



COMPARATIVE TREATMENT REGARDING THE LEGAL CLASSIFICATION OF ACTS THAT AFFECT THE SEXUAL LIFE OF MINORS

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Abstract

This article aims to carry out an analysis of the different methods of regulating offences against sexual self-determination, especially in relation to minors.

From this comparative view will result the different views on this aspect of the European legislators in Germany and France, for example regarding the value of the consent of a minor victim of such crimes.

This approach can be useful for a better understanding of the optimal way to legislatively counter this criminal phenomenon, namely what changes could be made in the national legislation in this regard. Also, this analysis can even provide certain criteria to be considered by the magistrates when they establish the gravity of the offence.

At present, this theme is of great interest, given that some opinions claim that the current legislation in Romania should be modified, for example because according to the current situation, a minor under 14 years old can consent to a sexual act.

Key words: *crime, sexual self-determination, minor, legislation;*

INTRODUCTION

In this article, we will compare the regulation of some of the crimes regarding sexual life in the legislation of Germany and France with the domestic legislation, and we will analyze the changes that have occurred as a result of the implementation of various mandatory provisions at the European level assumed by the member states of the EU and the Council of Europe through directives or conventions.

Our attention will be focused mainly on the acts that in Romanian legislation are incriminated as rape, sexual assault, sexual act with a minor and sexual corruption. We will also present the differences that occur in the legislations of Germany and France, regarding the same offences.

Thus, we will analyze the offences against self-determination committed in the context of the absence of a valid consent of the victim, as well as sexual acts of any nature committed in relation to a minor victim, regardless of their consent.

Sexual acts refer to those involving penetration, regardless of their form, as well as to other types of sexual acts (referred to as acts of a sexual nature in domestic law). There are also sexual acts that do not involve physical contact with the victim, but nevertheless fall within the scope of criminal protection because of their negative effect on the right of sexual self-determination of minor victims. Such acts are, for example, sexual intercourse performed in the presence of minors, or presenting pornographic materials to minors.

Important legislative changes have taken place in recent years in the European states, including provisions of substantial law regarding offences against self-determination, with the implementation of a more favorable legislative framework for victims. For example, the cases in which the victim could not object for various reasons to the sexual act are classified as rape.

At least some of these changes occurred as a result of the implementation by the member states of the EU and the Council of Europe of acts that aim to ensure better protection of vulnerable people against abuse, aggression of any kind and discrimination.

Such act is the Convention on preventing and combating violence against women and domestic violence, adopted in Istanbul on May 11, 2011 (*signed by Romania on June 27, 2014 and ratified by Law no. 30/2016*), by which the member states agreed to sanction certain behaviors explicitly stated (provided in art. 36), and regardless of the nature of the relationship between the victim and the aggressor. Also, the member states agrees that the elements mentioned in art. 46 represent aggravating circumstances of the incriminated behaviors.

Another important act is the 2011/93/EU Directive on combating sexual abuse of children, sexual exploitation of children and child pornography, signed by EU member states. Through this document, states agree to criminalize certain behaviors and also impose minimum prison sentences, depending on the act and the circumstances shown in the text, including acts of sexual nature that do not involve physical contact with the minor (art. 3). States have also committed to criminalize the enticement of children for sexual purposes (art. 6), that is, the proposal to commit certain sexual acts by means of information and communication technology. Also, art. 9 provides for a series of circumstances that can be considered aggravating circumstances by the member states.

As an example regarding some legislative changes on this topic that have occurred in European legislation, in July 2019 the Greek incrimination of the rape has changed in such a way that the determining factor would be the lack of the victim's consent and not the traces of violence (*The report on the practice of the courts and the prosecutor's offices attached to them in the investigation and*

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resolution of cases regarding sexual offenses with minor victims, made by the Judicial Inspection and approved by the C.S.M. on 27.07.2021, page 28).

