Obstructing justice according to the Romanian law. The preexistent elements and the constituent content

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Abstract

Within the present study we have examined the constitutive content and the pre-existing elements of the crime of obstructing justice. We should specify that this offense was not provided in the previous Criminal Code, representing from this point of view a novelty element for the new Criminal Code. However, we pointed out that the offense with similar legal content, without a marginal name, was also provided in two other normative acts, namely Law no. 85/2006 on Insolvency Procedure and G.E.O. no. 46/2013 regarding the financial crisis and the insolvency of the administrative-territorial units. The novelty elements of this paper aim both at examining the constitutive content, the preexisting elements, as well as in the comparative examination of the provisions of the present incrimination and the one existing in the normative acts referred to above. Also, as a novelty, we also support the necessity of completing the provisions of the law by including in its content, as bodies with attributions in the field, the judge of the preliminary chamber and the judge of rights and freedoms, institutions that cannot be assimilated to the term of court. This paper is part of a broader work to be published early next year, continuing to investigate crimes in the light of the new law. The work may be useful to students of law faculties, master students, and law practitioners.

Keywords: *offense; material element; essential requirements; subjective side.*

JEL Classification: K14

1. Introduction

Obstruction of justice was not provided for in the Criminal Code of 1969, which is why, in terms of the marginal name and partly the legal content, it is represented as a novelty element of incrimination in the Romanian Criminal Code.

This offense consists in the act of a person who, being warned of the consequences of his deeds, performs one of the following actions or inactions:

- prevents, without right, the criminal prosecution body or the court to carry out, under the law, a procedural act;

- refuses to make available to the criminal investigation body, the court or the syndic judge, in whole or in part, the held data, information, documents or assets explicitly required by the law in order to settle a case.

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In the recent doctrine it was expressed that "The offense of obstructing justice is a novelty in Romanian criminal law. If in the previous regulation only in the case of the witness we were dealing with its criminal sanction for refusing to cooperate with the judicial authorities in order to execute the act of justice, the new regulation imposes on third parties a broader obligation to cooperate with judicial bodies (in order to carry out the act of justice), but also an obligation on them not to impede in any way the performance of a procedural act. As it is a personal legal obligation, we appreciate the fact that the act cannot be committed in co-authorship."[2]

The explanatory memorandum states that "The offense of obstructing justice is a new incrimination and the regulation is justified by the realities of judicial practice, which has often faced a lack of cooperation on the part of the persons who are called upon to support the judicial authorities. The offense punishes the person who, unjustifiably and after being warned of the consequences of his deed, impedes the execution of a procedural act or refuses to make available to the judicial authorities the data, information, documents or possessions which have been requested under the conditions of the law, in order to settle a case. The purpose of this regulation is primarily to prevent the commission of the incriminated acts and only if the non-penalizing means proves to be ineffective to appreciate the opportunity of recourse to criminal means."[3]

Regarding the reason of incrimination, the doctrine stated that "it should be stressed that there are other procedural institutions that allow the coercion of the refusal to cooperate with the judicial bodies. We believe that our criminal law must be used as the *last ratio*, that is, only when the natural means of obtaining the goods, records, data or information necessary for the proper conduct of a criminal proceeding are blocked by a third party, thereby jeopardizing the effectiveness of the judiciary criminal system. This way of incriminating the lack of cooperation with the state bodies is also found in other crimes, such as the act incriminated by art. 4 of Law no. 241/2005 for the prevention and combating tax evasion.

The most well-known example of procedural institutions alternative to "coercion" through criminal sanctions is the possibility for the judge to have a search for a given space or persons in case they refuse to make available the goods, data or information that were requested to him. Also, the judge or the criminal investigation body may apply fines if a person fails to comply with the provisions.

