

THE NOTION OF „FAMILY MEMBER” IN THE LIGHT OF THE NEW ROMANIAN CRIMINAL CODE AND THE LAW NO. 217/2003 FOR PREVENTION AND COMBATING DOMESTIC VIOLENCE, REPUBLISHED

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ABSTRACT: *The legislator has created in the special part of the new Criminal Code a separate chapter in the title relative to the offenses against the persons, dedicated to describing the crimes committed on a family member. In the general part of the code the definition of „the family member” has been changed for the purposes of widening the scope of its applicability for the people who have established relationships like those between spouses or between parents and children, provided they live together. It was aimed to harmonize the definition existing in the Law no. 217/2003 for preventing and combating domestic violence, republished.*

KEYWORDS: *family members, cohabitants, cohabitation, definition, harmonization.*

JEL CODE: *K14, K36.*

INTRODUCTION

We undertook this study having as a starting point the amendment brought by the legislator of the new Criminal Code to the definition of the „family member”, in conjunction with the desire expressed in the explanatory memorandum to the new Criminal Code in relation to the harmonization for a number of reasons of the definition from the Criminal Code with that well-known of the Law no. 217/2003. Taking into account the sources of inspiration given by the legislator in the explanatory memorandum in creating the provisions of the Art. 177 of the new Criminal Code, we wanted to analyze the Spanish and Portuguese Criminal Codes in order to see to what degree our criminal laws are harmonized with the European law. Moreover, since the Law no. 217/2003 was republished as a result of its amendments brought by the Law no. 25/2012, we wanted to assess whether the new definition of „the family member” contained in the above-mentioned law is consistent with that in the new Criminal Code and whether any changes in criminal law are necessary.

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In doing so we have had as a foundation the criminal literature established in the field, but we wanted to analyze the issues from a new perspective.

THE NOTION OF „FAMILY MEMBER”

1. The Provisions of the Criminal Code in Force

The Art. 149¹ of the Criminal Code in force contains the definition of „the family member”, as follows: „a family member means the spouse or a close relative, if the latter lives and has her household with the perpetrator.”

As can easily be seen, this definition cannot be understood except in relation to Art. 149 of the Criminal Code in force, which states: „ (1) <close relatives> are the ascending and the descending, brothers and sisters, their children, and people who have become by adoption, according to law, such relatives. (2) The provisions of the criminal law concerning close relatives, with the limitations provided in the preceding paragraph, shall apply in case of full-effect adoption for the person adopted and its descendants compared to their blood relatives, and in case of adoption with restricted effects, for the adoptee and his descendants compared to the relatives of the adopter”.

The need for these two definitions contained in Title VIII of the general part of the Criminal Code is represented by the fact that in the special part of the concerned legal act the close relative or the family member is either an active subject of a crime, or a passive subject.

Thus, the husband or the close relative acts as an active subject in describing the offense of murder (Loghin, O. & Toader, T., p. 80) [Art. 175 para. (1) letter c)], theft (Art. 210), concealment [Art. 221 para. (2)], the offense of not exposing a crime [Art. 262 para. (2)], the bias of the perpetrator [Art. 264 para. (3)] and the concealment and the bias for crimes of genocide and inhumane treatment, according to Art. 361 Criminal Code. In the event of theft committed between spouses or close relatives, the perpetrator will be prosecuted if only complaint of the victim and criminal liability is precluded if reconciliation. In the case of concealment, the fact of not exposing a crime and the bias of the perpetrator, the spouse or the close relative is protected of punishment, as provided in these legal texts, meaning that while the acts of these people remain crimes, they will not be punished. In the latter two offenses mentioned above, “the concealing and the bias of the perpetrator committed by a spouse or a close relative in case of the offenses listed in Art. 357 (genocide) and Art. 358 para. (3) and (4) (inhumane treatment) they are punished”, but the limits specified in para. (2) (imprisonment from 3 to 10 years) is reduced by half and for the other offenses they will not be punished”.

The husband or the close relative has the quality of passive subject in describing the offense of murder [Art. 175 para. (1) letter c)], blackmail [Art. 194 para. (2)], threat (Dongoroz, V. et al., 1971, p. 316) (Art. 193), theft (Vasiliu, T. et al., 1975, p. 287) (Art. 210), and in the case of the crime of hitting or other violent acts, personal injury, serious injury, collisions or injury causing death, the illegal deprivation of liberty and threats committed against a spouse or a close relative of the persons mentioned in Art. 239 para. (5) (judge, prosecutor, criminal investigation officer, expert, legal executor, police officer, constable or military), in the purpose of intimidation or retaliation in connection with the exercise by such persons of their duties.

