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The Protection of Sexual Freedom and the Incrimination of the Sexual Assault in Romania

Mariana Pădureanu*

Abstract:
In the multitude of problems that Romania faces at the beginning of 21st century, the emergence of offences that refer to the sexual life represents a reality that has reached a controversial point, sometimes manifesting through constraints and threats on addressing the victim, extremely violent actions that can lead to the death or even the suicide of the victims. The period that followed after the Romanian Revolution from December 1989 was marked by substantial changes that took place in our perception on sexuality and sexual freedom, and the causes and the negative implications of the facts that infringe this freedom are combated with the penal legislation. The successive legal modifications show progress on the incrimination of different modalities in committing the offences that infringe the sexual freedom (especially rape, sexual aggressions, sexual harassment) and the inclusion of the acts of homosexuality and lesbianism in the material elements of these offences, and also a lack of clarity and coherence of the Romanian legislator in defining the sexual acts, or "other modalities to obtain sexual satisfaction". This study underlines, on one side, the ambiguity and discordance between the legal norms that sanction the acts of sexual assault, sexual aggression, sexual intercourse with a minor person, sexual harassment, and, on the other side, the different aspects that these offences can display into practice. Another aspect preponderantly discussed has been the criteria for differentiating between rape and other sexual offences, especially when the victims are minors, owing to the increasing amount of texts from the Penal Code that refer to such facts committed against minors.

Keywords: *sexual act/intercourse; rape; victim; minor; Penal Code; offence*

* PhD candidate, University of Craiova, Faculty of Social Sciences, Phone: 0040756501229, Email: mariana86ro@yahoo.com.

Sexual freedom is related to the human's right to dispose of their body, their physical integrity and the freedom to make their own choices on addressing the private and sentimental life, to choose the sexual orientation and the sexual partner, including the right to avoid the risk of an unwanted pregnancy and the right to abortion.

Broadly presented, the right to the respect of intimate life encompasses a great variety of situations that refer to sexual, sentimental or family life, to the person's health condition, and to the right to dispose of their own body, to patrimony, to domicile's inviolability (Radu, 2010: 79-80).

The Romanian Constitution, revised through Law no.429/2003, regulates, with the value of principle, the right to intimate, family and private life. Although it is not expressively mentioned, not only family life is protected by the law, but the sentimental and sexual relations, due to the fact that they represent voluntary affective relationships that person enjoys. The offences stipulated by the Romanian penal legislation, through which there is infringed the sexual freedom, (they refer to sexual intercourse, of any nature, through constraints or menace, or taking advantage of the impossibility to defend of the victim – rape, sexual aggression, sexual harassment); the ones that infringe the public order and good morals (they address, because of their committing in public spaces, or their mentioning, the emerging of a public scandal – sexual perversion, including the one that involves minors, or that committed for producing pornographic materials; indecent exposure; child pornography); the ones in which the offender intends to determine minors to have sexual intercourse, or do/assist to obscene acts: the sexual intercourse with a minor, sexual corruption, use of child prostitution, recruiting of minors for sexual purposes. Moreover, we can consider that they can be sub-divided in offences that infringe directly the sexual freedom of a person (when their consent lacks or if it is obtained through constraint, threats, promises and so forth), and offences that involve the production, possession, obtaining, storing, exposure, promotion, distribution of images that cannot be shown to the public legally (Robert & Duffar, 1993: 95), along with the providing, of any kind, of pornographic materials with minor participants, the watching of pornographic shows with minors, or the accessing, without the right, through electronic means or ways of communication, of pornographic materials with minors.

Rape represents the most severe infringement of the sexual freedom, with profoundly and extremely serious psychological implications. Depending on the way and circumstances it is committed, this act that implies a high degree of social danger, can infringe, directly, but extremely brutal, other important values too, which are defended by the legal system, such is the right to dignity (Radu, 2015: 92-93), the right to life and physical and psychical integrity, the right to health, the right to freedom. From the victim's point of view, the most severe infringement is that against the dignity and honour, through the committing of such an act the victim being subjected to threats, violence, constraints, humiliation that would decrease the self-esteem and self-trust, sometimes leading even to suicide.

In the initial form of the Penal Code from 1968, rape, in its typical variant, was defined as "the sexual intercourse with a female person, through her constraint or taking advantage of her impossibility to defend or express her will", respectively when the victim is asleep, or under the influence of drugs, alcohol, pills, or other substances, and can be easily immobilised to force her to engage in the sexual intercourse. The penalty in case of rape was prison from 2 to 7 years. For the same act, committed in aggravating

circumstances – for example, the victim did not reach the age of 14, the rape was committed by several people, the victim was enjoying the care, education, guardianship, or treatment of the offender, or the victim was suffering from body or health impairment, the penalty was prison from 3 to 10 years, and in case of death or suicide of the victim, the limits of the penalty were raising from 7 to 15 years.

