

CONSIDERATIONS ON THE MATERIAL ELEMENT OF THE OBJECTIVE SIDE OF THE CRIMINAL OFFENCE OF PUBLIC ORDER AND TRANQUILITY DISTURBANCE, AS PROVIDED IN ARTICLE 371 OF THE CRIMINAL CODE

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Abstract

These considerations are brought about by Decision no. 9 of 12 April 2016 of the High Court of Cassation and Justice, the Panel for the settlement of matters of criminal law. The panel was called to rule on the following matter of criminal law: "whether the material element of the objective side of the criminal offence of public order and tranquility disturbance provided for in Article 371 of the Criminal Code needs to be directed at several individuals and whether, in the case where the action described above referred to only one person, de-criminalization operates in accordance with Article 4 of the Criminal Code."

Keywords: *objective side, offence of public order and tranquility disturbance, several individual.*

In settling the issue above, the decision emphasizes that, in the legal world, two opinions were manifested:

- a) A majority opinion supporting that the material element of the objective side of the criminal offence of public order and tranquility disturbance, as provided for in Article 371 of the Criminal Code is fulfilled even if the defendant's action refers to only one individual, because it also touches on all present individuals, provided that the key requirement that the criminal offence be committed in public is fulfilled;
- b) A minority opinion supporting that the material element of the objective side of the crime of public order and tranquility disturbance, as provided for in Article 371 of the Criminal Code, needs to be directed at several individuals, the incriminated wording including the term "individuals";

Having regard to the considerations above, the Panel decided that "the provisions of Article 371 of the Criminal Code shall be enforced, in relation to the criminal offence of public order and tranquility disturbance, in order for the criminal offence to exist, the violence, threats or severe prejudice against dignity need not be committed against several individuals, as it suffices for the violence, threats or severe prejudice against dignity, disturbing public order and tranquility, to be committed in public against a certain individual."

Having regard to the above ruling reached by the Panel of Judges, correct in our opinion, we want to nuance the variant where the severe prejudice against

dignity is committed in public, against only one individual, a passive subject of the committed offence.

Public order and tranquility consists, for the members of the society, of important social values, around which social cohabitation relationships occur and develop, in the absence of which a community could not efficiently operate. In principle, social cohabitation relationships established between the members of the community and protected by the State are "habitation relationships between people and other people"¹.

The State needs to protect social cohabitation relationships because, in the absence of such protection, such relationships would be jeopardized or damaged, entailing a negative effect on the society, because the members of the community would no longer have the guarantee of their moral security.

The doctrine emphasized that "social cohabitation relationships in restrictive meaning shall mean the social cohabitation relationships requiring close, direct, frequent contact between people and whose breach result in moral suffering"².

The care of the Romanian law-maker to ensure a civilized social cohabitation environment, based on morality and mutual respect between the members of the society materialized in the legal field by the issuance of appropriate laws.

In Romania, the social values consisting of "public order and tranquility" are especially protected by Law No 61 of 27 September 1991 (republished) sanctioning the infringements of social cohabitation rules, public order and tranquility³ and by the Criminal Code, Article 371, incriminating the offence of public order and tranquility disturbance.

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¹ Ion Oancea, comment in the collective paper Theoretical Clarifications of the New Criminal Code, volume III the special section, Academiei RSR Publishing House, Bucharest, 1972, p. 543.

² Idem op. cit. p. 544.

³ Law no. 61 of 21 September 1991 penalizing infringements of social cohabitation rules, public order and tranquility, was published in Official Gazette of Romania no. 96 of 07 February 2014.

In light of the above-mentioned laws, it follows that, depending on the degree of social jeopardy pertaining to the disturbance of public order and tranquility and on the outcome, the illicit offences in this field may amount, as the case may be, either to contravention or to criminal offence.

Thus, in accordance with Article 2 paragraph (1) item (1) of Law no. 61/1991 (republished), contravention shall be “the perpetration in a public situation of actions, obscene acts or gestures, abusive language, offensive or vulgar expressions, threats of violence against individuals or their property, likely to disturb public order and tranquility or to incite the citizens’ indignation or prejudice their dignity and honor or that of public institutions.”