The legislator described the active subject and, accordingly, the passive subject for some legal types of the following offenses: hitting or other violence (Pascu, I. &

Gorunescu, M., 2009, p. 128) [Art. 180 para. (1¹) and (2¹)], injury [Art. 181 para. (1¹)], collisions or injury causing death (Art. 183), rape [Art. 197 para. (1) letter b¹].

2. The Provisions of the New Criminal Code

Title X of the general part of the new Criminal Code, dedicated to explaining the meaning of words or phrases, does not contain anymore a distinct definition of the term „close relative”, but only that of „the family member”.

Thus, in Art. 177 the legislator provided that: „(1) by <family member> we understand: a) the ascendants and the descendants, brothers and sisters, their children, and people who have become by adoption, according to law, such relatives; b) the spouse c) the persons who have established relationships like those between spouses or between parents and children, with the condition they live together. (2) The provisions of the criminal law concerning the family member, within the limits provided in para. (1) letter a), shall also apply in case of adoption for the person adopted or its offspring compared to her natural family”.

Comparing the provisions of Art. 177 para. (1) letter a) of the new Criminal Code and those of Art. 149 Criminal Code in force it can be observed that the legislator has taken the definition of the close relative from the Criminal Code in force and inserted it entirely in the definition of the family member.

The scope of the latter definition was expanded to another category of persons represented by those who have established relations similar to those between spouses or between parents and children.

In the Explanatory Memorandum to the new Criminal Code the legislator stated that they wanted to drop the parallelism existing in the code in force, which operates both with the notion of „close relative” and with that of „family member”, the latter notion absorbing entirely that of close relatives and another argument was the fact that more and more couples agree to a consensual union instead of marriage and it is important to ensure them the same legal protection provided for the married couples and because they also wanted to harmonize the definition of Criminal Code with that established by the Law no. 217/2003 for preventing and combating domestic violence, they have expanded the scope of the notion of „family members” for the people who have established relationships like those between spouses or between parents and children.

The family member acts as an active subject in describing the offense of not exposing a crime [Art. 266 para. (2)], the bias of the perpetrator [Art. 269 para. (3)], the concealment [Art. 270 para. (3)] and the offense of not exposing crimes against national security [Art. 410 para. (2)] but he is not punished. We will certainly have a qualified active subject and, accordingly, a qualified passive subject in the person of a family member, if we analyze the provisions of Chapter III, entitled ”Crimes committed against a family member”, contained in the Title I of the special part dedicated to the description of offenses against the person (Dungan, P., Medeanu, T. & Pașca, V., 2010, pp. 104-105). It is about Art. 199 called the „Domestic Violence” (Boroi, A., 2011, p. 82) which reads: „(1) If the facts set out in Art. 188, Art. 189 and Art. 193-195 are committed against a family member, the maximum of the penalty provided by law shall be increased by a quarter. (2) In case of the offenses referred to in Art. 193 and Art. 196 committed against a family member, the criminal action can be set in motion of office. Reconciliation precludes criminal responsibility”, and about the crime of murder and injury of the newborn committed by the mother, referred to in Art. 200.

Also, the family member acts as the passive subject in the description of offenses of outrage [Art. 257 para. (3)], influencing the statements [Art. 272 para. (1)], retaliation for helping justice [art. 274 para. (1)] and judicial outrage [Art. 279 para. (3) and (4)].

As shown throughout the explanatory memorandum, the inspiration for the development of Art. 177 N.C.C. was represented by Art. 173 Para. (2) of the Spanish Criminal Code and Art. 152 para. (2) of the Portuguese Criminal Code.

According to Art. 173 para. (2) Spanish Criminal Code „one that usually carries psychological or physical violence against a person who is or was the spouse or the person who is or was connected with it by a similar relationship of affection even without cohabitation, or the ascendants or descendants or brothers by nature, by adoption or affinity of the spouse or life partner, or child with disabilities who lives with it or are subject to authority, guardianship or trusteeship in fact of the husband or the life partner or the person who is involved in another relationship so he is integrated into the core of family life and on persons because of their special vulnerability are in the custody or supervision of public or private centers, will be punished with imprisonment of 6 months to 3 years, and forfeited his right to possess and bear arms, between two to five years and, if applicable, if the judge or the Court considers it in the interest of the child or the incapable, would prohibit to the person concerned the exercise of parental authority, guardianship or trusteeship for a period of one to five years, subject to penalties that may apply to crimes or offenses that would be specified by physical or mental violence".

