

Short observation on some crimes governed by the New Criminal Code concerning the child

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Abstract

In this article, the main crimes committed against children by the main actors in his life were submitted to a careful analysis. Through legislation, namely the criminal code, as well as the Romanian Constitution, was consecrated the positive obligation of the State to protect children in difficulty, that is, those children who do not benefit from sufficient conditions required to ensure development and physical and mental integrity.

Key words: crime, child, family abandonment, rights and obligations.

Criminal law, in the version of the current coding, incriminates as offences the action or inaction of certain persons in the care of whom there are children, through which the legal obligations are disregarded or there are breached the rights in the exercise of parental rights.

In the following we will stop with brief considerations on the following facts that seriously affect children's rights to protection and care, all being incriminated as crimes:

- Abandonment of the family (article 370 Criminal Code);
- Non-compliance with measures regarding the child custody (article 379 Criminal Code);
- hindering the access to compulsory education (article 380 Criminal Code);
- ill-treatment applied to children (article 197 Criminal Code).

At national level, the protection of the right to life is guaranteed by the Constitution, the fundamental law of the country, which in article 22 of Romania's Constitution regulates the right to life and the right to physical and mental integrity as follows: „(1) The right to life, as well as the right to physical and mental integrity of the person are guaranteed. (2) No one may be subjected to torture and any kind of punishment or inhuman degrading treatment times. (3) the death penalty is prohibited”.

In the same manner, criminal law is the guarantor, in Romania, of defense against crime, of the sovereignty, independence, unity and indivisibility of the State, of person, its rights and freedoms, property, and the entire order of law (the old penal code-article 1).

As a preliminary conclusion, criminal law aims to protect social values such as, person and fundamental rights and freedoms, values that are submitted in the same time in Romanian Constitution.

The first crime is the subject of the analysis of family abandonment.

According to art. 378 from the criminal code, this crime consists in the fulfillment by the person who has the legal obligation of maintenance, against the one entitled to the maintenance, of any of the following acts:

- a) Leaving, casting out or sagging without help, exposing him to physical or moral suffering;
- b) The failure to fulfill, in bad faith, of the maintenance obligation provided by law;
- c) Failure to pay, in bad faith, for 3 months, alimony set about by the court. Family abandonment is performed through three forms. „In its first form, family abandonment implies, in what concerns the material element, the leaving, casting out or leaving without help of the one entitled to maintenance.

Leaving consists of the abandonment of the person entitled to maintenance, and casting out consists of the banishment of the person entitled to maintenance. In the case of leaving without help, the perpetrator has an attitude of passivity, he never leaves the home, nor does it remove from home the one entitled to maintenance, but continuing to live together, he no longer provides the necessary means of subsistence ” (Loghin & Toader, 1999: 535).

In the second alternative of the legal text that criminalizes the abandonment of the family provided by the current encoding, respectively, lit. b, it may be committed in the form of the failure in bad faith, to provide maintenance as required by law. Maintenance obligation has a concrete character, being that obligation imposed by law on a person to provide another means of livelihood (Filipescu, 2000, pp. 438-483). This obligation is virtually an effect of relatedness and marriage. The law establishes the obligation of maintenance but between other persons who are not relatives between them (Filipescu, 2000: 438-483).

Under the art. 516, 1st paragraph, of the Civil code, the obligation of maintenance exists between husband and wife, relatives in a straight line, between brothers and sisters, and between other persons specifically provided by law. The 2nd paragraph of the same text provides that the legal obligation of maintenance exists between relatives in direct line, as well as between brothers and sisters are applicable in the case of adoption, and paragraph three specifies that the obligation of maintenance exists between former spouses, subject to the conditions provided by law.

Transposing the civil law provisions above shown in the area of criminal law, and especially of the offense, in the doctrine it was shown that, if the maintenance obligation exists, it always has a character of continuity, that is to be carried out at any time. From here it results that the failure of maintenance will have a character of family abandonment, continuity, in this form, being a felony." (Munteanu & Cunesu, 1977: 35-39)

The literature shows the fact that the abandonment of the family, in the form provided by art. 375 lit. c from the Criminal code, is a momentary crime, because the obligated to pay maintenance payments being overdue, the crime is consumed at the date of expiration of this term (Dongoroz & Kahane & Oance & Fondor & Iliescu & Bulai & Stănoiu & Roșca, 1971: 573)

Other authors (Vasiliiu & Pavel & Antoniu & Lucinescu & Papadopol & Rămureanu, 1975: 381-382; Pavel, 1969: 59) considered that, in this form, family abandonment is a continuous felony because, although there is a time limit for payment of the alimony, abstaining from the obligation to pay is continuous.

Also in jurisprudence was considered, for example, that non-payment of alimony set about by the court is not a crime if the child for whom it was established its own income, which ensures the

necessary conditions for growth, educating, learning and professional training (Decision No. 2211, 1973: 443).

The act constitutes a crime, however, if the child has their own income, but they are not plentiful in order to ensure the necessary conditions for growth, education, education and professional training (Decision No. 2211, 1973: 443).

Regarding punishments stipulated for violating legal provisions governing the offence of family abandonment, it is to be remembered that the crime of abandonment is punished with imprisonment from six months to three years or with a fine, and in accordance with art. 378 paragraph 1, 2 from the Criminal code, with the same punishment shall be punished the failure, in bad faith, to execute by the condemned of the obligation to provide periodical maintenance as established by court ruling, in favor of the persons entitled to it, on the part of the victim of the crime.

