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CRIMINAL LEGISLATION REGARDING CRIMES AGAINST SEXUAL FREEDOM AND INTEGRITY COMMITTED AGAINST MINORS

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Abstract

This study analyzes the criminal legislation in Romania regarding crimes against sexual freedom and integrity committed against minors, in the context of the recent amendments to the Criminal Code of 2023 and 2024. Despite efforts to align with European directives and strengthen the protection of minors, frequent changes and inconsistencies of legislation challenge effective law enforcement. The rapid succession of changes and legal ambiguities can affect the real protection of minors. In our opinion a coherent penal policy and the adoption of clear measures to protect the rights of minors, in accordance with international standards, are necessary.

Key words: *minor, sexual intercourse, consent, victim, punishments, legislative changes.*

INTRODUCTION

Child sexual abuse and sexual exploitation of children, including child pornography, are serious violations of fundamental rights, in particular the rights of children to the protection and care necessary for their well-being, as stipulated in the 1989 United Nations Convention on the Rights of the Child and in the Charter of Fundamental Rights of the European Union.

In accordance with Article 6(1) of the Treaty on European Union, the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, which, in Article 24(2), provides that in all actions concerning children, regardless of whether they are carried out by

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public authorities or private institutions, the best interest of the child must be considered paramount (*Directive 2011/92/EU*).

Unfortunately, sexual violence is ubiquitous, in almost every culture, at all levels of society and in every state of the world. Relevant data contained in international studies indicate that at least one woman in 5 has suffered an attempted rape or rape, and the vast majority of victims are women and children of both sexes. Sexual violence is seen as a global problem, not only in a geographical sense but also in terms of the age and gender of the categories affected by this type of violence. (*Explanation of reasons for amending the Criminal Code*).

I. EUROPEAN AND DOMESTIC PROVISIONS REGARDING CRIMES AGAINST SEXUAL FREEDOM AND INTEGRITY RELATING TO MINORS

According to Directive 92/2011 of the European Parliament and of the Council, it is established in the provisions of art. 2 what exactly is meant by:

"Child" – i.e. any person under the age of 18;

"Age of sexual consent" - i.e. the age below which it is prohibited, in accordance with national law, to practice sexual activities with a child;

"Child pornography" - i.e. (i) any material that visually depicts a child engaged in explicit, real or simulated sexual behavior; (ii) any depiction of the genitalia of a child primarily for sexual purposes; (iii) any material that visually depicts any person who appears to be a child engaged in explicit, real or simulated sexual conduct, or any depiction of the sexual organs of a person who appears to be a child, primarily for sexual purposes; or (iv) realistic images of a child engaged in sexually explicit behavior or realistic images of a child's sexual organs, primarily for sexual purposes.

According to this directive and the Criminal Code in force (published in the Official Gazette, Part I no. 510 of 24 July 2009, in force from 1st February 2014) the practice of sexual activities, i.e. with a person under the age of 18, who has not reached the age of sexual consent, is punished according to the crime with imprisonment.

Unfortunately, the current Criminal Code, since its entry into force on February 1st 2014, has been amended 35 times to date, 12 times in 2023 and 5 times in 2024, without having a coherent criminal policy, the essential changes which were made in 2023 concern crimes against freedom and sexual freedom, especially with regard to crimes committed against minors.

Thus, by Law no. 217/2023, amended and supplemented by Law no. 424/2023, several legal texts concerning minors were adopted, currently existing as crimes: the use of child prostitution provided for in article 2161, the rape committed on a minor art. 2181, sexual assault committed on a minor art. 2191, determining or facilitating the maintenance of sexual or sexual acts between minors art. 2192, sexual corruption of minors art. 221 and recruitment of minors for sexual purposes prov art. 222.

It was considered that there must be legislative solutions against sexual abuse and violence of any kind directed against children in order to guarantee a real protection of this category, regardless of the time that has passed since the act was committed (by law no. 217/2020 was amended art. 153 para. 2 C.pen. which states that crimes related to rape of a minor, sexual assault of a minor have no statute of limitations).

As we showed above, in the last 10 years there has been an incoherent criminal policy where, from particular cases, a legislative amendment has been reached, so that some criminal provisions regarding sexual activities against minors lead to the false impression of additional protection of the minor against sexual abuse. Many of the provisions seem unconstitutional or even confusing, so there is a possibility that in some situations minors will suffer due to committing certain sexual abuse crimes.

