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ELEMENTE DE DREPT PENAL COMPARAT PRIVIND INFRAȚIUNEA PREVĂZUTĂ LA ART. 208 COD PENAL AL REPUBLICII MOLDOVA

Alina STAHURSCHI

Doctorandă, Academia „Ștefan cel Mare” a Ministerului Afacerilor Interne,

Chișinău, Republica Moldova

e-mail: alina.stahurschi@igp.gov.md

<https://orcid.org/0000-0003-4909-4602>

În scopul efectuării unui studiu complex al infracțiunii „Atragerea minorilor la activitate criminală sau determinarea lor la săvârșirea unor fapte imorale”, sub diverse aspecte și reglementări constituie examinarea legislației penale a altor țări, fapt care ne permite să efectuăm o analiză comparativă între normele juridico-penale autohtone și cele străine. Realizarea studiului de drept penal comparat permite preluarea practicilor bune din legislația străină precum și modificarea legislației naționale în vederea lichidării lacunelor existente în legislația penală autohtonă. La baza studiului elementelor de drept penal comparat privind infracțiunea prevăzută la art. 208 Cod penal al Republicii Moldova a fost pusă legislația penală a următoarelor țări: Statele Unite ale Americii, Germania, Olanda, Spania, Elveția, Franța, Ucraina, Rusia etc.

Cuvinte-cheie: pedeapsă penală, lege, aplicarea legii, legislație națională, legislație străină, drepturi, drept penal comparat.

COMPARATIVE CRIMINAL LAW ELEMENTS REGARDING THE OFFENSE PROVIDED FOR IN ARTICLE 208 CRIMINAL CODE OF THE REPUBLIC OF MOLDOVA

In order to carry out a complex study of the “Attraction of minors to criminal activity or their determination to commit immoral acts” offence, in various aspects and regulations constitutes the examination of the criminal legislation of other countries, which allows us to carry out a comparative analysis between domestic and foreign criminal legal norms. The performance of the comparative criminal law study allows the taking over of good practices from the foreign legislation as well as the modification of the national legislation for the liquidation of the existing loophole in the domestic criminal legislation. The study of the elements of comparative criminal law regarding the offense provided for in art. 208 of the Criminal Code of the Republic of Moldova are based on the criminal legislation of the following countries: the United States of America, Germany, Holland, Spain, Switzerland, France, Ukraine, Russia, etc.

Keywords: criminal punishment, law, law enforcement, national legislation, foreign legislation, rights, comparative criminal law.

ÉLÉMENTS DE DROIT PÉNAL COMPARÉ CONCERNANT L'INFRACTION PRÉVUE À L'ARTICLE 208 DU CODE PÉNAL DE LA RÉPUBLIQUE DE MOLDOVA

Afin de réaliser une étude complète de l'infraction « Attraction des mineurs à des activités criminelles ou leur détermination à commettre des actes immoraux » sous différents aspects et réglementations, nous examinons la législation pénale d'autres pays, ce qui nous permet d'effectuer une analyse comparative entre les normes juridiques et pénales nationales et étrangères. L'étude de droit pénal comparé nous permet de reprendre les bonnes pratiques de la législation étrangère et de modifier la législation nationale afin d'éliminer les lacunes du droit pénal national. La base de l'étude des éléments de droit pénal comparé concernant l'infraction prévue à l'article 208 du Code pénal de la République de Moldova a

été soumise la législation pénale des Etats-Unis d'Amérique, Allemaghe, Hollande, Espagne, Suisse, France, Ukraine, Russie, etc.

