OPINIONS REGARDING A NEW ACCUSATION-COMPROMISING THE INTERESTS OF JUSTICE

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Abstract

The criminal offence of compromising the interests of justice, according to the new regulation, refers in particular to the respect and authority that needs to be attached to the performance of the act of justice, and such performance is protected by criminal law in two manners: both as regard the criminal offences committed by persons from outside the judicial system in the capacity of unqualified active subject , also against the abuses commited by the persons called to perform the act of justice.

Keywords*: compromising the interests of justice, divulge, disclosure, predictability and functionality of the criminal rule.*

The New Romanian Criminal Code[1] provides in 4-th Title of Special Part a separate chapter, Second Chapter, established for Crimes against justice's administration, art no 266-288.

In the explanatory memorandum of the New Criminal Code was shown that the name „Crimes which impede the course of justice„ was replaced by „Crimes against justice administration„ ,because through this infractions achievement of justice it is not always impeded,but producing just a state of danger for achieving the act of justice.

The changes brought to the Criminal Code regarding this infractions have been justified by the legislator by the need of ensuring legality, independence, impartiality and firmness in the process of carrying out justice by punishing criminal acts likely to affect seriously, ignore or undermine the authority of justice.

Thus, have been introduced new incriminations , such as „Obstructing justice„ , „Revenge for helping justice„ , „Pressure on the judiciary„ , „Compromising the interests of justice„ , Violation hearing solemnity„ , „ Unfair assistance and representation„ .

Have also been redesigned other criminal acts that were already incriminated, such as, „not-telling„ , „ favoring the perpetrator„ , „influencing statements„ , „perjury„ , concealment„ .

By introducing a new incrimination, that of compromising the interests of justice, provided for in art. 277, the legislature followed to achieve several objectives.In this way, was wanted to be increased the requirement to officials working in the administration of justice in connection with the management of data and information they obtain during a criminal trial, which can significantly influence the truth or the right to a fair trial of the person investigated or accused.

In the same time to strengthen the guarantees of the right to a fair trial, and in particular the presumption of innocence, enshrined in art. 6 of the Convention for the Protection of Human Rights and Fundamental liberties had been incriminated as an alternative way of offense, the act of disclosure without law, evidence or official documents in a criminal case before it has a solution not to proceed to trial or final settlement of the case by an official who has knowledge of them by virtue of office.

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[1] Adopted through no 286/2009 Law,published in „The Official Monitor of Romania",part I,no 510 from 24 of July 2009

Since, under the Convention, signatory states have, besides negative obligation to refrain from any violation of the rights outside the permitted limits, and a positive obligation to take necessary measures to ensure these rights provided against their violation by any other person, violation of the presumption of innocence if disregarded state responsibility on those obligations.

It was also noted in the explanatory memorandum to the new Criminal Code, that through this legislation is intended to prevent public officials to present evidence (witnesses statements, surveys, video recordings hear) from an ongoing criminal proceedings in order not make the presumption of innocence into a presumption of guilt provisional pending the outcome of the case.It was also envisaged that the assessment of evidence, whatever its content, can often lead to erroneous conclusions as long as there shall be assessed against all the evidence taken, to determine its legality, relevance and probative force.For example, testimony which is later proven to be false or any other apparently incriminating evidence will inevitably induce the idea of guilt, and sometimes it can not be changed even by presenting the official verdict of innocence found by judicial authorities.

Another objective is the need to preserve the secrecy of the administration evidence in a criminal investigation phase which is secret.

1. Legal content

Article nr. 277 of the Penal Code provides that the crime of compromising the interests of justice may be committed in the following alternative arrangements:

(1) Disclosuring without law, confidential information concerning the date, time, place, manner or means by which evidence is to be administered by a magistrate or other public official who has knowledge of them by virtue of office if this can be hindered or prevented the prosecution. The penalty is imprisonment from 3 months to 2 years or a fine.

(2) Disclosuring without law, evidences or official documents in a criminal case before a solution has not proceeding to trial or final settlement of the case by a civil servant who became aware of them under function. In this way, the penalty is imprisonment from 1 month to 1 year or a fine.

(3) Disclosure, without right of information in a criminal case by a witness, expert or interpreter, when the ban is imposed by the law of criminal procedure, shall be punished with imprisonment from 1 month to 1 year or a fine.