Mention is also to be made that, in the case of the misdemeanor referred to above, in respect of the passive subject thereof, the lawmaker employs the plural number, within the meaning that the actions amounting to the material element of misdemeanor shall be able to disturb public order and tranquility or incite the citizens’ indignation or prejudice their dignity and honor.

In accordance with Article 371 of the Criminal Code, the criminal offence of public order and tranquility disturbance consist of the “action of an individual who, in public, through violence committed against individuals or their assets or by threats or severe prejudice against personal dignity, disturb public order and tranquility”.

As it may easily be noticed, the material element of the contravention provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991 (republished) is similar to that of the offence referred to in Article 371 of the Criminal Code, but there are also differences separating the contravention from the incrimination amounting to criminal offence.

The substantial difference between the contravention referred to in Article 2 paragraph (1) item (1) of Law no. 61/1991 and the offence incriminated in Article 371 of the Criminal Code consists of the fact that, while the contravention is, in its legal configuration, a jeopardy offence, the incrimination provided for in Article 371 of the Criminal Code is an offence of result.

Thus, the misbehaviour provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991 (republished) amounts to contravention, when, in the particular circumstances in which it was perpetrated, it is only able to disturb public order and tranquility, while the offence provided for in Article 371 of the Criminal Code only amounts to a criminal offence when it disturbed public order and tranquility and therefore entailed a particular outcome.

The legal provisions existing before the effective date of the New Criminal Code, when the contravention

provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991 (republished) was provided in Article 2 of Decree no. 153/1970, and the criminal offence was provided for in Article 321 of the previous Criminal Code, it was intended to separate the contravention from the incrimination.

In one case, the local prosecutor’s office of the town of Roman, county of Bacau, decided by means of an ordinance⁴ that the “offence of the individual who, under the influence, made threats against the clients of a restaurant, also breaking a glass, as a result of which the tranquility of the establishment was disturbed, is susceptible to amount to public order disturbance, as provided for in Article 321 of the Criminal Code” (previous, note added).

In the same ordinance, without correlating the offence committed by the law-maker with the contravention provided for in Article 2 of Decree no. 153/1970, the prosecutor reached the conclusion that “having ascertained that the disturbance against the tranquility of the establishment was not of significant proportions, that the perpetrator has a mental disorder, which under the influence determines violent reactions, that he had alcohol by accident that evening, being upset because of family misunderstandings, that, although he has criminal antecedents, his behavior in the society and at his work place is appropriate and that he has proven an intention to complete his training, all of the considerations above should lead to the conclusion that the misconduct does not have the social jeopardy of criminal offence and the Court shall impose an administrative nature, in accordance with Article 18¹ of the Criminal Code” (previous – note added).

In criticizing the decision of the prosecutor, the commentators of the ordinance above have emphasized that “in order to appropriately classify the offences committed by the defendant, the prosecutor should have focused on the distinctive criteria of the criminal offence of indecent exposure and public order disturbance, on the contraventions provided for in Article 2 of Decree no. 153/1970 in letter (a) (“an individual committing, in public, actions, gestures and actions or using indecent, offensive, obscene language, likely to incite citizens’ indignation”) and letter (d) (“causing scandal in public establishments”) and, in light of the criteria above, to classify the offences either in Article 321 of the Criminal Code or in the above-mentioned sections of Decree no. 153/1970⁵.”

Between the legal wording stipulating the contravention set forth in Article 2 paragraph (1) item (1) of Law no. 61/1991 and the wording of the offence incriminated under Article 371 of the Criminal Code, there are also interesting differences as regards the description of their legal content.

Thus, while the wording of Article 371 of the Criminal Code, the law-maker refers to “threats or

⁴ Please see Ordinance no. 161/B/1976 of the local prosecutor’s office of Roman, county of Bacau, notes by I. Pop and Vl. Dumbrava in the Romanian Law Review no. 11/1976, p. 54.

