OFFENCES REGARDING THE STATE AUTHORITY AND BORDER FROM THE PERSPECTIVE OF THE NEW CRIMINAL CODE AND OF THE PREVIOUS CRIMINAL CODE

Constantin Duvac, PhD.*

Abstract:

The author first presents some general remarks on the special part of the new Criminal Code, then stopping upon the offences regarding the authority and state border laid down in Title III of the Special Part of the new Criminal Code of 2009.

He indicates the amendments brought to the matter under examination and the legal content of various rules of incrimination, highlighting both the positive aspects as well as those which are still under debate with regard to which makes proposals for new legislation.

Further on, the author makes a comparative study of legal norms of incrimination that have corresponding rules in criminal law in force, a brief examination of ex novo incriminations, analysis accompanied by several observations and some suggestions (proposals for new legal norms) to improve the texts that were examined.

Keywords: *Criminal Code, criminal law, criminal offence, punishment, authority, state border.*

1. The offences regarding the state authority and border have been ranged in Title III of the special part of the new Criminal Code, being divided in two chapters: one regarding the deeds committed against authority and another one being consecrated to the criminal activity regarding the state border.

In case of offences regarding authority, the incriminations of the applicable Criminal Code were kept in broad terms without significantly amending their content, the criminal offense committed against certain insignias was given up and two offenses were introduced in this title, and which were provided in the Government Emergency Ordinance no. 194/2002 on the regime of foreigners in Romania, respectively the fraudulent border crossing and the avoidance of the actions of removal from the Romanian territory.

According to the commission's opinion, the waiver of the criminal offense committed against certain insignias represents the conclusion reached as a result of the examination of the need for the respective incrimination, but also of the adequacy between the nature and the severity of the means of constraint on the one hand, and the importance of the social value protected by these means, on the other hand. As regards the need for incriminating such a deed, there is no argument which could reasonably sustain its keeping in the scope of criminal protection provided that the judicial practice is almost inexistent in this matter. In terms of adequacy, in the context of the significant reduction of the limits of punishment for the offences provided in the new criminal laws, the keeping of the present penalties (imprisonment for 6 months to 3 years, respectively imprisonment for 3 months to 1 year or a fine) appeared to be excessive even in case of their proportional reduction, and the consequences arising from the pronouncement of the judgment of conviction appeared to be disproportionate by comparison to the seriousness of such deeds.

The new Criminal Code included the following deeds in the category of offenses against authority: the assault (art. 257), usurpation of official functions (art. 258), the taking or destruction of documents (art. 259), the break of seals (art. 260) and the embezzlement of assets under seizure (art. 261), the last two incriminations being adopted from the applicable Criminal Code without any amendments.

* Associate Scientific Researcher – "Acad. Andrei Rădulescu" Legal Research Institute of Romanian Academy; Romanian-American University of Bucharest – the Faculty of Law, e-mail: ctinduvac@yahoo.com.

2. Regarding the **assault** (art. 257), certain amendments were brought regarding the *group of the persons protected by this incrimination*. Thus, the aggravated variant of the present regulation regarding magistrates is not found anymore in the content of the offense of assault within the category of the offenses against authority, but rather they form the subject matter of a distinct incrimination in relation to the offenses against the application of justice (the judicial assault art. 279), and the choice of this systematization being sustained by the need for classifying the offenses against justice in the same title of the new Criminal Code (Title IV).

The deed provided in art. 239[1] of the applicable Criminal Code – Special cases of punishment – was introduced in the legal content of the offense of assault as in fact it only represents a special form of threat against the civil servant for the deeds committed during the exercise of his/her job duties or in relation thereto. Moreover, the new regulation sanctions the violence or threats aimed at against the spouse, parents or children of a policeman or of a peace officer, but also those aimed at against a family member[1] of any civil servant holding a position which involves the exercise of the state authority, when these deeds are committed for the purpose of intimidation or revenge.

Moreover, in the new Criminal Code, as opposed to the applicable regulation, the hits or bodily injuries causing death, as well as the simple murder and the aggravated murder are absorbed by the content of the offense of assault.

