

# A Critical Analysis of the Crime of Rape of a Minor in the Romanian Criminal Code. A New Normative Paradigm?

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**Abstract:** The international community began to address the diverse needs and vulnerabilities of children as human beings in the last century, and some human rights instruments have also addressed the rights of young people. In this regard, it has been recognized that young people, who are still in the early stages of their personality development, need special attention and assistance in order to develop mentally and intellectually and to integrate better into society, and must be protected by law in accordance with conditions that guarantee their peace, freedom, dignity, and safety. All states with a legal system based on the rule of law have made legislative changes that focus on the principle of protecting the best interests of the child. However, some legal systems, including the Romanian one, seem to be moving towards a new paradigm through certain legislative changes, some of which are open to criticism in that they depart from the aforementioned principle, with particular reference to prevention, especially with regard to the crime of rape of a minor. In our opinion, prevention should focus on raising the quality of life and general well-being, and not only on the immediate elimination of clearly defined but partial problems.

**Keywords:** Rape, Minor, Child's Best Interests, Legislation, Criminal Code

## 1. Introduction

The offense of rape of a minor occupies a special place in the Romanian Criminal Code, having a particular legal, moral and social significance. It involves not only a serious violation of the physical and psychological integrity of the victim, but also a profanation of the child's dignity, affecting his or her long-term psycho-emotional development. In the context of recent legislative changes and the constant pressure from civil society and the European courts for more effective protection of minors, the question arises: does the current legislation reflect a new regulatory paradigm in dealing with this type of crime?

## 2. Current legal framework and elements of the crime

According to **Article 218 of the Criminal Code (2009)**, rape is defined as:

*"(1) Sexual intercourse, oral or anal sex with a person, committed by coercion, rendering the person unable to defend themselves or express their will, or taking advantage of this state, shall be punished by imprisonment of 5 to 10 years and the deprivation of certain rights. (on 02-11-2020, amended Law no. 217/2020)*

*(2) The same punishment shall apply to any other acts of vaginal or anal penetration committed under the conditions set out in paragraph (1).*

*(3) The punishment shall be imprisonment for 7 to 12 years and the deprivation of certain rights when: (on 02-11-2020 amended Law no. 217/2020).*

*a) the victim is in the care, protection, education, custody or treatment of the perpetrator;*

*b) the act was committed by a family member or by a person living with the victim; (on 02-11-2020, amended by L. 217/2020)*

*c) repealed; (on 01-01-2024, Law no. 424/2023)*

*d) the act was committed for the purpose of producing pornographic material;*

*e) repealed; (on 01-01-2024, Law no. 217/2023)*

*f) the act was committed by two or more persons acting together.*

*g) the perpetrator uses the authority of his position. (on 01-01-2024 added Law no. 217/2023)*

*(3<sup>1</sup>) Repealed. (on 01-01-2024, L. 217/2023)*

*(3<sup>2</sup>) The punishment is imprisonment for 7 to 15 years and the prohibition of the exercise of certain rights if the acts referred to in paragraphs (1)-(3) are committed in one of the following circumstances:*

*a) the act resulted in bodily harm or endangered the life of the victim in any other way;*

*b) the act was committed against a pregnant woman;*

*c) as a result of the act, the victim becomes pregnant;*

*d) the victim is in a state of obvious vulnerability due to age, illness, physical or mental disability, or a situation of dependence;*

*e) the act was committed using a weapon or by threatening to use one;*

*f) the victim was given, without their knowledge or against their will, alcohol or any substance that affects their judgment or control over their actions. (on 01-01-2024, Law no. 217/2023)*

*(4) If the act resulted in the death of the victim, the punishment is imprisonment for 9 to 18 years and the deprivation of certain rights. (on 02-11-2020 Law no. 217/2020)*

*(5) Criminal proceedings for the act provided for in paragraph (1) and paragraph (2) shall be initiated upon the prior complaint of the injured person.*

*(6) Attempts to commit the offences provided for in paragraphs (1)-(3<sup>2</sup>) shall be punished (on 01-01-2024 Law no. 217/2023)”.*

