



## Breaching the Solemnity of the Hearing

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**Abstract:** In the paper we have examined the offense of breaching the solemnity of the hearing in the light of the new law. For didactic purposes, but also because of the need to present a clear perspective in judicial practice, we have examined comparatively the two incriminations, as provided by the law in force and the previous law. The novelty consists in the conducted examination, taking into account the provisions of the law in force, as well as the references made to the judicial practice in the field. This paper is included in a more elaborate paper to be published in the future in a recognized publishing house. Being conceived in an accessible manner, the work can be useful to both theorists and practitioners of criminal law.

**Keywords:** The objective side; the subjective side; the preexisting elements

### 1. Introduction

The offense of *breaching the solemnity of the hearing* consists in the use of offensive or obscene words or gestures, such as to disrupt the activity of the court, by a person attending or assisting court proceedings.

The explanatory memorandum states that this offense is an element of novelty in the Romanian criminal law “by which there are incriminating or obscene manifestations during court proceedings in order to protect the solemnity of court hearings, the regulation being justified in view of abandoning the incrimination of acts of insult and slander. At the same time, the purpose of the incrimination is to protect the solemnity and the proper conduct of court proceedings before the court and not necessarily the honor or reputation of the representatives of the judicial authority. It is precisely because of this approach that offending manifestations against any person in the courtroom are sanctioned, whether or not they participate

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in the proceedings (for example, offenses addressed to the public in the room) or when they are addressed to the judge, prosecutor or lawyer during the proceedings. The offense of contempt of the court cannot be committed by the judge who presides or participates in the trial because it has the status of a secondary subject in relation to the content of the incriminated facts, however, in the case of committing such acts by the judge during the proceedings he will answer for committing the offense of abusive behavior". (Cioclei, 2009, p. 57)

## **2. Elements of Identity and Differentiation in Relation to the Previous Law**

The offense under examination was foreseen (with some differences) in the Criminal Code of 1969 in Art. 272<sup>1</sup> with the marginal name *Defiance of the judicial bodies*.

That incrimination was not foreseen in the original wording of the previous law, and it was subsequently introduced by G.E.O. no. 198/2008, normative act repealed with the entry into force of the new Criminal Code.

The comparative examination of the two legal norms allows us to highlight the differences and similarities between their drafting way.

As for the existing differences, we mention the following:

- the marginal title of the offense, in the "*Defiance of the Judicial Bodies*", was changed in "Breaching the solemnity of the hearing";
- in the new law, they are incriminated those actions that make use of the material element of the objective side, i.e. the use of words or grievous or obscene gestures, while in the old law there are mentioned actions such as the use of insulting words or obscene gestures or threats;
- in the new law, the actions by which the material element of the objective side is achieved must be such as to disrupt the activity of the court, whereas in the earlier law these actions were directed against the physical integrity of a judge, prosecutor or a criminal investigative body;
- in the law in force, paragraph (2) of art. 272<sup>1</sup> where it was sanctioned to use of insulting words or obscene or threatening gestures directly to the physical integrity of a judge, a prosecutor or a criminal investigative body, a police officer or a gendarme for acts performed during service;

- the last difference is in the sanctioning regime which is milder in the new law (one month to 3 months imprisonment or fine, compared to 3 months to one year imprisonment or fine).

As elements of resemblance, we point out the presence of the offense in the group of crimes against the achievement of justice and the maintenance of some actions by which the material element of the objective side is achieved.

### **3. Preexisting Elements**

#### **3.1. Legal Object**

The *special legal object* of the offense to be examined consists in the social relations related to the activity of performing the justice, which also presupposes the protection of the solemnity of the court hearing.

We also consider that, through this incrimination, “at the secondary level, there are also affected the relations on the dignity of the person, regardless of the quality of the person (judge, prosecutor, lawyer, party, principal procedural subject, witness, expert, interpreter or other person present in the court room”) (Neagu, 2016, p. 452).

#### **3.2. The Material Object**

The examined offense does not have *a material object*.