The legislator of the year 2009 did not establish any own explicit limits of sanctioning the assault, this being sanctioned by adding a fraction (one third or one half, as the case may be) to the special limits of punishment of the absorbed offense.

The criminal doctrine appreciated that the lack of certain own limits of sanctioning the assault faded away the autonomous nature of this offense, which thus appears as a normative aggravated variant of an offense against the person absorbed in the content of the assault. The text did not determine whether it operated also in relation to the *former public servant* for the deeds committed in the exercise of the job duties, and neither the applicable criminal law has solved this problem[2].

In the Law no. 160/2005[3], in a questionable way,[4], the insult and defamation of the content of the offense of assault were abrogated, this solution being kept in the new Criminal Code, as well. Due to the frequency of committing this kind of deeds because of weakening of the authority which the bodies in charge with the enforcement of the domestic laws enjoy and in compliance with the traditional solution adopted in the Romanian criminal law, but also with the criminal laws of other Member States of the European Union (art. 433-5 of the French Criminal Code, art. 341 of the Italian

---

[1] For more details related to the signification of this explanatory rule, see C. Duvac, *Înţelesul unor termeni sau expresii în legea penală*, in „Explicaţii preliminare ale noului Cod penal (art. 53-187), vol. II, by George Antoniu (coordinator and co-author), B.-N. Bulai, C. Bulai, Ş. Daneş, C. Duvac, M.-K. Guiu, C. Mitrache, C. Mitrache, I. Molnar, I. Ristea, C. Sima, V. Teodorescu, I. Vasiu, A. Vlăsceanu, Universul Juridic Publishing House, Bucharest, 2011, p. 538-542.

[2] G. Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II)*, in RDP no. 1/2008, p.19-20. The author expresses reservations in relation to the repealing of the provisions regarding the offense of certain insignias, as well, such as those regarding the defamation of the country, moral values deserving of being protected through the agency of the criminal law, as well.

[3] Published in the Official Journal no. 470 of 2 June 2005.

[4] For more details see: M. Făgăraş, *Ultrajul săvârşit prin insultă sau calomnie*, in RDP no. 3/2006, p.123-128. The author proposes to reincriminate the assault when committed through words, through gestures, through exposure to derision, through assignation of a physical flaw, disease or invalidity which, even if they existed, they should not be revealed, through threat or through public affirmation or imputation, by any means, of a determined deed regarding a person, who, if it was real, would expose that person to a criminal, administrative or disciplinary sanction or to the public contempt. By waiving the terms of "insult" and „defamation" of the content of the assault and the introduction of certain equivalent phrases it is considered that, from the point of view of the legislative technique, the independence of the assault is ensured in relation to the repeal of the texts pertaining to insult and defamation. C. Dobre,. *Ultraj şi purtare abuzivă. Consideraţii critice*, in RDP no. 1/2007, p. 118-119. The author considers that the repeal of insult and defamation in the content of the assault is „an incovenient measure, with harmful consequences for the activity of the public authorities". M. Făgăraş, *Din nou despre infracţiunea de ultraj săvârşită prin insultă sau calomnie*, in RDP no. 3/2007, p. 132-134; C. Duvac, in Gheorghe Diaconescu, Constantin Duvac, *Drept penal. Partea specială. Noul Cod penal*, university course, vol. I, România de Mâine Publishing House, Bucharest, 2006, p. 515; C. Duvac, in „Tratat de drept penal. Partea specială" by Gh. Diaconescu, C. Duvac, C.H. Beck Publishing House, Bucharest, 2009, p. 335.

Criminal Code and so on), *de lege ferenda* it would be required to return to the solution which existed until the emergence of the Law no. 160/2005.

As opposed to the basic variant, in the assimilated variant provided in paragraph (2), against the passive subject, under the conditions mentioned therein, any kind of offense may be committed, no matter its nature (offense against the person, against patrimony etc.) or the localization of the incrimination (Criminal Code or special laws with incriminations and punishments).

The specialty literature drew the attention to the opportunity of the emergence of certain problems related to the delimitation in the judicial practice, between the offenses against the person leading to the completion of the content of the standard variant of assault from the assumption when the same offenses result in the classification of the offense of assault in the first assimilated variant. In the absence of some legal criteria, the criminal doctrine should establish those criteria of concrete separation of the standard variant of the assault from the first assimilated variant in order to get a unitary judicial practice[5].

