Different Legal Classification of Crimes Regarding Sexual Life *vs.* Uniform Interpretation and Implementation. Comparative Aspects of the New Criminal Code

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Abstract: Sexual freedom, being one of the individual freedom, is protected by law whenever is violated and no matter what way take place, but controversy and lack of unanimous interpretation occur once the legal status of infrinfed rule and therefore the individual sentence. In this sense, we tried to highlight some aspects regards to the legal boundaries classification, and the new elements brought by the new Criminal code.

Keywords: sexual freedom; sexual offenses; pedophilia; morality; legality

Title II, Chapter III of the current Criminal Code, entitled „Crimes against sexual life" includes rape crime, sexual intercourse with a minor, seduction, sexual perversion, sexual corruption, incest and sexual harassment. Considering that some offenses have the minor, as passive subject, they may be associated with another term, called „pedophilia".

Title I, Chapter VII of the new Criminal Code (Law no. 286/2009), entitled „Crimes against sexual freedom and integrity", includes offences such rape, sexual assault, sexual intercourse with a minor, sexual corruption of minors, recruitment of minors for sexual purposes, sexual harassment. Therefore, is apparent that the crimes of seduction and incest will no longer find meaning under the new Criminal Code, the crime of incest is absorbed by aggravating version of rape – „when the victim is a relative in direct line, brother or sister", this new law giving priority to a new offense, respective, the recruitment of minors for sexual purposes.

In courts practice, have held contrary views on the legal classification of rape, and the crime of incest in perfect concourse, in case of sexual relation with a person of different sex, family member, with which author is relative in direct line, brother or sister, made it through coercition or taking advantage of her inability to defend or to express their will. Not having a single viewpoint in this regard, some courts have held that the act constitutes only the rape crime, considering that the incest crime is absorbed in the worsening situation relating to the situation when „the rape victim is a family member". Other courts, have held that such an act, committed by the author on a family member, which is relative in direct line, brother or sister, constitutes both rape crime and incest in the perfect concourse.

In this regard, the High Court of Cassation and Justice upheld an recourse in law interest, by decision no. 2/2005 (Recourse in law interest, no. 27/09/2005).

According to art. 197, para.1 of the Criminal Code, the rape crime is „sexual act of any kind, with a person of different or same sex, by coercition or taking advantage of her inability to defend or to express their will", and under para.2 points b^1 the same article, the fact that the „victim is a family member", is aggravating.

Moreover, art. 203 of Criminal Code provides that „the sexual relation between relatives in direct line, or between brothers and sisters" constitute the incest crime. Also be noted that, in relation to art. 33, point b of the Criminal Code, exist perfect concourse of crimes „when an act or omission, committed by the same person because the circumstances that took place and the consequences produced, meets the elements of several crimes".

Taking into account the limited significance of the „family member" concept, represented by the art. 149^1 Criminal Code, under which could be absorbed in the aggravating version of rape crime, than if the nearest relative, the victim of rape lives with the perpetrator, which means that would not give any criminal significance to the situation when victim, relative in direct line, brother or sister not lives with the perpetrator, which would be inadmissible.

Because those legislative voids meaning of some terms, the new Criminal Code extends in art. 176 the meaning of „family member" term, as ascendants, descendants, brothers and sisters, their children and people have become by adoption as relatives, husband or wife, person who have established similar relationships those between matrimonially, or parents and children, where they live together. Concomitantly, is apparent that the new law brings supplements regards to the material element of rape crime, so this will be dependent on „sexual relation, anal or oral sex acts", and not just „sexual act" in the current Criminal Code. Making an analogy between art. 197 the current Criminal Code – *rape crime*- and art. 219 new Criminal Code – sexual assault- it can be observed that there is similarity of legal content, the difference being that if the perpetrator of sexual assault „put" his victim in unable to defend themselves, and for the rape crime, the perpetrator is „taking advantages" of this state.

There can be also noted, that the absorption of incest in aggravating version of rape crime in the new Criminal Code, ***there will always retain a passive subject***. In current acceptation of incest crime, the „active subject" term refers to both partners, there is rarely a passive subject, for example, when one partner was the other victim. Currently, being committed the incest crime, will usually be held accountable, both partners, and the new Criminal Code gives the passive subject quality even by criminality rule „victim is a relative in direct line, brother or sister", is likely to be held criminally liable only active subject.