#### **3.3. The Subjects of the Offense**

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

As stated in the Explanatory Memorandum, “the judge who presides over or participates in the trial cannot be the active subject of the offense, since it has the status of a secondary subject in relation to the content of the facts incriminated in the case of committing such deeds by the judge during the proceedings, he will be responsible for committing the offense of abusive conduct.”

In the doctrine, it was appreciated that “If the prosecutor uses expressions or gestures without addressing to a particular person, thus disrupting the activity of the court, the deed will be detained in his charge.

For example, if the attorney, drunk in the courtroom, starts to say pornographic jokes, addresses the bad language to government, etc., his deed is likely to disrupt

the activity of the court, in which case he will not answer for the offense of abusive behavior, but for breaching the solemnity of the hearing.

The lawyer is included as he is not a civil servant within the meaning of the criminal law, and he could be the author of the offense.

A particular situation exists in the case of the court, as the text incriminates conduct that may disrupt the court's activity. Thus, the question arises whether acts of "self-perturbation" fall or not within the scope of the text of incrimination.

For example, if two judges, colleagues in full, quarrel in the courtroom, can their actions be considered as actions to violate the solemnity of the court hearing? Empirically, the answer may be affirmative. We emphasize, however, that the deed will be typical only if the actions of the members of the panel disrupt the activity of the courts (for example, disrupt the activity of the third colleague in a cassation panel) and do not fall within the text of criminalization of abusive behavior address of the other colleague.

Another interesting question is to what extent, if we have a single judge, can he use offensive or obscene words, gestures or expressions that could disrupt the activity of the court? Considering that in this case the court is even the "disturbing factor", we believe that the answer should be negative, "self-disruption" does not fall under the rule of incrimination". (Bogdan, Șerban & Zlati, 2014, p. 369)

With regard to the legal interpretation given by the legislator in the explanatory memorandum as to the active status of this offense of the judge who presides or participates in the trial, another opinion states that "This interpretation results from the use of the collocation "*which is likely to disturb the activity of the court*", but it is not without criticism, since the term "court" is associated, in legal language, with two meanings: the first is the "composition of the court", in which case the notion refers strictly to the judges who form the panel of judges, established in accordance with the provisions of the law on judicial organization, and the second is related to the "*constitution of the court*", a notion which has a broader meaning in the sense of participation of the judge / judges, clerk, assistant magistrate (in the cases solved by the CCCJ), as well of the prosecutor when the law provides for its participation in the case. In this latter situation, the discussions on the quality of the active subject of the other participants in the constitution of the court must be nuanced, as the insulting behavior manifests itself vis-à-vis the other participants in the proceedings or the persons attending the trial. In the first case it can be said that the prosecutor or the clerk will commit an offense of abusive behavior, but if their

attitude is only irreverent, without regard to those involved in the trial, breaching the solemnity of the hearing offense may be retained.

From the point of view of the subjects of the offense, the term “court” must also be understood as referring not only to the judge / judges who make up the panel, but also to the judge of rights or freedoms or that of the preliminary chamber; in the situation before them there is a contradictory procedure, even in the council chamber (for example, solving a proposal / request for a preventive measure)” (Bodoronca et al., 2016, pp. 824-525).

Both opinions are intended to raise questions as to what is stated in the Explanatory Memorandum as to whether or not the hearing judge has the quality of active subject of the offense under investigation.

At the same time, we consider that the hearing attorney, the assistant magistrate and the clerk may commit the offense of breaching the solemnity of the hearing when their actions are directed against the other participants in the trial (we have here the use of words or grievous or obscene gestures).

On the other hand, we consider that *de lege ferenda* requires the clarification of the notion of court, so that it gives a clear perspective to its composition.

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

According to the doctrine, “*The legal person* may have the capacity to instigate or to be a accomplice to the commission of the deed if the concrete actions of breach of the solemnity of the hearing were carried out by a natural person in the execution of instigated acts “plotted” in the interest of the legal person or his complicity. We consider that the legal person cannot commit this offense as author due to the concrete way in which the material element must be achieved (Oprea, 2015, p. 418).

The *main passive subject* is the state as the holder of the protected social value.