The offenses committed under the conditions set forth in paragraph (2) shall be sanctioned with the same punishment, if they concern a family member[6] of the public servant.

The last aggravated variant [art. 257 paragraph (4)] is different from the previous variants regarding only the passive subject which has to be a policeman or a peace officer.

To be mentioned that, in the new Criminal Code, *the judicial assault* (art. 279) represents an aggravated variant of the offense of assault (art. 257), even if it could have been provided in its content as a circumstantial aggravating element and aimed at protecting the persons having important judicial duties for carrying on the judicial process against psychical or physical violence during the exercise of these duties.

In the view of the editors of the code, the justification of the distinct incrimination of the offense of judicial assault as opposed to the offense of assault consists in the fact that, under the will of the legislature, the judge, the prosecutor or the lawyer have the most important legal duties, and the efficient conduct of a trial and its result decisively depend on their performance, so that the assurance of an increased protection against any kind of violence exercised against them, is justified from this point of view.

Although the creation of this incrimination is a choice of the legislator, we consider that it would be required its correlation with the rules of criminal procedure providing the composition of the criminal judicial bodies, since the categories set forth in art. 279 are not the only ones which contribute to the application of the criminal laws. Likewise, in our opinion all the judicial bodies have significant duties regarding the application of justice so that their division into bodies with more or less important duties does not seem inspired to us. Consequently, *de lege ferenda*, it would be required the introduction of the criminal investigation bodies as a passive subject in case of the offense of judicial assault as they take part of the judicial bodies contributing to the application of criminal laws. As such, we specifically propose the replacement of the term of "prosecutor" with the phrase "criminal prosecution body"[7]. As a matter of fact, the judicial practice agrees to it, as most of the offenses of assault are committed against this category of judicial bodies.

One should reflect as well, in relation to the explicit introduction of the rights and freedoms judge and of the preliminary chamber judge within the scope of the passive subjects of this offense.

---

[5] I. Pascu, *Infracțiuni privind autoritatea. Infracțiuni de fals. Infracțiuni electorale. Infracțiuni contra capacității de luptă a forțelor armate*, in the collective volume „Noua legislație penală în discuția membrilor Asociației Române de Științe Penale", Universul Juridic Publishing House, Bucharest, 2012, p. 193.

[6] For more details regarding the signification of this phrase, see C. Duvac, *Membru de familie* (Significance of certain terms or phrases), in „Explicații preliminare ale noului Cod penal", vol. II, by George Antoniu (coordinator and co-author), B.-N. Bulai, C. Bulai, Ş. Daneş, C. Duvac, M.-K. Guiu, C. Mitrache, C. Mitrache, I. Molnar, I. Ristea, C. Sima, V. Teodorescu, I. Vasiu, A. Vlăsceanu, Universul Juridic Publishing House, Bucharest, 2011, p. 538-542.

[7] C. Duvac, *Unele observații critice cu privire la proiectul unui al doilea nou Cod penal*, in „Revista română de criminalistică" no. 4, 2009, p. 153; *Idem*, *Unele observații critice cu privire la proiectul unui al doilea nou Cod penal*, in „Criminalitatea transfrontalieră la granița dintre prezent şi viitor", bilingual edition (Romanian-Hungarian), T.K.K. Debrecen, Hungary, 2009, p. 106, 390.

Last, but not least, the introduction of the phrase "during or" would be required at paragraph (4) after the term of lawyer in order to cover all the situations in which he could be outraged.

3. The usurpation of official capacity (art. 258) is incriminated in a standard variant, an assimilated variant and an aggravated variant. As opposed to the current form, the new regulation *reduced the scope of official capacity whose usurpation is sanctioned through criminal ways* by excluding those functions which, even if they are official, *do not involve the exercise of the state authority*, as the consequences of such deeds do not justify their keeping within the scope of the criminal unlawfulness. For instance, in the committee's view, the capacity of a spokesperson of the Ministry of Justice who undoubtedly is an official capacity according to the criminal law, does not fall within the scope of the reviewed text, so that the illegal use of such capacity followed by the communication of a press release in this way, does not justify the reference to the criminal coercion means from the perspective of its seriousness.

