

# **THE INFLUENCE OF INTERNATIONAL REGULATIONS REGARDING FAMILY PROTECTION BY THE ROMANIAN CRIMINAL LAW**

RUXANDRA RĂDUCANU

Faculty of Law and Administrative Sciences, University of Craiova,  
Romania

## **Abstract in original language**

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The exercise of parental protection in the exclusive interest of the child – a principle stipulated in the Convention on the Rights of the Child – is guaranteed by the punishment inflicted on the parent who acts abusively towards his child, against the child's interest. The Criminal Code deals with the offences against family in one chapter, regulating family abandonment, non-observance of the measures concerning the minor's custody. Moreover, the new Romanian Criminal Code incriminates incest with consent within the offences against family, since the object of this offence stands for family relations, not relations concerning sexual liberty. A new regulation has been introduced with regard to the prevention of access to obligatory general education. This new incrimination refers to those situations when the parent acts abusively by withdrawing the minor from school, and it proves necessary in order to decrease the number of school abandonment cases.

All these regulations under criminal law represent key factors by which the legislature aims to protect the minor and the exercise of parental protection for the benefit of the child.

## **Key words in original language**

parental protection, minor's interest, family abandonment, incrimination by the Criminal Code, criminal liability

Introductory considerations. The need to adopt a new Criminal Code in Romania was obvious and absolutely necessary especially after the economic, social and political changes which arose after the 1989 Revolution. After an attempt to adopt a new Criminal Code in 2004, which failed, a new Criminal Code was adopted by Law 286/2009, and it will come into force on September 1, 2012. The very presentation of these reasons explains how this new Criminal Code was meant to meet the requirements resulting from the fundamental principles of criminal law consecrated by the Constitution and by international agreements and treaties regarding the fundamental human rights, to which Romania is a party. Another objective of the Romanian legislature was to harmonize the Romanian material

criminal law with the legal systems of other member states of the European Union, as a premise for judicial cooperation in criminal matters based on mutual recognition and trust.

As expected, the legislature proved a special concern for the protection of the interests and rights of minors who, due to lack of physical and intellectual maturity, also need appropriate legal protection. The regulations on the sanctioning of the acts which prejudice family relations aim to guarantee the fulfilment of the dispositions arising out of the international treaties and conventions to which Romania is a party and which refer to the child's protection by ensuring a harmonious physical and intellectual development.

The Convention on the Rights of the Child represents the most ratified international treaty with regard to human rights, becoming as binding as the law and being inserted in the national law of many states. The reasons for which this treaty has become a component of national law are the fundamental dispositions on the protection of children's rights in order to ensure their harmonious evolution. Thus:

Art. 1 defines a child as every human being below the age of eighteen years. By setting out such an age limit, majority age is equalled to the full responsibility of an adult.

Art. 2 prohibits discrimination of any kind and imposes that the states shall take appropriate protection measures, meaning equality of legal treatment.

Art. 3 provides that in all the decisions of the authorities of the state, regarding the criminal penalties applicable to the minor, "the best interests of the child shall be a primary consideration".

Art. 6 guarantees every child's right to life, which entails the prohibition of the death penalty for every human being below the age of eighteen.

Art. 12 guarantees the child's right to express his or her views in all matters affecting the child and the right to be heard in any judicial and administrative proceedings affecting him or her, either directly, or through a representative.

Art. 16 guarantees the child's right to the protection of private and family life.

Art. 19 provides that the states as parties to the convention shall take all legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Criminal law provisions on the protection of the family. The exercise of parental protection for the best and exclusive interest of the child –

a principle stipulated in the Convention on the Rights of the Child – is guaranteed by the sanctioning of the situations in which the parent has an abusive conduct towards his/ her child against the child's interest. The Criminal Code consecrated an entire chapter to the offences against the family, regulating offences such as: incest, family abandonment, non-observance of the measures concerning the custody of the child, prevention from access to compulsory general education.

The novelties brought by this Code in the matter of offences against the family consist of a new incrimination first of all. Thus, for the first time in the Romanian legislation, the act of preventing access to compulsory general education comes under criminal law in case this prevention is not justified. The prevention of access to compulsory general education is an offence provided that the parent or guardian of the child, with no justification, withdraws or prevents the child from attending the classes of compulsory general education. The action is not punishable if before the end of the prosecution, the accused ensures that the attendance of classes is resumed by the minor. Such a regulation was necessary considering the highly alarming number of school abandonment cases. It is also essential in those cases in which there is an abusive behaviour, with no justification, and it is not applicable when the reason for the non- attendance of classes is the poverty of the family.

Another change that deals with the offences against the family refers to the new classification of certain offences. The offence of maltreatment applied to the minor is no longer regulated under the offences against the family, but under the offences against bodily integrity and person's health.

This change is not accidental. The most important change in the content of the offence refers to its active subject. In the present Criminal Code (that came into force on January 1, 1969) the active subject of the offence of maltreatment applied to the minor was circumstantial, i.e. it could be either of the parents or the legal guardian of the minor. For this reason, the offence appeared as an offence against the family, the juridical object aiming at the social relations of social cohabitation in a family, relations implying the care for the physical, intellectual and moral development of the child.