The *secondary passive subject* is the judge sitting in the court or any person participating in the court hearing, whether or not he participates in the proceedings. Among the persons participating in the trial we mention: the assistant magistrate, the clerk, the prosecutor, the lawyer, the defendant, the parties, the injured person, the witness, the expert and the interpreter.

## **4. The Structure and Legal Content of the Offense**

### **4.1. Premise Situation**

The premise is represented by the existence of a judicial procedure that takes place before the court, in compliance with the provisions of the law.

### **4.2. The Constitutive Content**

#### **4.2.1. The Objective Side**

The material element of the objective side consists of an action (commission) that materializes in an active, yet conscious behavior of the active subject, materialized in words or offensive, obscene gestures capable of disrupting the activity of the court.

From the analysis of the legal content of the examined offense, it follows that the material element can be achieved by two alternative actions, consisting either *in the use of offensive or obscene words or in the use of offensive or obscene gestures*.

At the same time, in the examination of these actions incriminated by the legislator, we must start from clarifying the expression of “*offensive or obscene words or gestures*”, which in our opinion expresses an affront to the honor, dignity or reputation of a person.

In this context, “*offending the honor* consists in committing acts by which it is offended the sense of self-esteem of the person. The *offending the honor* (dignity) therefore consists of an action (for example, it is said of an individual that it is a “villain”, even if all who know him thinks him as such - because the law is pursuing the curtailing, not the amplification of such behavior contrary to the person's right to be protected by the person's attributes) or in an inaction (for example, to leave someone who greets hands with a loud hand in contempt and dishonor). *Offending reputation* consists of committing an act that strikes the god name earned by people in society” (Neagu et al., 2016, p. 452).

By the term *use of offensive or obscene words* is meant “the use of words, expressions such as to affect the honor and dignity of the person, values recognized and protected in relation to each individual” (Toader, Safta et al., 2016, p. 126).

The use of abusive or obscene gestures “implies the use of trivial manifestations, trivial gestures capable of interfering with good morals” (Toader, Safta et al., 2016, p. 126).

According to the doctrine, “although the text of incrimination refers to a plurality of words or insulting or obscene gestures, we consider that the elements of the offense are met even when the perpetrator uses one such word or one such gesture to disrupt the activity of the court” (Toader, Safta et al., 2016, p. 126).

In order to complete the material element of the objective side, it is necessary to ascertain the existence of the essential requirements.

The first essential requirement implies that one of the two incriminated actions is to be enforced in court proceedings before a court.

Another key requirement is the need for the active subject to participate or assist in the judicial proceedings before the court.

Therefore, “the act will constitute an offense only if it is committed at the place where the trial takes place, and not elsewhere (it will not retain as offense, for example, insulting the judge on the court’s lobbies, even if the deed is seen and heard by many people and even during the trial, as long as this activity did not influence in any way the conduct of the hearing” (Neagu et al., 2016, p. 453).

Another essential requirement is that the act of using words or offensive or obscene gestures is likely to disrupt the activity of the court.

It will disrupt the activity of the court where the offensive or obscene words or gestures are heard or seen by the members of the panel “without being seen or heard by the members of the panel, are likely to create rumors or scandal in the courtroom between the participants, which leads to a passing of the court hearing, thus contributing to the violation of the solemnity of the hearing (for example, comments made in a low voice to the judge, which, without being heard by him, trigger hilarity in the side of the room where comments can be heard)” (Neagu et al., 2016, p. 453).

As far as we are concerned, starting from the fact that the offense we are examining is an *abstract danger*, we consider that this essential requirement will be fulfilled also in the case where the activity of the court was not disturbed, but by the way the act was committed it was likely to disrupt the court’s activity.

We observe that the legislator uses the expression “*likely to disrupt the activity of the court*”, not the phrase “*to disrupt the activity of the court*”, which suggests that he (the legislator) considered an abstract and not a concrete danger.

The more the deed will be typical when the use of words or grievous or obscene gestures has resulted in the disruption of the court's activity.

The last essential requirement implies that “the judicial body has fulfilled its service duties within the limits of its legal competencies, otherwise special criminal protection has no basis, and the deed will eventually fall within the scope of a common law offense” (Toader, Safta et al., 2016, p. 126).

