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The New Crime of Rape of a Minor as an Atypical Means of Protecting Minors Through Criminal Policy Instruments

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Abstract: The Romanian legislator has chosen to question the ability of minors to give valid consent to sexual intercourse, regardless of their age, although this legislative option is highly questionable in relation to reality, to minors' access to information about sex (at school, on the internet, etc.), and to the non-punishment clause if the age difference between the minor and the active subject of the crime does not exceed five years. The article also criticizes the legislator's choice in relation to the legal content and meaning of the concept of "discernment" in the sense of civil law, as well as the scientific process of assessing this discernment. Although this issue has long been a source of contention between legislators and practitioners, it remains the element that differentiates between the various forms of this crime, which are difficult to distinguish in practice due to the variety of situations.

Keywords: Rape of a Minor, Discernment, Consent

Introduction

Recent changes to crimes against sexual freedom, in particular the crimes of rape and rape of a minor, sexual assault and sexual assault of a minor, but also that of determining or facilitating sexual acts or acts of a sexual nature between minors (which is a new criminal offense) have created a polarization, a dualism between adults and minors, by separately criminalizing these acts against minors with their own *nomen juris*, but also a division of the acts in relation to the minor's ability to express valid consent. Looking at the legislative changes as a whole, we can say that this chapter lacks the necessary coherence and substance, even though the explanatory memoranda of the amending laws affirmed the need to protect minors.

Despite the legislator's assertions that this need for regulatory change stems from EU legislation (Directive 2011/92/EU, 2011), we are obliged to note that the deadline for implementation expired long ago (December 18, 2013), but that the directive has already been transposed by the Criminal Code in force and all previous amendments to the two laws. The only problems in judicial practice arose from cases where the victim was a minor and the coercion was unclear, in the sense that it was either not explicit or not proven, as well as the issue of the existence of a fraud of consent of the minor.

The result of the amendments made by Law No. 217/2023 and Law No. 424/2023 is an excess of regulation, lacking in coherence, which raises "serious problems of legal logic, consistency, drafting, and proportionality of sanctions in relation to the offense provided for by criminal law" (Rotaru, 2023), in addition to multiple repeals and new criminalizations, not to mention that a law amending the Criminal Code also amended another law (the audiovisual law), which is "strange" (Cioclei, 2024). We would like to point out that the explanatory reasoning erroneously blames the courts/prosecutors: "the practice of the judicial authorities has revealed numerous shortcomings in the interpretation and assessment of the validity of the consent of minors.... through the media and NGOs, the judicial authorities have placed the responsibility for the abuse to which the child was subjected on the child's shoulders, based on criteria that are rather subjective than legal", because the legislator has lost sight of the diversity of objective, concrete, factual realities, in which it is often difficult to detect a defect

in consent, especially in cases where there is no physical coercion, but only moral coercion, which is insufficiently defined. The legislator seriously confuses sexual abuse/rape with human trafficking. Absolutizing any statement made by a minor (even if they may appear to be a victim of sexual abuse) exceeds any rule and principle of criminal law and criminal procedure, including EU legislation aimed at protecting minors. Of course, increased protection of minors is required with regard to all types of crimes, especially those against a person's sexual freedom, but this cannot lead to the absolutization of the minor's statements, especially since practice has shown, in numerous cases, false accusations made by minors against persons, usually parents, including for sexual abuse, even though the alleged acts did not exist. For example, a 17-year-old minor accused her father of rape, although the act never actually took place, it was only a false accusation, because her father sent her to school (which she later abandoned after entering into a relationship with an adult man with a criminal record, who encouraged her to steal money and goods from the house to sell) and forbade her relationship with that man. At the request of her boyfriend, with whom she had sexual relations, she filed a criminal complaint against her father, which was later proven to be false, just to escape her father's pressure, with the judicial authority giving due importance to the specific vulnerability of young people and specific psychological elements. Therefore, those subjective criteria, referred to by the legislator in the explanatory memorandum, are divorced from reality, the changes being rather populist and "whacky", as stated by a distinguished scholar (Cioclei, 2023).