The fact that this text of incrimination has to be used with caution results from the explicit conditionality of applying the text of incrimination to prior warning of the person of the consequences of his obstruction act."[4]

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[2] Sergiu Bogdan (coord.), Doris Alina Șerban, George Zlati, *Noul Cod penal, Partea specială, Analize, explicații, comentarii, Perspectiva clujeană/New Criminal Code, Special Part, Analyzes, Explanations, Comments, The Perspective of Cluj*, Universul Juridic Publishing House, Bucharest, 2014, p. 344.

[3] Codul penal (Legea nr. 286/2009), Noile Coduri, incluzând și Expunerile de motive/ New Codes, including the Explanatory Motives, Ed. C.H. Beck, Bucharest, 2009, p. 54.

[4] Sergiu Bogdan (coord.), Doris Alina Șerban, George Zlati, *op. cit.*, p. 344.

According to the recent doctrine, the offense under consideration has *subsidiary feature* in the case of not committing a more serious crime (for example, favoring the perpetrator, forgiving or destroying the evidence or writings)".[5]

2. The Criminal Code in force in relation to the previous law

As we have pointed out earlier, this offense was not provided for in the previous Criminal Code.

However, a similar text was found in art. 147 of Law no. 85/2006 on insolvency procedure, as subsequently amended and supplemented, the text repealed by the provisions of art. 175, par. 5 of the Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code.

The fundamental distinction between the two incriminations lies in the quality of the active subject who was qualified in the previous law, being the director, executive director or legal representative of the debtor, a legal person, while in the new active law it can be any natural person who performs one of the actions or inactions that the law penalizes.

Another difference is that in the old law, this deed could be committed only in the course of insolvency proceedings, while in the new law, the offense can be committed at any time, the fundamental condition being represented by the necessity of a criminal trial in which the incriminated action or inaction is executed.

One last difference is the sanctioning regime, which in the old law was more severe (one year to 3 years' imprisonment or fine, 3 months to one-year imprisonment or fine in the new law).

Another similar text currently in force is provided in the provisions of art. 120 from Government Emergency Ordinance no. 46/2013 regarding the financial crisis and the insolvency of the administrative-territorial units.

The fundamental difference between the two texts is the quality of the active subject, which in the case of art. 120 from G.E.O. no. 46/2013, is qualified, its qualification being main credit officer.

Another similar text is provided in the provisions of art. 4 of Law no. 241/2005 on tax evasion, which incriminates a person's deed of unjustified refusal, to submit to the competent bodies, after having been summoned three times, the legal documents and the assets of the patrimony, in order to prevent the financial, fiscal or customs verification.

Considering the provisions contained in the special laws to which we refer, we believe that they will always have priority over the provisions of art. 271 of the Criminal Code.

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[5] Mihail Udroiu, *Drept penal, Partea specială, Sinteze şi grile, Ediția 3/ Criminal Law, Special Part, Syntheses and Grids, 3rd ed*., C.H. Beck Publishing House, Bucharest, 2016, p. 356.

3. The preexisting elements

3.1 The legal object

The legal object of this offense is the social relations that concern the good performance of justice, which is incompatible with the attitude of some people of refusing to cooperate with law enforcement bodies.

3.2 The material object

The offense provided in paragraph (1) letter a) is devoid of *material object*.

The offense provided in paragraph (1) letter b) has as its material object the documents or possessions, requested by the criminal investigation body, the court or the syndic judge. With regard to certain information, if they are held on electronic media, we consider that that hard drive may be the material object of the offense under examination.

3.3 The subjects of the offense

The general rule established by the provisions of paragraph (1) letter a) is that an *active subject* can be any natural or legal person who meets the general conditions required by law, except for those prosecuted or prosecuted for the offense that is the subject of the case.