In our doctrine, in the analysis of the material element of the offense, with reference to recent judicial practice, in a complex examination it is claimed that “The offense is committed by an act consisting of the use of offensive or obscene words or gestures. The content of these acts will be related to that of the offense of insult in the previous Criminal Code, subsequently taken over by the offense of defamation of the judicial organs. Defamatory or obscene words can be addressed orally or in writing, and may consist either of words or of other suggestive voices (whistles, hootings, etc.). The act of committing offensive or obscene gestures means expressing movements or attitudes likely to damage the person's honor or reputation (for example, imitation a certain infirmity or suggestion of a begging act, sexual intercourse, etc.).

This crime, for example, was held in the charge of a person who had inappropriate behavior before the court and said that “the judges here are known as offenders, but they are not convicted” [Jud. Deva, criminal sentence no. 1329 of 3 June 2014 ([www.rolii.ro](http://www.rolii.ro))]. It was also decided that “the act of the defendant II, who, during the hearing (...), used insulting words and gestures (he asked in a high tone to make justice, addressed the injustice of the act of justice). Using the word “Mobsters” repeatedly struck with a fist the table), such as to affect the solemnity of the court proceedings before the court, facts which caused the interruption of the trial, meets the constitutive elements of the offense of violation of the solemnity of the hearing, provided by art. 278 Criminal Code.” [Jud. Iasi, the criminal sentence no. 65 of 16 January 2015 ([www.rolii.ro](http://www.rolii.ro))], the same offense being held in the case of the defendant who, “at the hearing as a petitioner in file no. xxx / 215/2013 of the Craiova Court, addressed words and expressions offensive and obscene to the president of the court panel, disrupting the activity of the court of law [C.A. Craiova, Criminal Decision no. 973 of June 14, 2016; in the same sense, C.A. Cluj, Criminal Section, decision no. 22 of January 12, 2016 ([www.rolii.ro](http://www.rolii.ro))] or of the defendant who, being arrested in another case and brought before the court to be heard as a defendant for committing a crime of qualified theft “during the debate of the case became aggressive , hitting the shackles in the barracks of the arrested



men's desk, using strong language that cannot be reproduced given their vulgar content. The court drew the defendant's attention to the extremely serious conduct that had been adopted, but he continued to address in a strong language to the president of the courtroom, while in the courtroom there were the justice seekers, as well as lawyers and legal counselors [C.A. Ploiesti, Criminal Section, Criminal Decision no. 262 of 12 March 2015 ([www.rolii.ro](http://www.rolii.ro))].

Any of the committed acts must be capable of disrupting the activity of the court, otherwise the act will not constitute an offense. However, it is not necessary for it to cause an actual disorder, the act being a danger and not a result. On this point, it has been held in the case-law that disturbance of the court's activity "will happen if they are heard by the court which compiles the court in the courtroom or, without being seen or heard by the members of the panel, are liable to create rumors or scandal in the courtroom between the participants, which causes a passing of the court hearing, thus contributing to the violation of the solemnity of the hearing.

Also, for the existence of the offense it is imposed a condition of place, namely that the deed should be done in the proceedings before the court. Consequently, the deed will constitute an offense only if it is committed to the place where the trial is held" [Jud. Galati, criminal section, sentence no. 106 of January 25, 2016 ([www.rolii.ro](http://www.rolii.ro))], but also that "the analysis of the constitutive content of the offense provided by art. 278 Criminal Code requires two relevant observations to be made in relation to the facts dealt with. First of all, the court considers that this offense is a criminal offense, not a result (the use of the phrase "capable of disrupting the activity of the court" and not the phrase "which disrupted the activity of the court"). The court also considers that the use of offensive words can also be done in writing, not only verbally, but the text does not discern, and the consequences of the act, as regulated by the legal text, regarded the marginal title of the text the activity of the court and not the courtroom [Jud. sector 2, criminal sentence no.295/2015, final by the criminal decision no. 530/2016 pronounced by C.A. Bucharest, the Criminal Section ([www.rolii.ro](http://www.rolii.ro))" (Bodoroncea et al., 2016, pp. 825-826).