Concept and definition of the crime of rape of a minor

The crime was introduced by Law No. 217/2023 and amended even before it came into force by another law, being a new regulation, which received its own *nomen juris*, which is nothing more than an aggravated variant of the crime of rape[i].

Consequently, sexual intercourse with a minor—that is, an act consented to by the minor—was transformed into rape, given the specific vulnerability of minors, with the argument that the regulation is required by the Lanzarotte Convention, although legal scholars have criticized the new regulation (Kadar, 2024, pp. 115-137; Kadar, 2025, p. 175).

If the legislator has chosen to challenge the capacity of minors to give valid consent to sexual intercourse, this constitutes a double standard, as the same legislator (recent debate on a proposal by a member of parliament, on the grounds that the number of crimes committed by minors has increased: https://www.instagram.com/p/DQ40tGeDbfO/) considering that the age of criminal responsibility should be lowered from 14 to 13, obviously considering that at 13, minors are sufficiently intellectually developed, have discernment, and can be held criminally responsible (Danileț, 2025). In these circumstances, we ask the rhetorical question: if a 13-year-old minor has discernment and can be held criminally responsible, why can't that same minor give valid consent to sexual intercourse?

Of course, the issue of consent is key to resolving this problem in all states, and there are differences which, although they may not seem significant at first glance, nevertheless mean that each year of a person's development is important, not only in terms of physical development, but also intellectual and moral development.

This concept does not conflict with that of sexual integrity, especially with regard to minors, who do indeed require special protection (Paraschiv, 2019, pp. 104-105). The problem, in my opinion, is understanding and adequately explaining the nature of these crimes, because it seems at least illogical to claim that a minor just under the age of 18 could not have sufficient discernment to express valid consent to sexual intercourse. In addition, today's generations are developing much faster than previous generations, and exponential technological development probably plays an important role.

Legal object and subjects of the offense

Obviously, the right protected by the special legal object involves the distinction between acts involving consensual sexual acts provided for in Article 218/1(1), (1^1), and (5^1) of the Criminal Code and forms involving coercion of the minor. Thus, the forms provided for in para. (1), (1^1) and (5^1) represent a takeover of the variants of the crime of sexual intercourse with a minor provided for in the former Art. 220 para. (1), (2) and (3) of the Criminal Code, even if the minor consents to the sexual act, so that their legal object is the minor's right to sexual freedom (Cioclei, 2017, 201; Bogdan & Șerban, 2020, 340). It is thus considered that the minor cannot give valid consent, as this would be vitiated by their psychological immaturity (Cioclei, 2017, p. 201).

In the case of the aggravated forms provided for in paragraphs (2) and (3) of the Criminal Code, the legal object is identical to that of the crime of rape, namely the sexual freedom of the person, and the secondary legal object is social relations relating to the health, bodily integrity, and life of the person (Cioclei, 2017, p. 188). The active subject of the crime is general, i.e., any natural person, adult or minor (in the case of mitigated forms). However, in the case of the form provided for in Article 218/1 paragraphs (1) and (^{1}1) of the Criminal Code, which presuppose the consent of the minor, the provisions of Article 218/1 paragraphs (7) of the Criminal Code require a circumstantial determination of the active subject related to age, in the sense that the age difference between the active and passive subjects must be greater than 5 years, because otherwise the act is not punishable. Although the doctrine (Bogdan & Șerban, 2020, p. 308) says that the active subject could be the legal person, we do not share this idea, because although the legal person might commit acts of facilitation, these are limited to complicity in the crime of rape. We support this statement by referring to the specificity of the material element, for example, a sexual act of any nature. However, a legal entity cannot perform a sexual act, regardless of its nature, even if the perpetrator acts on behalf of the legal entity, as long as the sexual act is performed by a natural person, so that the legal entity will be liable for incitement or complicity in rape, as the case may be.