In the new Criminal Code, the active subject is also qualified, but he can be either the minor's parent or any person who has the care of the child. This new perspective on the active subject entails important consequences with regard to the juridical object, consequences that have determined and imposed a new classification of this offence, from the former category of offences against the family into a new one, namely the offences against bodily integrity and the person's health. Although the active subject is qualified, it is no longer, from the standpoint of the juridical object, about the social relations regarding cohabitation in a family, but the social relations regarding the protection of an essential feature of the person – bodily integrity and health. It is obvious that the distinct incrimination of the act is determined by the quality of the active subject, by the minority of this

subject which implies paying special attention and providing special protection, in case the minor is the victim of some offences causing bodily injury or harming the minor's health.

The act represents an aggravated form of the offence of causing bodily harm, the aggravating characteristic being determined, on the one hand, by the circumstantiation of both the active subject and the passive subject, and, on the other hand, by the result surpassing in gravity the result of the action of causing bodily harm. For the existence of the offence of maltreatment applied to the minor, it is not important to know the number of days of medical care necessary for the healing of the injury inflicted on the minor, but its gravity which is expressed in the way in which the physical, intellectual and moral development of the minor is seriously threatened.

Another novelty in Law 286/2009 is the incrimination of incest within the offences against the family. The present Criminal Code regulates the offence of incest in the chapter on the offences regarding sexual life. In the present regulation, the special juridical object of the offence of incest is constituted by the social relations regarding the sexual life of the person, whose normal existence and development are guaranteed by meeting the fundamental, essential, biological and moral requirements of sexual intercourse, taking into account the primary finality, the perpetuation of the human race. By incriminating incest, the biological as well as moral basis of society is protected. As incest is currently incriminated, the jeopardy state determining and justifying the incrimination of incest exists in all the situations regarding sexual intercourse between relatives of a direct descent or between brothers and sisters.

As for the material element of the objective side of the offence, one can notice in the regulations of the former, as well as of the present Criminal Code, that it consists of the sexual intercourse, that is normal sexual intercourse between relatives of direct descent or between brothers and sisters.

Along with the modification brought to the Criminal Code by the Emergency Ordinance no. 89/2001, the legislature extended the scope of the acts which can constitute the material element of the offences of rape or sexual intercourse with a minor, the objective side of these offences also referring to sexual intercourse of any kind with a person of opposite sex or same sex. The change was necessary and got recognition due to the fact that the same norm decriminalized homosexual acts.

The consequence of these changes was that from a criminal law standpoint, the sexual acts of any kind, other than heterosexual acts between relatives of direct descent or between brothers and sisters remain unpunished. The regulation of the offence of incest relies on biological considerations, but at the same time aims to protect the morality of sexual life. Or, the moral grounds on which the offence of incest is based impose the incrimination of sexual intercourse between relatives of direct descent or between brothers and sisters and their

inclusion in the material element of the offence, regardless of the fact that it is performed with a same-sex person or with a person of opposite sex.

Social danger, as an essential feature of the offence, also exists, having the same determinations and dimensions in the situation of sexual intercourse of any kind between relatives of direct descent or between brothers and sisters, same-sex persons (heterosexual), as well as in the hypothesis that the legislature had in view, namely normal sexual intercourse.

At present, there is a discriminating legislative solution in the sense that homosexual acts between relatives of direct descent or between brothers and sisters do not come under the regulations of criminal law, unlike sexual intercourse between these persons coming within criminal law and its penalties. This discrimination is not justified as long as the ground for the legislative solution is partly the same in both situations, namely the protection of morality lying at the basis of the family, the relationships among its members and the sexual life.

Therefore, by regulating the offence of incest within the category of offences against the family, the controversies and debates related to the present regulation are useless. The special juridical object is represented by the social relations regarding sexual life which implies that it should take place under conditions which should not affect the biological and moral qualities of the human race. The danger of the act comes from causing degeneration to the human species; at the same time, by the commission of this act, family relations are also infringed. This is the reason for which in the new regulatory framework it is natural that the material element of the offence should be only the normal sexual intercourse, not other kinds of sexual acts.

Other legal norms by which the criminal legislation guarantees the protection of the minor's rights are those incriminating the actions of family abandonment and non-observance of the measures regarding the custody of the minor.

The offence of family abandonment occurs when a person owes the legal obligation of maintenance to the one who is entitled to maintenance and commits one of the following acts:

- Abandonment, sending away or leaving with no aid, exposure to physical or moral pains;
- Failure, in bad faith, to fulfil the duty of maintenance provided by the law;
- Failure, in bad faith, to pay, for three months, the alimony established by a judgment.

The act is not punishable if, before the end of the prosecution, the accused performs his obligations.

The offence of failure to observe the measures regarding the custody of the minor can be committed in two ways. The former way of committing this offence consists in retaining the minor by either parent, without the consent of the other parent or of the guardian of the child. The latter way involves the offence of failure to observe the measures concerning the custody of the minor, which can be committed by the action of the person who has the custody of the minor by a judgment, to prevent, repeatedly, either parent from having personal relations with the minor under the conditions established by the parties or by the competent body.

The criminal charges are filed on the basis of previous complaint of the injured party.

Conclusions. Criminal liability arising out of committing serious acts which jeopardize the physical or psychical development of the minor represents the certain guarantee that the legislature aimed to observe the provisions of international documents and treaties in the matter of child protection. All these criminal regulations entail the objective of protecting the interests of the minor and of exercising parental protection in accordance with the best interest of the minor.

As a matter of fact, the main positive feature of the new Criminal Code consists, on the one hand, in the attempt to compensate certain legislative voids and, on the other hand, in the wish to provide a clear regulatory framework for the situations which, throughout the enforcement of the present Criminal Code, have generated doctrinal debates and issues in the judicial practice.

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#### Contact – email

*rux\_raducanu@yahoo.com*