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IS THERE A REDUNDANT OVERLAP OF LEGAL PROVISION OF THE ROMANIAN CRIMINAL CODE IN THE CASES OF VIOLENT ACTS PERPETRATED IN PUBLIC SPACES?

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Abstract: *The article aims to analyze the impact of the enforcement of the Law no. 248 of July 20, 2023 on the situations involving the use of violence in public spaces, in the presence of non-participating persons. Specifically, the law introduces aggravating variants for both the offense of assault and other violence when committed in public spaces and for the offense of disturbing public order and peace, when committed through acts of violence. Therefore, the concurrent application of the aggravating variants of the two offenses raises an analysis that constitutes the subject of this article and it has a significant practical significance because there is a certain and very high probability that this type of case will be the subject of criminal cases.*

Keywords: *Violence in public spaces, assault or other violence, disturbing public order and peace, complaint of the injured person, criminal action initiated ex officio, formal contest between the offenses, the aggravation of criminal liability for perpetrating acts of violence in public spaces.*

1. Introductory aspects

This article aims to clarify the correct legal qualification of the acts of violence committed against one or more persons, given that they were seen by several uninvolved persons and occurred in a public space. The need for an analysis regarding the legal qualification of an act of this kind arose as a result of the amendment of the Romanian Criminal Code by Law no. 248 of July 20, 2023. This law introduced a new aggravated form of the crime of *assault or other violence*, previewed by the Article 193 of the Criminal Code, namely, paragraph 2^1 letter c) where it is specified that the special limits of the crime are increased by one third if the act was perpetrated in public spaces. On the other hand, the law, mentioned above, also modifies the content of the crime of *disturbing public order and peace* provided for in Article 371 of the Criminal Code by adding to paragraph (2) an aggravated form which, apparently, overlaps with the content of the aggravated form of the crime of *assault and other violence*.

2. Legislative amendments that introduced aggravating circumstances for the analyzed crimes

Specifically, the content of the crime of *assault and other violence*, provided for in Article 193 of the Criminal Code, has the following content:

(1) Assault or any acts of violence causing physical suffering are punishable by imprisonment from 6 months to 3 years or by a fine.

(2) The act by which traumatic injuries are caused or the health of a person is affected, the seriousness of which is assessed by days of medical care of no more than 90 days, is punishable by imprisonment from 1 year to 5 years or by a fine.

Law no. 248 of July 20, 2023 introduces the following paragraph:

(2¹) The special limits of the punishment provided for in paragraphs (1) and (2) are increased by one third when:

a) the victim is in the care, protection, education, guard or treatment of the perpetrator;

b) the victim is a minor;

c) the act is committed in public;

d) the perpetrator has on him a firearm, an object, a device, a substance or an animal that may endanger the life, health or bodily integrity of persons.

Other important clarifications from a procedural point of view are those in paragraphs (3) and (4) of this article, which refer to the aspects regarding the option of the injured person to request or not, the criminal liability of the author of the acts of violence or the possibility of the judicial bodies to undertake criminal investigations ex officio, even in the absence of a complaint from the injured person. Thus:

(3) The criminal action is initiated upon the prior complaint of the injured person.

(4) In the case of acts committed under the conditions of paragraph 2¹, the criminal action may also be initiated ex officio.

The other offense referred to in this article is the disturbance of public order and peace, which has the following content provided for in Article 371 of the Criminal Code:

(1) The act of a person who, in public, by threats or serious attacks on the dignity of persons, disturbs public order and peace is punishable by imprisonment from 3 months to 2 years or by a fine.

By the Law No. 248 of July 20, 2023, two new paragraphs were introduced, adding to the basic form of the offense two situations of aggravating criminal liability, as follows:

(2) The act of a person who, in public, by violence perpetrated against persons or property, disturbs public order and peace is punishable by imprisonment from one to 5 years.

(3) If the act provided for in paragraph (2) is perpetrated by a person who has on him a firearm, an object, a device, a substance or an animal that may endanger the life, health or bodily integrity of persons, the special limits of the punishment are increased by one third.

