

SEXUAL CRIMINAL OFFENCES - DIFFERENCES AND SIMILARITIES THE CRIMINAL CODE IN FORCE AND THE CRIMINAL CODE 1969

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Abstract: *The state of danger created by the committing of sexual criminal offences and their impact on the victims and on the society in general, the legislative modifications occurred in the last period of time makes it necessary to define the concepts of sexuality, sexual deviance, sexual aggression, the presentation of the types of perversions and of sexual aggressions, as well as of the similarities and differences between the new Criminal Code and of the Criminal Code from 1969. One of the fundamental institutions in the criminal law is the penalty seen as a modality of constraint and a mode through which the re-education of the convicted person, so that this is wanted both for a coercive purpose, as well as for the rehabilitation. Through the enforcement and the execution of the conviction, one has in view the obtaining of the compliance with the norms and conventions of social cohabitation, the correction or the formation of a correct attitude towards the legal order and the values of the society. It is important to define the concept of sexuality in order to understand the evolution of the sexual behaviours labelled as normal or as deviant during the time. The person committing a crime can be rehabilitated and integrated into society of this rehabilitation feature becomes reality from the first moment of the criminal process and a solid re-education action takes place.*

Key words: sexual criminal offences; criminal code; sexual deviance;

1. Introduction

The categories of convictions, the limits within which they apply and the general execution of these are stipulated in the criminal law. Detention is stipulated in the Criminal Code as being one of the main convictions, which might be applied alone. The imprisonment as a conviction is stipulated almost for all the criminal offences, their general restraints being comprised between 15 days and 30 years. Probation represents an evolution of the sanctioning system by transferring the centre of gravity from the sanctions strictly based on the isolation of the criminal offender through the construction of an alternative system which is based on keeping the criminal offender and sanctioning him/her within the community, being counselled and supported with the scope of a good integration into the community (Durnescu, 2011).

In the category of the sexual disorders, among other sexual criminal offences, one can find paedophilia, which is categorized as a disorder of the sexual preference (of the object of the sexual preference).

2. The definition of the concept of sexuality

The dictionary of sociology defines the concept of sexuality through the behaviours which have as purpose the obtaining of the sexual desire in a direct way. It is generally considered that we can talk about sexuality, about the obtaining of desire, without making any reference to the feelings, emotions which can accompany these

behaviours and which can provoke them, represented by words, images or fantasies (Boudon, Besnard, Cerkaoui et al., 1996).

From the perspective of psychology, sexuality is defined as the totality of the elements which make reference to sexual life. Sexuality is influenced in its manifestation both by the physiological maturation, as well as by the social and cultural conditions, through the submission to norms which can be moral and/or religious (Sillamy, 1996).

When we talk about the disorders and the pathology of sexuality at (Rădulescu, 1996), two types are distinguished, one which makes reference to the anatomical pathology and another to sexual behaviours, which can manifest starting with puberty. It is not possible to set a unique model, generally valid for the manifestation of the sexual instinct by people, taking into account the influence culture has on it, the values, norms, customs, traditions or the written or not written rules of the human community it represents. The impossibility of the existence of a unique model to report to when we analyse the “deviations” or the forms of “deviance” shows us that the term of deviance is a relative notion, because defining the normal or the deviance differs from one society to another, from one period to another, respectively, what in one community is considered normal, in another can be considered deviant, abnormal (Rădulescu, 1996: 9).

If the society we live in passes through a period of balance, expressed in stable social institutions, in a protected and safe environment, with well-established social policies which have long term, with predominantly positive inter-human relationships, the sexual behaviours no longer represent an issue, because the values appropriated and manifested by the people through education and tradition are positive and are accepted by the social norms, whereas in the moments marked by the lack of a positive education, of the social norms and values, socio-political changes, economic crises, migrations of populations, natural imbalances, also the sexual deviances appear (Enăchescu, 2003).

3. The definition of the concept of sexual deviance

In order to differentiate between the sexuality considered normal and the one considered deviant, three criteria can be taken into consideration, respectively:

- **Statistic**, the difference between the behaviour considered normal and the deviant one being given by the statistical average, which shows us that there are more normal behaviours than deviant ones. It is a criterion subjected to critics, because the normality of a behaviour can be appreciated differently, according to culture, historical period, society.

- **Normative**, according to these criteria, the assessment of the sexual behaviour as being a deviant one is made in the relationship to the social norms, a socially accepted behaviour is manifested, which the individual acquires following the socialization. It is, at the same time, a criterion which bears critics, being given the possibility of the change of the social norms, which bear changes given by time and space

- **Medical**, the deviant behaviour is determined by genetic, psychopathologic problems, it is a criterion which can bring the understanding of the community towards the behaviour adopted by the individual, being conditioned by the subjection to a treatment. The critic brought to this criterion is that the majority of the people

considered to exhibit a deviant sexual behaviour are not assessed as being sick, but were fully aware with regards to the behaviour chosen (Rădulescu, 1996).