Mots-clés : *sanction pénale, loi, application de la loi, législation nationale, législation étrangère, droits, droit pénal comparé.*

ЭЛЕМЕНТЫ СРАВНИТЕЛЬНОГО УГОЛОВНОГО ПРАВА В ОТНОШЕНИИ ПРЕСТУПЛЕНИЙ, ПРЕДУСМОТРЕННЫХ СТАТЬЕЙ 208 УГОЛОВНОГО КОДЕКСА РЕСПУБЛИКИ МОЛДОВА

В целях комплексного исследования преступления «вовлечение несовершеннолетних в преступную деятельность или склонение их к совершению аморальных действий» в различных аспектах и положениях, необходимо изучить уголовное законодательство других государств, что позволяет провести сравнительный анализ между отечественными и зарубежными уголовно-правовыми нормами. Исследование сравнительного уголовного права позволяет перенять положительный опыт зарубежного законодательства и внести изменения в отечественное законодательство, с целью устранения имеющихся недостатков в отечественном уголовном праве. Основанием для сравнительного исследования преступления, предусмотренного статьей 208 УК РМ, стало использование уголовного законодательства следующих государств: Соединенных Штатов Америки, Германии, Голландии, Испании, Швейцарии, Франции, Украины, России и др.

Ключевые слова: *уголовное наказание, закон, правоприменение, национальное законодательство, зарубежное законодательство, права, сравнительное уголовное право.*

Introduction

Interest in children's rights arose in the second half of the 19th century, when the first movement concerned with *child development* issues arose, that were advocating for the *protection of the children* against neglect, exploitation and violence. After the first World War, the idea of the rights of the child caught the attention of the world for the first time. In 1924, the League of Nations adopted the Declaration of Geneva. In 1959, the United Nations adopted the Declaration of the Rights of the Child. On November 20, 1989, the UN Convention on the Rights of the Child was adopted. It entered into force in September 1991 and has been ratified by the majority countries in the world.

The protection of the rights of the child remains a priority for all countries of the world. Minors represent the category of society that should benefit from increased protection from the state.

It is important to specify that according to the content and the technical-legislative way of expression, the rules of right, meant to pro-

tect minors, are different in the laws of the states of the world.

Research methods used. In order to achieve the stated goal, a series of methods were applied in the present scientific approach, among which: the logical, systemic, comparative method.

Research content

Through the analysis of the criminal laws of the countries of the world, we have concluded that the legislation of the United States of America provides sufficient guarantees for the protection of the minor and his/ her development. According to the author Rubaseva A. according to the US legislation of 19th century, the offense was committed by that person, who caused physical or moral damage to the minor, or forced him/ her to practice a certain activity, so as to endanger his/ her life and health [9, p.39]. It was forbidden to leave the child unaccompanied in theatres, concerts or places where alcoholic beverages were sold, as well as selling them to minors was strictly forbidden. Likewise, the minor could not be forced

to practice begging. We mention that there were certain premises where the entry of minors was strictly forbidden, it was also forbidden through minors to distribute pornographic materials to mature people.

Similar rules were also regulated in Germany's criminal law of the 16th century. The German legislature provided for criminal liability for the abduction of the minor in order to induce him to commit immoral acts, beggary or other offences.

The Austrian legislature did not create the optimal legal framework for the protection of the minor's interests, thus for the determination of the minor to commit immoral acts or other offences, the custodial sentence was not provided.

Currently, when the main source of domestic law is international treaties on the rights of the child, considerable differences in the provisions of other states and the Republic of Moldova for the protection of children are not many.

The criminal laws of other states, in a different way, solve the problem of the introduction of rules on the protection of children and their content. Most states (Switzerland, Spain, Poland) have introduced in the criminal code the separate chapter on the protection of minors and family; but some states (China, the Netherlands) have not provided for such chapters in criminal legislation, but the subject of child and family protection is regulated in other chapters of the criminal code.

The most important right of the child, which is protected by the legislation of other states, is his/ her right to protection against the determination to commit criminal acts and agitation harmful to his/ her health, which affect the moral and spiritual development of the child.

In some legislations, the legislator expressly provided for certain actions that are forbidden to be performed in the presence of

the minor. An eloquent example of this is the Dutch Criminal Code, which provides for imprisonment for up to two years or a fine of up to 2500 euros, for the person who: provides, offers or presents to the minor an image or objects, the demonstration of which is considered harmful to minors up to the age of 16 years, provided that the person showing the object or image, knows with certainty or assumes that the minor has not reached the age of 16 years [10]. That rule is unique, and we have not found such provisions in the legislation of other states.