The marriage of the offender with the victim could acquit the first from penal liability, besides when rape was committed by two or more persons together. The reason for the penalty acquaintance was that, on one side, the offender showed remorse, and wanted to rectify the harm did to the victim, and it was created a home for the child that could result from this forced union. The inflicting of penalty on the offender, after the marriage, could lead to the disturbance, and even the breaking of family relations, by constantly maintaining, in the conscience of the persons involved, the committed act. This solution was continuing a tradition of the Romania legislation in this matter, which would obligate the man who would rape a virgin to marry her, case in which he would remain unpunished. Nonetheless, the Civil Code would allow that, when the regret of the offender would prove to be only a formal one, the marriage being just for appearance and having behind mean interests, the deception and the fiction, the rapist wishing only to avoid penalty, the marriage would be annulled, with the consequence of the offender to be sentenced.

The specialists in the field of law criticised for many years the possibility to acquit the author of the rape, if he married the victim. The main argument was residing in the fact that a marriage concluded under these circumstances cannot be a long-lasting one, even if the man showed good-will, because his consent is given under the menace of prison and the two spouses would always be suspicious. Nevertheless, the dominant opinion was favourable to this solution, because it could be considered that, through marriage, the woman would be offered the possibility to remove the memory of the violence she was subjected to, and to obtain a social status that would attenuate the sufferance and the infringement to her honour and dignity.

The evolution of social relations, the changing of mentalities after the Romanian Revolution from 1989, and the research that has been carried out in this area, imposed several successive modifications, which made that the incrimination of rape in the penal law to appear under a different formula, introducing fundamental differences, as confronted to the anterior regulation, both as regarding the modality to commit the felony (the material element) and the penalty, and on addressing the persons that can constitute the subjects of this offence. Thus, article 197 of the Penal Code was sanctioning "the sexual intercourse of any kind, with a person of different or the same sex", committed "through their constraint, or taking advantage of their impossibility to defend or express their will", with prison "from 3 to 10 years, and the interdiction of certain rights". Consequently, there was made the transition towards the protection of any person's sexual freedom, regardless their sex, not only of the woman, as in the old regulation. Moreover, the introduction of the concept of "sexual assault of any nature", although it was not defined by the law, denotes the clear intention of the legislator to regard it through a different perspective, not only as the conjunction of sexual male and female organs (Antoniu, Bulai & Chivulescu, 1976: 235), and which was clearly different from the other sexual activities, so far incriminated through the other offences. The introduction of this new variant of the material element, through Law no. 197/2000, triggered a constitutional controversy, bringing forward, among other issues, the problem of including the material element of the offences of sexual relations between people of the same gender, still

incriminated at that time, among the offences of rape or sexual intercourse with a minor. By rejecting this opinion of the doctrine, through the Decision no. 211/2000, the Constitutional Court of Romania considered as constitutional the dispositions from article 197 that incriminated rape, mentioning that the notion of "sexual intercourse" did not include that of "sexual intercourse between people of the same gender", which the article 200 from the Penal Code was referring to. Motivating its decision, the Constitutional Court declared that, through the new material element of the offence of rape, there was designated the notion of sexual act, instead of sexual intercourse, "to incriminate the sexual perversions that people are subjected to, and which occur, until the committing of the sexual intercourse". Nonetheless, this opinion was later contradicted by the legal modifications introduced in the subject, through the abrogation of article 200, and the maintaining of article 201 from the Penal Code, which incriminated sexual perversion. The legislative evolutions that occurred on addressing the offence of rape denotes obviously that, in the notion of "sexual act of any nature", there are also included the sexual relations between people of the same gender, as long as they happen through constraint, or taking advantage of the victim's impossibility to defend or manifest their will.

