions such as Law no. 191/2003 regarding the offenses to the naval transport regime, with the subsequent modifications and completions[1] , where at art. 14 paragraphs (1) lit. c) provide for the sanctioning of imprisonment from one to 5 years for *the act of forgery or destruction of car logbooks,* as well as in Law no. 535/2004 on preventing and combating terrorism, with subsequent amendments and completions[2], where at article 33 paragraph (2) letter c) the imprisonment of 3 to 10 years *for the falsification of official documents or their use for the purpose of facilitating the commission of an act of terrorism shall be sanctioned.*

The examined crime is also mentioned in article 29 para. (3) of Law no. 236/2018 on insurance distribution, as subsequently amended and supplemented[3], where it is provided that *the issuance, marketing, possession of false or falsified insurance policies by companies, main intermediaries, members of staff directly involved in distribution activities, as well as by persons physical persons who distribute insurance policies, constitute a crime and are punished according to article 320 of Law no. 286/2009 on the Criminal Code, with subsequent amendments and completions.*

We specify that in case the application of the provisions contained in the two special laws is required, they will have priority in relation to the provisions contained in article 320 of the Criminal Code.

The examined crime was also provided in the Criminal Code of 1969 at art. 288.

The comparative analysis of the two texts gives us the opportunity to ascertain their identity in terms of both the marginal name and the legal content.

Thus, both texts provide for two ways, namely one type (simple) and one aggravated, as well as sanctioning the attempt.

Significant differences occur instead in the sanctioning regime which is different. Thus, in paragraph (1) in the new law the punishment provided is imprisonment from 6 months to 3 years, while in the old law the punishment is imprisonment from 3 months to 3 years.

In paragraph (2) the punishment is imprisonment from one to 5 years and the prohibition of the exercise of certain rights, and in the old law the punishment is imprisonment from 6 months to 5 years.

In both texts, tickets, vouchers or any printed matter with legal consequences are assimilated to official documents, and the attempt is punishable.

2. Subjects of the Crime

An *active subject* of this crime can be any natural or legal person who meets the general conditions required by law.

[1] Published in the Official Monitor of Romania, Part I, no. 332 of May 16, 2003.
[2] Published in the Official Monitor of Romania, Part I, no. 1161 of December 8, 2004.
[3] Published in the Official Monitor of Romania, Part I, no. 853 of October 8, 2018.

If the active subject has the quality of a *civil servant* and is in the exercise of his/her duties, the deed is considered to be more serious, being sanctioned with greater punishments.

The phrase *civil servant* used by the legislator is not synonymous with the same phrase in administrative law, in criminal law it is gaining a broader interpretation, being included here in addition to civil servants in administrative law and other special categories of officials.

In order to avoid other interpretations than those desired by the legislator, the Romanian criminal law defined the quality of civil servant.

Thus, *a civil servant* is defined as *a person who, on a permanent or temporary basis, with or without remuneration:*

a) exercises powers and responsibilities, established under the law, in order to exercise the prerogatives of the legislative, executive or judicial power;

b) exercises a function of public dignity or a public function of any nature;

c) exercises, alone or together with other persons, within an autonomous administration, another economic operator or a legal entity with full or majority state capital, attributions related to the achievement of its object of activity.

According to the provisions of article 175 paragraph (2) Criminal Code, it is *considered a civil servant, within the meaning of the criminal law, the person who exercises a service of public interest for which he was invested by public authorities or who is subject to their control or supervision regarding the performance of that public service.*

From the examination of the above-mentioned provisions it results that in the Romanian criminal law the quality of civil servant differs a lot from the quality of civil servant defined in Law no. 188/1999 on the status of civil servants, republished[1].

In the category of civil servants provided in the provisions of article 175 paragraphs (1) letter a) of the Criminal Code includes the President of Romania, MEPs, senators, deputies, members of the government, judges, prosecutors, members of the SCM, clerks, judges of the Constitutional Court, etc.

