General Aspects on Sexual Corruption Offense of Minors according to the Romanian Law

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Abstract: In this paper we have examined the crime of sexual corruption of a minor according to the new rules laid down in the new Criminal Code. To support theorists and practitioners we have insisted on examining the constitutive content of the offense and the elements of similarity and difference between the regulations of the Criminal Code of 1969 and the Criminal Code in force; the examination itself is extremely useful in terms of identifying and applying the more favorable criminal law. The innovations brought by this paper consist in a comparative examination of the provisions of the two laws, the examination of the content of constitution, and the consideration of alternatives regarding the enforcement of the more favorable criminal law. The paper can be useful for law students and the practitioners in the field.

Keywords: content association; similarities and differences between the two regulations; more favorable criminal law

1. Introduction

The offense of sexual corruption of the minor is provided for in article 221 of the New Code of Criminal Law, that is the person who commits a sexual act other than intercourse, oral or anal intercourse or vaginal or anal penetration act (referred to in art. 220 of the Criminal Code) against a minor under the age of 13 years, and its determination to support or carry out such an act.

In par. (2) of the same article there are provided several aggravated normative ways (i.e. the minor is relative in direct line, brother or sister, the child is in the care, protection, education, guard or treatment of the perpetrator, the act was committed in order to produce pornography materials and the offense endangered the life of the minor), and par. (3) and (4) of the article 221 of the Criminal Code there are

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mentioned other legal regulations, it will retain under the conditions when the intercourse of any kind is committed in the presence of a minor under the age of 13 years and the determination of a minor under the age 13 years by an adult to witness the acts of exhibitionism or shows or performances in which they commit sexual acts of any kind or making available pornographic materials.

In the recent doctrine it was highlighted that "incriminating the act, the legislator intended and wanted for the minor not to be incited to sexual practices of early age, before their time. Committing the sexual acts upon a minor or in his presence can influence, hinder the formation of feelings of shame and decency.

The criterion for distinguishing between rape and sexual assault, in terms of material element can be found in the sexual intercourse with a minor, i.e. sexual corruption of minors. Thus, if the act involves penetration or oral sexual act, we will be in the presence of sex with a minor, and if it is about other sexual acts, the act will fall into the category of corruption of minors."[1]

2. Elements of Similarity and Difference between the Two Regulations

The examined offense was provided also in art. 202 of the 1969 Criminal Code marginally entitled sexual corruption, there are many differences between the two regulations.

The first difference is in the different marginal title i.e. sexual corruption of minors in the current regulation and sexual corruption in the previous regulation.

Other changes are found in the constitutive elements, the structure of aggravated ways and the limits of penalties.

Thus, within the type way set out in the paragraph. (1) art. 221 of the Criminal Code, the material element of the objective side is performed by the commission of a sexual act (other than those referred to in art. 220 of the Criminal Code), or minor's determination to support or to carry out such an act, while in art. 202 the type way referred to in par. (1) consists of committing over the minor or in the presence of a minor obscene acts.

Also, the aggravated normative ways differ in the sense that in the new law, there are mentioned in relation to his or her age (to 13 years) and the quality that it has in

[1] Norel Neagu in (Dobrinoiu, et al., 2016, pp. 187, 189).

relation to the active subject of the offense, respectively, relative to direct line, brother or sister in the care, protection, etc. of the perpetrator, or if the offense was committed for the purpose of producing pornographic material. Also being sanctioned the sexual acts of any kind committed by an adult in the presence of a minor, or the determination of a minor by an adult to assist in the commission of acts of exhibitionism or shows or performances in which they commit sexual acts of any kind or providing minor pornographic materials; in these ways, for the existence of the crime it is necessary for the minor not to reach 13 years.

In the previous law, the normative aggravated ways there were retained the acts referred to in par. (1) when there were committed in the family, for the production of pornography and enticement of a person in order to commit sexual acts with a minor of different or same gender.

We note that the current the legislator considered only minor protection under the age of 13 years, the minor who reached this age does not have the quality of an active subject of this offense.