II. LEGISLATIVE CHANGES WHICH WE CONSIDER ARE A DIMINISHMENT OF PROTECTION FOR MINORS

Although the criminal amendments were criticized by some authors of criminal law, they entered into force after January 1st 2024, so that the protection of minors by criminal means was reduced (*Professor PhD Valerian Cioclei and PhD Hunor Kadar*).

In the sense of what has been shown, we will exemplify some crimes by which there is a decrease in the protection of minors, namely:

a) Use of child prostitution prev. of art. Art. 2161, according to which *the maintenance of any act of a sexual nature with a minor who practices prostitution is punishable by imprisonment from 6 months to 3 years, if the act does not constitute a more serious crime.*

By the practice of prostitution is understood the maintenance of sexual acts with different people in order to obtain patrimonial benefits for oneself or for another (*art. 213 par. 4 Penal Code - pimping*).

This crime has a very narrow applicability, showing that for example if an adult has a sexual act with a minor over the age of 16, the act does not constitute a crime, if the minor does not practice prostitution.

When a 15-year-old minor maintains a sexual act with a 17.5-year-old minor, who engages in prostitution, he/she as an active subject will be liable for the use of child prostitution, while the passive subject, the 17.5-year-old minor, who prostitutes, will not commit any crime (*Valerian Cioclei, 2024, p. 197*).

Likewise, an adult by law touching or kissing a 16.5-year-old minor who is a prostitute is a crime, and the same act committed by a minor of the same age who has not started sexual life is not a criminal act. We specify that the notions minor of age and major also include the female gender.

b) The rape of a minor - the introduction of this criminal offense by Law no. 217/2023 had influences on the internal judicial practice in which solutions

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were pronounced regarding valid consent even at a lower age (14 years) regarding a sexual relationship, oral or anal intercourse, as well as any other acts of vaginal penetration, adopting a threshold regarding the age of the minor, namely the one who has not reached the age of 16, which constitutes rape even in the situation where there was his consent to sexual relations, since children cannot truly consent / to give valid consent to sexual acts with an adult, even when we obviously do not have coercive behavior on the part of the adult (*Explanation of reasons to Law no. 217/2023 - George Visu – Consent or coercion*).

Due to the criticisms that were signaled at the issue of Law no. 217/2023, it was amended and supplemented by Law no. 424/2023, so that in the first two versions of this crime they are similar to the old crime of sexual intercourse with a minor, which has been abrogated, and the next two, when the crime is committed by coercion, contain provisions similar to those provided for the crime of rape in art. 218 Criminal Code.

The novelty of this crime is that we have the crime of rape when according to art. 2181 paragraph 1 Criminal Code, the act is not committed by coercing the victim, the minor consenting to the sexual act, but this consent would be vitiated due to age and mental immaturity (*Valerian Cioclei, 2024, p. 221*).

When we have this version of the rape provided by art. 2181 C. pen. in which the acts are committed without coercion (on a case-by-case basis here the judicial bodies should be able to appreciate with a forensic psychiatric expertise regarding discernment-consent) the act is not punished if the age difference between the perpetrator and victim does not exceed 5 years.

If in the previous regulation regarding the crime of sexual intercourse with a minor the provision was for a difference of up to 3 years, this has been increased to 5 years, so where there is better protection of the minor, where for example, a minor of 16 years maintains a sexual act with a minor of 13.5 years, and this act is no longer sanctioned considering the age difference of 2.5 years (previously, if the difference exceeded 3 years the punishment was from 2 to 9 years) (*Valerian Cioclei, 2024, p. 221*).

In situations where sexual intercourse, oral or anal intercourse takes place between a minor and another minor under the age of 14, it is sanctioned according to art. 114 of the Criminal Code. In the provisions of art. 114 paragraph 1 C. pen. if the minor is between the ages of 14 and 18 at the time of the crime, a non-custodial educational measure is taken, and paragraph 2 shows when a custodial educational measure can be taken, in certain situations. How can such an educational measure be taken when the punishment provided by law for the crime committed is 7 years or more times life imprisonment, and in the case of rape of a minor on paragraph 2 there is no punishment to which we can refer, so that the legal provision somehow leaves its application up in the air, even when a non-custodial educational measure would be taken, since no punishment is provided for.