However, in the specialised literature, the discussions continued, on addressing the acts of *sexual perversion*, considering that there are situations in which the material element of the offence of rape can coincide to that of the sexual perversion. In the practice of the courts, there were situations in which the judges embraced this opinion, asserting that "the committing through constraint, of abnormal sexual acts, as the oral ones, against a person of different gender, is considered rape" (Court of Appeal Bucharest, Penal Section I, decision no. 1053/2004). Moreover, the Supreme Court of Justice decided, in 2003, that it is rape, and not the offence of sexual perversion, if the defendant engaged, through violence and threats, in sexual intercourse, normal and anal, with a minor (Supreme Court of Justice, Decision no. 3342/2003). On the line of the same thought, the specialists underlined that: "It is obvious that the acts of sexual perversion, such as oral and anal sex, are included in the notion of sexual act of any nature, which expresses the material element of the rape. For this cause, the sexual anal or oral act, committed through the constraint of the victim, represents the offence of rape. In such a hypostasis, there cannot be taken into consideration an eventual ideal background of the crime, because, besides the coincidence of the material element, we also face the coincidence of the legal object, owing to the fact that, through the incrimination of the violent perversion, it is the sexual freedom of the person that is presumably protected" (Cioclei, 2004: 41). The problems of delimitation appear when the oral or anal act, or both of them, are superposing over the existence of a sexual intercourse with the victim. In such a situation, the judges can consider, according to the meaning conferred to the notion of sexual act, either one offence of rape, or an offence and a sexual perversion too, besides the one of rape. This might be the reason for which, embracing the opinion of the specialised authors that the sexual oral or anal act, regardless the fact that it is done by a person of opposite or the same gender falls in the category of sexual act of any nature and can constitute, depending on the case, the offence of rape or the offence of sexual act with a minor (Cioclei, 2005: 34-38), the legislator renounced, in the new Penal Code, elaborated and adopted in 2009, the incrimination of sexual perversions.

Returning to the modifications suffered by the Penal Code in 2000, for the first time the parties were no longer circumstantial, unlike the old regulation, in which the passive party was the woman, and the active party could be only the man, because it was

considered, at that moment, that only he owned the physiological capacity to complete a sexual intercourse through constraint. This major difference confronted by the old regulation appears as a very important one, a turning point in the evolution of the conception on rape, due to the fact that the condition on addressing the physiological capacity of the man seems to not be valid any more (Fuchs, 2004: 93-121). If the fact was perpetrated in aggravated circumstances – for example, there were more persons participating to the rape, the victim enjoyed the care, education, guardianship or the treatment of the offender, or a member of the offender's family, or if the victim suffered from the violation of the body or health integrity – the sanction was prison from 5 to 18 years, and if after this episode there occurred the death/ suicide of the victim, the limits of the penalty were from 15 to 25 years. If the age of the victim was lower than 15 years old, the penalty was prison from 10 to 25 years.

The offence of *seduction* used to be considered an infringement of the woman's sexual freedom, that was the obtaining of a female person's consent, of under 18 years old, to engage in sexual intercourse, with the promise of marriage. The offender was the man who would promise the victim that he would marry her, or he would even engage with her, to obtain her consent to live together, after a period of time intending to leave her, without fulfilling his obligations taken upon himself. The consent of the victim could not be considered valuable – on one side, due to her age, and on the other side, because it was obtained through treachery, and false promises of marriage. Owing to these reasons, the act of the offender are equivalent, from the point of view of the infringement brought to the sexual life, to the acts of constraint, in case of rape, and the abusive acts, in case of sexual intercourse with a minor. The penalty for seduction was prison from 1 to 5 years. For the existence of the offence of seduction, it was irrelevant weather the minor had had or not previous sexual intercourse, if she was a widow or a divorcee (taking into consideration that, under the provisions of the old legislations, the minor could be married starting with the age of 16, and, in some exceptional cases, 15). If the marriage promise was coming from a married man (the situation being known by the victim), she could not assert that she had been deceived to give her consent for sexual intercourse; the same was the situation when the promise was coming from a man with whom the minor girl had had sexual intercourse before.

In 2002, there was introduced, for the first time in Romanian penal legislation, the offence of *sexual harassment*, representing the menacing or the constraining of a person "to obtain sexual satisfaction, by a person who abuses of their authority, or the influence conferred by the position at work". The incrimination of sexual harassment, which is part of the Romanian legislator's innovations meant to bring the internal penal law to the European one, was considered of real use for the repression of behaviours, especially of the employers, who condition the employing or the performing of services, or the access to certain services to the obtaining of sexual favours (Mateuț, 2002:3). Defined as "any active or passive behaviour that, through the effects that it generates, advantages or disadvantages unjustifiably, or subjects to unjust or degrading treatment a person, a group of people, or a community, as confronted to other people, groups of people or communities" and it is sanctioned as a convention, by the G.O. no. 137/2000 on the prevention and sanctioning of all forms of discrimination, sexual harassment became an offence through the use of menace or constraint, with the purpose to obtain sexual satisfactions, by a person who abuses of their quality or influence conferred by the position at work. Yet, the new penal norm also had imperfections noticed by the law specialists, who remarked that, the employed minors represent an extremely vulnerable social

category, exposed to the risk of sexual harassment, and the offence committed against a minor would have constituted, if considered the social danger aspect, an aggravating circumstance, the Romanian legislator omitting to make a difference on addressing the penalty (Tanislav & Tanislav, 2003: 67; Avram & Radu, 2010: 100-108; Radu, 2017: 96-97).