Similarly, we did not find a norm similar to the one provided by art. 135 Criminal Code of Switzerland, according to which: the person who produces, imports, stores, issues, advertises, exhibits, offers, displays, provides or makes available audio recordings, photographs, images, or other objects that are not protected because of its insignificant cultural or scientific character, where violent, brutal actions are demonstrated in relation to humans or animals, thus intentionally violating the values of society, is punished by imprisonment for up to 3 years or a fine in the amount of up to 40 000 Swiss francs [12].

In particular, the criminal laws of other states prohibit the dissemination of a concrete type of information: concerning the intention to commit criminal acts, pornography, etc.

In the Criminal Code of Spain [4], the legislature provided for a section on family relations, which itself includes three chapters. Chapter III entitled “Offences against family rights and relations”, which is divided into two paragraphs: “Failure to fulfil obligations relating to the protection of minors and the creation of a desire to abandon the home” and “Abandonment of the family, the minor and the irresponsible person”. Such detail contributes to the formation of a detailed mechanism for protecting the normal development of the minor's personality [7, p.61].

Likewise, we mention that some rules of the Criminal Code of Spain provide for criminal liability for beggary (art. 233), for the practice of prostitution (art. 187), the use of pornographic materials (art. 189). Such a legislative technique offers the possibility to structure the criminal rules relating to the protection of minors as well as to determine the value of the protected rules.

The Criminal Code of Germany, Sweden and Denmark provides for criminal liability for determining the minor to commit certain immoral acts, such provisions are included in the criminal rules that provide for criminal liability for actions that endanger the good moral development of the minor (having sexual relations, committing other immoral acts).

Those rules are well structured in a certain chapter of the special part, where offences against the family and minors, which are based on the good development of the child, are expressly provided for [8, p. 22].

Likewise, Criminal Code of France pays attention to the development of the minor and the protection of the family. Compared to other criminal laws, the Criminal Code of France has a special chapter dedicated to the protection of minors from some criminal attempts, namely: Chapter VII "On Attempting Minors and the Family" in the Second Section "On Attempting the Human Personality" of Book Two. In the content of the nominated chapter, we note the existence of incrimination rules similar to the one provided in art.208 of Criminal Code of the Republic of Moldova, as well as others with a specificity in relation to the offense under investigation [2, p. 56].

It is well known that in French law, the totality of criminal acts is divided into three categories: 1. Misdemeanors; 2. Contraventions; 3. Offences.

According to French criminal law, acts that endanger the moral development of the minor constitute contraventions, i.e. law violation of

a lesser harm degree than misdemeanors and with a higher degree of harm than offences. What makes them similar is that both felonies, as well as misdemeanors and offences are law violations enshrined in the same codification.

According to the art. 227-18 of the Criminal Code of France, constitutes a contravention of "direct incitement of a minor to illegal consumption of narcotic substances". The criminal liability for such an act will be aggravated if the victim of the crime will be a minor who has not reached the age of 15, or if the criminal actions were committed inside any school or educational institution. The cited norm has its practically analogous correspondent within art.209 Criminal Code of the Republic of Moldova [2, p. 57].

At the same time, art 227-18-1 of the Criminal Code of France provides for criminal liability for "direct incitement of a minor to transport, preserve, propose or transmit narcotic substances". In the view of the French legislature, such a criminal act is capable of harming social relations with regard to the normal development of minors. In the sense of the domestic legislator, the commission by a person who has reached the age of 18 of the actions of transport, storage, transmission, etc., with the attraction of minors, will be sanctioned not according to art.208 Criminal Code of the Republic of Moldova, but as the case may be, either on the basis of letter b) para. (3) art.217, or on the basis of letter b) para.(3) art.217 Criminal Code of the Republic of Moldova [2, p. 58].

Also, according to art. 227-19 of Criminal Code of France condemns the act of "direct incitement of a minor to the systematic and abusive consumption of alcoholic beverages". In order to be in the presence of the stated criminal act, it is not enough that the perpetrator has determined the minor to consume alcoholic beverages. It is necessary that the consumption of alcoholic beverages is abusive and es-

pecially systematic (on a regular basis). The cumulative failure to meet these two characteristics of the alcoholic beverages consumption will deprive of qualitative importance the incitement of the minor to the consumption of alcoholic beverages.