⁵ Please see, in that respect, Vasile Papadopol, Mihai Popovici, Alphanumeric repertoire of court practice in criminal matters, for 1976-1980, Scientific and Encyclopedic Publishing House, Bucharest, 1982, p. 394.

severe prejudice against personal dignity”, in the wording of the misconduct provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991, the lawmaker no longer uses the phrase “severe prejudice”, on the other hand, it explains the manners in which personal dignity may be prejudiced, in particular: obscene acts or gestures, abusive language, offensive or vulgar expressions, all of which shall obviously be committed in public, provided that they incite the citizens’ indignation or prejudicing their dignity and honor.

In comparing the two legal texts, in particular Article 2 paragraph (1) item (1) of Law no. 61/1991 and Article 371 of the Criminal Code, it is revealed that obscene acts or gestures, abusive language or offensive or vulgar expressions, in public, in order to amount to the incrimination provided for in Article 371 of the Criminal Code, need to have a certain intensity amounting to severe prejudice against personal dignity. In our opinion, the wording of Article 371 of the Criminal Code infers that if everything the perpetrator did could not reach a certain amplitude, causing severe prejudice against the dignity of the passive subject, the misconduct shall be qualified as contravention, and not criminal offence. For instance, if the offence consisted of a mere curse or the tendentious reference to a physical flaw of the passive subject, it shall not meet the constituent elements of the criminal offence provided for in Article 371 of the Criminal Code.

In terms of structure of the constituent content, the offence of public order and tranquility disturbance, as provided for in Article 371 of the Criminal Code has an alternative content, as it may be committed as follows:

- a) by violence committed against individuals or assets; this is the case most dealt with in court practice;
- b) by threats or severe prejudice against personal dignity.

In both regulated methods (a+b), in order to amount to a criminal offence, the action shall be committed in public and disturb public order and tranquility.

In reference to the regulated method specified under letter (a), committed in public, irrespective of whether the offence is committed by several individuals or only one, the offence shall always fall under the incrimination provided for in Article 371 of the Criminal Code, and not contravention, because it reaches an intensity whereby it becomes able to disturb public order and tranquility and hinder the social security environment.

The doctrine emphasized that “public order is a feature of normal social life, where the relationships

between people are conducted in a peaceful manner under conditions of mutual respect, personal security of trust in the behavior and actions of others. Public order and tranquility is disturbed when immoral manifestations or behaviors take place in public, when scandal occurs, when people face the risk of being subject to physical or language violence”⁶.

As indicated in the beginning of the paper, the Panel for the settlement of matters of criminal law decided that the incrimination referred to in Article 371 of the Criminal Code persists even when the threats or severe prejudice against dignity, disturbing public order and tranquility are committed against only one individual. In connection with this assertions, several clarifications are in order.

As regards the offence of public order and tranquility disturbance, as regulated in the new Criminal Code in the manner of “threats or severe prejudice against personal dignity”, the question arises whether the perpetration of threats, acts, gestures, or the use of indecent, offensive, obscene expressions against only one individual (passive subject) in public, in a location where, by its nature or intended purpose, is accessible to public, however, no one is present, satisfies the constituent content of the incrimination provided for in Article 371 of the Criminal Code.

In the court practice preceding the effective date of the New Civil Code, it was decided that the “offence of having an irreverent behavior against an individual who reprimanded the perpetrator because he was singing with others in front of a residential building and plunging his fist against the other’s face, causing injury, requiring 12 days’ of medical care, does not amount to the criminal offence of indecent exposure and public order disturbance”⁷. The same court practice preceding the effective date of the New Criminal Code decided that the “content of the criminal offence provided for Article 321 of the Criminal Code (previous – note added) is not satisfied as regards the offence of an individual who, after asking permission of the train attendant, enters a 1st class compartment, where he knew there was an individual against whom he had dissatisfaction and uttered offensive words against the latter, also assaulting him”⁸.

The doctrine contends that, in case of the offences provided for in Article 371 of the Criminal Code, what is relevant for incrimination is not the number of individuals touched by the author’s actions, but the disturbance of public order and tranquility by means of the behavior committed in public and having such characteristics (violence against individuals, violence against assets, threats or severe prejudice against personal dignity)”⁹.

