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THE PARTICULARITIES OF INCRIMINATION THE SEPARATISM CRIME IN THE CRIMINAL LEGISLATION OF THE REPUBLIC OF MOLDOVA

PARTICULARITĂȚILE INCRIMINĂRII INFRAȚIUNII DE SEPARATISM ÎN LEGISLAȚIA PENALĂ A REPUBLICII MOLDOVA

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Summary

The focal element of the present study is the Law of the Parliament of the Republic of Moldova no. 9 of 02.02.2023 for the modification of some normative acts, entered into force on 18.03.2023, by which criminal liability for the crime of separatism was provided for in the national criminal legislation under art. 3401 of the Criminal Code. For the application of the criminal law in strict accordance with the principle of the legality of incrimination, it is necessary to interpret the constituent elements and signs that are related to separatism and that characterize it as a criminal act. Starting from this non-negligible premise and in order to ensure cognitive knowledge of the phenomenon, in this study the particularities of criminalizing separatism are addressed with the approach of the constitutive signs from which the legal essence of this criminal act derives.

Keywords: criminal offence, criminal penalty, criminal liability, separatism, state security.

Rezumat

Elementul de focalizare al prezentului studiu îl constituie Legea Parlamentului Republicii Moldova nr. 9 din 02.02.2023 pentru modificarea unor acte normative, intrată în vigoare la data de 18.03.2023, prin care în legislația penală națională a fost prevăzută răspunderea penală pentru infracțiunea de separatism la art. 3401 C.pen. Pentru aplicarea normei penale în strictă corespundere cu principiul legalității incriminării este necesară interpretarea elementelor și semnelor constitutive ce sunt aferente separatismului și care o caracterizează ca faptă penală. Plecând de la această premisă deloc neglijabilă și pentru a asigura cunoașterea cognitivă a fenomenului, în cadrul prezentului studiu sunt abordate particularitățile de incriminare a separatismului cu abordarea semnelor constitutive din care decurge esența juridică a acestei fapte infracționale.

Cuvinte cheie: infracțiune, pedeapsă penală, răspundere penală, separatism, securitate de stat.

Introduction. State security is an important social value protected by the legislator against criminal acts by the commission of which it can be endangered or actually harmed. This results from the very title of Chapter XVII of the Special Part of the Criminal Code, which sounds as follows: "Crimes against public security and public order".

Currently, there is a constant concern of the national legislator to develop criminal legislation on the dimension of protecting state security. This concern is completely justified. On the one hand, the criminal rules of Criminal Code of the Republic of Moldova, by which the crimes that threaten the security of the state are described, were taken from Criminal Code of the Moldavian Soviet Socialist Republic from 1961, not being adapted to today's realities, respectively to the new dangers that may appear regarding the security of the state. Criminal rules that belong to this category are the following: art. 337 of the Criminal Code – betrayal of the country; art. 338 of the Criminal Code – espionage; art. 344 of the Criminal Code – disclosure of state secrets; art. 345 of the

Criminal Code - loss of documents that constitute state secrets, etc. On the other hand, the Republic of Moldova is currently facing new risk factors that endanger state security. These factors can be both external and internal: the existence of the Transnistrian separatist regime; the existence of regions with a potential risk of being separated from the territory of the Republic of Moldova; interferences from outside the country that influence political and administrative processes, etc.

Aware of these dangers through Law no. 9 of 02.02.2023 for the modification of some normative acts, which entered into force on 18.03.2023 [1], the legislator introduced several legislative amendments in the criminal law by wanting to supplement the criminal legal measures to protect the security of the state. Substantially, new crimes that threaten the security of the state were criminalized. Apart from the crime of separatism, which will be further analyzed, the following acts were also criminalized:

→ **Establishment of an illegal information structure** – art. 338¹ of the Criminal Code. The crime presupposes *the initiation of the establishment, organization, establishment on the territory of the Republic of Moldova of an illegal informational structure or the recruitment, instigation to the recruitment of persons in order to commit actions to the detriment of the sovereignty, independence, territorial inviolability, state security or defense capacity of the Republic of Moldova;*

→ **Conspiracy against the Republic of Moldova** – art. 338² of the Criminal Code. The crime presupposes *establishing, maintaining ties with a foreign state, with a foreign organization, with an unconstitutional entity or with their representatives for the purpose of committing the crimes provided for in art. 337, 338, 338¹ and 340¹ or expressing consent to engage in such activity.*

→ **Unauthorized collection of information** – 338³ of the Criminal Code. The crime consists in *gathering or stealing information for the purpose of storing or using it to the detriment of the sovereignty, independence, territorial inviolability, state security or defense capacity of the Republic of Moldova, if the act does not constitute treason or espionage.*

Secondly, by Law no. 9 of 02.02.2023 for the amendment of some normative acts, some crimes that threaten state security, such as treason (art. 338 of the Criminal Code) and espionage (art. 339 of the Criminal Code) were amended. The completion of these crimes consisted in expanding the recipients to whom the information constituting a state secret can be transmitted, in addition to “...a foreign state or a foreign organization...” being also provided for “the anti-constitutional entity”.