Subsequently, the legislator introduced a new offense, with the marginal title “rape of a minor”, through Law no. 217 of July 10, 2023 (published in the Official Gazette No. 634 of July 11, 2023), which became Article 218 of the Criminal Code, consisting of:

*“(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 of 7 to 12 years and the deprivation of certain rights.*

*(1<sup>1</sup>) 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 Article 114. (01-01-2024 supplemented Law no. 424/2023)*

*(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 prohibition of the exercise of certain rights. (on 01-01-2024 modified by Law no. 424/2023)*

*(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 taking advantage of this state, shall be punished by imprisonment of between 3 and 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 family member of the minor 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 manifestly vulnerable situation caused by illness, mental or physical disability, dependence, or physical or mental incapacity;*

*c) the act resulted in bodily harm or endangered the life of the minor 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 acting 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 trafficking in minors;*

*g) as a result of the act, the victim became pregnant, the special maximum penalty is increased by 3 years. (on 01-01-2024 amended Law no. 424/2023)*

*(5) If the acts referred to in paragraph (1) and (1<sup>1</sup>) 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. (on 01-01-2024 amended Law no. 424/2023)*

*(5<sup>1</sup>) 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 of 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 his or her position of trust or authority over the minor or the minor's manifestly vulnerable situation due to a mental or physical disability, a situation of dependence, illness, physical or mental incapacity or other causes;*

*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. (01-01-2024 supplemented Law no. 424/2023)*

*(5<sup>2</sup>) The act referred to in paragraph (5<sup>1</sup>) shall be punished by imprisonment of 3 to 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. (01-01-2024 added Law no. 424/2023)*

*(6) If the act resulted in the death of the victim, the punishment is imprisonment for 9 to 18 years and the deprivation of certain rights.*

*(7) The acts referred to in paragraph (1) and (1<sup>1</sup>) shall not be punishable if the age difference between the perpetrator and the victim does not exceed 5 years. (01-01-2024 amended Law no. 424/2023)*

*(8) Attempts to commit the offences referred to in paragraphs (1) - (5<sup>2</sup>) shall be punished. (Law no. 424/2023)".*

The reasons behind the amendments are not only unclear, as can be seen from the explanatory memorandum, but also decriminalize certain acts that were previously considered criminal offenses and fail to provide greater protection for minors against sexual abuse. Furthermore, they introduce penalties for juvenile offenders that are not permitted by the Criminal Code, even if the intentions were positive (Cioclei, 2024). Therefore, in the case of minors, consent is legally irrelevant below a certain age threshold (13 years) or is strongly relativized depending on the relationship with the perpetrator, reflecting a special protection regime.

Although the concept of "consent" is not used *expressis verbis*, its absence is a condition attached to the crime of rape, which by definition is committed through coercion (physical or

moral), rendering the victim incapable of defending themselves or expressing their will, or by taking advantage of this state.

This concept is defined in Article 113 of the Criminal Code, which provides: “Limits of criminal responsibility (1) Minors under the age of 14 are not criminally responsible. (2) Minors between the ages of 14 and 16 are criminally responsible only if it is proven that they committed the act with discernment. (3) Minors who have reached the age of 16 are criminally liable under the law”.

Consequently, the legislator considered that minors are criminally liable from the age of 14, but cannot give valid consent to sexual intercourse or acts.

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As there is no legal definition of consent, the concept has been defined in legal doctrine as: “the mental capacity of a person to understand the nature and consequences of the act they are committing and to consciously express their will in relation to a specific act” (Antoniou & Bulai, 2017, p. 277). Therefore, discernment is an essential condition for consent (Cioclei, 2023).

### **3. Critical aspects and interpretative challenges**

The current regulation of the crime of rape of a minor, although seemingly clear in its legal wording, raises a number of substantive and practical issues that deserve careful analysis. These mainly concern the consistency and predictability of the criminal law, the way in which the consent of the minor is assessed, but also the way in which the victim is protected in criminal proceedings. The most relevant issues are highlighted below.

#### ***3.1. Inconsistent age thresholds and lack of a unified vision***

One of the most significant shortcomings of the current legislation is the fragmentation and lack of consistency in the age thresholds used to determine the severity of the offense.