As can be easily seen, the legal text of the Spanish Criminal Code is much broader, including in its scope the persons having a relationship but who do not cohabit and the ascendants or descendants or the brothers of his concubine, and children with disabilities who live with him or which are subject to authority, guardianship or trusteeship in fact of the husband or of the life partner or the person who is involved in another relationship so he is integrated into the core of his family life and on persons who because of their vulnerability need special custody or supervision from public or private centers.

We consider appropriate the specification made by the Spanish legislator on the inclusion in the notion of the family member of the life partners that are not living as cohabitants because the relationship of affection between individuals is of the essence of the term defined in the Criminal Code, whether they cohabit and have a household together or not.

For this reason we propose for the future regulations to change the definition of the „family member” of Art. 177 of the Criminal Code by eliminating the condition of cohabitation for those having a relationship but who are not married.

Moreover, we believe that by this change a situation of legal equality is created both for spouses and for couples who are not married because if the spouses that live apart but who are not yet divorced are considered by law to be family members, as it is stated in the criminal literature, then the paramours not living together should be considered as family members because of the essence of the notion in question is not the existence of an official act which binds the two, but the nature of the relationship of affection between them. An additional argument in support of this idea is the provision by the legislator of the cohabitants as being family members because they are living together.

Moreover, the legislator considered that the scope of the term shall include the underage and the incapable under guardianship or trusteeship, but they must coexist.

According to art. 152 para. (2) Portuguese Penal Code, the same punishment (imprisonment from 1 to 5 years) is applied to the person causing the spouse or to the person living with her in similar conditions to those of spouses, physical or mental abuse".

The second source of inspiration given by the legislator in the explanatory memorandum is the Art. 152 para. (2) Portuguese Penal Code. Analyzing these provisions we can say that the definition of „the family member” contained in this legal act is more similar to that existing in the new Romanian Criminal Code, the Portuguese legislator understanding to provide the condition of cohabitation for those who have similar relationships to those of spouses.

3. The Provisions of the Law no. 217/2003 for Preventing and Combating Domestic Violence

By the Law no. 25/2012 there have been introduced several articles in the Law no. 217/2003, including art. 2², as follows: „In this law, a family member means: a) ascendants and descendants, brothers and sisters, their children, and people who have become family by adoption, according to law, b) the spouse/wife and/or former spouse/ex-wife, c) persons who have established relationships like those between spouses or between parents and children, if they live together; d) guardian or other person exercising factual or legal rights for the child; e) legal representative or other person who cares for the person with mental illness, intellectual or physical disability, except those that meet these responsibilities in the exercise of professional duties”.

Because the Law no. 217/2003 was republished in the Official Gazette no. 365 of May 30, 2012 pursuant to Art. IV of the Law no. 25/2012 on amending and supplementing Law no. 217/2003 for preventing and combating domestic violence, published in the Official Gazette, Part I, no. 165 of March 13, 2012, the articles in the legal act were renumbered. For these reasons, the definition of „the family member” is found in the art. 5 of the above mentioned law.

Prior to this amendment, the definition of „the family member” was described by the legislator in the Law no. 217/2003 as follows: „*Art. 3* In this law, a family member means: a) spouse, b) a close relative as defined in art. 149 of the Criminal Code. *Art. 4* The effects of this law are also produced to persons who have established relationships like those between spouses or between parents and children, based on proven social investigation”.

It can be seen therefore that the existing definition of the family member from the Law no. 217/2003 has just been taken by the legislator of the new Criminal Code.

Although it was stated that they wanted to harmonize the two definitions, this goal was already exceeded by the amendment of the Law no. 217/2003 in March 2012. A natural question would be whether it is necessary to amend the definition of the family member as described in the new Criminal Code to match the new wording of the Law no. 217/2003 republished. We believe that the legislator would not wish to modify this definition existing in the criminal code, an argument in this respect is that if the legislator had intended to do that he would have expressly provided such an amendment to the Law no. 27/2012 amending and supplementing the existing Criminal Code and new Criminal Code, law which was published in the Official Gazette after the Law no. 25/2012.

Analyzing the provisions of Art. 5 of the Law no. 217/2003 republished we have observed that the legislator took over the definition of Art. 177 letter a) of the new Criminal Code, which refers to close relatives, because in the new Criminal Code there is no longer provided a separate definition for this group.

We have to keep in mind that before this change of the provisions of the law in question made by the Law no. 25/2012, the rule defining „the family member” was a reference to the Art. 149 Criminal Code in force, article about the notion of „close relative”.