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The situations in which we have sexual intercourse, oral or anal intercourse, as well as any other acts of vaginal or anal penetration committed by a minor with another minor under coercion are punishable by imprisonment from 3 to 10 years and prohibiting the exercise of certain rights. And in this situation the legislator "forgot" that according to art. 114, only educational measures can be taken, so the minor cannot be punished either with prison or with the prohibition of certain rights.

Legal oversights also exist within art. 2181 paragraph 4 of the Criminal Code, where letter g) states that the rape was committed either with the consent of the minor or by coercion, since the victim became pregnant. If the rape was committed by coercion, it was normal to provide for this situation as well. However, if the act was committed with the consent of the minor, which legal provision is to be applied, Art. 2181 para. 1 and 11 if, for instance since the age difference between the perpetrator and the victim does not exceed 5 years? or even if this situation exists, is applied a penalty where the special maximum of the penalty is increased by 3 years so that the perpetrator can risk a penalty of up to 15 years in prison? Where is the protection of the minor here, if also in this situation the acts constitute rape of a minor?

c) Sexual assault committed on a minor - This crime is similar to the crime of rape on a minor provided by in art. 2181 with the difference that the material element of the objective side is represented by acts of a sexual nature other than those provided by in art. 2181 Criminal Code.

For this crime as well, depending on the age of the minor, the cases that apply to the commission of such acts have been established, specifying that, just like in the case of rape provided in the art. 2181 para. 1 and 11, the acts are not sanctioned if the age difference between the perpetrator and the victim does not exceed 5 years, unlike the previous age threshold that was set at the age difference of up to 3 years (until January 1st 2024), and it represented sexual assault committed against a minor. Increasing the age difference to 5 years makes the same act no longer punishable, which leads to a de facto weakening of the protection of the minor and not to an additional protection as mentioned in the statement of reasons for the law no. 217/2023.

d) Determining or facilitating the maintenance of sexual or sexual acts between minors. The crime was introduced by law no. 217/2023, taking elements in paragraph 1 from the crime of rape provided by art. 2181 para. 1-3 Criminal Code in the sense that an adult determines the maintenance of a sexual relationship between minors who have not reached the age of 16, and on paragraph 2 it is the adult who determines the commission of any act of a sexual nature other than those mentioned above. in paragraph 1 by minors who have not reached the age of 16, punishing themselves with the provisions of art. 219 para. 1 – 3 of the Criminal Code, in both situations the penalty is reduced by one third.

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As can be seen only from the reading of the two paragraphs of this article, there is no "facilitation" as a way of achieving the material element and where the legislator refers only to the fact that we have an action to determine the major to a minor for the maintenance of sexual relations with another minor.

By determining the maintenance of sexual acts or acts of a sexual nature, it is understood that an adult convinces a minor who has not reached the age of 16 to maintain one of the sexual acts that fall within the content of the crime of rape committed against a minor as well as the commission of any act of a sexual nature, other than those provided in paragraph 1 of art. 2192 Criminal Code.

It exists in both situations of determining that the minor endures or performs such an act, the legislator succeeded in not making any difference between maintaining the sexual act, on the one hand, and enduring or performing it, but it is essential that the determination be made by an adult, and the maintenance of sexual intercourse or the bearing or performance of it be made by minors under 16 years of age.

In the judicial practice, there will be situations in which this crime enters into competition with, for example, the previous version of art. 2192 paragraph 2 Criminal Code, when the determination of the minor under the age of 14 was to endure or perform an act of a sexual nature regardless of whether the act was performed with a minor or an adult, situations in which there is the possibility of not being punished considering that under the old provisions there were legal penalties for this. In both paragraphs of art. 2192 regarding the determination of the maintenance of sexual acts or of a sexual nature must be done voluntarily and not by coercion.

We believe that the mere determination of minors to perform sexual acts involving penetration or to perform acts of a sexual nature constitutes a crime. If the determination is made through acts of coercion, we are either in the situation of inciting the crime of rape provided by art. 2181 paragraph (2) Criminal Code or instigation to the crime of sexual assault committed against a minor provided by article 2191 paragraph (12) Criminal Code.