In connection with these regulatory differences, in the recent Romanian doctrine it was said that "the significant difference is the legislator's option to leave out the rules in the current Criminal Code the offenses committed against minors aged over 13 years. We believe that this provision of the legislator is a concern. Given the changes in the constitutive content of the offense of sexual intercourse with a minor and sexual perversion of the previous legislation and taking these provisions in the current regulation, the part of those regulations, which included sexual consensual acts achieved without penetration had to be adopted, according to the statement of reasons, in the provisions of the offense of sexual corruption of minors (it should reflect for the sexual act with a minor, the same relation that exists between rape and sexual assault)"[1]

Continuing his argument, the author in question states that "But while sexual assault can be considered a mirror regulation of the rape, differing only the material element, the differences between intercourse with a minor and sexual corruption of minors refers also to the category of minors that need protection. The legislator chose to protect the consensual sexual acts committed by penetration to minors under 13 years old, and minors between 13 and 15 years. Moreover, in the case of a special relations between offender and victim (in the sense that the child is in the care, protection, education, guard or treatment of the perpetrator), the child is

[1] Norel Neagu in (Dobrinoiu, et al., 2016, pp. 187, 189).

protected until the age of 18 years. Instead, the offense of sexual corruption of minors protects only the child aged up to 13 years. Or, as we have shown to the offense of sexual assault, the variations of committing at least as aggravated action as carrying out acts of sexual penetration, so it does not justify leaving out the protection of minors with such a young age (between 13 and 15 years) to undergo the temptation of debauchees and immoral sexual acts at an age when they could not understand the deep meaning of such sexual acts"[1].

Significant differences occur in terms of minimum and maximum penalties in the two laws, the differences that will be analyzed in the section provided in the two laws, the differences we will insist upon when analyzing the most favorable criminal law enforcement.

3. The Constitutive Content

3.1. The Objective Side

The material element of the objective side in the case of type normative ways provided in par. (1) is to commit an act of a sexual nature other than sexual intercourse, oral or anal intercourse and other acts of vaginal or anal penetration, with a person of the same or different gender, against a minor who has not yet reached 13 years old.

By committing some acts of a sexual nature, other than those provided for in art. 220 of the Criminal Code it means "committing any act of sexual practices which do not involve penetration of a sexual nature" (Udroiu, 2016, p. 172).

In another opinion it shows that by committing a sexual act other than that referred to in art. 220 of the Criminal Code it means "committing an act of sexual nature seeking sexual arousal, but not necessarily obtaining sexual satisfaction. It is about sexual acts provided for in art. 219, but unlike them, in the case of sexual corruption of minors, they are committed with the consent of the minor less than 13 years old. It falls into this category of sexual acts and sexual acts that are not performed by penetration".[2]

According to the doctrine "the act is committed against a minor when the author uses the body of a minor to carry out acts of a sexual nature, for example, the

[1] Norel Neagu in (Dobrinoiu, et al., 2016, pp. 187, 189).
[2] Daniela Iulia Lămășanu in (George Antoniu, Pascu, Sima, Toader, & Vasiu, 2013, pp. 227, 233).

minor's unveiling so that there can be seen the sexual organs, their palpation or their touch".[1]

The second alternative means by which the material element of the objective side, provided the same text content, is to determine the minor to bear or carry out such an act.

Through the activity of determining the minor to bear or carry out such an act means the activity carried out by the active subject in which he convinces the child to agree for another person to perform an act on him, or to make himself (minor) such an act. The concrete action of determining may include actions of offering gifts, promises or entreaties.

In the event where the determination action takes form of constraints of the minor (when the minor does not consent after insisting) it will be governed by the provisions of art. 219 par. (2) of the Criminal Code, i.e. charge of sexual assault.

The essential requirement regards the age of the juvenile victim, consisting of its determination to aim specifically a minor under the age of 13 years.

In the doctrine it was said that "If the same person determines the minor to bear sexual act and to perform this act on the minor we will be in the presence of a single offense of sexual corruption of the minor, the simple way.