Criminal participation is only possible in the form of incitement and complicity. Co-authorship is not possible, in our opinion, sharing the opinion expressed in doctrine (Cioclei, 2020, p. 192; Rotaru et al., 2025, p. 145; contrary opinion, Bogdan & Șerban, 2020, p. 324; Streteanu & Nițu, 2014, pp. 205-206; Bodea & Bodea, 2018, pp. 144-145; Kadar, 2014, p. 162: the author states, with justified arguments, that "even under the old regulations, co-perpetration of the crime of rape was possible in the event that one of the defendants carried out the act of coercion on the victim, and the other defendant had sexual intercourse with the victim, given that in the case of complex crimes, any person who performs any of the actions or omissions that make up the complex crime is considered a co-perpetrator", the argument being relevant) that although the current regulatory framework provides for the possibility of a person being subjected to different sexual acts simultaneously (vaginal, anal, and oral), we consider that in this case each participant commits a crime of rape as a perpetrator, with the application of the relevant aggravating circumstances. Co-perpetration could be possible in the case where two perpetrators commit the same sexual act in the same way simultaneously (for example, simultaneous acts of vaginal penetration by two perpetrators, which would be extremely difficult to achieve). The passive subject can only be a minor, regardless of age. However, the age of the minor (e.g., under 14 or 16 years of age) will lead to the application of aggravated forms.

Objective aspect versus consent/discernment:

The incrimination is almost identical to that of rape, namely sexual intercourse, oral or anal sex with a person, committed through coercion, rendering the person unable to defend themselves or express their will, or taking advantage of this state, with a few differences.

In the hypothesis criminalized by paragraphs 1 and 1^1, any act specific to rape but performed without coercion, involving the "consent" of the minor, is punishable. Due to age,

the law has established that this consent is not valid, given the young age of the minor: in the case of rape committed by an adult against a minor, the threshold is set at 16 years of age, and in the case of acts committed between minors, the threshold is set at 14 years of age.

In the case of acts committed by minors, the law refers to Article 114 of the Criminal Code (which regulates the consequences of criminal liability of minors) for the penalty applied. In these cases, it is not classic rape, because it is not committed by coercion, the consent of the injured person is not affected, and the legislator only takes into account the age of the minor. The 16-year-old age limit is controversial, as the legislator, showing inconsistency, proposes to lower the age at which minors can be held criminally liable. The current regulation is also questionable, as a 14-year-old minor is criminally liable but cannot give valid consent, which is at least a contradiction in terms.

With regard to the consent of minors, the legislator considers that it is not valid because minors do not have sufficient discernment to understand the consequences of sexual intercourse or acts. In our opinion, in analyzing the legislator's option, we consider it useful as a starting point for reasoning to examine the meaning of the concepts of discernment and consent under civil law, without attempting to delve deeper into these concepts specific to civil law, but only from the perspective of their relevance in criminal law. Thus, Article 1205 of the Civil Code provides that a person's lack of discernment is a condition that renders them, even temporarily, incapable of realizing the consequences of their actions. Article 1206 of the Civil Code provides that consent is vitiated when it is given in error, obtained by fraud or violence, or in the case of injury.

Consent is no longer free and expressed in full knowledge of the facts, i.e., it is vitiated by fraud when the party was in error caused by the fraudulent actions of the other party or when the latter fraudulently failed to inform the contractor of circumstances that it was required to disclose (Art. 1214(1) of the Civil Code).

It should be noted that defects of consent under civil law are limited to rape as a typical act whereby sexual intercourse is performed without the consent of the person: coercion (physical or moral) is equivalent to violence; making it impossible to defend oneself or to express one's will within the meaning of criminal law is equivalent to error or fraud under civil law. Therefore, it is obvious that in the event that consent is affected by one of these vices that have the effect of annulment within the meaning of criminal law, any vice (but not just any) of consent will lead to the incidence of the crime of rape.

There can be no question that a young child can give valid consent, as it is obvious that a child does not have an understanding of a sexual relationship or act, and any agreement cannot be considered valid, which is also a constant in judicial practice.