According to the doctrine, "*the person prosecuted or on trial* (the suspect or the defendant) for the offense that is the object of the criminal trial cannot be an active subject (author, accomplice or instigator), because it enjoys the right to silence and the privilege against self-incrimination; but they can be the active person of the crime of the injured person, the civil party or the civilly responsible party in the criminal trial."[6]

With regard to the provisions of paragraph (2) providing for a case of non-punishment related to the situation of the active subject at the time of the offense, in the doctrine it was argued that "in accordance with the provisions of art. 118 Code of Criminal Procedure which governs the right of the witness of not to self-esteem, the notion of "pursued person" must be viewed in a broad sense, so that a person who has witnessed the moment when he committed one or both actions of realizing the material element, it cannot be held criminally liable for the offense provided by art. 271 if he subsequently acquired the quality of suspect in the same case."[7]

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[6] *Ibid.*, pp. 356-357.

[7] Georgiana Bodoroncea in, Georgiana Bodoroncea, Valerian Cioclei, Irina Kuglay, Lavinia Valeria Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca-Maria Vasile, *Codul penal, Comentariu pe articole, art. 1-446, Ediția 2, revizuită și adăugită/Criminal Code, Comment on Articles, Art. 1-446, 2nd ed., revised and added*, C.H. Beck Publishing House, Bucharest, 2016, p. 795.

In the same vein, another author, claiming the above view, states that "in view of guaranteeing the witness's right of defense under art. 118 the New Code of Criminal Procedure, the concept of "wanted person" should be viewed in a broad sense, so that a person who witnessed the moment of committing one or both of the actions to achieve the material element, he cannot be held criminally responsible for the offense provided by art. 271 New Code of Criminal Procedure, if later, in the same case, he acquired the quality of suspect."[8]

As far as the criminal participation is concerned, it is possible "in all its forms: co-authorship (in the commissive way and when the co-operation obligation lies with more people who can only decide together)".[9]

The main passive subject is the state as the holder of the socially protected value and the *secondary active subject* is the natural or legal person whose interests have been reached (the injured party) by the commission of the offense.

4. The structure and legal content of the offense

4.1 Premise situation

According to the recent doctrine, *the premise situation* is "*the circumstance that the perpetrator has been warned of the consequences* of the act of preventing the execution of a procedural act by the prosecution body or the court, as well as of the consequences of the refusal to make available to the criminal prosecution body, the court or the syndic judge, in whole or in part, the data, information, documents or possessions explicitly required to settle a case".[10]

4.2 The constitutive content

4.2.1 The objective side

Under par. (1) of art. 271 Criminal Code, *the material element* of the objective side is made in two alternative ways, namely by *preventing, without right, the criminal investigative body or the court from doing a procedural act, according to the law, a procedural act and the refusal to make available to the criminal investigation body, the court or the syndic judge (in insolvency or bankruptcy proceedings), in whole or in part, the data, information, documents or assets held in accordance with the law, explicitly for the purpose of solving a cause.*

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[8] Mihail Udroiu, *op. cit.*, p. 357.

[9] *Ibid.*, p. 357.

[10] Tudorel Toader, Marieta Safta in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasiu, *Explicațiile Noului Cod Penal, vol. III, Art. 188-256/ Explanations of the New Criminal Code, vol. III, Art. 188-256,* Academia Română, Institutul de Cercetări Juridice, Universul Juridic Publishing House, Bucharest, p. 102.

We also appreciate that the offense is one with alternative content.

Given the differences between alternative ways of committing the offense, we will proceed to their separate examination.

a) The first alternative way provided in the provisions of art. 271 par. (1) letter a) consists in *preventing, without right, the criminal investigation body or the court to perform, under the law, a procedural act.* The preventing action means "any act by which the author blocks in his actions the execution of the procedural act by the prosecution body or the court. In our view, the term requires absolute obstruction of the procedural act, not sanctioning those conduct that makes this procedural step seriously difficult. Preventing does not mean disturbing or extinguishing.

