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ABOUT THE AMENDMENTS AND COMPLETIONS OF THE CRIMINAL CODE THROUGH LAW NO. 217/2023, IN WHAT THE OFFENSES AGAINST SEXUAL FREEDOM AND INTEGRITY OF THE PERSON ARE CONCERNED

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Abstract *Changes and additions to the provisions of a normative act are necessary in the context of protecting social values in line with the evolution of society. It is important to understand the will of the legislator, the rationale behind it, so that the new rules are easily interpreted and applied to the various concrete cases, but more importantly, it is necessary that all recipients of the norm, be it criminal, know its content in order to be able to model their behaviour, not wanting to violate it. The field in which, from January 1, 2024, additions and changes will be made is that of protection from the perspective of the criminal law of the freedom and sexual integrity of the person, the emphasis being on the increased protection of minors.*

Keywords: minor; offense; sexual freedom; sexual integrity

1. General Aspects

It is the second time[2] that the legislator sets a period of several months between the moment of publication in the Official Gazette of a law amending and supplementing the provisions of the criminal law and the moment these provisions enter into force. This time, the amendments and additions[3] concern certain criminalization rules from the special part of the Criminal Code[4], more precisely from Chapter VIII, of Title I, the chapter dedicated to crimes against a person's sexual freedom and integrity.

At this time, the crimes of rape and sexual assault, as well as those of sexual intercourse with a minor and sexual corruption of minors can be analysed in the mirror. Starting from January 1, 2024, the criminalization of the act of rape (art. 218 of the Criminal Code) changes, a new crime is introduced in art. 218[1] of the Criminal Code, the rape of a minor, the criminalization

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[2]The first case was that of the provision in art. 6[1] para. (1) from Law no. 241/2005 regarding the prevention and combating of tax evasion, published in the Official Gazette of Romania no. 672 of July 27, 2005, with subsequent amendments and additions, which entered into force on March 1, 2022, although the norm had been published in the Official Gazette of Romania no. 1202 of December 18, 2021.

[3]Operated by the provisions of Law no. 217/2023 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, of Law no. 135/2010 regarding the Criminal Procedure Code, as well as the Audiovisual Law no. 504/2002, published in the Official Gazette of Romania no. 634 of July 11, 2023.

[4]Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania no. 510 of July 24, 2009, with subsequent amendments and additions.

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of the act of sexual assault is modified (art. 219 of the Criminal Code), the norm of criminalizing the act of sexual intercourse with a minor is repealed, two new crimes are introduced, in art. 219[1] of the Criminal Code, the crime of sexual assault committed against a minor, and art. 219[2] of the Criminal Code, the offense of determining or facilitating the maintenance of sexual acts or of a sexual nature between minors, and the content of the criminalization of the act of sexual corruption of minors is also modified (art. 222 of the Criminal Code). The reason for these changes and additions lies in ensuring a better protection of this vulnerable category of people, minors, through criminal law, in terms of sexual freedom and integrity.

It was desired to increase the age limit for sexual consent to 15 years, as stated in the Explanatory Memorandum[1] to Law no. 217/2023, however, analysing the new provisions, we find that, in fact, the age limit for sexual consent will be 16 years.

2. Amendment of art. 218 of the Criminal Code

Regarding the changes that will be made in the norm of criminalizing the act of rape, we are considering several clarifications. First of all, the introduction of the minimum age of 16 years for the minor victim, in the case of the first aggravated variant, from letter c) of paragraph (3) of art. 218 of the Criminal Code, was imposed by the reason for the introduction of a new crime, in art. 218[1] of the Criminal Code, the rape of a minor, where the passive subject is only a minor who has not reached the age of 16. Since the minor is, in the common sense of the term, the person who has not reached the age of 18, we consider it appropriate for the legislator to amend the marginal name of art. 218[1] of the Criminal Code, in the sense of "rape committed against a minor who has not reached the age of 16", in order to be in agreement with the content of the criminal law.

