THE OFFENSE OF MALTREATMENT APPLIED TO THE MINOR IN THE VIEW OF THE ROMANIAN LEGISLATOR

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Abstract: In this paper we have examined the pre-existing elements and constitutive content of this crime with direct reference to the existing judicial practice. We have also presented some controversies that generally concern the contest of offence between the examined offense and other offenses such as: strikes and other violence, personal injury, unlawful deprivation of liberty, murder or attempted murder. The novelties concern both the examination of the offense in the light of the new law and the references to judicial practice and the presentation of different opinions from the recent Romanian doctrine. The work may be useful to students of law faculties and practitioners in this field.

Keywords: objective side, subjective side, forms, ways, sanctions

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1. Introduction

The offense of maltreatment of the juvenile is provided in the provisions of art. 197 of the Criminal Code, and it consists in the deed of the parents or any other person in the care of the minor, of seriously endangering the minor's physical, intellectual or moral development through measures or treatments of any kind.

In the recent doctrine, it is argued that “the main object of this incrimination is to fight off the facts likely to endanger the physical, intellectual or moral development of the minor, to alter the family atmosphere in which the juvenile must be raised and who can provide him a normal development and favorable conditions for proper development. By incriminating these facts the legislator aims at protecting mainly family relations and to stimulate the adoption of human behavior towards the minor in order to provide him an adequate development to the requirements of social life. Only at the secondary level is the child's protection against violence that could damage his / her bodily integrity or health” [1].

As regards the necessity of adopting this incrimination, in the older Romanian doctrine it was argued that when the deeds “committed by the parent or the person responsible for raising and education of the minor present a higher degree of social danger, the civil sanctions may no longer be enough. The fact that the minor is not housed (homeless), the lack of necessary clothing, the exposure to illness, the application of serious physical blows, the serious threat, deprivation of liberty, the bringing of a minor to beg or a minor to practice prostitution, and placing the minor to witness scenes or obscene acts etc. are examples of maltreatment of the minor, which seriously jeopardizes the physical, moral or intellectual development of the minor. Such acts, presenting danger and harming family relationships, take the form of a crime of ill-treatment” [2].

The opinions mentioned above are as current as possible, with the statement that the development of crime in this field has new valences, in the sense that in the judicial practice there have occurred other factual normative ways of committing this crime, among which we mention: the incitement of minors to commit other offenses such as theft, robbery, rape, etc.;
selling minors; sale of minors' organs; including minors in some organized crime groups; trafficking in minors, etc.

2. The Criminal Code in force in relation to the Previous Law
In the Explanatory Memorandum of the Draft Law on the Criminal Code, it is stated that “the offense of ill-treatment of the minor as well as that of the brawl, has been brought into this section because it endangers first the physical integrity or the health of the person, in subsidiary family relationships, respectively social cohabitation. Moreover, as regards the offense of ill-treatment of the minor, it has never been a particularly active subject, which could be committed not only by a family member, but also by the minors admitted to the centers placement or other forms of protection. In addition, in other legislation, the offense in question appears in the same or similar form in this category of offenses (article 152 of the Criminal Code, article 225 of the German Criminal Code, articles 92-92 of the Austrian Criminal Code)” [3].

The offense under examination has the same marginal name and a legal content similar to that provided in art. 306 of the Criminal Code of 1969.

The first distinction between the two regulations is how to identify the active subject in the sense that in the previous law it (in addition to the minor's parents) it can be any person to whom the minor has been entrusted to raise and educate, while in the new regulation the active subject of this crime (besides the parents of the minor) may be any person in the care of the minor.

The second distinction is the sanctioning treatment consisting of 3 to 15 years' imprisonment and the forbidding some rights in the previous law, and the 3 to 7 year imprisonment and the prohibition of some rights in the law in force.

We appreciate that the new incrimination is more complete than the previous one.