3. Dilemmatic aspects in the situations of concurrent application of the legal provisions of incrimination

After studying the content of the two crimes, as they were modified by adding some situations of aggravating criminal liability, we note that there is an apparent overlap of situations, when an act of violence is perpetrated in a public place, in the presence of some uninvolved persons: the act can be legally classified as the crime of *assault and other violence* in the aggravated form provided for by Article 193 paragraph (2¹) letter c) of the Criminal Code, when *it is perpetrated in public*; the act can also be considered as a *disturbance of public*

peace and order, *perpetrated through violence*, which makes it possible to classify the act in the aggravated form of this crime, provided for by Article 371 paragraph (2) of the Criminal Code. Therefore, in the event that such an act is perpetrated, the question arises as to which of the respective crimes will be incidental or whether both are attributable to the perpetrator.

The variants could be:

a) retaining a formal (ideal) contest between the offense of *assault or other violence* provided for by Article 193 paragraph (2^1), letter c) of the Penal Code and the *disturbance of public order and peace*, provided for by Article 371 paragraph (2) of the Penal Code, i.e. the two aggravated forms. In this situation, the question arises as to whether the perpetrator must be held liable for both aggravated forms, respectively for violence exercised in public but also for disturbing public order and peace through acts of violence, at the same time, as long as each aggravation involves the perpetration of the basic content of the other offense;

b) retaining a contest between the basic form of the offense of *assault or other violence* provided for by Article 193 paragraph (2) of the Criminal Code and the aggravated form of the *crime of disturbing public order and peace*, provided for by Article 371 paragraph (2) of the Criminal Code, considering that both aggravating factors cannot be retained because the perpetrator would be held liable twice for the same act;

c) retaining a single aggravated crime of *assault or other violent acts* provided for by Article 193 paragraph 2^1, letter c) of the Criminal Code, considering that by retaining this aggravated form of committing the act in public, the crime of *disturbing public order and peace* is also absorbed.

The question is legitimate but also of practical interest, in light of the fact that the legislator clearly intended, by adopting Law no. 248 of July 20, 2023, to more severely sanction acts of assaulting or other violence perpetrated in public, in order to discourage aggressors who do not hesitate to act on victims, despite the fact that there is a public exposure of the aggression, which causes the state of peace and safety of other people who, randomly, are at the scene, to be strongly affected. The application of the two legal provisions is complicated precisely because each of the basic content of one of the crimes represents the aggravated form for the other crime. It is clear that the hypotheses of perpetrating these crimes are multiple and not all of them assume an overlap from the perspective of the content of their aggravated forms. However, there is an appreciable margin of possibilities for same criminal acts to claim the incidence of both legal texts.

In the first hypothesis, that is, in the case of retaining an ideal competition between the offense of assault or other violence provided for by Article 193 paragraph (2^1), letter c) of the Criminal Code and the *disturbance of public order and peace*, provided for by Article 371 paragraph (2) of the Criminal Code, both incriminations representing aggravated forms of the basic offense, it could be interpreted that a double legal valence is given in attracting criminal liability for the same element, the commission of the offense in public. This element would constitute both an offense in itself and an aggravating factor for another offense.

The other two variants of legal classification could raise criticism because each of them leaves without effect certain legal provisions expressly provided for such situations. Thus, the application of the aggravating factor from Article 193 paragraph (2^1) letter c) of the Criminal

Code, in the case of applying the second study variant and in the case of the third variant, the incidence of the provisions of Article 371 paragraph (2) of the Criminal Code, regarding the *disturbance of public order and peace*, would be omitted entirely.

4. The legislator's explanation for the aggravation of criminal liability for committing acts of violence in public space

In order to find the answer to the dilemma of applying this competition of incrimination norms, a starting point could be the *Explanatory memorandum for the adoption of the draft law amending the Penal Code, materialized in Law no. 248 of July 20, 2023*, where some of the below mentioned ideas were shown.