Also, the methods of punishment by reducing by one third, as they are provided in art. 2181 paragraph 1 – 3 and art. 2191 paragraph 1-3 become inapplicable since the crime under art. 2192 refers only to sexual or sexual acts committed only between minors.

e) Sexual corruption of minors is when the sexual act of any nature is committed by an adult in the presence of a minor, when a minor is determined by an adult to assist in the commission of acts of an exhibitionist nature or at shows in which acts are committed sexual of any nature, including materials of a pornographic nature or to incite a minor by means of remote transmission to commit any act of a sexual nature on him or with a person. It should be noted that the crime of sexual corruption of minors occurs only if a minor has not reached

the age of 16 in both situations presented, and at the incitement of a minor including when the act of a sexual nature is not committed.

If for the other types of crimes regarding minors we criticized the age difference between the subjects of the crime, in the case of the crime of sexual corruption of minors we can have hilarious situations where, for example, an adult aged 20 years and 3 months will be able to support a sexual relationship with a minor of 15 years and 3 months, since the age difference between the two does not exceed 5 years and will not constitute rape with a minor, but if this is done in the presence of a minors under 15 years of age, the adult will be liable for the sexual corruption of minors, provided by art. 221 para. (3) Criminal Code.

Things are simple because it does not sanction the adult who maintains a sexual act with a minor, but it sanctions him because he was "seen" by another minor of the same age having a sexual act. Or, looking at it from the perspective of the minor: it is permissible to have a sexual act, but it is forbidden to witness a sexual act.” (*See in this sense, Professor PhD Valerian Cioclei*).

f) Enlisting minors for sexual purposes. It is a new crime as the Romanian legislation adopted such a crime to be consistent with the Council of Europe Convention for the protection of children against sexual exploitation and sexual abuse (ratified by Romania through law no. 252/2010).

In this crime, the active subject is an adult (regardless of gender) who recruits minors (also regardless of gender) who have not reached the age of 16, either for the purpose of committing a sexual act of any kind, or for the purpose of committing the crime of child pornography provided by art. 374 of the Criminal Code.

This can be done even when the proposal was made by means of remote transmission. For this type of crime, the legislator was clearer in the sense that there must be only the recruitment of minors for sexual purposes which consists of an act of proposal by the perpetrator, who has not reached the age of 16, to meet for the purpose of committing a sexual act of any nature or those provided for the crime of child pornography.

This crime is consummated the moment the proposal to meet for sexual purposes was made, and it reached the recipient minor. If the raping also leads to sexual intercourse, oral or anal intercourse or another act of vaginal penetration, we may find ourselves in the situation of a criminal contest and the rape of a minor.

CONCLUSION

Amendments to the Criminal Code made in 2023 and 2024 mainly targeted crimes against sexual freedom and integrity committed against minors, with the aim of stiffening penalties and clarifying certain legislative aspects. However, the frequency and nature of these changes raises questions about the coherence of criminal policy in this area.

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In 2023, by Law no. 217/2023, significant changes were introduced, such as:

- *Setting the age of consent at 16, considering any sexual act with a minor under this age as rape, even with their consent.*
- *Eliminating the possibility of applying the criminal fine for the crime of using child prostitution and increasing the prison sentence from 6 months to 3 years.*
- *Introduction of aggravating circumstances for the crime of rape, such as the commission of the act by a family member or by a person using the authority of his position.*

Later, in December 2023, Law no. 424/2023 made additional changes, correcting and completing the previous provisions under certain aspects. For example, a new paragraph was introduced that sanctions sexual relations between minors under the age of 14, according to the provisions of art. 114 of the Criminal Code.

In 2024, Law no. 202/2024 continued the series of amendments, targeting in particular the crimes of human trafficking and slavery, by increasing the punishment limits and prohibiting the suspension of the execution of the sentence under supervision for these crimes.

Although these changes reflect an ongoing concern for the protection of minors and the fight against sex crimes, the frequency and rapid succession of changes can create confusion and difficulties in uniform enforcement of the law. To ensure a coherent criminal policy, it is essential that legislative changes are well-grounded, follow a clear strategy and are effectively communicated to all actors involved in the judicial system.

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