If a person causes the child to endure the sexual act performed on him by a third party, the latter will be responsible for sexual corruption of minors, the simple way being provided by art. 221, par. (1) Thesis I, and the other person for art. 221 par. (1) The phrase II".[2]

If the sexual acts of corruption described in the text in question are committed in public, in the task of the active subject it will retain the examined offense formally in contest with the crime of insult against morality (art. 375 of the Criminal Code).

The immediate result in the case of the examined crime is to create a state of danger for the social relations on protecting the juvenile's health care and sexual freedom.

The causation link should not be proven, thus resulting in the materiality of the scene.

[1] Norel Neagu in (Dobrinoiu, et al., 2016, pp. 187, 189).
[2] Daniela Iulia Lămășanu in (George Antoniu, Pascu, Sima, Toader, & Vasiu, 2013, pp. 227, 233).

3.2. The Subjective Side

In terms of the subjective element the crime of sexual corruption of minors committed in all circumstances intentional, as the active subject is the representation of the fact that it commits on the juvenile an act of a sexual nature, foresees the result of his act and aims at producing it by committing the act, and although it does not intend this result, it supports the possibility of producing it.

Unless the offense was committed for the purpose of producing pornographic material, in which case the method will retain the aggravated offense, the motive and purpose have no legal relevance for holding this offense; however, in the process of individualization of criminal law sanction, there can be taken into account by the court and influence the final decision of the court.

The essential requirement accompanying the subjective element is the active subject to be aware that the acts of a sexual nature that they commit are against a minor under the age of 13 years, or a minor with such an age is determined to support or to perform such an act.

If the perpetrator did not know the age of the minor, and the concrete circumstances of the commission of the offense that could not realize that the child has not reached the age of 13 years, not knowing that fact will determine the incidence of the provisions of art. 30, par. (1) Criminal Code (the error), under the situation where the subjective side will be removed and consequently the absence of the offense.

4. Penalties

In the simple normative way provided in article. 221, par. (1) the penalty prescribed by the law is imprisonment of one to five years, and the aggravated normative way in par. (2) the penalty provided for imprisonment of from 2 to 7 years.

In the mitigating normative way provided for in article 221, par. (3) the penalty prescribed by law is imprisonment from six months to two years or fine, and in the aggravated normative way provided in the article 221 par. (4) is provided the penalty of imprisonment from 3 months to one year or fine.

Pursuant to art. 221, par. (5), the acts under par. (1) shall not be sanctioned if the age difference does not exceed 3 years.

5. The Cause of Non-punishment

In a similar way the offense provided for in art. 220, the Criminal Code (intercourse with a minor), the legislator has provided a cause of punishment to be incident given that the age difference between the perpetrator and the victim is at most three years (not exceeding three years as expressed legislator).

Provided in article 221, par. (5) of the Criminal Code, in order to determine the incidence of the causes of non-punishment, it is necessary to establish the following cumulative conditions:

- to commit a sexual act (other than that provided for in the provisions of art. 220 of the Criminal Code) against a minor under the age of 13 years or to persuade him to support or conduct such an act;
- the perpetrator to have the age more than three years older than the victim.

We disagree with the view according to which the second condition is that "between the offender and the minor under the age of 13 years not to have an age difference of more than three years"[1], as in this case, as in all circumstances the law has dealt with only with the age of the perpetrator to be with no more than three years older than his victim, still a minor, the possibility that the age is more than three years older than the perpetrator. This interpretation is apparent from the text of the indictment, which stipulates that the child victim is aged under 13 years. In the event the offender is younger than the minor, it will not be criminally responsible due to his age, not because of the cause of punishment (art. 27 related to art. 113 par. (1) Criminal Code).

From the achieved interpretation it results that it will benefit from this cause of non-punishment the juvenile offender who is aged between 14 and 16 years, unfulfilled, but only if it is proved that he acted with discernment (art. 113 par. (2) Criminal Code).

In the event that the perpetrator of the offense on an age of 16 years (of age on the day of the offense), it will not benefit the cause of non-punishment and he will be criminal liable.