Also, in 2018 and 2020, respectively, the legislators in Sweden and Denmark established that there is a lack of consent when the victim “freezes” or is taken by surprise and did not have time to react. Thus, the new legislation led to a significant increase in convictions and prosecution in cases that previously were not considered rape. We will observe the same change in German legislation.

Next, we will briefly present the German and French legal provisions on offenses against sexual self-determination, with the accent on the legislative differences between them and the domestic legislation.

1. GERMAN CRIMINAL LEGISLATION

Offences against sexual self-determination

German regulation divides the criminal acts into serious and less serious criminal offenses (“Verbrechen und Vergehen”). The latter are illegal acts punishable by imprisonment for less than one year or a fine, while serious criminal offenses are illegal acts punishable by a minimum of one year in prison or more.

German legislation regulates in Division 13 - art. 174-184i Criminal Code offenses against sexual self-determination.

Art. 174 regulates sexual abuse of persons in one’s charge, the injured person being either a minor under 16 or under 18 years old. At art. 174a-174c Criminal Code we can find the incrimination of sexual abuse of prisoners, persons detained by official order, or sick or vulnerable institutionalized persons. In these cases, the victim, although not a minor, is in a state of vulnerability or dependence in relation to the perpetrator, i.e., is detained, prosecuted, ill, hospitalized in a center, or is in a counseling, treatment or care relationship with the perpetrator.

In the domestic legislation there is an aggravating circumstance when the act is committed against a victim that was in the care, protection, education, guard or treatment of the perpetrator. Also, national legislation has a general provision that states that it is an aggravating circumstance if the act is committed while taking advantage of the obvious vulnerability of the victim.

In this regard, we emphasize that this circumstance will also be applicable if there is an obvious disproportion of force, which makes practically impossible any attempt by the victim to defend oneself. Also, this situation must be external to the author’s activity, i.e., not due to his actions, in which case they can represent preparatory or executional acts of the committed crime (*Mihai Udriou, Criminal Law. General part, C.H. Beck publishing house, 2016, page 238*).

At art. 176 of the German Criminal Code deals with sexual abuse (“sexueller Misbrauch”), which implies sexual acts on children under the age of

14, offences that fall under the scope of sexual corruption in Romanian legislation.

Unlike the Romanian Criminal code, the German code uses the notion of sexual acts in a broader sense, which also includes the notion of acts of a sexual nature from Romanian legislation. Also, Germany, unlike Romania, transposed into their legislation the above mentioned 2011/93/EU Directive, by which even the attempt to meet with a minor with the aid of information technology means, which the scope of committing acts of a sexual nature, represents a sexual offence.

In addition, it represents a crime to allow the child to commit sexual acts on the perpetrator, to determine the child to perform such acts on a third party or to allow a third party to perform such acts on the child.

Next, we will talk about some recent legislative changes, which can be found in art. 176 lit. a-e German Criminal Code (<https://www.gesetze-im-internet.de>).

Thus, art. 176a refers to the sexual abuse of children without contact with the child (for example, sexual acts in the presence of the child; it usually falls under sexual corruption in domestic legislation), art. 176b criminalizes the determination of the child to perform sexual acts, and art. 176c, entitled aggravated sexual abuse of children, is applicable for example when sexual intercourse or other similar sexual acts/acts involving penetration of the body are involved (the description of the crime is similar to that of sexual act with a minor in Romania).

In all these cases, the age of the minor must be under 14 years. By comparison, in Romania the offence of sexual intercourse with a minor refers to a victim younger than 16 years old, and the act is more serious if the minor is under 14 years old.

In German law, the act is more serious if: the author has committed similar acts in the last 5 years; if the act was committed by several people together; if the victim's health or physical or mental development was seriously endangered; if it had the purpose of producing pornographic materials; if the victim was in danger of death, or serious physical abuse was committed against the child.