Also, this situation raises the question in terms of legal classification of the rape crime in continued form, committed on the victims family member, before the age of 15 years and once it has reached 15 years. In this regard, both doctrine and jurisprudence have different views, claiming first that only the last action of rape crime exhausted after the age of 15 years old will require the recruitment of type version, and secondly sustaining also after the age of 15 years, the legal classification of act should cover both typical version and aggravating.

In this regard, the High Court of Cassation and Justice has rendered through decision no. *17/10.03.2008* (Recourse in law interest, 22/12/2008) *on recourse in law interest determining the legal classification of the plurality of sexual acts committed in achieving the same criminally resolution, when the victim is a family member, through coercition or taking advantage of its inability to defend them or to express their will, both before and after it has reached 15 years old.*

According to art. 41 para. 2 of the Criminal Code, „offence is continued when a person commits at different intervals, but to achieve the same resolution, actions or inactions showing each hand, the same crime". Therefore, repeating the rape crime against the same victim tend to meeting the same conditions as a continued act, where, actions under the same resolution, are committed in similar ways. Lack of uniformity of actions, which may differentiate how to commit the rape crime can not the unique nature of this crime, while distinguishing features of those actions are not likely to remove their legal uniformity and overall are filled, in meanwhile through the unit of resolution.

Thus, the content unit should be rendered by unit criminal resolution and the moment of depletion of rape crime, in continued form, coincides with the last action, with all its typical elements or worse, likely to affect the whole legal status of repeated act.

However, the courts practice has not consistently held in cases regards „the crimes committed with intention, that resulted in a death of a person", the High Court of Cassation and Justice ruling is made by decision no. 20/10.03.2008 (Recourse in law interest, 20.05.2009).

Thus, some of them proceed to reduce the sentence in the case if finding attenuated circumstances for not more than one third of the special minimum (according to art. 76, para. 2, Criminal Code), other courts doing otherwise. It is possible that in practice, different judgements issued by courts to have their basis in different interpretation of the phrase "crimes committed with intention that resulted in a death of a person". We believe that the correct interpretation of the phrase mentioned above, refers to any crime causing death whose guil is praeterintention form. Praeterintention, called „outdated intention" by the doctrine is that form of guilt mixed up of intention and negligence, achieved by committing an act with intention and produce a worse result than sought or accepted by the offender, a result that is attributable to the fault form as prescribed either not sought or accepted from, but reckoned without reason that he does not will occur or not to predict, although it must be able to provide.

Also, given the subjective aspect relating to sexual offences, respective intention or praeterintention, that can be easily inferred that to the active subject cannot allege the specific mitigating circumstances specified in art. 73 Criminal Code, is not issued the overcoming self-defence, the state of emergency, or a challenge from the injured party caused by violence, just because these crimes are committing by coercing the victim.

Therefore, we believe that reducing maximum third penalty for „crimes committed with intention that resulted in the death of person" is too general and should not find application in case relating to sexual crimes.

The new Criminal Code brings amendments in relation with to sexual harassment crime, that it refers to „repeatedly claiming of sexual favours in an employment relationship or a similar relationship, if that victim has been intimidated or made a humiliating situation", unlike the current provision which is „threat or coercition for the purpose of obtaining sexual signification by a person who abuses the authority or influence function conferred him, at work". The change is justified by the gaps in current legislation, so that if the active subject has the same function as the passive subject in an institution, it is outside the susceptibility of criminal responsibility. The new law extends even to this case, replacing the abuse of authority or influence to work with the term „within the framework to relationship in an institution", while implementing an essential requirement, namely the repetitive nature of the material element.

Art. 222 the new Criminal Code – the recruitments of minors for sexual purposes, establish a legal employment loss for „adult act to propose a minor under the age of 13 years, to meet in order to commit a sexual act with a minor or the sexual corruption of minors, including when the proposal was made by means of transmission to the distance", because we believe that not finds application in particular, because the probation of act will determine by difficulty of following considerations: the material element is the proposal to meet, and the object is qualified by committing of sexual act. Consequently, having an elusive material element and precisely object is difficult to determine the relation of causation. Therefore, we consider that it could retain the normative way of sexual corruption with minor crime, „determining or facilitating the commission of a sexual act or sexual corruption", and not a separate offense.

References

Law no. 286/2009.

Recourse in law interest, 20.05.2009.

Recourse in law interest, 22/12/2008.

Recourse in law interest, no. 27/09/2005.