The legislator has provided also in paragraph (4) of the same article and a justifiying cause:,, deed is not a crime if trough itself are disclosed or revealed clearly illegal acts or activities committed by the authorities in a criminal case,,.

Criminal Code of 1936 divided the „Offences against the administration of justice" located in Title IV of Special Part in „ Crimes against judicial activity" (art. 269-294), „Crimes against court ruling authority" (art 295-300) and „The Duel" (art.301-307)[2]

Criminal Code of 1936 provided a similar indictment in art. 293 entitled „Crime of disclosing acts of secret procedure".

This offense which was punishable by correctional imprisonment from 1 month to 6 months and a fine of 2,000 to 5,000 RON could be commited in the following ways:

" 1.That who, contrary to the provisions of the Code of Criminal Procedure, made public in any way, in whole or in part, indictments or other proceedings in criminal or correctional before the instruction to be completed and before these acts to be public hearing was read in court, and acts of research or instruction of a closed business;

[2] Criminal Code Carol The Second,annotated by Constantin G. Rătescu, I.Ionescu Dolj, I.Gr. Perieţeanu, Vintilă Dongoroz, H. Aznavorian, Traian Pop, Mihail Papadopulu, N. Pavelescu, second Volume,Special Part,Publishing of SOCEC & Co S.A Library, Bucharest, 1937.

2.The one who publishes a report on the proceedings of a trial, that the Court has forbidden publication or has declared secret;

3.The one who publishes the names of judges, indicating their individual votes which are awarded in verdicts or judgments, or assessments made on solutions based judgments likely a current or on the facts and background of people in process;

4.Whoever publishes the report on the hearing which is being discussed as a crime committed by a minor, or portrait of a minor sought or any other illustration related to it or on its criminal acts of;

5. The one who publishes a complete account of libel,in which the sample material to the truth is not allowed.

The provisions of paragraphs 2 and 3, the second part, and at 4 and 5 shall not apply to studies, scientific comments and notes, in no case can be made on behalf of the parties to the claim.

The comment made regarding the punishment of the offense of „Disclosure of the secret pleadings" is showed that this crime is not only sanctioning the ban on publication of court documents expressly referred to in terms of art. 110 and 111 of criminal procedure Carol The Second,but also in the special provisions related to proceedings of the same code of crimes against minors and honor (art. 296 and 608 penal procedure)[3].

Similar incriminations are found also in the legislation of some European countries,like in the Italian Crminal Code (art.379 bis),Spanish Crimal Code(art. 466),French Criminal Code(art. 434-7-2 şi art. 226-13),Portuguese Crminal Code(art 371),Swiss Criminal Code (art.293), Swedish criminal code(Chapter 20).

Thus, the Italian Criminal Code incriminates in art. 379 bis,,disclosure of secrets required to a criminal procedure" as follows:

„Unless the act constitutes a more serious offense who would illegally disclose the secret information on criminal proceedings,found by him because he participated or witnessed an action of this procedure, is punished with imprisonment up to one year.Same punishment applies also to the person who, after giving statements during the preliminary investigations,he doesn't respect the interdiction imposed by prosecution on the strength of art. 391 alin.5 Code of Criminal Procedure".This article was introduced by art. 21 of Law no. 397 of 7 December 2000.

Spanish Criminal Code criminalises the art. 466 par. (1) that the lawyer or the prosecutor who disclose declared secret procedural actions by the judicial authority.[4]This offense is punishable by a fine of 12 to 24 months and the special lapse item,from the civil service, profession or occupation for a period of 1-4 years.

Alin. (2) of the same article incriminates disclosure of actions declared secret taken by a judge or a member of the Court, representing the Public Prosecutor, Registrar or any official in the department of Administration of Justice, in which case the punishment laid down in article 417 applies in their half higher.

The French Criminal Code[5] also provides in art 434-7-2modificat through the nr 2005-1549 Law from 12 december 2005,the following incrimination:

„Without prejudicing the rights of defense, the act of any person who by reason of his duties, becomes aware, in accordance with the provisions of the Criminal Procedure Code,by information relating to an investigation or pending criminal prosecution on a felony or a crime knowingly disclose such information to persons likely to be involved as perpetrators, co-authors, accomplices or adopters in committing these crimes,when disclosure is made in order to obstruct the investigation or finding the truth,it is punished by two years imprisonment and 30,000 euros fine.

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[3] Criminal Code Carol The Second,op.,cit., pages 222-223.