The new Penal Code, in force since the 1st of February 2014, incriminates rape by specifying that it represents any sexual intercourse, oral or anal sexual act with a person, regardless their gender, committed through constraint, in the impossibility to defend or express their will, or taking advantage of such a condition in which the victim is. As it can be observed, the material element was rethought by those who elaborated the Penal Code; it can be represented by any act of penetration, either standard sexual intercourse, the conjunction of sexual male and female organs, or any sexual act consisting of oral or anal penetration, committed against a person of the same or opposite gender. In a variant assimilated by the law, it is considered rape any other act of vaginal or anal penetration (for example, the introduction of objects or fingers in vagina or anus), which can be done directly by the offender, on the victim's body, but it can also be performed by constraining the victim to do the actions of penetration, on their own bodies.

The offence of *sexual aggression*, stipulated distinctively in art. 219 from the new Penal Code, consists in any other sexual act which does not involve penetration or sexual oral act, committed through constrain, or with a victim in the impossibility to defend or express their will, and taking advantage of this condition of the victim – for example, the act of masturbation constitutes the offence of sexual aggression (Udroiu & Constantinescu, 2014: 300). If the offender, on the same opportunity, commits sexual acts that include penetration, and both acts that do not involve penetration, the criminal act in its assembly is to be qualified as offence of rape (Udroiu & Constantinescu, 2014: 298).

Sexual intercourse performed during the offence of rape represents the lack of the victim's consent, who has their sexual freedom infringed. This can be realised directly, through constraint or menace, or indirectly, if the offender takes advantage of the victim's condition, who is in the impossibility to express their will, or reject the offender's advances.

The constraint can be of two ways – physical and moral, of such effectiveness and intensity that would render the victim powerless. It is not taken into account whether the victim put up physical resistance or not, this aspect can be neglected if the victim expressed their rejection clearly. The condition from the old legislation, according to which the victim had to put up resistance, become obsolete as long as the victim would expose themselves to the risk of being injured by the offender who threated to do harm; thus, if the victim rationalise that the injury can be avoided if adopting a passive attitude, that is the acceptation of the sexual act, the request referring to the existence of constraint can be considered fulfilled. Moral constraint, on the other side, involves the menace in such a manner that would inspire the victim a very strong feeling of fear that would break their resistance or opposition.

Threat is another modality to break the resistance of the victim, it ought to be seriously expressed and to really frighten the victim. The judge is the one who appreciates concretely the serious character of the threat, depending on the case and a multitude of factors, such as the object of threat, the victim's psychical construction, the constitution and the person of the offender, or the circumstance when the victim, in a certain psychical condition, was easier to be intimidated and "ceded", "accepting" the sexual act, due to the fact that it was appreciated that in such a manner it is avoided the harm of the threats.

In the conception of the Romanian legislator, the sexual intercourse committed forcedly against a person, who is directly related, brother or sister – meets the conditions for being considered offence of rape, in the aggravating circumstance provisioned by article 218, section 3, letter b), from the Penal Code in force, not being considered an offence of rape correlated to that of *incest*, because, in case of incest, the law provisions the condition that the sexual intercourse to be consented.

The criterion of differentiation between the offence of rape and sexual aggression consists of the modality to commit, respectively it is mentioned any other sexual act than those provisioned by the law for the offence of rape, the offence also including the annihilation or the lack of the victim's consent.

Rape committed against a minor constitutes an aggravating circumstance of the offence, being punished with prison, whose limitations are between 5 and 12 years, and the accessory penalty of forbidding the exercising of certain rights.

The offences on sexual freedom, which imply the minor's consent, regardless the manner it was obtained, are differentiated from the material point of view, as following: if there were committed acts that involve vaginal or anal penetration, or oral sexual acts, there can be identified a sexual act with a minor, and if there were committed other sexual acts, the offence is to be considered corruption of minors.