Looking at letter b) we consider unnecessary the reference to both „husband” and „wife” or „the former husband” and „former wife” because according to a literal interpretation of a legal text in drafting the text using the masculine feminine is understood. For this reason we propose to modify for the future the contents of the letter b) as follows: „spouse and/or former spouse”.

The provisions of letter c) of Art. 5 of the Law no. 217/2003 republished were taken from the new Criminal Code, namely from the Art. 177 letter c). Prior the amendment of the Law no. 217/2003 brought by the Law no. 25/2012 there was an identical provision in Art. 4, but the proof of the relations similar to those between spouses or between parents and children was based on social survey. This latter provision does no longer appear in the letter c) of Art. 5 of the republished law but the condition of coexistence is required instead.

Letters d) and e) of Art. 5 of the Law no. 217/2003 republished have no correspondent in Art. 177 of the Criminal Code.

In the criminal literature there is an opinion that we agree on consisting in the fact that under the new Criminal Code, the notion of „family member” also extends to the relatives of one husband in relation to the other husband and to any other person, with two conditions: they have established relationships like those between parents and children, and they have to live together” (Dobrinouiu, V, Neagu, N., 2011, p. 70).

Starting from this idea, there is a legitimate question relative to the quality of family member for the legal guardian of a minor under tutelage, from the perspective of the criminal law. In other words, the tutor may be included in the scope of the provisions of letter c) of Art. 177 N.C.C.? We think the answer to be affirmative, but only if the two conditions are respected.

The first condition is that the designated guardian to be a relative or a close family of the child in accordance with Art. 118 Civil Code. The second condition is that the child lives at the guardian’s house as it is established in accordance with Art. 137 Civil Code. In other words, there must be satisfied the requirement that the minor has to live together with the tutor.

It is true that within the Law no. 217/2003 the legislator referred to the guardian as a family member, without imposing the condition to live together with the minor, in the provisions of the letter d) of Art. 5, separately from those of the letter c).

We believe that the legislator has provided in a distinct situation within the Law no. 217/2003 the quality of family member for the tutor in the letter d) of Art. 5 because of the following two reasons, namely: on one hand, any individual or husband and wife together can be a guardian [Art. 112 para. (1) Civil Code], not only a close family or a relative of the minor, and on the other hand, the minor may have, according to civil law, a different residence, established with the guardianship court authorization. For these reasons we believe that the legislator did not provide the condition of coexistence for the guardian or for the person indicated in Art. 5 letter d).

We believe that in terms of criminal law the same legal reasoning can be applied to the legal representative or to the person caring the one with mental illness, intellectual or physical disability, except those that meet these responsibilities in the exercise of professional duties for the purposes to be considered these people members of the family in accordance with letter c) of Art. 177 N.C.C., second thesis, provided that such persons are relatives or in-laws and that they live together.

The above mentioned arguments support the idea expressed in the beginning of our approach, that there is no need in modifying the content of the definition of „the family member" as provided in Art. 177 N.C.C. in order to be consistent with Art. 5 of the Law no. 217/2003.

CONCLUSIONS

The new Criminal Code, represented by the Law no. 286/2009, which has not yet entered into force, brings a number of changes and innovations in the Romanian criminal law.

Among these changes made by the legislator we include the definition of „the family member", which is found in Art. 177.

As can be seen from the analysis of the above mentioned article, the scope of the analyzed concept was extended to people who have established relations similar to those of spouses and between parents and children, provided they live together.

Analyzing the sources of inspiration for writing the Art. 177 N.C.C., represented by the Spanish and the Portuguese Criminal Codes, which do not require the coexistence condition, we considered timely this issue and proposed for the future regulations to remove this condition from the Romanian criminal law because we considered that the essence of the notion of „family member" is not the civil status given by marriage, but the nature of relationships of affection that exists both between spouses and between paramours.

Having as a premises the harmonization of the definition existing in the new Criminal Code in relation to the Law no. 217/2003, expressed in the explanatory memorandum to the new Criminal Code, in conjunction with the above mentioned law amendment by the Law no. 25/2012, for the purposes, inter alia, of widening the scope of the term „family member" to new categories, we examined whether it was necessary to change the definition of „the family member" of the new Criminal Code and, bringing arguments, we concluded that the definition of Art. 177 N.C.C. should not be changed.

Harmonizing Romanian legislation with the one of the EU is a goal and an objective to be achieved in the context of integration of Romania in the European Union. But it is also extremely important to maintain the consistency and the unique way to define legal concepts in order to easily and swiftly apply the legal acts to regulate social relations in optimal conditions.

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