Thirdly, Chapter XIII of the General Part of the Criminal Code “Meaning of some terms or expressions in this code” was supplemented with rules of interpretation that clarify the signs of the components of the crime that were introduced in the criminal legislation, being about “unconstitutional entity” and “legal information structure”. Thus, in art. 134²³ by “unconstitutional entity is meant an alleged authority created on the territory of a state, outside the constitutional regulations of the respective state and which is not recognized in accordance with the provisions of international treaties”, but in art. 134²⁴ **of the Criminal Code through** “illegal information structure means the organization created outside the constitutional and legal regulations of the state, for the purpose of gathering, processing information that contains state secrets, other information that can be used to commit actions to the detriment of sovereignty, independence, territorial inviolability, state security or the defense capacity of the Republic of Moldova or for the purpose of recruiting people in order to provide support in such actions” [2].

Basic content. Transnistrian separatism, during the 30 years of existence of the Republic of Moldova, proved to be a negative factor of destabilization and political influence on the decisions taken by the national authorities. Moreover, the secessionist regime generates numerous impediments for the socio-economic development of the Republic of Moldova: the potential and actual danger for the outbreak of military conflicts; the presence of the Russian army on the separatist

territory; energy dependence; hindering the process of joining the EU; serious and massive violations of the fundamental rights and freedoms of the person; the vulnerability of the border in the eastern part of the country; influencing the electoral process; increase in crime, especially cross-border crime, most often manifested through drug trafficking, human trafficking and smuggling, etc. Therefore, the existence of Transnistrian separatism and the danger of the separation of other parts of territories within the territory of the Republic of Moldova determined the legislator as in art. 340¹ of the Criminal Code to provide for criminal liability for the crime of separatism.

In essence, the incriminating norm from art. 340¹ of the Criminal Code of the Republic of Moldova, enshrines criminal liability for three crimes by which separatism can be committed.

The first offense is provided for in art. 340¹ paragraph (1) of the Criminal Code and consists of the “proper crime of separatism” which involves *actions committed with the aim of separating a part of the territory of the Republic of Moldova* [2].

From the interpretation of the text of the law, it can be seen that the legislator, in defining separatism, was inspired by the Shanghai Convention on the Prevention of Terrorism, Separatism and Extremism of 15.06.2001. According to art. 2 of this legal act of regional vocation, “Separatism means any act aimed at violating the territorial integrity of a state, including the separation of a part of its territory or the territorial disintegration of the state, committed through the application of violence, including planning and the preparation of such an act, complicity and instigation, acts which are prosecuted according to the national legislation of the party states” [3].

At the same time, it should be mentioned that in art. 340¹ paragraph (1) of the Criminal Code of the Republic of Moldova, the legislator did not foresee the use of violence as a mandatory method of committing separatism. Therefore, any action that is likely to separate a part of the territory of the Republic of Moldova and that is committed with such a purpose can be classified from a legal point of view as a crime of separatism. In fact, separatism can be committed through the following actions: taking control of public institutions in a certain region of the country; formation of paramilitary resistance detachments; organizing illegal electoral polls, including referenda; territorial delimitation of the region by setting borders; establishment of illegal authorities, etc.

The second offense is stipulated in art. 340¹ paragraph (2) of the Criminal Code and involves “incitement to separatism”. The crime involves inciting separatism, as well as distributing objects, producing and/or distributing, in any form and by any means, materials and/or information that incite separatism. From the interpretation of the law, it appears that the offense provided for in art. 340¹ paragraph (2) of the Criminal Code can be done in two ways: inciting separatism and distributing objects, producing and/or distributing, in any form and by any means, materials and/or information that incite separatism.

The incitement to separatism involves the determination by any method of another person to separatism, in other words, the activity through which the subject conveys the decision to commit an act of separatism to another person. For the existence of the crime, it is not relevant whether or not the act of instigation was followed by the actual execution of the separatist actions. It should also be mentioned that the action of instigation refers to a person or to several concrete persons regarding whom the determination is exercised.