The impact of violent acts is even more grave when they are perpetrated in public space, a space that must be characterized by a climate of peaceful and dignified coexistence, based on mutual respect and consideration between members of the community. Moreover, by Decision no. 705/2019, the Romanian Constitutional Court (RCC), held that: *"in order to ensure the climate of public order and tranquility necessary for the normal conduct of daily life, with all the economic and socio-cultural activities that this implies, as well as for the promotion of civilized relations within society, citizens are obliged to have a civic, moral and responsible behavior, in the spirit of the laws of the country and the norms of social coexistence. Peaceful coexistence between the members of a society is an essential element for its evolution, and people, forming society, have given up part of their freedoms in order to be able to coexist. This peaceful coexistence needs norms that ensure it, norms that without sanctions would be absolutely ineffective."*

The frequency of cases of beatings and other violence in public space, the seriousness of the consequences of such acts (infirmities, deaths of some people), as well as the escalation of acts of disturbing public order and peace that have occurred recently, have highlighted the existence of a specific pattern characterized by the participation of a significant number of people, the existence of older conflict situations, the exercise of acts of violence and a refractory attitude, including towards the police, ostentatiously manifested through violence.

In some cases, the acts perpetrated in public were preceded by acts of public incitement through the use of social platforms, both through messages, but especially through images and video clips, live, aspects that increased the violence and the intimidating nature of the community. Therefore, it is necessary for this type of events to receive a firm, adequate and harsher response from the authorities, since such situations can degenerate, leading to the perpetration of much more serious antisocial acts. In this regard, the perpetration of the act in public must be criminalized distinctly, as an aggravating form of the basic offense, in the case of the following offences*: i) Hitting or other violence (Article 193 of the Criminal Code); ii) Bodily injury (Article 194 of the Criminal Code); iii) Hitting or injuries causing death (Article 195 of the Criminal Code).*

Even if in certain situations there is a competition between *crimes involving violence* and others, such as *disturbing public order and peace*, may be observed, this aspect should not be such as to prevent the existence of such an aggravating factor for the first category. It should be borne in mind that we are in the hypothesis of the existence of the crime provided for by Article 371 of the Criminal Code when the result occurs and is proven, namely *"disturbing public order and peace"*, the passive subject of the crime being the community. The

aggravating factor proposed for the three above mentioned crimes targets the victim of violence and not the community (as is the case of the act provided for in Article 371of the Criminal Code). The commission of the act in public causes additional harm to the victim, in that:

- the act occurs in an environment uncontrolled by the victim, unlike the act committed in the private environment (where the victim has the possibility and means to refuse contact with possible aggressors;
- the access to the victim's home without consent or refusal to leave it constitutes a distinct offense (*Trespassing*, previewed by Article 224 of the Criminal Code);
- by bringing the act to the public's attention, the victim's right to dignity is prejudiced;
- the commission of the act in public also affects the level of safety felt by the victim and shapes their behavior, in the sense of their fear of exercising their rights in public space.

Taking in consideration the above mentioned, a firmer reaction from the state is necessary to discourage public violence, which is increasingly mediatized, technological progress facilitating the dissemination and bringing these actions to the public's attention. For example, we are increasingly becoming aware of people being hit in public spaces due to a traffic misunderstanding.

5 Theoretical and doctrinal aspects

5.1. The contest of legal qualifications

The so-called *contest of legal qualifications* occurs when a single act perpetrated by a person appears, at first glance, to fall within the content of two or more different offenses, but, in reality, a single offense will be retained. The contest of legal qualifications, also called *the apparent contest of norms* or *apparent plurality*, represents the situation in which, there is an essential opposition between the legal contents of the offenses susceptible to be retained, such that the choice of one qualification necessarily excludes the other.

In this case, there is only an apparent contest of qualifications, because upon careful analysis, only one of the qualifications has the vocation to apply in the case of the perpetrated act. Therefore, in the doctrine, this hypothesis is also called the apparent contest of qualifications. In practical terms, resolving this type of contest should not raise any particular problems, because the opposition of the two qualifications means that, in reality, the constitutive elements of the crime are met only in the case of one of the two incriminations.

For example, the problem of the legal qualification of the act of the person who, through violence, maintains a sexual relationship with a person who is his direct relative, brother or sister, more precisely, whether, in addition to the crime of *aggravated rape*, the crime of *incest* will also be considered. In reality, the two qualifications are mutually exclusive, since incest presupposes a consensual sexual relationship, while rape, by definition, excludes the idea of a valid consent. Therefore, the act will be classified only according to the text that incriminates *aggravated rape*.