In another opinion it is stated that: “Unlike the previous regulation, where the deed was incriminated in crimes that affect social cohabitation within the family, the offense of ill-treatment applied to the minor is considered, under the new Criminal Code, a crime against body integrity or health, as this offense primarily threatens the physical integrity or the health of the person, and only in the alternative family relationships, respectively social cohabitation. Moreover, as regards the offense of maltreatment of the minor, it was never a specially restricted subject to family members, which could be committed not only by either a family member or a minor, interned in placement centers or other forms of protection. The introduction of the offense of maltreatment in this chapter also clarifies the controversial relationship with other crimes against bodily integrity or health (for example, hitting or other violence or bodily injury)” [4].

3. The Preexisting Elements
3.1. The Legal Object
The special legal object of this crime consists of social relations concerning the protection of the minor against maltreatment to which parents or other persons in charge of which the minor is subjected, treatments which may endanger the physical, intellectual or moral development of minor.

In another opinion it is argued that “The main legal object is the social relations concerning social cohabitation within the family, relationships that involve the care of the child's physical, intellectual and moral development.

The secondary legal object, according to the new Criminal Code, consists of the relations regarding the normal physical, intellectual or moral development of the minor, relations that exclude the ill-treatment applied to him [1].

3.2. The Material Object
The material object of the offense is the minor's body with all its attributes related to physical, intellectual or moral development.

3.3. The Subjects of the Offense

a) Active subject

The active subject of this crime can only be the parent of the minor or another physical person in whose care the juvenile is; we have here the guardian, curator, relative or other person to whom the minor was entrusted to take care of him.

From this perspective, the active subject of the offense can be any person in the care of the minor, even for a short period of time; it is not necessary for an active subject to have a certain quality in relation to the minor or his / her parents, the only condition being in the care of the minor.

In the event that the person concerned does not meet the two conditions, the deed will not meet the constituent elements of the offense under examination.

The criminal participation is possible in all three forms: co-author (in the case where all the active subjects of the offense have the special quality of law, namely: parents or persons in charge of which the minor is), instigation and complicity.

b) Passive Subject

The passive subject of the offense is the minor, regardless of his state of health or age.

According to the doctrine, “it is not a passive subject of the crime provided by art. 197 of the New Criminal Law married 16-year-old married, who, having acquired full exercise capacity, goes beyond raising and educating parents (in this case, acts of violence or deprivation of liberty will constitute the appropriate offenses in the New Criminal Code); it is also not the passive subject of the 16-year-old who was anticipated by the guardianship court to be fully capable of exercising under the conditions of art. 40 of Civil Code.” [5].

As we have shown above, it may be the passive subject also the minor who is interned in a foster care or other form of protection, as well as the minor given by the parents to the temporary care of a third person.

4. Structure and Legal Content of the Offense

4.1. Premise Situation

According to the doctrine, “the premise situation is the existence of a legal relationship regarding raising and education of the minor, which is the responsibility of certain persons (parents or any person in the care of the minor). The premise will always exist when the minor is raised and educated by the parents or is in the care of a person who has undertaken to take care of raising and educating the minor” [1].

4.2. The Constitutive Content

4.2.1. The Objective Side

The material element of the objective side is accomplished by actions or inactions through which measures or treatments of any kind are taken which have the consequence of seriously jeopardizing the intellectual and moral development of the minor.

Actions can consist of beatings or other violence, and inactions can consist of not providing adequate food, clothing, proper living conditions, etc.

As in the judiciary practice there were different views regarding the application of the rules of the offense contest in the case where against the minor there were exercised acts of violence, bodily injury, illegal deprivation of liberty, as well as ill-treatment of the minor, the High Court of Cassation and Justice has decided in the course of an appeal in the interest of the law that the offenses of injury or other violence provided in art. 180 of the Criminal Code, bodily harm provided in art. 181 of the Criminal Code and illegal deprivation of liberty provided for in art. 189 of the Criminal Code, as the case may be, shall be held in an ideal competition with the offense of ill-treatment of the minor, in the case of the parent's or the person's
custody of the minor who is abusive of his authority and, contrary to the interests of the minor, exerts acts of violence or deprivation of liberty against him, with the intention of causing sufferings, physical or moral injuries, and seriously jeopardizing the physical, intellectual or moral development of the minor. [6]