⁶ Costica Paun, Comment in the commented New Criminal Code – special section – third issue, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2012, p. 928.

⁷ The Supreme Court, Criminal Division, decision no. 1278/1973 in Vasile Papadopol, Mihai Popovici *Alphabetic repertoire of court practice in criminal matters, for 1969-1975*, Scientific and Encyclopedic Publishing House, Bucharest, 1972, p. 427.

⁸ County Tribunal of Brasov, criminal decision no. 829/1972, in Vasile Papadopol, Mihai Popovici, op. cit., p. 429.

⁹ S. Bogdan, D.A. Serban, D. Zlati, *The New Criminal Code, special section – Universul Juridic Publishing House, Bucharest, 2014, p. 716.*

The above assertion is accurate, within the meaning that the violence perpetrated in public, even against only one individual or only one asset, meets the constituent elements of the incrimination provided for in Article 371 of the Criminal Code, however, in our opinion, in dealing with threats or severe prejudice against dignity, the number of individuals against which they are performed also matters.

We believe that the threats or severe prejudice against the dignity of only one individual, when committed in public, without any other people in attendance, meet the constituent elements of the misconduct provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991 (thus a contravention) and not of the incrimination provided for in Article 371 of the Criminal Code.

In differentiating the above-mentioned contravention from the offence provided for in Article 371 of the Criminal Code, a decisive element shall be whether public order and tranquility was indeed disturbed. If the offences consisting of threats or severe prejudice against dignity resulted in the disturbance of public order and tranquility, then we are dealing with the incrimination provided for in Article 371 of the Criminal Code, and if the actions were merely likely to disturb public order and tranquility, without actually disturbing it, then we are dealing with the contravention provided for in Article 2 paragraph (1) item (1) of Law no. 61/1991 (republished).

The criterion of whether public order and tranquility has been disturbed or not is decisive in differentiating the contravention from the criminal offence.

Both the criminal law, and Law no. 61/1991 (republished) do not define the meaning of “public order and tranquility disturbance”. In its case law, the former Supreme Tribunal deemed that, in order to rule in favor of the existence of public order disturbance, it is required to examine, in reliance upon the evidence submitted, whether the actions committed by the defendant were likely or not to induce strong indignation and disavowal both in the social

environment immediately impacted by the perpetration of the offence, and outside it¹⁰.

Considering that the interpretation of “public order disturbance”, the extent to which the objective side of the offence provided for in Article 371 of the Criminal Code, in the method of “threats or severe prejudice against dignity” is satisfied should be ascertained, where they are perpetrated in public against only one passive subject, without any other people in attendance. In our opinion, in such a case, the misconduct shall amount to contravention and not criminal offence, because it does not have the intensity required to cause the disturbance of public order and tranquility, insofar as there was no indignation and disavowal by members of the society and there is no increased social jeopardy by the perpetrator.

In the case where the “threats or severe prejudice against dignity” are directed against more than one passive subjects, at the same time and upon the same occasion, in public, without any other people in attendance, we believe that the outcome stipulated by law is caused, in particular, disturbance of public order and tranquility, and the action shall amount to a criminal offence, as the perpetrator proves a higher degree of social jeopardy.

Older court practice also decided that the “stalking, approaching and hitting without any reason, in the street, two individuals, shall amount to a conduct prejudicing good morals”¹¹.

Conclusion

In our opinion, in order for the misconduct to fall under the scope of the incrimination provided for in Article 371 of the Criminal Code, in the variant of the objective side – “threats or severe prejudice against dignity” – it needs to be directed against more than one passive subjects, because this is the only instance in which the offence has the required intensity for disturbing public order and tranquility.

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¹⁰ The Supreme Tribunal, criminal division, decision no. 5351/1971, in the Romanian Law Review no. 8/1972, p. 154.

¹¹ The Supreme Tribunal, criminal division, decision no. 3350/1971, in the Vasile Papadopol, Mihai Popovici, Repertoire....., op.cit., p. 428.

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