As we can see, it is clear from the jurisprudence that two separate opinions are already supported in relation to the place and the manner in which the deed can be committed.

In a pertinent analysis, the abovementioned author, referring to the analysis of the two positions expressed in the case-law (referred to above), emphasizes the following aspects of the place and manner in which the act may be committed:

- the marginal name of the text proves that acts can only be committed in the courtroom because it is the place where the trial takes place and which requires respect for order and solemnity (see also art. 359 of the Code of Criminal Procedure);

- the text does not distinguish between the use of words or offensive or obscene gestures orally and / or in writing, and the verb used to express the material element, "the utilization", is susceptible of application for both forms of manifestation; if the legislator does not distinguish them, the interpreter should not do so, so that logically the act can be committed in both of these variants;

- the condition "to disrupt the activity of the court" is fulfilled not only when, due to the vocal manifestations of the perpetrator, there are rumors, tension, hilarity, etc., i.e. a result, but also when obscene or offensive words in writing, are seen, for example, only by the president of the panel, because, according to art. 359 par. (1)

Code of Criminal Procedure, it shall ensure that the order and the solemnity of the hearing are maintained, and may take measures in accomplishing that purpose; if the offensive or obscene gestures or words are likely to affect, by their gravity, the attitude of the judge to whom they are addressed, the solemnity of the hearing is indirectly affected, given that on the chairman of the panel depends the entire course of the hearing.

To strictly interpret *verbum regens* of the crime means to make distinctions where the legislator does not, and to allow circumvention of legal provisions under the "excuse" of addressing in writing the offensive or obscene words. For example, if the documentary evidence was challenged in order to prove a certain fact, the court would accept that evidence, but by accepting the admission as evidence, it would find that it actually contains obscene words or drawings to his address; it is obvious that, in such a case, the solemnity of the hearing would be affected by the attitude of the person who handed in such a document, given that the chairman of the panel must take action in relation to that situation; we also consider that the requirements of the law were met in terms of materiality and whether such words or drawings would be displayed on a pantry carried in the courtroom by a person, such a manifestation is likely to violate the solemnity of the hearing". (Bodoronca et al., 2016, pp. 826-827)

The immediate consequence is the creation of a state of danger for the work of justice, as well as the attainment of the fundamental attributes of the person.

The causal link results from the materiality of the act.

#### **4.2.2. The Subjective Side**

The form of guilt with which the active subject acts is the intent that may be direct or indirect. In judicial practice it was appreciated that “As regards the subjective side, the defendant must act with the guilt form provided by art. 16 par. (3) Criminal Code, namely, either with a direct intent, i.e. to foresee and follow the result of his deed, either with an indirect intent, namely to foresee and not to follow the result of his deed, but to accept the possibility of his production. In the present case, during the trial hearing dated 27.06.2014 at the Iasi Court - Civil Section, the defendant, with direct intent, spoke in an extremely high tone, bang his fist on the table, used bad language against the judge and the act of justice (“mobsters”), and despite the repeated appeals from both the president and the lawyer, he continued to speak loudly, becoming more and more aggressive [Jud. Iași, the criminal sentence no. 65 of 16 January 2015 ([www.rolii.ro](http://www.rolii.ro))]” (Bodoronca et al., 2016, p. 827).

### **5. Forms, Ways, Sanctions**

#### **5.1. Forms**

The acts of preparation and attempt, although possible, are not sanctioned by law. Consummation of the offense takes place at the time of use of words or offensive or obscene gestures, capable of disrupting the activity of the court. The offense may also be committed in continuous form, in the case where the same active subject uses abusive or obscene words or gestures in the same case before the same court but after a certain period of time or towards the same person/s, at different times or in different causes.

The jurisprudence has taken into account the continuous form of committing the offense in the case of “the deed of the defendant H.G.R. who, based on the same criminal resolution, adopted an inappropriate attitude before the court invested with the settlement of a complaint made by him under Law no. 275/2006, shouting and spitting to the prosecutor of the hearing, using obscene / vulgar words, which by his conduct prevented the normal holding of court sessions, establishing that he constituted the offense of violating the solemnity of the hearing, in a continuous form provided by art. 278 Criminal Code with the application of art. 35 par. (1) Criminal Code. (three material acts) [C.A. Alba Iulia, Criminal Decision no. 686 of 29 June 2015 ([www.rolii.ro](http://www.rolii.ro))]”. (Bodoronca et al., 2016, p. 827)

If, in the same case, words or grievous or obscene gestures are used against more than one person or in the same circumstances and the same person uses both obscene and offensive words and gestures, no matter their number and nature, it retains as a single offense.