The requirement introduced in the content of the offense of usurpation of official capacity is deemed to be unnecessary (as it is not required by the doctrine or by the judicial practice), it being also appreciated that the usurpation of official capacity may be committed as well, by the person pretending to be a school inspector and carries out inspections at the school in this usurped capacity[8].

The standard variant was supplemented by an assimilated variant regarding the offense of the civil servant who continues to hold an office involving the exercise of the state authority, after having lost this right according to law.

If the civil servant who was released from his/her position or whose employment relationships with the respective unit terminated in an abusive manner, continues to exercise the held office, he is not criminally liable for the offense provided in art. 258 paragraph (2), due to the lack of an essential implicit requirement (in order to exist the examined offense it is necessary that the loss of the office should take place according to the legal provisions). It is sure that nobody is allowed to do justice oneself, so that in such situations it is desirable for the civil servant who deems himself/herself injured to act according to Law no. 554/2004 of the contentious-administrative, and the issuing body of the administrative provision or its superior hierarchical body or the court order proves that he/she didn't lose this right according to law (as regards the incidence of the reviewed text, their effects shall produce *ex tunc*).

The usurpation of official capacities is more serious in case the deeds described by the standard variant and the assimilated variant are committed by a person who wears distinct uniforms or badges of a public authority without having this right.

4. The removal or destruction of documents (art. 259) has content similar to the content provided in art. 242 of the applicable Criminal Code, being incriminated in a standard variant and in an aggravated variant.

The content of the standard variant was reformulated by reason of the necessity of making it clearer and harmonizing it with other texts to which it refers[9].

The new Criminal Code has not kept anymore as an offense the destruction on ground of guilt of any of the documents kept or held by one of the persons provided in art.176 or in art. 175 paragraph (2).

The deed is more serious if it is committed by a civil servant[10] during the exercise of his/her job duties.

5. The break of seals (art. 260) and **the embezzlement of assets under seizure** (art. 261) have the same legal content as that provided in the applicable criminal law, except the limits of punishment which have been insignificantly reduced.

---

[8] G. Antoniu, *Observații cu privire la anteproiectul unui al doilea nou Cod penal (II)*, *cit. supra*, p. 20.

[9] I. Pascu, *op. cit.*, p. 194.

[10] For more details regarding the meaning of this term, see C. Duvac, *Conceptul de funcționar public în lumina noului Cod penal*, in Dreptul no. 1, 2011, p. 95-127.

6. Chapter II – Offenses against state borders included the following crimes: the fraudulent crossing of the state border (art. 262), the smuggling of migrants (art. 263), facilitating the illegal stay in Romania (art. 264) and the circumvention of the removal measures from the Romanian territory (art. 265) by adopting them, as amended, from the criminal laws with criminal provisions, respectively the Emergency Government Ordinance no. 105/2001 regarding the Romanian state border[11], as approved by Law no. 242/2002 and the Emergency Government Ordinance no. 194/2002 on the regime of foreigners in Romania, as republished[12], approved by Law no. 357/2003.

7. The fraudulent crossing of the state border, an offense which does not have any correspondent in the Criminal Code of 1968, is provided in art. 262 in a standard variant and an aggravated variant, representing an adoption, as amended, of the provisions of art.70 of the Government Emergency Ordinance no. 105/2001 and art.139 paragraph (1) of the Government Emergency Ordinance no.194/2002.

In the standard variant, the word of "state" was followed by the phrase "of Romania", and this addition did not influence the scope of this rule of incrimination, together with an increase of the special limits of the penalty of imprisonment from 3 months to 2 years for 6 months to 3 years, but alternatively with the penalty of fine.