If the proper manner of committing the impediment is itself an offense (outrage, jail, etc.), the two facts will be retained in the contest."[11]

In another opinion, it is argued that "*Preventing* the execution of a procedural act involves the suspension, forbidding to carry out the act, having the effect of failing to do so by the judicial bodies or the court. Such a procedural act may consist of hearing witnesses, injured parties, confrontation, identifying objects and documents, identifying individuals, intercepting calls or communications, accessing an information system, video surveillance, audio or photography, locating or tracking by technical means, obtaining the list of telephone calls, retention, handing over or searching for postal items, obtaining, according to the law, the data regarding the financial transactions, as well as the financial data of a person, the supervised delivery, the home search, vehicle or computer, conducting an expertise, conducting on-site research or reconstituting, etc. In order for the offense to be committed in this variant of committing, the impediment must be done without right (for example, it is not obstructing justice the refusal of Parliament to give notice of the commencement of criminal proceedings against one of his member, as according to the law, has this right) and the procedural act is legally complied with (for example, the refusal to allow a search does not constitute an offense as long as the judicial authorities do not have a home search warrant)"[12].

Regarding the phrase *procedural act*, in doctrine it was considered that "the definition in criminal law will correspond to that in procedural law[13]. In order to be able to discuss obstruction act, the act of procedure must be carried out under

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[11] Sergiu Bogdan (coord.), Doris Alina Șerban, George Zlati, *op. cit.*, p. 345.

[12] Norel Neagu in Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiș, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, *Noul Cod penal comentat, Partea specială, Ediția a III-a, revăzută și adăugită/The New Criminal Code commented, Special Part, 3rd edition, revised and added*, Universul Juridic Publishing House, Bucharest, 2016, p. 421.

[13] For example, in procedural criminal law, procedural acts have been defined as those "legal acts by which the procedural acts and measures are carried out. Procedural acts are considered to be acts of execution because their purpose is to carry out the provisions contained in the procedural documents", Gh. Mateuț, *Tratat de procedură penală, Partea generala*/*Criminal Procedure Treaty*, Part II, CH. Beck Publishing House, Bucharest, 2012, p. 751.

the law. From this point of view, a hypothesis that would require a closer analysis would be where the author hinders the execution of the procedural act because, from his point of view, it is not carried out under the law. We appreciate that not any vices of legality will be able to "discredit" the author, but only those vices of **obvious illegality**. This interpretation is natural, as it is presumed that acts performed by a judicial authority are performed under legality, any "small" procedural errors in the performance of the act cannot be "invoked" as grounds for "blocking" it by the individual. For example, the author does not have the right to prevent a procedural act from occurring even when, in his view, it is done by an incompetent court (for such an assessment of the legitimacy of the judicial authority can only be done by another judicial body). Instead, it will have the right to prevent a manifestly illegal act (for example, preventing a home search for which there is no search warrant)".[14]

Regarding the interpretation given by the authors to the phrase *procedural act*, we have another opinion, considering that this phrase can be interpreted only in the given context, which implies other procedural acts than those of criminal procedure.

We are considering here some acts issued by other state bodies such as those of the National Agency for the Undisclosed Assets or ANAF, acts which, although are not acts of criminal procedure adopted by a judicial body, are procedural acts issued by certain institutions of the Romanian state.

In this context, by an extensive interpretation, we consider that the *procedural act*, in the sense desired by the legislator, which means both the procedural acts adopted by the judicial bodies empowered by the Code of Criminal Procedure or other special laws with criminal procedural provisions, as well as other acts issued by other authorities, such as acts issued by the National Agency for the Undisclosed Assets, ANAF, OLAF, etc.

On the other hand, we do not share the view *that not all legality vice may discredit the author, but only those vices of obvious illegality.*

As far as we are concerned, we believe that under these circumstances the author can invoke any *flaw of illegality, and not only those that refer to a so-called obvious illegality*.

Undoubtedly, the perpetrator of the act of preventing the criminal investigative body or the court from executing a procedural act, considering that they act in violation of the law, assumes a risk i.e. the risk of committing the offense of obstructing justice.

When deciding to invoke the unlawfulness of the enforcement of the procedural act as a reason for preventing the prosecution body or the court from proceeding with the procedural act, the person concerned must be aware that if it subsequently turns out that the activity itself was legal, would be an active subject of the crime of obstructing justice.