From the category of civil servants mentioned in article 175 paragraphs (1) letter b) the following categories of persons are part of the Criminal Code: civil servants provided for in the special law (Law no. 188/1999), civil servants with special status, civil servants within the central and local administration, civil servants employed at the Romanian Parliament, " mayors, county council presidents and local council presidents, the president of the Court of Accounts, the police, the doctor employed on a contract in a hospital unit in the public health system (regardless of degree or specialization: mayor, specialist or resident, anaesthetist, surgeon), the forensic doctor or the expert doctor of social insurance, the teacher from the gymnasium education or from the state or private university education (preparatory, assistant, lecturer, associate professor, university professor)" (Udroiu, 2021, p. 834).

Regarding the quality of civil servant of the doctor employed with a contract of employment in a hospital unit of the public health system or of the professor of state pre-university education, we specify that this

[1] Published in the Official Monitor of Romania, Part I.

quality results from two decisions of the Supreme Court pronounced by the Panel for resolving legal issues in criminal matters[1].

In the category of civil servants to which the text from article 175 paragraph (1) letter c) the Criminal Code includes a person who, on a permanent or temporary basis, with or without a remuneration "*exercises, alone or together with other persons, within an autonomous authority (for example, the Autonomous Directorate for Nuclear Activities, the Autonomous Directorate"* Official Journal", Autonomous Administration of the State Protocol Patrimony, Romanian Car Registry, etc.), *of another economic operator or of a legal entity with full or majority state capital, attributions related to the achievement of its object of activity* (for example, the director of an autonomous authorities, the governor of the National Bank of Romania, the agent in charge of carrying out relative activities of locking or unlocking the wheels of vehicles, who is employed in a limited liability company in which the sole partner is the municipality through the Local Council, persons employed in banks with capital integral or majority state…)" (Udroiu, 2021, p. 835).

The last category of civil servants is provided in the provisions of article 175 paragraph (2) Criminal Code, which provide categories of persons *assimilated to civil servants*, respectively persons exercising a service of public interest for which they have been invested by public authorities or who are subject to their control or supervision regarding the performance of that public service.

Until the date of writing this study, the High Court of Cassation and Justice, the Panel for resolving legal issues in criminal matters, by several decisions, established that in interpreting the provisions of article 175 paragraph (2) Criminal Code and article 175 paragraph (1) lit. b) Thesis II of the Criminal Code, the following persons who have the following professional qualities have the quality of civil servants, within the meaning of the criminal law:

- *the judicial technical expert* has the quality of civil servant provided in the provisions of article 175 para. (2) Thesis I of Criminal Code; [2]

- *the doctor employed with an employment contract in a hospital unit from the public health system* has the quality of civil servant provided by article 175 paragraph (1) Thesis II of the Criminal Code; [3]

- *the professor of state pre-university education* has the quality of civil servant within the meaning of the provisions of art. 175 paragraphs (1) letter b) the second thesis of the Criminal Code; [4]

- *the bank clerk, employee of a banking company with fully private capital, authorized and under the supervision of the National Bank of Romania,* has the quality of civil servant within the meaning of the provisions of article 175 para. (2) of the Criminal Code. [5]

Also the same quality of civil servant, in the meaning of the provisions of article 175 paragraphs (2) The Criminal Code also has the bailiff. [6]

In the recent doctrine it was emphasized that they have the quality of civil servants "notaries, bailiffs, insolvency practitioners (judicial administrator, liquidator, conciliator) who carry out their activity within one of the forms of organization provided by law within the National Union of Insolvency

[1] The following are considered: Decision no. 26/2014, available on www.scj.ro and Decision no. 8/2017, available on www.scj.ro.
[2] I.C.C.J., Decision no. 2/2014, published in the Official Monitor of Romania, part I, no. 766 of October 22, 2014.
[3] I.C.C.J., Decision no. 26/2014, published in the Official Monitor of Romania, Part I, no. 24 of January 13, 2015.
[4] I.C.C.J., Decision no. 8/2017, published in the Official Monitor of Romania, Part I, no. 290 of April 25, 2017.
[5] I.C.C.J., Decision no. 18/2017, published in the Official Monitor of Romania, no. 545 of July 11, 2017.
[6] I.C.C.J., Criminal Division, decision no. 133/A of April 12, 2019.