In exchange, the first assumption of incriminating the aggravated variant, that of letter b), represents an extension of the scope of the provision of art.70 paragraph (2) of the Government Emergency Ordinance no. 105/2001 and in those cases in which the specific offense is committed "for the purpose of the avoidance of the entailment of criminal liability or of the enforcement of … an educational measure involving deprivation of liberty". The phrase of "entailment of criminal liability" has a much broader meaning than that of the avoidance of the enforcement of a sentence, an aggravating circumstantial element provided in the applicable regulation and to which the abovementioned cases have been added. This phrase would sum up, in our view, all the activities carried out by the relevant judicial bodies in relation to the settlement of the legal report of criminal law of conflict, from the date of referral and until its settlement, which in case of the defendant's conviction is performed by enforcing the custodial sentences applied or decided, as the case may be, by the court of law. In such an interpretation, the specification "or from the enforcement of a sentence or of an educational measure involving deprivation of liberty" appears to be superfluous and it should be removed as it represents only the final composition of the entailment of criminal liability of a person having breached the criminal law on grounds of guilt. And in this case as well, the special limits of the sentence of imprisonment were increased from 6 months to 3 years for one to 5 years.

In relation to the second aggravation assumption adopted, as amended in art.139 paragraph (1) of the Emergency Government Ordinance no.194/2002, first, it is required to remark that the phrase "under another identity" was correctly eliminated from its content as it represents one of the concrete (factual) methods of illegally crossing the state border, this normative means being kept in the new regulation. In this case, the sentence of imprisonment provided by law was reduced from 2 years to 6 years, for one to 5 years. The new regulation did not adopt anymore the aggravated assumption in which the offense provided in art.139 paragraph (1) of the Emergency Government Ordinance no. 194/2002 was repeatedly committed, and which was described in paragraph (2) of the same article. A novelty introduced by the legislator of 2009 is represented by the sanction of the offense provided in art.262 paragraph (2) letter b) when it remained at the stage of attempt, a solution which was not provided in the Government Emergency Ordinance no. 194/2002.

8. The smuggling of migrants (art. 263) is a new incrimination in relation to the provisions of the applicable Criminal Code, however not in relation to the positive criminal law, as it represents an adoption of art.71, as amended, of the Government Emergency Ordinance no. 105/2001.

[11] Published in the Official Journal no. 352 of 30 June 2001.
[12] Republished in the Official Journal no. 421 of 5 June 2008.

The physical element is extended as well, in the new regulation regarding certain activities such as "the transfer", "the transportation" and "the accommodation", these amendments being required by the judicial practice. The word "state" was followed by the phrase "of Romania" without any influences upon the scope of this rule of incrimination.

The variant provided in art.71 paragraph (2) was restylised instead of the phrase "by its nature, it may endanger the migrants' life or safety or may expose them to an inhuman or degrading treatment" and the synthetic phrases were used, being equivalent to the existing one "by means which endanger the migrant's life, integrity or health", respectively by "exposing the migrant to inhuman or degrading treatments".

A new provision refers to the aggravating circumstance in which the specific deed is committed for the purpose of obtaining a patrimonial advantage directly or indirectly.

At the same time, the circumstance provided in art.71 paragraph (3) of the Government Emergency Ordinance no. 105/2001 was eliminated from the aggravated content of the offense of smuggling of migrants, respectively when the "offense resulted in the victim's death or suicide", and in these cases, after the new criminal laws enter into force, the rules of the concurrence of criminal offenses shall be applicable.

9. Facilitating the illegal stay in Romania (art. 264) represents an adoption, as amended, of art.141 of the Government Emergency Ordinance no. 194/2002.

First, the existence of the standard variant of the offence depended on the action of facilitating the illegal stay in Romania of only certain categories of foreigners whose residence is not in Romania, respectively the persons who are the victims of an offense of human trafficking, of trafficking in minor children or migrants, and in these cases the punishment provided by law shall be imprisonment for one to 5 years and the interdiction of exercising certain rights, instead of the sentence of imprisonment for 6 months to 5 years, as the applicable rule sets forth.

If the person supported to illegally stay in Romania is another foreigner than those aforementioned, staying illegally in Romania, the deed shall be sanctioned more indulgently, and the special limits of the punishment provided by law for the specific offense have been reduced by one third.

The legislator of 2009 did not adopt any of the aggravating variants provided in art.141 paragraphs (2) and (3) of the Government Emergency Ordinance no. 194/2002 in the new criminal law.