The Criminal Code (2009) mentions in different paragraphs the ages of 13, 15, and 16, each associated with a specific legal regime. For example, if the victim is under 13, it is not necessary to prove coercion - consent is presumed to be lacking. Between 13 and 16 years of age, consent becomes debatable, but may be invoked in the absence of an authority relationship. At 15 years of age, an aggravating circumstance arises if the perpetrator is an educator or guardian, which creates a confusing overlap with the regulations for 13 and 16 years of age.

This lack of clarity leads not only to difficulties of interpretation, but also to inconsistency in court practice, which may assess the maturity of the victim, the context of the relationship, or the veracity of consent differently. In the absence of a clear and predictable legal threshold for sexual consent, victims are exposed to abusive defenses and risks of secondary victimization in the trial.

#### ***3.2. Consent of minors: between psychological reality and legal fiction***

Another vulnerable point is the conceptualization of consent in the case of minors, as previously highlighted. The Criminal Code operates with legal presumptions related to the age of the victim, but does not provide a definition or an objective framework for analyzing whether a minor between the ages of 13 and 16 can validly consent to sexual intercourse.

Key issues include:

- The lack of a standardized assessment of the psychological maturity of minors;
- The disregard of emotional, educational, social, or economic factors in assessing the victim's actual will;
- The danger of instrumentalizing consent by defendants as a defense strategy, especially in cases where there is a prior relationship or apparently friendly communication.

In the absence of an integrated legal, psychological, and social view of consent, the justice system risks giving excessive weight to the victim's statements or interpreting them through the lens of prejudices related to their behavior, to the detriment of effective protection. In our opinion, the legislator should have placed greater emphasis on prevention through education, rather than excessive punishment.

### ***3.3. Inadequate protection of victims in criminal proceedings***

Although, in theory, the Criminal Procedure Code (2010) provides for special protection measures for child victims, in practice these are applied unevenly, and the lack of psychological expertise among investigators and magistrates creates risks of revictimization.

Critical issues include:

- Repeated questioning of minors during the criminal investigation phase, without sufficient consideration being given to previous statements;
- Lack of specially equipped rooms for questioning minors in many courts and prosecutors' offices;
- Interrogations that may be perceived as intimidating or accusatory, without taking into account the age and psychological state of the victim;
- Direct confrontations with the aggressor - sometimes formally avoided, but carried out using methods that do not fully protect the child.

In addition, the length of criminal proceedings and the lack of ongoing psychological support during the proceedings create additional traumatic effects on child victims.

### ***3.4. Difficulties in proving the crime***

Rape of minors is, by its nature, a crime that is often committed in the absence of witnesses or direct evidence, which leads to excessive reliance on the victim's statements. In the absence of a coherent framework for assessing these statements, courts oscillate between overestimating and minimizing them.

Furthermore, in some cases:

- Prosecutors are reluctant to bring firm charges due to a lack of corroborating evidence;
- Courts require excessive levels of certainty in an area where the trauma itself alters the coherence of the victim's narrative.

These difficulties can lead to failure to punish crimes or unjustified acquittals, which undermine public confidence in the justice system.

## **4. Towards a new normative paradigm?**

The need for a new normative paradigm in regulating and combating the crime of rape of minors is becoming increasingly evident in the Romanian legal landscape. Although the current Criminal Code contains aggravating provisions aimed at protecting minors, these do not always reflect a coherent, integrated vision adapted to contemporary social realities. There is a growing tension between the traditional form of regulating sexual offenses and the need for enhanced protection of child victims, in line with new international standards.

In recent years, under pressure from civil society, the media, and ECHR decisions, there has been a trend toward reform aimed at strengthening the legal protection of minors in cases of sexual offenses:

- Increased penalties for rape of minors, in particular through recent legislative initiatives;
- Proposals to establish a single age of sexual consent (e.g., 15 years), as in other European jurisdictions (France, Germany, Spain);
- Introduction of new autonomous offenses, such as psychological manipulation for sexual purposes (“grooming”);

- Generalization of special hearing rooms and prohibition of direct confrontation between the victim and the perpetrator in all cases of rape involving minors.