[4] Hose Luis Manzanares Samaniego, Codigo penal (Adaptado a la Ley Organica 5/2010, de 22 de junio), Comentarios y jurisprudencia, II, Parte Esepcial (articulos 138 a 639, Granada, 2010, p. 1263-1265

[5] Available on http://www.legifrance.gouv fr/

When investigation or prosecution regards a felony or a misdemeanor, punishable by imprisonment up to ten years,as they are revealed by the provisions of article 706-73 of the Code of Criminal Procedure,the penalties will increase to five years in prison and 75 000 euro fine."

Thus, the Italian Penal Code incriminates in the art. 379 bis of „Secrets disclosure required in criminal proceedings" as follows:

„Unless the act constitutes a more serious offense who illegally disclose the intelligence information on criminal proceedings, available to him because he participated or witnessed the action of this procedure, is punished with imprisonment up to one year. The same punishment applies to a person who, after he made statements during the preliminary investigations, the prosecution does not comply with the prohibition under Art. 391alin.5 Code of Criminal Procedure.

This article was introduced by art. 21 of Law no. 397 of December 7, 2000.

2. Preexsting conditions

A. Object of the crime

The doctrine distinguishes between legal subject and material object of the crime. It was argued that „the rules of criminal law, like any other legal requirements, are designed so they can be carried through and reunite on legal social order". Thus, in the concept of criminal law rules we find, always, the idea of protection of interest (primary idea or order), face to face with the idea of limiting the actions which could hit or threaten the interest protected (adjacent idea or disorder idea).

In establishing incriminating provisions, it is always considered the interest that is protected and the evil against which the protection is created; based on these two concepts is built the incriminating rule. That's why, in each incriminating provision , we find a combination of both concepts (the primary idea and the adjacent idea), combination which reflects synthetic the idea of right"[6].

In foreign doctrine was argued that the legal subject is an abstract value, immaterial, which does not identifies with a determined good, tangible or intangible[7].

Our doctrine has defined the legal object of the crime (or criminal object of protection) as „the interest that the criminal rule protects". In this way, „in all crimes we will find: an interest specially protected, that the incriminating rule was concerned directly and an interest protected generally, that that the incriminating rule was concerned indirectly"[8].

In which concerns the legal object, is also distinguished in the legal literature, between the general legal object, the legal generic object and the special legal object.

Regarding this classification some reservations were expressed in the doctrine of our country. Thus, it was argued that „ the general legal concept of object is a category without any practical importance, and in addition, far too vague to be accepted. If we accept the idea that any crime affects the law order, we must accept that other forms of illegality have the same meaning. Therefore, the law order is not only affected by crimes, but also by contraventions"[9].

Related to the general legal object was noticed that the conditions under which this has special importance in the systematic special part of the Criminal Code can't be ignored the fact that there is a „plurality" of such objects when there are more groups andundergroups of crimes in the same title,being given as exemples the crimes against person[10].

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[6] Vintilă Dongoroz, *Criminal Right* , (republication of 1939 edition), Romanian Association of Criminal Sciences, Bucharest, 2000, pages 163-164

[7] I. B. Gomez de la Torre, ş.a., *Curso de dercho penal. Parte generale*, Ed. Experiencia, Barcelona, 2004, page 204, quoted by Florin Streteanu,*Treaty of criminal right.General Part ,* Vol. I, page 345.

[8] Vintilă Dongoroz, *Criminal Right* , (republication of 1939 edition), Romanian Association of Criminal Sciences, Bucharest, 2000, page 164.

[9] Florin Streteanu, *Treaty of Criminal Right*, Vol. I, C. H. Beck Publishing, Bucharesti, 2008, page 346.

[10] Florin Streteanu,op. cit., page 347

Depending on the legal structure of the object, Italian doctrine distinguishes between monooffensive and pluriofensive crimes. It was considered therefore that if in monooffensive crime, the crime is sufficient for the existence of a single violation of a social value, while plurioffensive crimes must involve necessarily undermine more social values. There is a plurioffensive crime only when its typicity is conditioned in abstract by damaging or jeopardizing more social values.

a) The special legal object of the crime lie in those social values and social relations that grow on them, whose existence is ensured by the maintenance work of justice against acts to hinder or frustrate the truth by the judicial organs.

b) The secondary legal object(adjacent) is represented by the freedom or dignity of the person and sometimes his patrimony also when sometimes by disclosuring , without law, evidence or confidential information bring some damage.