Likewise, the legislator of 2009 charged other aggravating circumstances of this criminal offense than those existing in art. 141 paragraphs (2), (3) and (4) of the Government Emergency Ordinance no. 194/2002. Thus, the offense will be more serious when it is committed for the purpose of obtaining a patrimonial advantage directly or indirectly, or by a civil servant during the exercise of his/her job duties. We should mention that the first aggravating circumstance is not completely new as art.141 paragraph (4) provided as aggravating circumstantial elements the cases in which the specific offense was "committed by a person taking part of an organized group or who obtained some important material benefits for himself/herself or for another person". From the point of view of the examined matter, the mention is required that the formulation of art. 264 paragraph (2) letter a) is broader than the formulation existing in art. 141 paragraph (4) the last sentence of the special law, as in the new regulation the deed of obtaining the material advantage is a requirement of the subjective element of the incrimination, but not of the material element as it is at present. Consequently, in the new concept related to the existence of the offense it will be sufficient to show that the defendant has acted for such a purpose, without the need for obtaining any material advantages, no matter their size. Likewise, the new formulation is superior to the existing one.

If the offense provided in art. 264 is committed by a person taking part of an organized crime group, it shall be charged together with the offense provided in art. 367.

If the deed of facilitating the illegal stay of a foreigner in Romania causes his/her bodily injury or death, the provisions regarding the concurrence of offenses shall apply. Furthermore, art. 264

paragraph (1) the last sentence accurately provides that "in case the means used represents an offense by itself, the rules regarding the concurrence of offenses shall apply".

10. The avoidance of the actions of removal from the Romanian territory (art. 265) represents an adoption, as amended, of the provisions of art.138 of the Government Emergency Ordinance no. 194/2002, together with a reduction of the special limits of sentence of imprisonment provided for this offense from 6 months to 5 years for 3 months to 2 years, alternately with the penalty of fine.

The text was restylised, instead of the formulation "for which the measure of expulsion, of returning was decided or one of the measures of the interdiction of the right to stay on the territory of the country or to temporarily reside or to establish his/her residence in certain regions or localities" and it was correctly used the synthetic and equivalent mention "for which the measure of removal from the Romanian territory was decided or the interdiction of the right to stay was disposed".

Likewise, from the subjective point of view, the text was harmonized with the rule applied under art. 16 paragraph (6) sentence I, and the phrase "in bad faith" was correctly removed as in the new legislative concept, no matter the concrete manner of its performance, the deed consisting in an act or omission is considered as an offense when it is committed with intent, and the fault is retained only when expressly provided by law.

11. According to art.97 of the Law no.187/2012 for the enforcement of the Law no. 289/2009 regarding the Criminal Code[13], art.70, 71, 73 and 74 of the Government Emergency Ordinance no. 105/2001 regarding the Romanian state border, approved as amended by Law no. 243/2002, as subsequently amended and supplemented, shall be repealed.

Likewise, art.120 of the same regulation repeals art.138 and 139, 141 and 142 (regarding the criminal liability of the legal entity) of the Government Emergency Ordinance no. 194/2002 the regime of foreigners in Romania, as republished, subsequently amended and supplemented.

We should mention that both the Law no.286/2009, and the Law no.187/2012, with certain exceptions, shall enter into force on 1 February 2014.

12. *De lege ferenda* conclusions and proposals. The way in which the offenses against state authority and border were regulated in Title III of the Special Part of the new Criminal Code denotes the increased concern of the criminal Romanian legislator for paying special attention to the protection of the Romanian state authority and borders.

By adjusting these incriminations in a distinct title, the state authority and borders received their proper importance, and art. 257-265 were drafted to the largest extent, in compliance with the rules of legislative technique.

De lege ferenda it would be required to reintroduce the insult and defamation in the specific content of the assault, as provided in the Criminal Code of 1968, until its amendment according to Law no. 160/2005, all the more such a solution is found in some well-known systems of criminal law, such as the criminal laws of Germany, Italy or France. Furthermore, in case of the offense of judicial assault, *de lege ferenda* it would be required to introduce the bodies of criminal investigation as a passive subject as they take part of the judicial bodies contributing to the application of the criminal law, and instead of the word "prosecutor", the phrase "criminal prosecution body" may be used.

[13] Published in the Official Journal no. 757 of 12 November 2012.