[14] Sergiu Bogdan (coord.), Doris Alina Șerban, George Zlati, *op. cit.*, p. 346.

We appreciate that the interpretation of the phrase "prevents, without right, the law enforcement authority or the court to conduct a procedural act under the law", the following two reasons may be relevant for the author.

The first plea concerns the plea of illegality of the procedural act itself, and the second plea alleges the lack of competence of the investigation body or of the court for conducting the procedural act in question.

Concerning the interpretation of the term "the prosecution body", we consider that the legislator did not consider only the criminal investigation bodies, but all the Romanian prosecution bodies, including the criminal prosecution bodies.

Thus, as investigation bodies, other than criminal prosecution, we refer directly to the National Agency for Undisclosed Assets, which operates in Romania on the basis of Law no. 318/2015 for the establishment, organization and functioning of the National Agency for Managing Unavailable Utility and for amending and completing some normative acts.[15]

In order to achieve this broad interpretation of the legal norm in question, we also took into account the provisions of paragraph b) of the same article and paragraph, where the legislator refers directly to the criminal investigation body, avoiding the wording to which we refer (the investigation body).

Concerning the interpretation of the term "court" used in the examined text, the recent doctrine has stated that "The question arises as to how wide the notion of "court" used in this context by the legislator. In particular, the text only refers to the incrimination of the fact that the criminal court or the court of law is prevented from carrying out procedural acts? From our point of view, the applicability of the text is general, since the nature of the court is, from this perspective, indifferent. Another question that arises is whether the text is also applicable if a judge, and not a "court", is prevented from doing a procedural act under the law? The question is relevant since, both in the new criminal and civil procedural framework and in the previous procedural rules, some procedural acts may be ordered by the judge and not by the court, a situation where the text would appear to be inapplicable.

Only by an analogy in the detriment of the accused may one argue that the court is the same as the judge or that the term "court" in the art. 271, par. (1) letter a) the new Criminal Code also includes the notion of "judge". So if we cannot afford to make an analogy to the accused, then the text of incrimination will be applied *stricto sensu*, the consequences of such an interpretation being irrational. For this reason, it is imperative, *de lege ferenda*, to correlate the terms used by the legislator and to add that the judge may also be prevented by the author from making a procedural act (and not just the "court", as the text of the incrimination now provides)"[16].

As far as we are concerned, we fully share the view expressed above regarding the interpretation of the term "court" and we appreciate that the legislator's intervention is absolutely necessary for the correlation of the used

[15] Published in the Official Monitor of Romania, Part I, no. 961 of December 24, 2015.
[16] Sergiu Bogdan (coord.), Doris Alina Șerban, George Zlati, *op. cit.*, p. 346.

terms, especially in the context in which the Romanian criminal proceedings have two new institutions, which are not courts, respectively the judge of the preliminary chamber and the judge of rights and freedoms, who may order to conduct the procedural acts under the law.

In that interpretation, preventing a judge from taking a preliminary hearing or a judge of rights and freedoms from performing an act does not meet the conditions of the type of offense under examination, since both institutions to which we referred cannot be considered as courts.

This opinion is also embraced by another author who argues that: "the judicial body that is prevented from carrying out the procedural act is either the criminal prosecution body or the court (criminal or non-criminal); the act is not typical if the judge of rights and freedoms is prevented from carrying out a procedural act (for example, hearing the witness in the hearing procedure), it is hard to imagine the assumption that a judge is prevented from performing a procedural act, but also in the assumption of such a situation, the deed will not be typical".[17]

In this context, *de lege ferenda*, we propose to supplement the text in question with the notion of judge, so that the legal norm can be promoted in the following form: ... (a) *prevents from performing, without right, the criminal investigation body, the court or the judge, according to the law, a procedural act.*

According to the doctrine, "it is incriminated only the prevention of procedural act, either through an action or by an inaction, and not by making it more difficult (as in the case of favoring the perpetrator); so the deed is typical only if the procedural act could not be carried out, not when the perpetrator made it difficult to perform the procedural act."[18]