Since according to the structure of the crime's object analyzed may also be harmed the interests of justice, and rights belong to individuals, such as dignity, freedom, or its patrimony, we believe that this incrimination is part of plurioffensive crimes.

c) Material object can be, as is clear from the damning, the official documents, the evidence (witness statements, minutes of transcription of interceptions). In legal literature it is argued that the material object of the crime is „the good against which the action or inaction goes directly, and in its entirety can be harmed or endangered by this action"[11].

B. Crime's subjects

a) The active subject of crime is a qualified one (circumstantial):magistrate, a public servant, witness, expert or interpreter.

Participation is possible in the form of instigation and complicity, these participants were not directly required quality of the active subject. The coauthors is believed not to be possible because the obligation not to disclose confidential informations or not disclose confidential evidence, documents or information in a criminal case is a personal one.The doctrine was pronounced in the same way regarding the activ subject of the crime of disclosure of professional secrecy[12].If more persons are having the special quality required by law,based on an agreement, divulge or disclose, without law, confidential information, evidence, official documents or information they have acquired by virtue of office or the disclosure of which has been prohibited by the Criminal Procedure Act, each person commits a distinct offence of compromising the interests of justice, as author.

b) The mainly pasive subject is the state because the justice is its atribute. Along with the state natural or legal person whose rights or interests are harmed by the offense, is **secondary pasiv subject or adjacent.**

3. Constituent content

Premise situation. The premise situation is represented by the existence,prior committing the crime, of a „criminal cause" with the meaning of a pending cause of the judicial organs.

A. Objective side

a) Material element

The material element includes a description of the event which can be achieved by two alternative actions: „divulgence" or „disclosure". Since the law does not require that these ways to take place simultaneously, the content of the offense remains a simple one.

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[11] Florin Streteanu, Criminal Law.General Part, volI. page 351

[12] Victor Roşca,*Crimes against person's liberty(Disclosure of professional secreacy), in* „Theoretical explanations over The Criminal Code", by V. Dongoroz and others., vol. III, Second Edition, Romania Academy Publishing,All Beck Publishing , Bucharest, 2003, page 321; Vasile Dobrinoiu, Norel Neagu, *Criminal Law, Special Part,Theory and judicial practice,*Wolters Kluwer Publishing , Bucharest, 2008, pages 191-192.

„The legislator describes the fact that he intends to prohibit (vetitum) or to impose (jussum) not from imagination or caprice, but by giving expression to the social needs, the need to protect, by means of criminal law (which is last ratio) the fundamental social values . The description from the incrimination rule is a generalization of the specific traits of the facts assessed by the legislator in pre-legislative period, is his conclusion about the need to combat this facts through the intercession of law''[13].Regarding the description of the illegal act of the incrimination rule, the doctrine was argued that it „it must be, if possible, exhaustive, the legislator has the obligation not to omit anything that would characterize the act on which it seeks to repress.But sometimes is possible that the incrimination rule not to contain all the conditions of incrimination. The doctrine recognizes the possibility of a penal offense **open content**, when the legislator does not list all the ways it comes obtaining the results.Other times the legislator establishes **closed incrimination contents**, specifying, limited, the means to achieve the result to produce. Open content indictment refers to ways of committing crime can be totally omitted (as in murder), or be listed as examples, then use the formula „and other similars" or another closed formula".[14]

Divulging is to expose, to reveal, to make a secret to be known to many people.[15]From the text formulation results that he t action must be intended to disclose confidential information about a sample, ie the date, time, place, manner or means of administration.

To reveal is to uncover, make known (by words, writing, images) to show, to disclose. Disclosure must take place without law, what is an illegal condition or special antijuridicity , which was said to represent one of the elements of conviction.[16]

In the manner of disclosure, without law, evidence or official documents in a criminal case before a solution has not proceeding to trial or final settlement of the case, it may prejudice the right to a fair trial and particularly the presumption of innocence, as guaranteed by art. 6 of the Convention.

In the case of the crime committed by a witness, expert or interpreter, typical behavior is realisedtrough disclosure rightless,of information from a criminal case when this interdiction it is imposed by the law of criminal procedure.For the incrimination to respond to requirements of predictability and functionality ,relative to be understood by recipients of the criminal rule and to be applied by the judiciary organs,the law of crimianl procedure must expressly provide those situations when it is forbidden for witnesses,experts and interpreters to communicate or disclosure information.