On addressing the age of the minor, there can be noticed that, compared to the previous regulations, the actual Penal Code stipulates the aggravating circumstance of rape of a minor, which involves the taking into consideration those who have not come at age, while the old codes were sanctioning even harsher the same offence committed against minors under 14, and 15 years old respectively.

Referring to the other sexual offences committed against minors, the Romanian legislator differentiated the age of the passive party, considering that it is imposed a better protection of the minor's integrity and sexual freedom, in their relation with a major person, whereas the sexual acts between minors are further on unsanctioned. The age limitations, for the incrimination of the sexual act committed by a major person with a minor, are between 13 and 15 years old, the penalty being harsher in case of aggravating circumstances, which involve the minor not reaching the age of 13. The sexual act between a major and a minor, whose age is between 15 and 18 years old, is punished, according to the new Penal Code, with prison from 2 to 7 years, and the accessory penalty of forbidding the exercising of certain rights, in case the minor is a family member of the major person, if the offence was committed against a minor under the care, protection, education, guardianship, or treatment of the offender, or abusing of their position, or authority over the minor, or the extremely vulnerable condition of the minor, due to physical/psychical handicap, or created through a situation of dependence, if by the committing the offence was prejudiced the life of the minor, or there were produced pornographic materials. The legislator considered that the agreement of the victim for the committing of sexual acts has no value, as confronted to the lack of discernment and the incapacity of minors to consciously conduct their sexual life. It ought to be underlined that, when the minor is a direct line relative, brother or sister, with the offender, even if the minors consented for the sexual intercourse to take place, there are cumulated several offences, between that of sexual act with a minor, and that of incest (Gorunescu, 2010: 103).

According to the provisions of the old Penal Code, the offence of sexual act with a minor could be cumulated with that of seduction, consisting of the determining of a female person, younger than 18, to have sexual intercourse, her consent being obtained

after the promise of marrying her, while in the actual penal legislation, the offence of seduction is absorbed by that of sexual act with a minor (Gorunescu, 2010: 105-108).

In practice, there has been discussed the hypostasis in which the sexual offender does not realise that the victim is under 18. There are situations when the victim hides their age, and, from their appearance, it cannot be concluded that they are 18 or not. If the offender proves that they did not know that the victim was under 18, and, under these specific circumstances, the defence results to be verisimilar and trustworthy, the court can discharge the defendant, being considered an error for the existence of the penal character of the offence – except for the rape, which is to be sanctioned in its simple version.

The last sexual offence, which has received a new systematisation through the new Penal Code, in force since 2014, is *sexual harassment*. The incidents of the subject matter are two distinct texts from the Penal Code: the first, which incriminate "the repeated request of sexual favour, in a relation of work or a similar relation, if, through it, the victim was intimidated or positioned in a humiliating situation" (the proper harassment); the second, which sanctions "the offence of the civil servant, who, with the purpose of not carrying out, or delaying their duty at work, or with the purpose of acting contrary to these duties, pretends or obtains sexual favours, from a person directly or indirectly interested in the effects of this work duty" (the abusive use of the position for sexual purpose). In another variant, the civil servant pretends or obtains sexual favours, availing themselves or taking advantages of a position of authority, or superiority over the victim, a situation that derives from their position.

If studying comparatively the two incriminating norms of the sexual harassment – the former article 203^1 and the actual articles 221 and 229, there can be noticed that the Romanian legislator assumed the criticism from the specialised literature, according to which, on one side, the sphere of manifestation of the acts of sexual harassment was limited only to menace and constraint, and, on the other side, the differentiation between sexual harassment and that of rape, which implies necessarily the existence of constraint or menace, was, most of the time, complicated to be made because "it is difficult to make a distinction between the constraint that is followed by the consent of the victim, and the constraint that annuls any consent" (Radu & Avram, 2011: 64). It seems that the Romanian legislator, trying to offer a solution, eliminated, from the new Penal Code, the condition that the sexual favours to be obtained through menace and constraint, being sufficient to be pretended, or obtained within a relation of work, from a job, or a similar relation, if the victim was intimidated, or humiliated after this situation, or the author – civil servant – would avail or take advantage of a position of authority/superiority over the victim, a situation generated by the position at work.

The minors can be a passive party of the offence of sexual harassment, only if they gained the quality of employee, consequently, if they are between 15 and 18 years old. Nonetheless, as underlined in the specialised literature, sexual harassment committed against an employed minor, regardless their gender, constitutes an aggravating circumstance (Tanislav & Tanislav, 2003: 67; Avram & Radu, 2010: 100-108; Radu, 2017: 96-97), the Romanian legislator omitting, once more, to sanction this offence with a higher penalty.

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