In this context, "it will be taken into account when the obstruction relates to *procedural acts* (for example, hearing witnesses or main procedural subjects), but also when the impediment is aimed at carrying out a probative process (for example, home search, a special method supervision or research, confrontation, enforcement of objects and documents, carrying out an on-the-spot investigation, etc.)".[19]

Essential Requirements. In order to complete the material element of the objective side, it is necessary to meet cumulatively the following essential requirements:

(i) to be a prior warning to the perpetrator, a warning made by the relevant judicial body regarding the criminal consequences of its detention. The warning may be oral or written and must be made by the judicial body that executes the procedural act.

Regarding the need for the warning, in the recent doctrine it was argued that: "In the absence of the prior warning *legally achieved* by the competent bodies resulting from the administered evidence (for example, statements of witnesses,

[17] Mihail Udroiu, *op. cit.*, p. 357.
[18] *Ibid*, p. 357.
[19] *Ibid*, p. 357.

minutes, etc.) it will not retain the typical nature of the deed; the deed is not typical if the non-fulfillment of the obligation to cooperate takes place in the light of the manifestly unlawful nature of the procedural act or of the probative process."[20]

(ii) preventing the procedural act from being carried out by the active subject without right. This requirement is also complemented by the legal nature of the procedural act; in the absence of the legal nature of the procedural act in question, it is incident the action to prevent the fulfillment of the procedural act concerned by law is infringed, which will lead to the fact that the deed is not typical. In the event that the impediment of the prosecution body or of the court without right is accomplished by facts that meet the typical conditions of the offenses of *ultraj* or ultrajudicial crimes, the offense examined shall be held in contest with one of these offenses.

The immediate consequence is creating a state of danger for the work of justice.

The *causal link* results from the materiality of the act, and it is not necessary to be demonstrated by the judicial bodies.

b) The second alternative way provided in the provisions of art. 271 par. (1) letter b) consists in *the deed of the person being warned of the consequences of his deeds, refuses to make available to the criminal prosecution body, the court or the syndic judge, in whole or in part, the data, information, documents or possessions that have been requested explicitly, under the law, with a view to settling a case*.

According to recent doctrine, the refusal to provide data, information, documents or possessions implies "the action or inaction of the perpetrator that does not comply with the explicit request of the criminal investigating authorities, the court or the syndic judge, or through an active attitude of rejection, non-acceptance of demand, or through a passive, refusal to cooperate."

As far as the refusal is concerned, it is claimed in the doctrine that "there must be an explicit or implicit (but unequivocal) refusal to fulfill the duty of cooperation (action or inaction); it is irrelevant to the fact that the judiciary has previously been subject to judicial fines for refusal to cooperate (for example, the imposition of a judicial fine under Art. 283 par. (4) letter o) New Code of Criminal Procedure to a credit institution that refuses to provide data on financial transactions referred to by the judge's rights and freedoms); the provisions of art. 6 of the New Criminal Procedure Code on the application of the *ne bis in idem* principle are not applicable in this case, since there can be no criminal charge in relation to the procedure for the application of the administrative fine which is not a criminal sanction."

In another opinion, which also takes into account the essential requirements, it is argued that in case the act is committed under the conditions of art. b) "the material element of the objective side is accomplished by the act of refusing to make available to the criminal investigative body, the court or the

[20] *Ibid,* pp. 357-358.

syndic judge, in whole or in part, the data, information, documents or possessions which have been explicitly requested, under the law, to settle a case.

For the existence of the offense, a prior and express request for making available the data, information, records or assets held by the perpetrator is necessary. The request must be formulated under the law, by the criminal prosecution body, the court or by the syndic judge. The requested data, information, documents or assets must be required to settle a case, whatever its nature. If the request for the surrender of data, information, documents or assets held by the perpetrator must be explicit, the refusal to surrender, the disclosure may be explicit or implicit. The offense exists regardless of whether the refusal to make available data, information, documents or goods refers to all or only some of them."