According to article 285 paragraph 2 of the new Criminal Procedure Code[17]:the procedure during the prosecution is not public.Also,art.352 from the same code which provides as a general rule-the publicity of the trial-,provides and the possibility of declaring the trial secret,situation when the trial's file is not public.

Paragraph 8 of the mentioned article is imposing to the presiding judge the duty to inform the persons who participates to the secrettrial,obligation of keeping the confidentiality of the information got during the trial.

Violation of this obligation may be punished with judicial fine from 1000 to 10000 RON,excepting the situation when this divulging is not an infraction.

Besides these provisions were not identified in the procedural law other bans imposed to the witness or other active subjects of the crime that could be committed in the manner prescribed by the paragraph. (3) of art. 277 by which to determine specifically what information must not be disclosed.

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[13] George Antoniu, *The material element from the incrimination rule*, Criminal Law Magazine, nr. 2/1999, page 12.

[14] George Antoniu,Ibidem, page 12.

[15] Romanian Explicative Dictionary, Second edition, Universul Enciclopedic Publishing, Bucharest, 1998, page 321

[16] Vintilă Dongoroz,Criminal right (reeditated edition from the 1939 one), precit. page 163.

[17] The New Criminal Procedure Code,adopted through Law nr.125/2010,published in Romanian Official Monitor nr.486 from 15 of July 2010.

We consider that, at least in the manner prescribed by the paragraph. (3),the incrimination that we are analyzing can't pass the test of predictability and functionality that the objectivity of legality principle requires for any incimination.

b) Immediate consequence is endangering the social value protected. In legal literature it was argued, regarding crime's comission in modality of disclosure, without right, of confidential information as par.(1) of art. 277 provides -disclosure „must have as consequence hindering or preventing prosecution".[18]

We believe that this is not the meaning which the legislator has given through the wording of the law since it is alleged that the disclosure of confidential information as a requirement to complete the objective side to occur and the result also, is only sufficient to create a state of danger.Legislator has embodied this circumstance in the formulation in: „if through this prosecution can be hindered or prevented". By using this expression to delimit the concept of confidential information, their importance and especially the administration of some important evidence for criminal prosecution.We appreciate that for achieving the content of the crime in the the manner provided by .par. (1) is not actually necessary that the prosecution to be hindered or blocked, being sufficient just endangering the normal activity of the criminal investigation.

Towards the specific content from the incrimination rule, we believe that this crime is one of concrete danger.Considering the crimes of concrete danger was endorsed in legal literature[19] that „they are characterized through the provision in the incrimination rule of the demand that the fact must create a state of danger for the protected value.Therefore, the fact would be a crime only if it is proved that in concreto, it has generated such a danger.Like in the case of result crimes the existence of physical changes in the external world must be proved ,in hypothesis of crimes of concrete danger must be proved creating a state of danger for the social value protected by criminal law provisions."

c) Causality report. To complete the objective side of the offense it must be a causal link between the action (inaction) that the material element of the deed was done and the immediate consequence, endangering the social relations regarding administration of justice.

B. Subjective side.The form of guilty necessary to achieve the subjective side of the offense is intention direct or indirect.

4. Forms.Variants.Sanction

From the text's formulation results that the preparatory acts are not incriminated and the attempt is not punishable. The offense is consumed differently. In the type variant provided by alin.(1)it is necessary to must proved the actual state of danger, namely the way could be hampered or prevented the prosecution.

The legislor has provided two versions of incrimination in two legal ways and a justificative cause

Sanctions are provided alternative, namely imprisonment from one month to one year or fine and imprisonment from three months to two years or a fine.

5. Procedural issues. Criminal proceedings shall be initiated automatically

In conclusion, we are considering that the new incrimination regarding compromising the interests of justice can contribute to the prevention and punishment of those facts through which can be seek disclosure or divulging of elements, confidential information, evidence in a criminal case, issues that could hinder the proper conduct of the trial or would affect the presumption of innocence.

[18] Petre Dungan, *A new incrimination-compromising justice's interests,* in "Dreptul", nr. 8/2010, page 80.
[19] Florin Streteanu, op. cit., page 407-408.

De lege ferenda, we propose, for ensuring the predictability and functionality of the criminal rule, that the legislator to provide,in the law of criminal procedure, specifically or in ways that determine which are the information that a witness, expert or interpreter must not disclose in a criminal case. Otherwise, this task would be left to the judicial organs who could create the danger of an incrimination by analogy.

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