Practitioners, judicial technical experts, interpreters and translators authorized by the Ministry of Justice, etc.)" (Udroiu, 2021, pp. 836-837).

Criminal participation is possible in all its forms (co-authorship, instigation, complicity).

The passive subject is the institution, legal or natural person, who has to bear certain consequences as a result of the fraudulent assignment of the forged official document.

As for the false official document, it "may, however, produce legal consequences against a natural or legal person; this person is the *possible* passive subject of the crime, which will become an *effective* passive subject when the document is used against him, because the harm to the interests of this passive subject arises (has its cause) not only in the use of the false official document, but also in the act he created this false document, i.e. the crime of false material in official documents" (Dongoroz et line 1972, p. 425).

According to the provisions of article 328 of the Criminal Code, *the passive subject* of this crime may also be a foreign competent authority or an international organization established by a treaty to which Romania is a party, when the deed refers to documents issued by these authorities or the statements or false identity are given to these authorities.

Usually, the place and time are not relevant to the existence of the crime.

In the case of the aggravation normative modality provided in paragraph (2), for the existence of the crime it is necessary to ascertain that the deed was committed while the civil servant was in the exercise of his duties, and the activity itself falls within the scope of his duties.

3. Some Procedural Aspects

In the case of this crime, the criminal action is initiated ex officio, and the competence to exercise criminal prosecution usually belongs to the criminal investigation bodies of the judicial police under the supervision of the competent prosecutor.

Usually, the jurisdiction in the first instance belongs to the court in the district in which the crime was committed or to the court that was notified.

Depending on the circumstances of the commission of the act, the quality of the person executing the incriminated action, as well as the existence of a possible concurrence of offenses, the competence to carry out the criminal investigation may also belong to the prosecutor.

We have in view here the case where the active subject of the crime, at the time of the commission, has the quality of deputy, senator or judge, prosecutor, etc., in which case the competence to carry out the criminal investigation will belong in all cases to the prosecutor.

Regarding the material competence of the prosecutor, we specify that in relation to the quality of the active subject, the criminal investigation will be carried out by prosecutors from different prosecutor's offices.

Thus, in case of committing the crime by a deputy, senator, judges from the structure of the High Court of Cassation and Justice, etc., the competence to carry out the criminal investigation belongs to the prosecutor from the structure of the Prosecutor's Office attached to the High Court of Cassation and Justice or National Anti-corruption Division or the Directorate for the Investigation of Organized Crime and Terrorism.

Jurisdiction in the first instance may also belong to other higher courts in the case, in the event that the criminal investigation is carried out by the prosecutor, the Directorate for the Investigation of Organized Crime and Terrorism or National Anti-corruption Division.

If the crime fell within the scope of an organized criminal group in the sense provided in article 367 paragraphs (6) of the Criminal Code, regardless of the quality of the person, the competence to prosecute belongs to the Directorate for the Investigation of Organized Crime and Terrorism.

In these cases, the jurisdiction in the first instance belongs to the court seized.

Also, in relation to the quality of the active subject, the competence to carry out the criminal investigation may also belong to National Anti-corruption Division, according to the provisions of art. 3 lit. a) of GEO no. 43/2002, regarding the National Anti-corruption Directorate, republished with the subsequent amendments and completions[1] and of art. 1 of Law no. 78/2000 for the prevention, detection and sanctioning of acts of corruption, with subsequent amendments and completions. [2]

If the competence to prosecute belongs to the European Public Prosecutor's Office and the criminal investigation is carried out by this prosecutor's office, the jurisdiction in the first instance belongs to the court notified according to the provisions of art. 20 of Law no. 6/2021 on the establishment of measures for the implementation of Council Regulation (EU) 2017/1.939 of 12 October 2017 implementing a form of enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO).