On the other hand, the assessment of consent, which involves a scientific process, requires the analysis of certain attributes of the minor that relate not only to their intelligence quotient, but also to their degree of maturity, education, and actual life experience, i.e., the existence of a certain level of discernment on the part of the minor. This has been the "bone of contention" between legislators and practitioners, but it is the element that differentiates between the various forms of this offense, which are difficult to distinguish in practice due to the variety of situations. For example, French legislation has established a threshold of 15 years below which consent and discernment are presumed to be lacking (the author not only makes a well-founded criticism, but also puts forward arguments of great scientific value, which we share, in the sense that minors can also have discernment, at least in terms of expressing valid consent to sexual intercourse or acts – Cioclei, 2023).

Thus, paragraph 1 criminalizes acts that previously fell within the scope of the offense of sexual intercourse with a minor. Although it is based on the idea that sexual intercourse or sexual relations between an adult and a minor under the age of 16, regardless of whether or not the minor consents, constitutes rape of a minor, a distinction is nevertheless made between situations where these acts are consensual (paragraph 1) and situations where they are carried

out through coercion, rendering the minor unable to defend themselves or express their will, or by taking advantage of this state - paragraph 2, which punishes classic rape.

In practice, there is sexual intercourse/sexual act consented to by the minor or "consensual" rape:

- in the case of paragraph 1 - the act committed by an adult on a minor under the age of 16;
- in the case of paragraph 1^1 - the act committed by a minor between the ages of 14 and 18 with a minor under the age of 14;
- in the case of paragraph 7 – the act committed by an adult or minor, in its basic form, but the age difference between the active and passive subjects does not exceed 5 years (grounds for non-punishment);
- common aggravated forms – paragraphs 4 and 5^1 (committed by an adult against a minor under the age of 16);
- paragraph 5^2 (committed by an adult on a minor between 16 and 18 years of age), and "classic" rape, i.e., non-consensual:
- paragraph 2 – adult on a minor under 18 years of age;
- paragraph 3 – minor on a minor under 18 years of age;
- common aggravated forms – paragraphs 2, 3, and 6.

For consistency and better understanding, we will analyze the crime based on the existence of the minor's consent, because the structure of the crime is completely inconsistent and illogical, in the sense that it starts from a totally erroneous premise – the existence of consent that is not valid due to the age of the minor and, in contrast, the total lack of consent, so that two different acts (classic rape and rape with consent) are an integral part of the same normative figure of rape of a minor. No one disputes that a certain age of the minor implies a lack of consent, even if it formally existed, because logic and common sense dictate this conclusion: no one can consider that a minor aged 13, for example, can give valid consent, such an act constituting the crime of rape, judicial practice being consistent in this regard. On the other hand, assessing consent, which involves a scientific process, requires analyzing certain attributes of the minor, as we have previously emphasized.

We will not deal with the reasons considered by the legislator in setting these thresholds, nor the considerations for which it considered that in certain situations the minor can only give partially valid consent (given that it does not produce full effects), limiting ourselves to emphasizing that the presumption raised to the rank of absolute presumption of the minor's lack of understanding of the significance of the sexual act/relationship to which they consent is unsupported not only psychologically, but also criminologically (the explanatory memoranda of the two laws do not specify whether criminological or psychological studies were carried out, and in the absence of such mention, it is clear that these studies were not carried out, although they were necessary given the seriousness of the crimes committed against minors).

Reason for non-punishment

Paragraph 7 stipulates that the acts referred to in paragraphs (1) and (1^1) shall not be punished if the age difference between the perpetrator and the victim does not exceed 5 years. The wording used by the legislator reveals that this is a special cause for non-punishment, and not a cause for removing the typical nature of the offense (as was the case in the previous form of the law), which is strictly personal in nature, as it strictly considers the age difference between the perpetrator and the victim. It follows that if other participants in the commission of the act do not fall within this strict limit of a maximum age difference of 5 years, they will be criminally liable. In our opinion, this case should also have applied to the offense provided for in paragraph 5^1, since this form of the offense also punishes consensual rape in the cases provided for in letter c) last sentence (the

life of the minor was endangered) and d) – the act was committed for the purpose of producing pornographic material.