On the other hand, the concept of *apparent competition* of qualifications is distinct from the formal (ideal) competition of offenses, when a single action/inaction committed by a

person, due to the circumstances in which it occurred or the consequences it produced, realizes the content of several offenses.

The problem of apparent competition of qualifications arises when the legislator incriminates acts that may overlap. The challenge is to establish the correct legal qualification, eliminating norms that are redundant or secondary.

5.2. Resolving the apparent competition of norms

In order to resolve the conflict between two laws that appear to apply simultaneously, three fundamental logical rules are mainly used:

5.2.1. Priority of the special norm (specialia generalibus derogant)

This is the most common situation. The special norm has priority, and the general norm is removed. Example: the unlawful theft of correspondence addressed to another person, generates an apparent conflict between the norm that incriminates the crime of *theft* (Article 228, paragraph (1) of the Criminal Code) and the one that incriminates the crime of *violating the secrecy of correspondence* (Article 302, paragraph (1) of the Criminal Code). In this situation, although the act of theft has identical content to that which constitutes the material element of the crime of theft, the difference between the two crimes is confined to the sphere of the legal object and the material object.

Only the offense of *violating the secrecy* of correspondence will be retained, because it describes the act more precisely, encompassing both the legal object and the material object typical of this offense.

5.2.2. Legal absorption in the case of a complex offense or natural absorption.

In the case of a *complex offense*, the rule is that the complex offense "swallows" the absorbed offense. The absorbing offense cannot in any case be consumed without the perpetration of the absorbed offense (Streteanu et al., 2014:22). It is, also, necessary for the absorbing offense to have a special maximum of the penalty, greater than the special maximum of the penalty provided by law for the sanctioning of the absorbed offense, the latter becoming a simple constitutive element or an aggravating circumstance. In the event that the apparently complex offense (Udroiu, 2022:428-435) is sanctioned with a penalty lower than or equal to that provided by law for the absorbed offense, the two offenses will be retained in competition.

Example: *the threat of committing a harmful act* which is perpetrated in order to unjustly obtain a patrimonial benefit generates an apparent conflict between the norm that incriminates the offense of *threat* (Article 206 of the Criminal Code) and that one which incriminates the offense of *blackmail* (Article 208 paragraph (3) of the Criminal Code). In this situation, only the act of *blackmail* will be incident in case.

We, also, encounter natural absorption in a situation such as the one in which the offense of *rape* always necessarily involves *deprivation of liberty*, or *bodily harm* that absorbs the offense of *assault or other violence*.

5.2.3. Subsidiarity

The situation in which we encounter a norm that is the main one and another, competing, which has a subsidiary character. The subsidiary norm applies only if the act is not circumscribed by the content of the main norm. Example: The crime of *abuse in office* is incriminated by a rule of subsidiary character in relation to the crime of *intellectual forgery*.

In the Romanian doctrine of Criminal Law, it has been shown that the element of differentiation between the formal contest and the contest of criminal laws is represented by the ability of one of the applicable legal texts to cover the entire anti-legal significance of the committed act. To the extent that the action, together with all its consequences, is found in a single norm, there will be a contest of criminal laws, and that norm will be the only applicable one, to the detriment of the other incident texts. However, if none of the applicable norms fully covers the state of affairs, the existence of a formal contest will be retained.

6. Finding the right solution

Considering the theoretical considerations set out above, it is necessary to analyze the situation in order to determine exactly which of the two criminalization norms should be applied to the specific situation or, if both apply, to determine whether the basic or the aggravated version of each of the two criminalization norms will be applied in the competition.

A first observation is the one that entitles us to appreciate that the state of affairs that involves an act of violence perpetrated in a public space and is seen by other people who are not involved, may attract the incidence of two criminalization norms: *assault and other violence* and *disturbance of public order and peace*.