In the doctrine, in accordance with this decision of the Supreme Court, it is stated that “in the case where by the ill-treatment applied to the minor, he was deprived of liberty, his life was threatened, his bodily integrity was jeopardized, the contest between this offense and attempted murder, harassment or other violence, bodily injury, unlawful deprivation of liberty, etc.” [5]

In another opinion, contrary to the decision of the Supreme Court, it is alleged that the offense of maltreatment of a minor is “a complex offense which naturally absorbs the mentioned offenses (the offenses referred to by the Supreme Court in the resolution of the appeal in the interests of law - sn). This is also reflected in the degree of social danger of the offense, as well as from the social value which is affected (the physical, intellectual or moral development of the minor, which, in our opinion, includes body integrity, health, freedom of the person). Also, the variants of committing the offense of ill-treatment applied to the minor are, for the most part, acts of violence, as we have shown in the material element. We believe that repeated repetitive beatings for the minor, which result in diminishing the state of health and ultimately lead to personal injury and endangering the development of the minor would only constitute the constitutive elements of the offense of maltreatment of the minor, another solution that violates the principle of non bis in idem (which, in my opinion, is of the same social values, with added seriousness and protection for the offense of ill-treatment of the minor, the detention of the offense would mean a double sanction for the same deed). This opinion [7] has been confirmed in the current regulation by including the offense of maltreatment of minors in the offenses section against physical integrity or health. Regarding the report on the offense of deprivation of liberty illegally, we consider that there is no precondition for this offense, the offense of maltreatment being exercised by a person who has a right over the minor (parent or person in care of the minor). The premise leads us to believe that the two crimes are mutually exclusive, although they can be committed in the same way (for example, keeping a child in a room without food for one week will constitute, as the case may be, the offense of maltreatment of the minor if the offense is committed by the parent, or illegal imprisonment if the minor has been kidnapped, because in the latter case the juvenile cannot be considered to be in the care of the kidnapper within the meaning of the law” [8].

In the same vein, another author, referring to the Supreme Court's decision no. 1646 of May 5, 2009, appreciated that “the solution is wrong. If the same violence that is taken into account in carrying out the ill-treatment ultimately resulted in death, it is naturally absorbed in the crime of murder (like hitting or other violence or bodily injury). It is wholly improper to take the immediate consequence of the offense of maltreatment that is to seriously jeopardize the physical, intellectual and moral development of the minor in the conditions in which he died. In fact, the supreme court, by an earlier decision adopted in a relatively similar case, has removed the thesis of the crime contest, stating that: “The offense of maltreatment of the minor committed by beatings and other acts of aggression, nature to cause the death of the victim, is found in the action that characterizes the objective side of the crime of murder or, as the case may be, an attempt at this offense (CSJ, Criminal Section, Decision No. 1917/1994 in C.P.Ad., p. 1036) [9].