Art. 227-20 of the Criminal Code of France provides for the “direct incitement of a minor to the practice of beggary”. And if as a victim poses a minor who has not reached the age of 15, then the criminal liability for such an act is aggravated. So, compared to the local legislator, the french one decided to indiscriminately criminalize the act of inciting a minor to practice beggary.

However, the above-mentioned norm entails some differences from the analogical norm of the national criminal law. First of all, we note the different prejudicial action set out in the incrimination rule. If in art. 208 Criminal Code of the Republic of Moldova as such actions may serve, alternatively: “attraction”, “instigation” or “determination”, then within the norm from art. 227-21 Criminal Code of France, the legislator uses only the notion of “incitement”.

Similarly, in order to be in the presence of the criminal act provided for by French criminal law, it is necessary to have the systematic nature of the criminal activity to which the minor is determined. Also, in the provision of the rule, the French legislature does not indicate the special age of the subject of the crime. Moreover, as a subject of the respective crime, as an innovation (as, moreover, in the case of the above-nominated), the legal entity may also be a legal entity, except for public authorities, a fact provided by art. 227-28-1 Criminal Code of France [2, p. 58].

Next, we propose to review the provisions of the criminal laws of the states that were part of the USSR, so that the standard model of the criminal codes of the CIS states is the criminal code of the former USSR.

The Ukrainian legislature also provided for criminal liability for some acts against minors. Thus, Chapter XII of the Criminal Code [5], entitled “Crimes against public order and morality”, art. 304 of that chapter, provides for criminal liability for the determination of minors to commit criminal acts, the consumption of alcoholic beverages, the practice of beggary or gambling. For that act, the Ukrainian legislator provides a sentence of up to 5 years in prison. Compared to the provisions of art. 208 of the Criminal Code of the Republic of Moldova, there are some provisions of the Criminal Code of Ukraine, which the domestic legal-criminal norm (art. 208 Criminal Code) does not include, for example, the consumption of alcoholic beverages, but by examining the meaning of the word “lechery”, left room for discussion on its meaning.

In art. 202 of the Criminal Code of Estonia [6], as well as the criminal liability for luring minors into criminal activity, but when describing the crime composition in the norm itself, terms from the Criminal Code of Ukraine of 1960 are used.

The Criminal Code of Armenia provides for criminal liability for the determination of minors to systematically consume alcoholic beverages, the consumption of narcotic substances (outside the doctor’s prescription), beggary as well as the performance of pornographic actions [10].

Compared to the Moldovan legislator, the Armenian legislator expressly provided for the actions falling under the scope of the respective offense, thus, there is no need for the interpretation of the criminal law by the law enforcement bodies.

The Criminal Code of Kazakhstan [2, p. 60], which entered into force on January 01, 2015, provides for a separate chapter, entitled “Criminal offences against the family and minors”, which regulates criminal liability for the determination of minors at:

- Committing the offences;
- Committing immoral acts (consumption of alcoholic beverages, narcotic substances);
- Practicing prostitution (including the threat of violence, blackmail, etc.).

However, if the offense is committed by a person practicing pedagogical activity, the legislator provides as a punishment the prohibition for life to practice pedagogical activity.

In some European countries, criminal liability is not provided for the determination of minors for criminal offences or other immoral acts. An example of this is the Criminal Code of Sweden [13]. The Criminal Code of Sweden generally lacks a chapter dedicated to the protection of minors. But the protection of minors takes place by other rules laid down in the Criminal Code.

Art.12 provided in Chapter XVI of the Criminal Code of Sweden, entitled “On Crimes against the Social Order” of Part Two, “the act of the person spreading among children or young people, literature, images or a technical record, which, on the basis of their content, may lead to rudeness or aggression, or otherwise create a serious danger to the moral education of young people, must be condemned for the deviation of young people from the path to fine or imprisonment for a period not exceeding 6 months.