A classification of the types of sexual deviations which also Rădulescu S. refers to in his paper "Sociologia și istoria comportamentului sexual „deviant” ("The sociology and the history of the "deviant" sexual behaviour") establishes three types: normal sexual deviance, pathological sexual deviance and „group” sexual deviance. Out of the three aforementioned types we find two most relevant for the present paper.

- **Normal sexual deviance** from the point of view of the correspondence between what society considers to be normal, the legal regulations and the behaviour adopted by the individuals, the pre-marital sexuality, the masturbation and the oral sexual contact are taken into account, in relation to which an ambivalent attitude is manifested, these ones being tacitly approved;

- **Pathological sexual deviance**, case in which the correspondence between the social norms, the legal regulations and the behaviour adopted is large and it refers to rape, sexual aggression against a child, incest. These behaviours are not specific to a group, they are more related to individual characteristics of the ones manifesting them. The exhibitionism and the voyeurism are also specified (Rădulescu, 1996).

The sexual aggressions are part of the actions included in the behaviour considered as deviant. It is considered deviant, because it contravenes to the norms admitted by the society, through the feeling of fear the violent character they have induce on people.

In the specialty literature, the definition of the deviant behaviour is intended through the separation of the term of psychic disease and the definition of the deviance through the reporting to normality, being considered a deviation from normality. Being a multitude of trials and definitions of deviance, one can conclude that deviance represents the result of the actions of the negative models on the person, who has learnt to interiorize them, models which are against the values and the norms of society.

4. The definition of the concept of sexual aggression

The definition of the aggression from the perspective of the theory of learning is done being a learnt behaviour, a result of the society and of a succeeded social control, behaviour which is manifested in accordance with the social norms, learnt in order to obtain the approval and the confirmation from the other surrounding people. Not always frustration produces aggression, it can also determine a repressive behaviour. The secondary aggression is explained in sociology as being the behaviour determined by the lack of adapting to the social rules of the people belonging to certain delinquency cultures, having a negative model of education.

One can define aggression as being unspecific, when we talk about aggressivity as the battle between species, with a constructive role in the (evolution) development of species and intra-specific when we describe the aggressivity manifested within the same species, becoming unnatural, if it is not manifested under the form of certain organized modalities of manifestation, "tournaments" (Scripcaru, 2002: 109).

5. Types of perversions and of sexual aggressions

The theories talking about sexual perversions consider them as, constitutional pathological states", affecting the instinctual sphere of individuals and are considered

as having an anti-social character, being diverse as manifestation, from violence, assault to depravation, prostitution, considering that sometimes the states of deviance can be confused (Enăchescu, 2003: 176).

Difference is made between what the perversions represent in general, the ones considered as sexual and deviant perversions. The differences come from the categorization under the sphere of psychopathology of the first ones, and of the last ones under the legal sphere, being considered deviances of behaviors and their antisocial and sociopathic behaviour being retained. Initially, sexual perversions were defined by resorting to the religious norms and moral interdictions, they were related to certain taboos.

B. Ball, when defining sexual perversions, defines them in the psychopathological sense and considers them as being opposed to the scope proposed by nature through us. From this definition, the classification of sexual perversions can be incurred, into two large categories, having as criterion their reporting to the object and to the modality of obtaining pleasure, therefore:

- in relationship with the object: homosexuality, paedophilia, gerontophilia, bestiality, etc;

- in relationship to the means for the obtaining of pleasure: fetishism, sadism, masochism, exhibitionism, voyeurism etc. (*apud* Enăchescu, 2003: 178). Homosexuality reported to our present days no longer represents a criminal offence, existing an acronym defining the diversity of sexual identities LGBT.

When we try to define perversion, there are definitions which have in view the behaviour of a person who does not abide by the law, being aware that this, by doing harm purely because that person wants this or all the deviations of the instinct are excluded from the scope, the object and the way that person gets satisfaction in accordance with the moral or the legal norms especially. The literature also mentions that “the true perverts are rare and they have four defining characteristics: lack of affectivity, lack of morality, impulsivity and the lack of adaptability” (Sillamy, 1996: 232).

The following are considered criminal offences to sexual life, the relationships which do not ensure the normal and moral development of the intimate life, and namely: rape; the sexual contact with a minor; sexual perversion which addresses to one’s own body and the ones addressing to the body of another person; sexual corruption; incest; the trading of sex and proxenitism.