We do not support the above opinions, considering that the offense of maltreatment of the minor does not absorb the offenses of beatings or other violence, corporal injury or deprivation of liberty, acts committed by the parent or the person in whose care the minor is. We should point out that when the acts committed against the juvenile are actions that characterize the offense of attempted murder, the deed constitutes only an attempt at this
offense and not a contest between the attempted murder and the offense of maltreatment of the minor. [10]
Taking into account the provisions of the new law, the act described above meets the constitutive elements of the offense of domestic violence, which, in these circumstances, absorbs in its content the offense of maltreatment of the minor.
Similarly, in another case, the court ruled that if the acts of aggression committed against a juvenile constitute acts that characterize the offense of murder, between them and the possibility of death of the victim there is a causality connection, as well as the intention to kill, the act constitutes the crime of killing or, if necessary, attempting to do so, and not a conciliation between the murder offense and the maltreatment of the minor [11].
In order to comply with the 2008 decision of the Supreme Court, in another case, the court ruled that the parent's deed repeatedly to exert violence on his minor child, resulting in partial paralysis of the child, and reiterates the exertion of violence on the child after the partial paralysis of the child, causing the death of the minor victim, meets both the constitutive elements of the crime of qualified murder and particularly severe provided for in art. 174, 175 par. (I) letters c) and d) and art. 176 par. (I), letter a) of the Criminal Code as well as the constitutive elements of the offense of maltreatment applied to the juvenile, stipulated in art. 306 of the Criminal Code, in an ideal contest (sn - formally) of criminal offenses, as by exerting repeated violence, which ultimately caused the child's death, the parent seriously threatened his physical, intellectual and moral development [12].
The immediate consequence is creating a state of danger for the physical, intellectual or moral development of the minor.
Between the action or inaction by which it is achieved the material element of the objective side and the produced result there should be established the existence of the causality connection.

4.2.2. The Subjective Side
The offense under investigation is committed intentionally, which may be direct or indirect. The mobile and the purpose have no legal relevance in the sense of the existence of the offense, but their existence may be useful to the court in the process of individualizing the criminal law sanction to be applied to the active subject.

5. Forms, Ways, Sanctions
5.1. Forms
Although the preparatory acts are possible if the act is committed through an action, they are not punished.
The offense is consumed when the action or inaction was executed, and the result required by the law occurred.
Also, the offense can be committed both in continuous form (through the omission to provide the minor's food) and in the continued form (when the maltreatment is repeated under the same criminal resolution, in which case there will be a moment of exhaustion which will be identified when the last act of execution was committed) [5].
5.2. Ways
The examined offense is presented in a single normative way described in the content of art. 197 of the Criminal Code.
5.3. Sanctions
The sanction provided in the text of incrimination is imprisonment from 3 to 7 years and prohibiting the exercise of certain rights.

6. Complementary Explanations
6.1. The Connection to other Offenses
The offense of maltreatment of the minor relates to offenses against the bodily integrity or the health of the person.

**6.2. Some Procedural Aspects**

The criminal action is initiated ex officio, and the jurisdiction in the first instance belongs to the court in whose district the act was committed, except in cases where the competence of the court is not determined by the quality of the person.

Criminal prosecution falls under the competence of criminal investigation bodies of the judiciary police, under the supervision of the prosecutor.

**7. The Legislative and Transitional Situations**

**7.1. Legislative Precedents**

The offense under examination was first provided in the Romanian law in art. 445 of the Carol II Criminal Code, under the marginal title of abusive right of correction.

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

Given the penalty limits set out in the two laws, we believe that the more favorable criminal law can be both old and new law.

Thus, if the court wishes to apply a penalty aimed at the special minimum, and the active subject benefits from attenuating circumstances (one or more), the more favorable criminal law will be the old law, and when the court is guided by a targeted sentence to the special maximum, the more favorable criminal law will be the new law (which provides for a lower maximum limit).

**8. Conclusions**

Maintaining the incrimination in the new Criminal Code is justified by finding a high rate of crime in this offense.

Regarding the sanctioning regime, we notice that in the new law, it is more permissive, this aspect being of major importance in terms of applying the more favorable criminal law.

Even though there are some small differences between the two regulations in terms of formulation, it can be pointed out that the wording used in the new law is more appropriate to the purpose of incrimination.

Even though the Supreme Court has made an appeal in the interest of law to hold the contest between the offense of maltreatment of the minor and offenses of hitting and other violence, bodily injury and illegal deprivation of liberty, the doctrine will continue to exist controversy on this issue.

It is also important to note that the Supreme Court also did not pronounce on the offense of murder (there are only case decisions, not decisions in the interest of law or prior decisions), in which case there are two different opinions.

The general conclusion that is required is that the examined offense will remain in the attention of specialists also in the future, the existing controversies aimed at restraining the contest between this offense and others, as mentioned above.

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