Distribution of objects, production and/or dissemination, in any form and by any means, of materials and/or information that incites separatism consists in supporting and progressively developing ideas inciting separatism. Production involves the creative activity through which the mentioned objects, materials or information are made, created or designed by the subject. The distribution activity, in turn, involves the distribution in different places and to several people of objects, materials or information inciting separatism. Unlike inciting separatism, the actions of producing or distributing inciting objects, materials or information are addressed to an unde-

terminated or undefined circle of people. In this case, it is essentially an apology for the crime of separatism, criminalized in the form of producing or distributing means, materials or information inciting separatism.

The third form of committing the crime is provided for in art. 340¹ paragraph (5) of the Criminal Code of the Republic of Moldova and constitutes the “financing of separatism”, in other words, the intentional provision or collection, by any means, directly or indirectly, of goods of any nature, acquired by any means for the purpose of using them, in whole or in part, for the organization, preparing or carrying out separatist actions or providing financial services for the purpose of using the respective goods or services or knowing that they will be used, in whole or in part, to organize, prepare or carry out separatist actions.

The financing of separatism can be carried out through three alternative actions:

a. *making available*, by any means, directly or indirectly, goods of any nature, acquired by any means. It is considered the supply or offering, free of charge or for a fee, of goods for the purposes indicated in provision of art. 340¹ paragraph (5) of the Criminal Code. The manner in which the goods are made available to the separatists is irrelevant for framing the act (physical delivery, transportation, dispatch, bank transfer, etc.). It also has no relevance if the perpetrator shares or not the separatist ideas or visions, whether or not he is part of the separatist group, etc.;

b. *intentional collection*, by any means, directly or indirectly, of goods of any nature, acquired by any means. Collecting means the selection or gathering together of those goods for the purpose of maintaining separatism. In general, the maintenance of separatism in the ex-Soviet space is based on exuberant funds of financial resources from outside. The one who collects such funds may be held criminally liable based on the rule of art. 340¹ paragraph (5) of the Criminal Code;

c. *provision of financial services* involves carrying out activities aimed at satisfying consumption needs, which normally have a financial remuneration in mind. The nature of the services offered is irrelevant (goods rental services, banking services, services based on the use of equipment, transport services, consulting services, etc.).

The crimes of separatism provided for in art. 340¹ of the Criminal Code, whatever the form of their commission, affects social relations whose existence and normal development are conditioned by the protection of the state security of the Republic of Moldova. According to art. 1 of the State Security Law no. 618/1995, by “state security is meant the protection of the sovereignty, independence and territorial integrity of the country, of its constitutional regime, of the economic, technical-scientific and defensive potential, of the legitimate rights and freedoms of the person against the informative and subversive activity of the special services and foreign organizations, against criminal attacks by certain groups or individuals” [4].

The *above-mentioned* notion is a *lato-sensu* by which a broad concept of the application of state security is established. It is understandable that separatism cannot pay attention to all social relations that are conditioned by the protection of state security, a notion that is made up of several elements: constitutional regime, economic potential, sovereignty, etc.

In the more recent specialized legal doctrine, it is argued that the special legal object of the crime of separatism consists in social relations regarding the inadmissibility of committing actions to the detriment of the sovereignty and territorial integrity of the Republic of Moldova, such as public calls for the separation of a part of its territory, the organization and participation in meetings for this purpose, the dissemination in various forms, for this purpose, of materials with such calls, etc. [5].

In our view, the special legal object of the crimes of separatism should be approached in a narrower sense, summarizing the social relations in the field of state security, whose existence and normal development are conditioned by the protection of the territorial inviolability of the

Republic of Moldova. In accordance with art. 3 paragraph (1) from the Constitution of the Republic of Moldova: “The territory of the Republic of Moldova is inalienable”, and according to paragraph (2) of the same art.: “The borders of the country are established by organic law, respecting the universally recognized principles and norms of international law” [6].

Conclusions. In order to raise the level of quality of the criminal law in terms of the provision and quality of the criminal law stipulated in art. 340¹ paragraph (5) of the Criminal Code, which provides for criminal liability for the crime of financing separatism, we propose reformulating the rule from art. 132¹ of the Criminal Code, as follows: “Assets, in the sense of art. 106, 106¹, 243, 279 and 340¹ mean financial means, any category of corporeal or incorporeal, movable or immovable, tangible or intangible values (assets), as well as documents or other legal instruments in any form, including in electronic or digital format, which certifies a title or a right, including any quota (interest) with respect to these values (assets)”.

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