Art. 177 deals with sexual assault, sexual coercion and rape, although the terms are not expressly defined by the article. Rape is present when the perpetrator, against a person's discernible will, performs sexual acts on that person or has that person perform sexual acts on them, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person. Other forms are present when the offender exploits the fact that the person is not able to form or express a contrary will, or that the person is significantly impaired in respect of the ability to form or express a will due to said person's physical or mental condition (unless the offender has obtained the consent of that person), exploits an element of surprise, exploits a situation in which the victim is threatened with serious harm in case of offering resistance or the offender has

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coerced the person to perform or acquiesce to the sexual acts by threatening serious harm.

Thus, in German legislation, just like in Romania, it must be assessed on a case-by-case basis, even when the child is under 14 years of age, whether the injured person was capable of actually consenting to a sexual act. If the victim could consent, the offender would be guilty only for sexual abuse (sexual act with a minor in Romanian law). Otherwise, he would be convicted for a joinder of offences – aggravated sexual abuse and rape.

Within this legal text we will find both the description of rape and that of sexual aggression from Romanian legislation, since German legislation does not criminalize sexual acts involving penetration and other sexual acts through distinct offences. Nevertheless, in German law the act is more serious if it involves in form of penetration.

Other circumstances that aggravate the crime: the perpetrator uses force, threatens the victim, carries a weapon/other dangerous object, uses this object, or takes advantage of a situation in which the victim is defenseless and at the mercy of the offender's influence.

Art. 182 German Criminal Code deals with sexual abuse of young people, when the perpetrator performs sexual acts/allows such acts to be performed on the victim or causes her to perform sexual acts on a third party/allows a third party to perform sexual acts on the victim, when the victim is a person under the age of 18 years old, and if the offender takes advantage of a predicament. Also, this crime is committed when a major author performs sexual acts for a consideration with a person under 18 years of age, or when the perpetrator is over 21 years of age and the victim is under 16 years old and the author performs sexual acts with her, have that person perform sexual acts on oneself or causes the victim to perform such acts with a third party, thereby exploiting the victim's lack of capacity for sexual self-determination.

The difference between sexual assault/rape and this hypothesis is the following: if the victim is totally incapable of expressing consent, art. 177 is applicable, and if the victim is aware and consents to the acts, but there is a difference in maturity and an imbalance of powers between the two people involved in the sexual act, then art. 182 is applicable.

Thus, when the victim is a child under 14 years of age, if sexual acts are committed against them (or are allowed to be committed by them/are determined to commit sexual acts), the offender commits a sexual abuse, or as the case may be, sexual abuse of young people, if for example the victim consents, but the offender exploits the victim's lack of capacity for sexual self-determination. But, for example, if a minor under 14 refuses the sexual act, or it is found that the victim was not able to form a valid consent - for example, she was not conscious -

, a joinder of offences will be present, specifically sexual abuse in conjunction with sexual aggression/rape.

So, if for example, the perpetrator performs sexual acts, including acts that involve the penetration of the body in any form, with a child under the age of 14, a joinder of offences will be applicable: rape and aggravated sexual abuse of children. Of course, the requirements of art. 177 must be fulfilled in one of the acts, for example if the minor expresses his refusal.

The joinder of offences is justified by the fact that the direction of protection of the two standards is different:

- Protection of children's undisturbed sexual development on the one hand;
- Protection of sexual self-determination on the other hand.

Also, in Germany, unlike Romania, in the case of a joinder of offenses, the aggregate sentence in this situation will represent the sentence for the most serious offence.

As a rule, the prosecution is initiated *ex officio*.