We also consider that this case should have been applicable to the form provided for in paragraph 4 letters a) and g), in the case where the perpetrator and the victim live together, in the sense that they are married or in a partnership (as is traditionally the case, especially in Roma families, who marry or live together, have children, a family), so that from this perspective, the principle of minimum state intervention in relations between private individuals is violated. It is true that it would be desirable to change certain mindsets deeply rooted in history, but this change in mentality and traditions cannot be achieved through the establishment of criminal liability, but rather through the streamlining of the education process.

In the same perspective, it should be mentioned that the provisions of the Civil Code allow marriage between minors: the rhetorical question is how one of the spouses, the adult, can be punished, assuming that the difference is greater than 5 years. In addition, the criminal provisions contradict those of the Civil Code, which in Article 372(2) provides that marriage may be contracted after the age of 16[ii] or that they may enter into a traditional marriage that is not legally recognized, but they will be denied, in whole or in part (i.e., recognized under less favorable conditions), access to economic and social rights, which are not restricted to those who are legally married, which constitutes discrimination.

On the other hand, increasing the age difference limit from 3 to 5 years does not in any way provide greater protection for minors; on the contrary, serious acts will remain outside the scope of criminal law (Cioclei, 2024) – for example, the scenario in which a 16-year-old minor has sexual intercourse with an 11-year-old minor, but if the same minor commits an act of sexual assault, caressing the minor in the genital area (much less serious), they will be severely punished, which demonstrates the total lack of consistency on the part of the legislator in making these changes. Practical situations will border on the absurd and, once again, the courts will be blamed for this lack of consistency and legislative vision.

As a renowned professor rhetorically asked: *"But what about minors who engage in sexual acts with other minors who are at an age where they cannot give valid consent? does this still constitute rape, leaving it up to the magistrate to decide on a case-by-case basis whether the victim can give valid consent, or has the legislator eliminated this possibility and decided to decriminalize this type of act?"* (ibid.), this text will allow serious acts to go unpunished, while other, much more serious acts have been removed from the sphere of criminal law, without it being clear whether this was the intention of the legislator or merely an unforgivable error on their part.

Conclusions

The most sensitive issue is the evaluation of the consent expressed by the minor or their minimal capacity to understand and comprehend the performance of a sexual act or relationship. From the taxonomy of the regulation, it can be seen that below the age of 14, the legislator has established a presumption of lack of discernment with regard to giving consent, the act being classified as rape (if committed by a minor on another minor under the age of 14 – paragraph 11. In this regard, the psychological assessment of the minor or a psychological evaluation is particularly important, as it serves to indicate emotional and behavioral manifestations following the abuse suffered, especially if the minor describes feelings and manifestations specific to peritraumatic dissociation, meaning an unconscious psychological mechanism with a protective role that is automatically triggered when trauma occurs. In many situations, people (especially minors) choose not to talk about the traumatic event, and scientific evidence must establish the reasons for this, which can be classified as the specific reaction of shame and guilt that inevitably occurs in victims who have suffered sexual trauma. Especially in the case of minors under the age of 14 (but also others, and even adults), it is necessary to avoid revictimization (as defined by Directive 2012/29/EU, 2012):

in fact, in the case of minors, the courts proceed, as a rule, to a hearing of the minor, usually carried out during the criminal investigation, in compliance with the rules of procedure, under the conditions of Article 111(7)-(10) of the Criminal Procedure Code.

With regard to the taxonomy of the regulation of these crimes that infringe the sexual freedom of individuals (some of which will be the subject of new studies by the author), we consider that the recent legislative changes lack coherence and generate not only excessive regulation (certain factual scenarios being likely to meet the essential characteristics of several offenses without the ideal concurrence of offenses, while certain serious acts that were previously criminalized are no longer crimes, as the legislator has failed to criminalize and punish them, which is regrettable because the protection of minors claimed in the explanatory memorandum of the bill amending the Criminal Code is not achieved.

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Endnotes:

[i] Art. 218^1 - Rape of a minor:

(1) Sexual intercourse, oral or anal sex, as well as any other acts of vaginal or anal penetration committed by an adult with a minor under the age of 16 shall be punished by imprisonment from 7 to 12 years and the deprivation of certain rights.