4. Conclusions and Some Critical Opinions

As we pointed out in the first part of the paper, the crime examined was also provided for in the previous law, having the same marginal name.

I insisted on examining the active and passive subject of this crime, appreciating that their identification implies some difficulties, especially with regard to the active subject, when the deed falls within the provisions of par. (2) in art. 320 C. pen.

We note that in order to ascertain the existence of the crime in this aggravated normative way, it is necessary to establish both the quality of the active subject and the civil servant, as well as the moment of committing the incriminated action which is identified with the moment when the active subject is on duty.

If, although the active subject is a civil servant, but the incriminated action is not committed in the exercise of his/her duties, the deed will not meet the constitutive elements of the crime.

However, an in-depth analysis shows that the text in question does not have the necessary predictability and clarity.

We are considering here the interpretation of the phrase civil servant "*in the exercise of his duties"*.

We appreciate that the wording used by the legislator can have two interpretations.

The first interpretation accepted by all the relevant doctrine and jurisprudence is that the phrase in question reflects the situation of the civil servant who commits the incriminated action during his service, so in the period between the moment of entering the service and the moment when he left the

[1] Published in the Official Monitor of Romania, Part I, no. 244 of April 11, 2002.
[2] Published in the Official Monitor of Romania, Part I, no. 219 of May 18, 2000.

service, period which is concretely measured in a time interval established by the legal norms in force (by law or by the job description, regulation or other internal or general provisions).

In other words, in order to establish the existence of such an offense, it is necessary to establish that the incriminated action is committed by the civil servant during his time in office, in accordance with his work schedule established by law or other provisions.

The wording used by the legislator allows us to formulate another interpretation which excludes the period of the civil servant's service schedule.

Thus, in this interpretation, the civil servant may commit the act in question outside his working hours, in the event that the act concerns an assignment specific to the function he performs.

Thus, we have in view the case where a civil servant, outside his working hours, falsifies an official document (a civil servant who, after working hours, remains in office and falsifies an official document).

The necessary conclusion is that the wording used by the legislator is unclear and unpredictable, because a civil servant can commit the incriminated action (for forgery or alteration of an official document), both during and outside the service (hours). time schedule).

In those circumstances, I consider that, in the light of certain amendments and additions, the text in question should be reworded, a future incrimination being able to exclude the phrase *"in the exercise of official duties"*, the main reason being that the incriminated action may be committed during both hours, as well as outside them.

References

*** (2014). I.C.C.J., Decision no. 2/2014, published in the *Official Monitor of Romania*, part I, no. 766 of October 22.

*** (2015). I.C.C.J., Decision no. 26/2014, published in the *Official Monitor of Romania*, Part I, no. 24 of January 13.

*** (2017). I.C.C.J., Decision no. 18/2017, published in the Official Monitor of Romania, no. 545 of July 11.

*** (2017). *I.C.C.J., Decision no. 26/2014,* available on www.scj.ro and Decision no. 8/2017, available on www.scj.ro.

*** (2017). I.C.C.J., Decision no. 8/2017, published in the *Official Monitor of Romania*, Part I, no. 290 of April 25.

Dongoroz, Vintilă; Kahane, Siegfried; Oancea, Ion; Fodor, Iosif; Iliescu, Nicoleta; Bulai, Constantin; Stănoiu, Rodica & Roșca, Victor (1972). *Theoretical Explanations of the Romanian Criminal Code*, vol. IV, Special part. Bucharest: Romanian Academy Publishing House.

Udroiu, Mihai (2021). *Synthesis of Criminal Law*, Special Part, Edition 2, vol. II. Bucharest: C.H. Beck.