Art. 184h Criminal code states that 'sexual acts' are only those which are of some relevance to the protected legal interest in question. Thus, we observe a large margin of appreciation given to the judge in this matter. Regarding this aspect, the Federal Court of Justice ruled that "the term sexual act can be determined using only objective criteria if the activity, i.e., measured only by the external appearance, has a clear sexual reference. Externally ambivalent acts can be classified as sexual acts if they are not necessarily sexual when viewed separately, but are sexual from the point of view of an objective observer who knows all the circumstances of the individual case, i.e. also the purpose of the perpetrator, recognizing such sexual intent" (*the decision of April 7, 2020 - 3 StR 44/20, StV 2021, 363 no. 13*).

2. FRENCH CRIMINAL LEGISLATION

Offences against sexual self-determination

In the French Penal code, we also find a series of particularities.

First of all, criminal offences are categorized as according to their seriousness as felonies, misdemeanours or petty offences – "crimes, délits et contraventions" (https://www.equalrightstrust.org/ertdocument/french_penal_code_33.pdf).

In French legislation, sexual assaults are criminalized in section 3, art 222-22 to art 222-33. Unlike the national legislation, these also include rape.

Art. 222-22 defines sexual aggression, stating that "sexual aggression is any sexual assault committed with violence, constraint, threat or surprise."

It is specified that moral coercion may result from the age difference between a minor victim and the perpetrator or from the legal or *de facto* authority he exercises over the victim.

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Another particularity is that in French legislation there is no minimum and maximum punishment for each crime, but a fixed punishment. Thus, the margin of appreciation of the judge is minimal in this respect.

For example, in the case of rape in the basic form, the punishment is 15 years. For other crimes against sexual self-determination, the prison sentence is accompanied by a fixed penalty with a fine, for example 75,000 euros or 100,000 euros.

The legal definition for rape is very similar to that in national legislation. However, in the French penal code, the alternative version of committing the act while taking advantage of the obvious vulnerability of the victim is not found in the definition of the crime. This hypothesis is regulated as a separate crime – “fraudulent abuse of the state of ignorance or weakness, which states that fraudulently abusing the ignorance or state of weakness of a minor, or of a person whose particular vulnerability, due to age, sickness, infirmity, to a physical or psychological disability or to pregnancy, is apparent or known to the offender, or abusing a person in a state of physical or psychological dependency resulting from serious or repeated pressure or from techniques used to affect his judgement, in order to induce the minor or other person to act or abstain from acting in any way seriously harmful to him, is punished by three years' imprisonment and a fine of €375,000” (www.codexpenal.just.ro – Penal Codes of the States of the European Union).

French legislation imposes harder punishments if the sexual assault or rape acts are committed in certain circumstances, of which we will mention only a few that are new for Romanian legislation: when the offense is committed by a person who is clearly intoxicated or under the obvious influence of narcotics; the rape victim is a person who practices prostitution; if the victim was put in touch with the author through an electronic communications network; because of the sexual orientation of the victim.

Art. 222-27 deals with sexual assaults, other than rape. This legislative model seems to have been a source of inspiration for the national legislation, where these acts are called acts of a sexual nature, other than the sexual acts that fall under the scope of rape.

As a rule, the offenses are more serious if they concern a minor under the age of 15.

As for consensual sexual acts with minors, they are in a separate section. Thus, in Section 5 Chapter VII of the French Penal Code we find the acts of endangerment of minors. Here, a wide range of acts are criminalized here, including the direct provocation of a minor to regular excessive consumption of alcoholic beverages, or to commit crimes. In this section, sexual acts or preparatory acts with a child under the age of 15 are criminalized.

Article 227-22 describes the offence of “assisting or attempting to assist in the corruption of a minor. The penalty is harder where the minor is under fifteen years of age, where the minor was put in contact with the offender by the use, for the dissemination of messages to an unrestricted public, of a telecommunications network, or where the offence is committed inside a learning or educational institution or, when the pupils are entering or leaving, outside such an institution.”

Also, article 227-25 criminalizes “the commission without violence, constraint, threat or surprise of a sexual offence by an adult on the person of a minor under fifteen years of age.”