Other authors, analyzing the material element of the objective aspect of the examined offense, appreciate "As a "chronological" structure, the text requires, in a first stage, an explicit request from the judicial body (criminal prosecution body, court or syndic judge) makes available those data / documents / etc.
Documents / information / data or goods should not be required to become essential evidence in a judicial procedure, but they should be able to contribute in any way to the settlement of a case (including the refusal to provide information about the new address of the applicant, in order to carry out the citation procedure, may be considered an act of obstruction of justice).

Interestingly, the syndic judge was also included among those who can "use" this text of incrimination, but the judge (for example, the judge of rights and freedoms or of the preliminary chamber) has not been listed, assuming, on the contrary the procedural provisions, that "court" means "judge". Therefore, the lack of terminological consistency signaled in Art. 271, par. (1) letter a) can be highlighted in case of letter b), par. (1) of art. 271 New Criminal Code, producing the same irrational effects."[21]

Concerning the phrase "criminal investigation body" we consider that it should be interpreted in the light of the provisions of the Criminal Procedure Law, in the sense that they can only be: the prosecutor, the criminal investigation bodies of the judicial police and the special criminal investigation bodies.[22]

We note that unlike the provisions of paragraph (1) where the term "investigation body" is used, which is interpreted extensively, as we have already pointed out, the use of the term "criminal investigative body" by the legislator can lead to an interpretation other than that mentioned above.

The term "court" also used in this incrimination has the meaning that results from the analysis of the offense provided in paragraph (1).

We note that in this case the preliminary chamber and the rights and freedoms were excluded, which is why, *de lege ferenda*, we propose to fill in the text with the word "judge" which should be introduced immediately after the court term.

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[21] Sergiu Bogdan (coord.), Doris Alina Șerban, George Zlati, *op. cit.*, pp. 346-347.
[22] Art. 55, par. (1) Code of Criminal Procedure.

The syndic judge has, according to law, the attributions stipulated in art. 11 of Law no. 85/2006 on the insolvency procedure.

In judicial practice, it was decided that "Unlike the offense provided in the old provisions of art. 147 of Law no. 85/2006, the offense of obstruction of justice provided in art. 271, par. (1) letter b) the New Criminal Code, committed in insolvency proceedings, implies the refusal of the person to provide the syndic judge with the data, information, documents or assets, which were explicitly required by the syndic judge, and not the refusal of the person to make available to the administrator or the liquidator the data, information, documents or assets which have been explicitly required by the judicial administrator or the liquidator. Therefore, if the act provided in the old provisions of art. 147 of Law no. 85/2006 consists in the refusal of the person to provide the data, information, documents or assets held, which were explicitly requested by the judicial administrator or the liquidator, at the disposal of the administrator or the liquidator, the provisions of art. 3, par. (1) LPANCP, according to which the provisions of art. 4 New Criminal Code, on the Criminal Law on Discrimination are also applicable in cases where a determined act, committed under the old law, is no longer an offense under the new law due to the modification of the constitutive elements of the offense. The offense provided in the old provisions of Art. 147 of Law no. 85/2006 had as its legal object the social relations regarding the normal course of the insolvency proceedings and as such constitutes a crime against the implementation of justice in the insolvency procedure, and not a crime of service. The rule of incrimination provided in the old provisions of Art. 147 of Law no. 85/2006 relates exclusively to the conduct of the debtor natural person, the administrator, the director, the executive director or the representative of the debtor legal person in the case of a judicial procedure - the insolvency procedure - and not in the exercise of his duties. Therefore, the offense of abuse of service was not subsidiary to the offense provided in the old provisions of Art. 147 of Law no. 85/2006 and, consequently, the acts that are excluded from the scope of the provisions of art. 271 par. (1) letter b), The New Criminal Code - such as the refusal of the person to provide the data, information, documents or assets held, which have been explicitly requested by the legal administrator or the liquidator, to make available to the judicial administrator or the liquidator the circumstance of abuse of service provided in art. 197 par. (1) referred to in art. 308 The New Criminal Code (ICCJ, Criminal Section, Decision No. 1160/2014, www.scj.ro)"[23]

The Essential Requirements. In order to complete the material element of the examined offense, it is necessary to meet cumulatively the following essential requirements:

(i) there is a case registered with the criminal investigation body, or there is a court case or there is an ongoing insolvency or bankruptcy procedure; in the absence of a registered case to the requesting body, the deed is not typical.