(1^1) Sexual intercourse, oral or anal sex, as well as any other acts of vaginal or anal penetration committed by a minor with another minor under the age of 14 shall be punished in accordance with the provisions of Art. 114.

(2) Sexual intercourse, oral or anal sex, as well as any other acts of vaginal or anal penetration committed by an adult with a minor through coercion, rendering the minor unable to defend themselves or express their will, or by taking advantage of this state, shall be punished with imprisonment of 8 to 15 years and the deprivation of certain rights.
(3) Sexual intercourse, oral or anal sex, as well as any other acts of vaginal or anal penetration committed by a minor with another minor through coercion, rendering them unable to defend themselves or express their will, or by taking advantage of this situation, shall be punished with imprisonment of 3 to 10 years and the deprivation of certain rights.
(4) If the acts referred to in paragraphs (1) to (3) are committed in one of the following circumstances:
a) the act was committed by a member of the minor's family or by a person living with the minor;
b) the minor is in the care, protection, education, custody, or treatment of the perpetrator, or the perpetrator has abused his or her position of trust or authority over the minor or the minor's obvious vulnerability caused by illness, mental or physical disability, dependence, or physical or mental incapacity;
c) the act resulted in bodily harm or endangered the minor's life in any other way;
d) the act was committed for the purpose of producing pornographic material;
e) the act was committed by two or more persons together;
f) the act was committed by a person who has previously committed an offense against sexual freedom and integrity, an offense of child pornography or pimping, or an offense of human trafficking or child trafficking;
g) as a result of the act, the victim became pregnant,
the maximum special penalty shall be increased by 3 years.
(5) If the acts referred to in paragraphs (1) and (1^1) were committed in exchange for remuneration, material gain or an advantage in kind or the promise of such benefits, the special limits of the penalty shall be increased by one third.
(5^1) Sexual intercourse, oral or anal sex, as well as any other acts of vaginal or anal penetration committed by an adult with a minor between the ages of 16 and 18 shall be punished with imprisonment from 2 to 9 years and the deprivation of certain rights, if:
a) the minor is a family member of the adult;
b) the minor is in the care, protection, education, custody, or treatment of the perpetrator, or the perpetrator has abused their position of trust or authority over the minor or the minor's obvious vulnerability; due to a mental or physical disability, a situation of dependence, an illness, a state of physical or mental incapacity, or any other cause;
c) the act resulted in bodily harm or endangered the life of the minor in any way;
d) the act was committed for the purpose of producing pornographic material.
(5^2) The act referred to in paragraph (5^1) shall be punished by imprisonment of between 3 and 10 years if:
a) the act was committed by two or more persons acting together;
b) the act was committed by a person who has previously committed an offense against the sexual freedom and integrity of a minor, an offense of child pornography or pimping of a minor, or an offense of human trafficking or trafficking of minors.
(6) If the act resulted in the death of the victim, the punishment shall be imprisonment from 9 to 18 years and the deprivation of certain rights.
(7) The acts referred to in paragraphs (1) and (1^1) shall not be punished if the age difference between the perpetrator and the victim does not exceed 5 years.
(8) Attempts to commit the crimes referred to in paragraphs (1) - (5^2) shall be punished.

[ii] Art. 372 of the Civil Code: *"(1) For valid reasons, a minor who has reached the age of 16 may marry on the basis of a medical opinion, with the consent of his or her parents or, where applicable, their legal tutor, and with the authorization of the tutelary court in whose jurisdiction the minor resides. (2) If one of the parents refuses to consent to the marriage, the guardianship court shall also decide on this disagreement, taking into account the best interests of the child. (3) If one of the parents is deceased or unable to express their will, the consent of the other parent shall suffice. (4) Also, under the conditions of Article 398, the consent of the parent exercising parental authority is sufficient. (5) If there are no parents or tutor who can consent to the marriage, the consent of the person or authority who has been empowered to exercise parental rights is required".*