It will also be criminally liable the minor under the age of 14 years and acted with discernment, and the victim is a child who is younger than 11 years old (between the age of the victim and the perpetrator is more than three years).

[1] Lămășanu, Daniela Iulia in (Antoniu, et al., 2013, pp. 227, 233).

We appreciate as other authors do[1] that the legislator provided for the cause of non-punishment as the perpetrator, due to his age, he can commit the act, most often out of curiosity, immaturity, etc.

6. The Transitory Situations. The Application of More Favorable Criminal Law

The differences between the two measures, both in terms of legal content and limits of punishment and those involving the way of regulation of important institutions in the general part of the two Criminal Codes, create some problems in the process of identifying and enforcement of the more favorable criminal law in transitory situation in which we are still.

Under these circumstances, depending on the specific circumstances of every act committed in part, in this transitory situation the more favorable criminal law in the light of the Constitutional Court Decision no. 265/2014, can be both, the new and the old law. Given the above and the differences between penalties in the two laws, we consider that the main issues concerning the application of more favorable criminal law can be identified in the following situations:

a) in the case of type normative way provided in article 221, par. (1) of the Criminal Code and the simple normative way specified in art. 202, par. (1) of the 1969 Criminal Code, the punishment limits differ in that in the new law they are between one and five years in prison, while in the previous law which are between six months and five years' imprisonment, the more favorable criminal law can be:

- the old law when in the perpetrator's task is retained the existence of one (or more) mitigating circumstances or when the court is inclined to a penalty oriented towards the minimum required by the law;

- the old law when it will retain the existence of two or more offenses under competition;

- the new law when it withheld the existence of one (or several) aggravating circumstance;

- the new law when the court finds also the incidence of the provisions of art. 80-82 of the Criminal Code or 83 et seq. of the Criminal Code.

[1] Lămășanu, Daniela Iulia in (Antoniu, et al., 2013, pp. 227, 233).

b) In the case of aggravated ways provided for in art. 221, par. (2) Criminal Code and art. 202 par. (2) 1969 Criminal Code, where the limits of punishment differ (from 2-7 years imprisonment and deprivation of rights in the new law and from one to seven years in prison in the old law), the more favorable criminal law will be:

- the old law when in the perpetrator's task is retained the existence of one (or more) mitigating circumstance or when the court is inclined to a penalty oriented towards the minimum required by the law;

- the old law when it will retain the existence of two or more offenses under competition;

- the new law when it withheld the existence of one (or several) aggravating circumstances;

- the new law when the court finds also the incidence of the provisions of art. 80-82 of the Criminal Code or 83 et seq. of the Criminal Code;

- the new law when the court intends to apply a sentence oriented towards the special maximum provided by the law.

c) In the case of the legal mitigated ways provided for in par. (3) and (4) of the article 221 of the Criminal Code, the more favorable Criminal law will be the new law.

d) We believe that if the provisions of art. 221, par. (5) of the Criminal Code, the more favorable criminal law will be in all cases the new law, as there are applicable the provisions of art. 4, Criminal Code.

6. Conclusions

Amid the increases in crime in this area, the reincrimination of this act in the new law was an objective necessity, the ultimate goal being to protect minors against sexual abuse in different circumstances and it is a positive aspect. The offense of sexual corruption of minors was provided for also in the Criminal Code of 1969, in a regulation similar to the one in force.

The conducted examination revealed that the new regulation has made several changes and additions that we currently consider them useful. The new indictment highlights the variety of actions incriminated by the legislator as actions by which

it is achieved the material element of the objective side, another positive aspect that contributes to the possibility of sanctions and other actions than those achieved for the offense of sexual intercourse with a minor.

It is important the fact that the legislator with the incrimination of this act protects the minor under the age of 13 years old.

As one general conclusion we consider as being appropriate to maintain the incrimination of this act, even under the extension of criminal liability for various acts of a sexual nature that are not confined to those described in the art. 220 of the Criminal Code, an opportunity arising from the need to protect minors against persons who commit such acts against them].

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*** The current Criminal Code regulations.

*** 1969 Criminal Code.