[23] Mihail Udroiu, *op. cit.*, pp. 358-359.

(ii) there must be an explicit (oral or written) request legally carried out by the criminal investigation body, the court or the syndic judge, concerning the communication of data, information, documents or assets; in the recent doctrine it was emphasized that the act "is not typical if the non-fulfillment of the obligation to cooperate takes place in view of the manifestly illegal nature of the request".[24]

(iii) *the data, information, documents or assets required to be in the possession of the offender*; in the event that they are not in the possession of the perpetrator, the deed is not typical.

(iv) *there is a prior warning (irrespective of the form - oral or written) of the perpetrator by the criminal investigating authority, court or syndic judge about the consequences of his deed if he does not fulfill his obligation to cooperate with the authorities*; in the case that the evidence in the file does not result in the existence of the prior warning under the law, the act will not be typical.

In court practice it was decided that "The Defendant C.G. has the quality of an active subject of the offense, having the documents provided by Law no. 85/2006, as statutory administrator of S.C. A B S.R.L. Bacau.

The material element of the offense materialized in the refusal of the defendant to provide the syndic judge with the information and documents held, which were explicitly requested under the law, with a view to solving the bankruptcy file no. XX. The essential requirement for the person to have been warned of the consequences of his deed was also met during the hearing of the so-called C.G. of 30.01.2014 [Bacău Court, the criminal sentence no. 2549/2014 (www.rolii.ro)]."[25]

According to the doctrine, "the deed is typical even if only one of the alternative modalities of the material element is committed; if the perpetrator commits both alternative variants of the material element, in principle the offense contest will be retained unless both normative acts are committed in the same circumstances and in the same case, when it is retained the offense unit is retained."[26]

The immediate consequence is the state of danger that is created for the work of justice.

The causal link need not be demonstrated by the judicial bodies, as it results from the materiality of the act.

4.2.2 The subjective side

The form of guilt with which this offense is committed is intention in its both forms (direct and indirect).

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[24] *Ibid.*, p. 358.

[25] Georgiana Bodoroncea, în Georgiana Bodoroncea, Valerian Ciclei, Irina Kuglay, Lavinia Valeria Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca-Maria Vasile, *op. cit.*, pp. 795 and 796.

[26] Mihail Udroiu, *op. cit.*, p. 358.

For the existence of the offense, the motive or purpose has no legal relevance, but their existence may be important in the process of individualizing the penalty of criminal law.

5. Conclusions

The examined offense is an element of novelty in the new Criminal Code, which was not provided for in the Criminal Code of 1969. However, the examination revealed that the incrimination itself is not an element of absolute novelty for the Romanian law, since the incrimination, to have this marginal name, with a different legal content, was also provided in two other normative acts, namely Law no. 85/2006 on Insolvency Procedure and Government Emergency Ordinance no. 46/2013 regarding the financial crisis and the insolvency of the administrative-territorial units.

In our opinion, the incrimination of this act under this name will prove to be a correct solution chosen by the Romanian legislator, with the observation that the text itself must be completed by mentioning the preliminary chamber judge and the judge of rights and liberties, so as the judicial bodies may request certain data, information, documents or objects or which may be prevented from conducting a procedural act.

We emphasize that the two institutions (the judge of the preliminary chamber and the judge of rights and freedoms) cannot be interpreted as being assimilated to the term of *court.*

As a general conclusion, we appreciate the usefulness of the incrimination and the need to urgently supplement the text as we have insisted on in the paper.

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