Criminal action in the case of the crime of abandonment is put in motion at the preliminary complaint of the injured person. Considering the fact that the social relationship breached is one of the family, the Romanian penal code exonerates of responsibility the defendant, if before the end of the criminal trial, he carries the obligations stipulated by law. In the same purpose, the defendant is offered a benefit if until the final decision fulfills his obligations, in this case being due to the application of postponing the punishment or suspension under supervision, thus being created a more favorable legal situation for defendant.

In accordance with article 379 from the Criminal Code, the second crime subject to a careful analysis is that of failure to comply with the measures concerning the child custody.

Non-compliance with measures regarding the child custody is carried out according to the criminal code in two ways.

The first way, provided in art. 379 paragraph 1 consists of the detention by a parent of the minor child, without the consent of the other parent or of the person to whom the child was entrusted according to the law. As a premise situation, the minor being at the other parent, following the right of each parent to have links with the child, it is not allowed to return to the parent or person to whom it was entrusted by the law. The legislature foresaw the fact that holding the child is required to be done without the consent of the other parent or of the person to whom the child was entrusted according to the law. According to the literature (Dobrinescu, 1969: 109), holding should not be confused with the rape of a minor.

Regarding the second form, the second paragraph of the above mentioned article stipulates that shall be punished with the same punishment the deed of the person that has been entrusted the child by the Court ruling towards growth and education, to hinder repeatedly, on either of the parents, to have personal connections with the child, under the conditions laid down by the parties or by the competent authority.

Thus, in this situation, the minor has been entrusted to a person other than his parents, by court order, and that person tries to break personal links with parents. In the case of the dissolution of marriage by divorce, the person to whom the child has been entrusted can also be one of the parents. In this case, the minor is hindered by the parent to whom it was entrusted to have connections with the other parent. The conditions under which personal connections are kept by the child with its parents shall be determined by the parties or by the competent authority. For the existence of the crime it is necessary that the action of hindering of any of the parents to have links with the child to be committed repeatedly, wherefrom to result it is not some random, isolated action, but an intent to remove the minor's parents (Toader, 2010: 437).

Criminal action for non-compliance with measures regarding minor when put in motion at the preliminary complaint of the person injured, and sanction provided for both methods is prison from one month to three months or a fine.

According to article from the Criminal Code the third offence as provided by the criminal code with regard to child is hindering the access to compulsory education.

According to the legal text, the crime consists in the deed of the parent or the person to whom a child has been entrusted, according to law, in unjustifiably, withdrawing or hindering it by all means to follow the general education courses required.

The penalty stipulated by the legislator is prison from three months to one year or with a fine. As in the case of the crime of abandonment of the family, the deed is not punished if before completion of the criminal case, the defendant ensures resumption of courses attendance by the child. Also, similar to the offence of family abandonment, the 3rd paragraph of art. 380 from the Criminal code, includes the same legislative solution, providing that, if by the final decision staying the sentence the defendant ensures resumption of courses attendance by the minor, the Court shall, if necessary, delay the application of the prison penalty or suspend under supervision

the penalty execution, even if the conditions stipulated by law for this purpose are not fulfilled.

The Romanian Constitution, as the fundamental law, grants a very important interest by guaranteeing the right to education under article 32.

Law No. 84/1995 governs the organization and functioning of the national system of education. In accordance with the provisions of the law, in Romania education constitutes a national priority (article 2 of law No. 84/1995). The provisions of law No. 84/1995 create prerequisites for harmonizing education of Romania with universal values and standards in human rights, including the rights of the child.

Thus, the State is the holder of the right and the obligation to regulate the organization and functioning of the education system, and the parents' right and obligation to choose the way of the learning and professional training of the juvenile, obviously respecting the principle of the best interests of the latter.

Another offence relating to child is the one stipulated by art. 197 from the Criminal code, that, according to the text of indictment, consists in putting in serious distress, through measures or treatment of any kind, of physical development, intellectual or moral, of the child by the parents or the person in whose care the child is located. The sanction consists of prison from 3 to 7 years and prohibition of certain rights.

„Consuming the offense occurs when physical, intellectual or moral development of the minor is seriously put in danger by actions taken or treatments applied ” (Toader, 2010: 435).

„Describing the material element of the crime, the legislature used a comprehensive expression, measures or treatments of any kind, to include all means or instruments that can be used against the child, violent flicks and not insuring feed, clothing, the appropriate conditions " (Loghin & Toader, 1999: 541). In the literature (Filipescu, 1997: 522), the facts constituting the offence of ill-treatment applied to children have a degree of higher social danger than those prosecuted with the decline of the parental rights, as mentioned by article 508 Civil Code.

„The application of corrections, accidentally, caused by a child mistake, that does not seriously jeopardize the physical, intellectual or moral development, does not constitute the crime of ill-treatment applied to children” (Toader, 2010: 434). It was detained in jurisprudence (Pavel, 1972: 154) the „the deed of the teacher to hit the

child with a stick in boarding house, as a result of irregularities committed by the latter, and to produce a lesion for whose healing were necessary three weeks of medical care, does not constitute the crime of ill-treatment applied to children, but of corporal injury.”

Conclusions

Protection of children's rights has become a priority for the legislator, thus making it essential to incriminate any acts committed by a parent or protector, which could affect the physical, intellectual and moral development of the child. The legislator has also established in the task of the main actors in children's life, on the one hand, a positive action for proper care of the child, required for maintaining health in normal conditions, and, on the other hand, a negative action, obtaining from any manifestation that might prejudice the physical, mental or moral integrity of the child.

In terms of negative liability of parents or other legal dissolution of not abusing physically, emotionally and mentally a child, it is also regulated through constitutional provisions, art. 22, 1st paragraph of the Constitution guaranteeing the right to life, as well as the right to physical and mental integrity of the person.

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