Until the entry into force of the Law no. 248 of July 20, 2023, such a hypothesis would have meant the concurrent application of both criminalization norms, in their basic version, because the act of violence meets the conditions of objective typicality of the crime of *assault and other violence* and the commission of an antisocial act in a public space, in the presence of other persons, meets the conditions of objective typicality of the crime of *disturbing public order and peace*. The fact that the legislator modified the two criminalization norms is a natural and well-justified approach in the statement of reasons, in the sense that the exercise of violence in public space and, at the same time, the popularization of acts of violence in virtual space, represent a very dangerous trend, with a major emotional impact on people, especially the sensitive and vulnerable, and which requires a harsher punishment by the criminalization norms. Therefore, for each of the two offenses, if analyzed separately, there is a legal justification for applying them in their aggravated form. However, their application, in competition, in their aggravated forms, is a matter of debate.

To have an even clearer picture of the circumstances of application of the incrimination norms, we must also refer to the prerequisites for holding the perpetrator criminally liable. Both crimes can be investigated *ex officio* by the judicial body, but, if they wish, the injured person can reconcile with the perpetrator and will not be held criminally liable for the crime of *assault and other violence*, even if it is held in the aggravated version because it is committed in public.

Therefore, under these conditions, it is natural to conclude that in the case of an act of violence committed in public, only the norm of aggravated incrimination of the crime of hitting and other violence cannot be applied, because a *reconciliation agreement* of the victim with the perpetrator would mean that the latter can no longer be punished for the antisocial act committed in public which is obvious and which must be penalized regardless of the victim's attitude. Therefore, the victim cannot be granted the privilege of escaping the criminal liability of the perpetrator for committing an antisocial act that affects the public climate. No person

can have the discretion to decide on the sanctioning or non-sanctioning of acts that affect the public interest. For this reason, we consider that in these situations, only the norm of incrimination of the crime of *assaulting and other violence,* in the aggravated version, cannot be applied alone.

In the hypothesis that the crimes are applied concurrently, the question arises, in what manner, namely whether the aggravated variant can be retained only for one of them, or, the aggravated variant will have to be applied for both. To answer this dilemma, we start from the analysis of the same aspect of the discretionary nature that the law leaves to the victim, in relation to holding the perpetrator accountable. Therefore, if the aggravated variant of the crime of *assaulting and other violence* were applied, in competition with the basic variant of the crime of *disturbing public order and peace* and the victim reconciled with the perpetrator, the latter would be liable only for the basic variant.

It is undeniable that the legislator did not pursue this outcome but, on the contrary, that acts of violence committed in public be punished more severely. Applying the contest rule in this manner, we would again be in the position where the reconciliation of the victim with the perpetrator for the crime of *assault and other violence* would make the legislator's will to sanction acts of violence committed in public space, inapplicable.

Therefore, eliminating the two hypotheses, it results that the only applicable variant is the one that involves the concurrent application of the aggravated variants for both offenses. In this hypothesis, regardless of the victim's intention to reconcile or not with the perpetrator, the act of violence committed in public will be punished, which corresponds to the legislator's intention, as appears in the explanatory memorandum of the draft Law no. 248 of July 20, 2023.

7. Conclusions

Although in appearance, the perpetrator would bear double responsibility for each of the two components of his act, violence and the commission of an antisocial act in public, which would constitute a reason for criticism by virtue of the *ne bis in idem* principle, we consider that this aspect is only at the level of superficial perception because each of the incrimination norms has autonomous content. The judicial body must apply the incrimination rules in such a way that the purpose of the criminal law is fulfilled, regardless of the procedural attitude of the victim, and this can only be achieved under the conditions of concurrent application of both offenses, in their aggravated version.

REFERENCES

1. F. Streteanu, D. Nita, *Drept penal. Partea generala. Curs universitar. Vol. I,* ed. Universul Juridic, București, 2014;
2. M. Udroiu, *Sinteze de drept penal. Partea specialii,* ed. a 3-a, editura C.H. Beck, București, 2022.
3. Romanian Criminal Code, adopted by the Law no. 286 of 2009, published in the Official Gazette of Romania no. 510 of 24 July 2009
4. Decision of the Constitutional Court of Romania no. 705 of November 5, 2019 regarding the exception of unconstitutionality of the provisions of art. 371 of the Criminal Code, published in the Official Gazette no. 193 of March 10, 2020
5. Law no. 248 of July 20, 2023, point 2, published in the Official Gazette no. 673 of July 21, 2023