The act is more severely sanctioned if it is committed while abusing the authority conferred by one’s position, if it is committed by more than one person, if it is committed by electronic means, or by a person under the influence of alcohol or drugs. Finally, we note that the sexual act with a minor under 18 years old is criminalized, in the hypothesis where the author abuses one’s authority over the victim - a situation similar to the one in the national legislation.

We also note that in the case of the French legal framework there are important similarities with the national legislation regarding the consent of minors to perform a sexual act, in the sense that the judge analyzes on a case-by-case basis whether the minor who is under 15 years old/under 18 years old has given a valid consent, in order to establish the correct applicable text - rape or sexual act with a minor.

CONCLUSIONS

Following this brief analysis, we can conclude that between the national legislation and the two analyzed legislations there are some differences, but also many similarities, especially when it comes to criminalization, having in mind that the general principles are the same.

For example, sexual abuse of children in Germany is sanctioned if the victim is under 14 years old, in France if the victim is under 15 years old, and in Romania, in the basic form, sexual intercourse with a minor is sanctioned if the child is under 16 years old, respectively under 14 years of age in an aggravated form, and sexual corruption is sanctioned in the case of minors under 14 years of age. As shown, in order to analyze whether the act constitutes rape, a contextual case-by-case analysis is necessary in all three legislations, in order to conclude whether or not there is a valid consent to the sexual act, even in the case of minor victims, passive subjects of the sexual act with a minor offense.

In all three legislations, there is a distinction between sexual acts involving penetration and sexual acts of another nature, the latter usually being assessed as such on a case-by-case basis, with the aid of jurisprudence. The penalty is always more severe when the acts involve any kind of penetration.

There are many identical or similar aggravating circumstantial elements to the three legislations, for example when the offender took advantage of the

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special relationship he had with the victim, a relationship that helped him commit the crime (Tudorel Toader, Romanian Criminal Law. Special Part. Vol. I, Universul Juridic publishing house, Bucharest, 2019, p. 167). Also, there are some differences when it comes to the aggravating circumstantial elements, as it was shown through the individual analysis of the three legal systems. Lex ferenda, part of the aggravating circumstances found especially in the German legislation should also be introduced into the national legislation, as a result of the commitments made by the Romanian state through the signing of the EU directive and the Council of Europe convention, as mentioned in the introduction.

A general note on the German regulatory system: this legislation presents many particularities and nuances and has a very layered structure, in opposition with the French legislation, which presents a more general and laconic framework. In my opinion, the Romanian legislation is more similar with the German legislation in this matter, after the changes that occurred in recent years, which led to a greater schematization of the legal framework.

On the other hand, the German sanctioning system offers a lot of discretion to the judge, unlike the French legislation, which is very strict, without maximum and minimum limits. From this point of view, Romanian legislation is in an intermediate position, with minimum and maximum legal limits for each crime, but smaller in amplitude compared to German ones.

As a personal opinion, I consider that the national legal framework regarding offences against sexual self-determination is well balanced and structured, even if some acts described in the European acts specified above should be criminalized. I do not consider that we need to regulate legal presumptions regarding the existence of an invalid consent in the case of victims under a certain age, as this would not lead to a more effective act of justice and to the discovery of the truth in an easier manner.

The difficulties in solving accusations of committing crimes regarding sexual life will always exist, and in order to counter this phenomenon and ensure fair solutions, it is necessary, on the one hand, for magistrates to correctly analyze the evidence on a case-by-case basis, without prejudices, to know and apply the minors' hearing procedure, when this is required, as well as the legal sanctioning provisions. It is also paramount to ensure the necessary logistics, namely spaces specifically intended for the discussions with minors, in order to create the proper setting for a reliable testimony. Moreover, it is mandatory for the state to invest in the specialization of professionals who come into contact with minor victims of crimes, namely social workers, probation counselors, psychologists, police officers and magistrates, as working with minors involves certain specific skills, which can be obtained only through specific training.

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