Following the researches performed, as concluded in the paper “The deciphering of human behaviour”, of Hans Eysenck and Michael Eysenck, there is a link between the presentation of the materials regarding sexual violent acts, pornography and their influence in the committing of sexual aggressions, as well as that the personality type, respectively psychotism in a high degree determines the committing of sexual aggressions. The relationship between the persons committing rapes and the type of personality with a high degree of psychotism and schizophrenia was scientifically proved. The authors are the adepts of the free speech for the media, television, but not of the libertinage with regards to the manifestation of the behaviour (Eysenck and Eysenck, 1998).

Sexual perversions are defined as a disorder of the sexual relationship and not as a disorder from a biological point of view, so that in the situations of difficult or abnormal relationship building, affection and eroticism, considered forms of the sexual

instinct, shall have aspect of perversion and not of sublimation. Rape is considered to be a criminal offence, taking into consideration that the obtaining of pleasure takes place through aggression and inequality of force, the other situations are considered by DSM (Diagnostic and Statistical Manual of Mental Disorders) "sexual minorities and not mental disorders" (Scriparu, Boișteanu, Astărăstoae et al.2002: 298).

6. Similarities and differences between the Criminal Code in force/The Criminal Code 1969 regarding the criminal offences against persons and the ones which prejudice certain relationships regarding social cohabitation

From the category of criminal offences against the persons, we have stopped on the criminal offences against the sexual liberty and the integrity and on the ones regarding the traffic and the exploitation of vulnerable persons, and from the category of criminal offences which bring prejudice to certain relations regarding social cohabitation, on criminal offences against the family. The literature in the legal field treats all the criminal offences against sexual freedom and integrity as being a special category granted by the social values forming the object of the legal protection, respectively the freedom and the sexual inviolability of the person and the morality of the sexual life.

The law considers that the committing of facts which breach the freedom and the morality of the sexual life of a person and produce serious repercussions on it and on its family are criminal offences against the sexual freedom and integrity (Bulai, Filipaş and Mitrache, 1997).

We have performed the analysis of the criminal offences previously mentioned through the identification of the similarities and of the differences between them from the perspective of the Criminal Code in force and of the Criminal Code from the year 1969, taking into account the social impact, the state of fear induced through their committing and the legislative modifications occurred.

Table 1: Presentation of criminal offences differences and similarities

<p>The category of criminal offences</p> <p>I. <u>Against sexual liberty and integrity</u></p> <p>The Criminal Code in force / The Criminal Code 1969</p> <p>1. Rape-art.218//art.197</p> <p>NOTE: modifications are brought through the Law no. 217/29.10.2020</p> <p>Differences</p> <ul style="list-style-type: none"> ✓ the conviction decreased in the cases when the victim is a relative, his/her death results (from 5 to 25 years in the old code from 7 to 18 in the new one) and the age of the victim in the new Criminal Code increased, ✓ in the new criminal code it is considered a criminal offence even if the purpose of the committing is the production of pornographic materials, mention which does not exist in the old criminal code, <p>Resemblances</p> <ul style="list-style-type: none"> ■ in both codes the criminal action is started at the preliminary complaint of the victim ■ the criminal offence is not defined in the same way,
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- the conviction for the criminal offence is the same, the imprisonment if there are no special situations,

2. Sexual aggression -art.219, in the old Criminal Code was not stipulated

NOTE: modifications are brought through the Law no. 217/29.10.2020

Differences

- ✓ it is defined as being a sexual act the sex which takes place through the forcing of the victim and through the fact that this one is under the impossibility and cannot express his/her will, but it is different from the sexual act categorized as rape,
- ✓ the conviction is from 2 to 7 years
- ✓ the conviction from 3 to 10 years, if the considered conditions are fulfilled also for the rape and namely the victim is a relative of the person committing the criminal offence, and is under the care, education of this one, the purpose of the production of pornographic materials, there results the bodily harm of the victim and the deed is done by several persons, together,
- ✓ if, following the committing of a deed, there results the death of the victim, the conviction is from 7 to 15 years,
- ✓ at the prior complaint of the victim, the criminal action is started,
- ✓ if the sexual acts are preceded or followed by the acts stipulated under art.218, the criminal offence is considered to be a rape,

3. Sexual act with a minor - art.220/art.198

NOTE: modifications are brought through the Law no. 217/29.10.2020

Differences

- ✓ in the new Criminal Code, it is specified the age level for the victim, in the old criminal code it was specified that the victim should not have fulfilled the age of 14 years,
- ✓ the conviction stipulated in increased,
- ✓ into the analysis it is introduced the differentiation of the deed if the minor was between 16 and 18 years old,
- ✓ in case between the person committing the criminal offence and the victim the age gap does not exceed 3 years and an act of a sexual rapport takes place, the deed is not convicted,
- ✓ in the old criminal code the conviction is stipulated in the case when there occurs the suicide or the death of the victim,

Resemblances

- The criminal offences are defined the same.