The Criminal Code of Sweden also stipulates some unusual rules for determining the punishment in case of committing the crime by a minor under the influence of another person. Namely, according to art. 5 of Chapter XXIII “On Attempt, Preparation, Understanding and Participation” of the Second Party, “if someone was determined to be a participant in the offense, by coercion, deception or taking advantage of early age, naivety or dependent position, then the punishment of that participant may be less than that provided for the offense committed. And in exceptional cases,

punishment in general may not be inflicted.” [2, p. 58].

Likewise, Criminal Code of Croatia protects the child’s interests in domestic legislation. In Chapter XVI, entitled “Crimes against Marriage, Family and Youth”, the legislator provided in art. 213 of the Criminal Code “Neglect and mistreatment of the child”, which includes the regulations similar to those in art. 208 Criminal Code of the Republic of Moldova.

Therefore, art. 213 of the Criminal Code of Croatia provides for criminal liability for, inter alia, forcing the child to beg or conduct that is harmful to child’s development, an act committed by the parent, adopter, guardian or other person obliged to maintain and educate the child [3].

In paragraph 2 of art. 213 of the Criminal Code of Croatia, the legislator aggravates the criminal liability, thus, if the victim has engaged in the practice of beggary or prostitution or other forms of antisocial or delinquent behavior. In general, the offense in para. (2) art. 213 of the Criminal Code of Croatia resembles the offense provided in para. (2) art. 208 Criminal Code of the Republic of Moldova [2, p. 61].

We mention that the Moldovan legislator, in art. 208 Criminal Code of the Republic of Moldova uses the word “determines”, in turn, art. 213 of Criminal Code of Croatia uses the word “obligation”, also as acts to which the child is obliged to commit, Croatian criminal law indicates: beggary or other such conduct harmful to child’s development, presuming, including, prostitution, a fact deduced from the systematic interpretation in relation to the provision in para. (3) art.213 of the Criminal Code of Croatia, the subject of the offense may be the parent, adopter, guardian or other person obliged to support and educate the child.

The Criminal Code of Georgia also pro-

vides for some criminal rules aimed at the protection of children.

Thus, art. 171 of Criminal Code of Georgia [11], provides for criminal liability for determining the minor to practice prostitution or other perverse actions, the practice of prostitution or other immoral acts, as well as the consumption of narcotic or psychotropic substances.

The Romanian legislation also provides sufficient legal guarantees for the protection of the minor, thus, in Title I Offenses against the person, in Chapter II Offenses against bodily integrity or health, the criminal liability for the crime of ill-treatment applied to the minor is provided (art. 197 Criminal Code) [1]. According to the text of the law, the offense consists in putting in serious danger, through measures or treatments of any kind, the physical, intellectual or moral development of the minor, by the parents or by any person in whose care the minor is. They shall be punished by imprisonment from 3 to 7 years and the prohibition of the exercise of certain rights.

The offense of ill-treatment applied to the minor was incriminated in this Chapter of the criminal law, because it was rightly considered that it endangers first of all the physical or mental integrity of the person and secondarily the social relations related to the family, respectively the social coexistence.

However, Title I of the special part of the new Criminal Code, intended for the protection of the person, was supplemented by Chapter VII entitled “Trafficking and exploitation of vulnerable persons” which comes to ensure, if not mainly, then at least voluntarily, the protection of minors, as one of the categories of vulnerable persons, from some criminal attacks, including social relations regarding their normal development [2, p. 56].

Conclusions

Comparative criminal law represent a field of criminal science whose objects of study

are the norms and legal institutions belonging to some different systems of criminal law, in order to know their meaning and content, as well as the differences between these norms and institutions. From this perspective, we considered the scientific approach dedicated to the study of the crime of attracting minors to criminal activity or the determination of minors to commit crimes through the lens of comparative criminal law to be appropriate.

In order to improve national legislation, it is necessary to use a comparative analysis with the laws of other states. Therefore, in the process of elaborating this paper, we consulted the criminal legislation of: Georgia, Ukraine, Romania, France, Croatia, etc., and we found that each legislator created sufficient conditions for protecting the interests of the minor. In some states there is a special chapter on the protection of the minor in others - no, but as I mentioned in the paper, the basis of the provisions on the protection of the minor is international treaties, for this reason the provisions of the criminal laws analyzed in the paper possess certain common signs.

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