### **5.2. Ways**

The offense under examination presents only one normative way which consists in the act of the person who participates or attends a court proceedings, to use words or grievous or obscene gestures, which may disrupt the activity of the court.

### **5.3. Penalties**

The sanction provided by law is imprisonment from one month to 3 months or a fine.

## **6. Complementary Explanations**

### **6.1. Link to Other Offenses**

The examined offense has some links with the other offenses that are part of this group.

### **6.2. Some Procedural Aspects**

The criminal investigation is carried out by the criminal investigation bodies of the judicial police under the guidance of the competent prosecutor assigned to the Prosecutor's Office attached to the district in which the offense under investigation was committed.

If the perpetrator has a certain quality (senator, deputy, judge, prosecutor, etc.), the prosecution will be carried out by the competent prosecutor within one of the prosecutor's offices.

The criminal action is put into motion *ex officio*.

The jurisdiction of the court of first instance is, as a rule, the court in the district of which the offense was committed.

If the perpetrator has a certain quality (senator, deputy, judge, prosecutor, etc.), the jurisdiction at first instance belongs to the tribunal, the court of appeal or the High Court of Cassation and Justice, in relation to the quality of the author at the time of

committing the offense or with the competence of the bodies that conducted the criminal investigation (DIICOT or DNA).

In relation to the actual conditions and circumstances of each individual offense, the offending offense may be in competition with other offenses (as mentioned above). Thus, in jurisprudence, “it has been retained as actual concurrence of offenses between the solemnity of the hearing and the ultra-judicial [Jud. Iași, the criminal sentence no. 65 of 16 January 2015 (www.rolii.ro)]” (Bodoronca et al., 2016, p. 828); a real concurrence of crimes was also held in the case of the defendant who “on 18.04.2011 threatened the president of the court in the court room during the trial of file no. xxxxx of Zărnești Court, where he was heard as a witness and on April 18, 2011, used insulting words directly on the physical integrity of the president of the court, for the 7-year prison sentence he passed against the defendant in another criminal case, at his hearing in criminal files no. (...) and no. (...) of Zărnești County Court as defendant and witness [Jud. Brașov, the criminal sentence no. 968/2014 (www.rolii.ro)]” (Bodoronca et al., 2016, p. 828).

## **7. Legislative and Transitional Situations**

### **7.1. Legislative Precedents**

As mentioned above, the offense examined was provided for in a similar legal construction in the Criminal Code of 1969. The offense under examination was not provided for in the criminal codes of 1864 and 1936.

### **7.2. Transitional Situations. Applying the More Favorable Criminal Law**

Given the special penalty limits that are lower in the new law (one month to 3 months imprisonment or fine, 3 months to one year or fine), we believe that the more favorable criminal law will be the new law.

However, the old law may be considered to be more favorable provided that mitigating circumstances are present or where the offense under examination is held in concurrence with other offenses. Undoubtedly, the transitional situations present a theoretical importance in relation to the old law (1969 Criminal Code), as in the judicial practice the term of prescription operates in connection with this crime.

## 8. Conclusions

The examination of the offense of breaching of the solemnity of the hearing was necessarily imposed on the background of the novelty item that it represents in the Romanian criminal law. Although it may be appreciated that in its structure there are certain elements of similarity with the offense of defamation of the judicial bodies of the previous law, its marginal title as well as some elements of difference from the old regulation lead us to support the novelty of the incrimination of this act in the Romanian Criminal Law.

The examination also highlighted numerous examples from the judicial practice, which proves the necessity of such an incrimination. As a general conclusion it can be appreciated that the incrimination was necessary under the current circumstances, thus helping to prevent and combat actions that violate the solemnity of the court hearing.

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