3. The sexual corruption of minors -art.221/sexual corruption -art.202

NOTE: modifications are brought through the Law no. 217/29.10.2020

Differences

- ✓ The difference is made between the act of a sexual nature defining the sexual corruption of a minor and the sexual act with a minor
- ✓ The age of the minor is stipulated, who have not fulfilled the age of 14
- ✓ The conviction is increased from 1 to 5 years, in comparison with the old code, from 6 months to 5 years,
- ✓ In the new penal code more aspects are mentioned regarding the committing of the deed
- ✓ In case the age gap does not exceed 3 years, the deeds are not sanctioned.

- ✓ Under the aggravating form, the maximum of the conviction stipulated has increased

Resemblances

The maximum of guilt is the same in both criminal codes.

5. The recruitment of minors for sexual purposes -art.222- it does not exist in the old Criminal Code

NOTE: modifications are brought through the Law no. 217/29.10.2020

Differences

- ✓ The age of the minor person is mentioned, 16 years old.

6. Sexual harassment -art.223/203¹

Differences

- ✓ in the old criminal code the person who abused had authority or influence offered by position, in the new code only work relationships or similar ones are mentioned,
- ✓ in the new code, the criminal action is started only with the prior complaint of the damaged party,
- ✓ the mixed limit of the conviction in the new code decreased by one year, in the old one the maximum being of 2 years,
- ✓ a note is mentioned in the criminal code in force repeatedly, without existing the threat or the constraint anymore

Resemblances

- In both codes the obtaining of certain sexual benefits is specified

The category of criminal offences

II.The traffic and the exploitation of vulnerable persons

The Criminal Code in force / The Criminal Code 1969

1.Proxenetism art.213/art.329

NOTE: modifications are brought through the Law no. 217/29.10.2020

Differences

- ✓ In the Criminal Code in force one or more persons are mentioned, and in the old one only one person,
- ✓ In the cases where the victims were minors in the old criminal code the conviction was not specified, respectively from 5 to 18 years old, in the new one it is mentioned the fact that the special limits of the conviction are increased by half
- ✓ In the old criminal code the goods, the values or any other goods acquired or obtained following the committing of the deed are confiscated or the person convicted is obliged to the equivalent in money,
- ✓ The attempt is not convicted any longer by the criminal code in force,

Resemblances

- The definition of the criminal offence and of the conviction, the same.

Category of criminal offences

III.Against the family

The Criminal Code in force / The Criminal Code 1969

1.Incest art.377/art.203

NOTE: modifications are brought through the Law no. 217/29.10.2020

Differences

- ✓ In the Criminal Code in force, the mention is made that it is an agreed sexual act
- ✓ The conviction is modified from prison from 1 to 5 years to prison from 2 to 7 years

Resemblances

- The sexual intercourse must take place between relatives on the direct line or brothers, sisters. (Boroi, 2014).

Law no. 118/2019 regarding the National automated registry regarding the persons committing sexual criminal offences, for the exploitation of certain people or on minors was approved in the month of June 2019 and it is intended to have a registry of the persons convicted for criminal offences against the sexual freedom and integrity and not only, on whom certain obligations are imposed to be fulfilled, and the police bodies shall take care about the assurance of their compliance.

The Law 217 for the modification and completion of the Law no. 286/2009 regarding the Criminal Code regarding the content and the conviction of the criminal offences which relate to the sexual freedom and integrity was approved on the date of 29.10.2020, and on the date of 12.04.2021 it was unanimously approved by the Senate in its quality of chamber of first instance notified (known as the Law no. 267/2021) for the modification and completion of the Law no. 286/2009 regarding the Criminal Code with regards to the impossibility to prescribe the criminal liability for the cases of sexual aggression against minors, traffic of minors, infantile pornography and proxenetism.

7. Conclusions

Deviance can be the result of the combination of socio-cultural, situational factors and of the ones related to the individual, to the individuality. A solution for the reduction of the appearance of the deviant behaviour following the urbanization and its specific phenomena (divorce, unemployment, the lack of personal relationships) could be set up by education and culture.

The deviance is always where the factors which relate to individuality and the ones related to the social side intersect. "Merton claimed that deviance is a normal reaction of behaviour in abnormal social conditions" (apud Scripcaru, Boișteanu, Astărăstoaie, Chirița, 2002: 125), and "Howard stated: the level of civilization attained by a society is illustrated the best by the place the woman has in the respective society, by the care the society grants to the child, starting from birth" (apud Predescu, 1989: 196-197).

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