All of this points to a paradigm shift from a legal-formalistic approach focused on coercion and consent to one based on vulnerability, power imbalance, and active child protection.

#### ***4.1. Moving from the “consent” paradigm to the “vulnerability” paradigm***

The classic paradigm in the regulation of sexual offenses, including those involving minors, is centered on the concept of consent. This approach assumes that minors can, to a certain extent, decide on their own sexual lives, and that a crime occurs when consent is vitiated by coercion, abuse of authority, or lack of psychological maturity.

However, this perspective has proven to be inappropriate and dangerous in the case of minors:

- It places the victim in a framework of “responsibility” that is disproportionate to their age and psychological development;

- It opens up the possibility of relativizing the sexual act based on the victim's previous behavior (e.g., whether they had previous relationships, how they dressed, whether they initiated communication, etc.);

- It allows the defense of aggressors by invoking “tacit consent” or an emotional relationship, which is absolutely incompatible with the principle of child protection.

The new paradigm emerging in European legislation and ECHR case law is that of “vulnerability” of the child, which translates into:

- Prohibition of any form of sexual act with a minor below a certain legal age, regardless of consent;

- Establishing a clear age of sexual consent (e.g., 15 or 16 years), with absolute prohibitions on adults having relationships with minors below this threshold;

- Considering power imbalance (age, authority, dependence) as a determining factor in the classification of the act.

#### ***4.2. Recent legislative trends and their impact***

Romania has begun to respond to these needs by:

- Increasing penalties for sexual offenses against minors, including by eliminating the possibility of suspending the execution of sentences;

- Introducing special statutes of limitations or imprescriptibility for certain serious sexual offenses committed against minors;

- Adopting amendments to the Criminal Procedure Code to strengthen confidentiality and protection for child victims.

However, reforms remain fragmented and reactive, lacking a strategic vision that combines:

- Amending the Criminal Code to harmonize age thresholds;

- Express recognition of psychological manipulation as an element of the crime;

- Introduction of a post-conviction monitoring mechanism for sex offenders (sex offender registry, warning systems, restraining orders, etc.).

#### ***4.3. Role of case law and international law***

The European Court of Human Rights (ECHR) has been a key player in shaping the new paradigm. In cases such as *M.C. v. Bulgaria*, *X and Y v. the Netherlands*, and *Blokhin v. Russia*, the ECHR ruled that the state has a positive obligation to protect minors from sexual abuse through clear laws, effective procedures, and proportionate sanctions.

At the same time, international organizations (UNICEF, GREVIO, UN Committee on the Rights of the Child) emphasize that effective legislation on sexual violence against minors must not be limited to punishment, but must include:

- early and age-appropriate sex education;
- integrated services for counseling, protection, and reintegration of victims;
- reform of the professional training of prosecutors, judges, and police officers, with a focus on psychological trauma and communication with children.

#### ***4.4. Towards a systemic rethinking of criminal policies on minors***

Ultimately, a new paradigm requires a change of mindset across the entire criminal justice system. It is not enough to make isolated amendments to the Criminal Code. A systemic rethinking is needed, which should:

- treat children not only as legal victims, but as vulnerable beings in need of long-term support;
- eliminate stereotypes and prejudices related to the behavior of child victims (e.g., the myth of “seductive consent”);
- ensure a multidisciplinary approach: legal, social, medical, and educational.

### **5. Conclusions**

The crime of rape of a minor raises multiple legal, moral, and social challenges. Current legislation reflects some important progress, but it remains subject to a fragmented view of child protection, in which consent is treated inconsistently and victims may be revictimized during the criminal proceedings.

The successful prevention of juvenile delinquency, as well as situations in which children are victims of such serious crimes as rape, requires efforts on the part of the whole society to ensure the harmonious development of adolescents, monitoring and stimulating their personality development from an early age. Also, the well-being of young people, from the earliest age, should be the focus of any prevention program.

A real paradigm shift requires more than just tougher penalties: it needs a coherent vision focused on prevention, age-appropriate sex education, professional criminal investigation, and real psychological support for victims.

Only in this way can criminal justice become an instrument of protection, reparation, and prevention, rather than one that further traumatizes the most vulnerable members of society.

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