Secondly, the repeal of letter e) of paragraph (3) of art. 218 of the Criminal Code was imposed as a result of the creation of a new aggravated variant common to the basic variant, from art. 218 para. (1) of the Criminal Code, the assimilated one, from art. 218 para. (2) of the Criminal Code, and the first aggravated version, from art. 218 para. (3) of the Criminal Code, in which "the act resulted in bodily injury or endangered the life of the victim in any other way" is the first of the circumstances that aggravate criminal liability.

Thirdly, the introduction of letter g) to para. (3) of art. 218 of the Criminal Code, in the sense that the act is more serious when "the perpetrator uses the authority of his position", has the role of widening the scope of the hypotheses in which the act of rape can be more severely sanctioned when, due to the position held, the perpetrator does not have the care, education, guard or treatment of the victim, and the perpetrator uses the authority of his position. An example of this would be the coercion to oral sex of a person by an individual who was a member of the board of directors of a multinational company where that person was employed.

Fourthly, the repeal of the second aggravated variant, from para. (3[1]) of art. 218 of the Criminal Code, does not mean a decriminalization of that behaviour in those situations, but only the fact that they are found in the content of the third aggravated variant of the new crime, namely the crime of rape committed against a minor.

Fifthly, through the provisions of para. (3[2]) of art. 218 of the Criminal Code, the legislator created a second aggravated variant, common to the first three, in which there are several circumstances that aggravate the criminal liability, apart from the one that represents a takeover of the former letter e) from paragraph (3) of art. 218 of the Criminal Code. Thus, in order to restrain the commission of the act of rape in the version from para. (3[2]) let. b), the perpetrator must know that the victim is a pregnant woman.

[1] Available at: https://www.cdep.ro/proiecte/2022/400/50/7/em549.pdf (last accessed: December 11, 2023).

Sixthly, another circumstance of aggravation of criminal liability is represented by the consequences of committing the act, namely the victim becoming pregnant, according to art. 218 para. (3^2) let. c) of the Criminal Code. Considering the evolution of medical technology up to this point, this is the only hypothesis in which rape is committed exclusively through sexual intercourse, the perpetrator is exclusively a man, and the passive subject a woman.

Seventhly, regarding the circumstance from art. 218 para. (3^2) let. d) of the Criminal Code, we consider that the legislator did not intend for the perpetrator to take advantage of the victim's state of obvious vulnerability, but it is enough that the victim is in that state, caused by age, illness, physical or mental handicap, or a situation of dependence. It is essential that the perpetrator knows the state of the victim, otherwise the secondary factual error intervenes. Taking into account the fact that the legislator has also provided such a circumstance that aggravates the criminal liability in the case of other crimes[1] as well, we consider that, *de lege ferenda*, for identity of reason, the norm should be modified in the sense in which the "perpetrator takes advantage of the state of obvious vulnerability (...)".

Eighth, the circumstance from art. 218 para. (3^2) let. e) of the Criminal Code refers to the notion of a weapon, the notion understood in both senses, according to art. 179 of the Criminal Code[2]. The difference between the notion of "use" of the weapon and that of "threat" with the weapon is given by the fact that in the first case the weapon is used, in the second case, the weapon is visible, it is the object of creating a situation of fear.

Ninthly, the circumstance from art. 218 para. (3^2) let. f) of the Criminal Code it is a hypothesis distinct from coercion, respectively from making it impossible to defend oneself or to express one's will. The scope of the phrase "any substance" is very broad, which, in our opinion, lacks the norm of predictability.

Tenthly, the amendment of para. (6) of art. 218 of the Criminal Code regarding the sanctioning of the attempt is a necessary aspect that also covers the new hypotheses of incrimination. But we consider that, like the hypothesis from para. (4) of art. 218 of the Criminal Code, in which the attempt is not possible, even in the hypothesis from para. (3^2) let. a) of art. 218 of the Criminal Code, when the deed resulted in bodily injury, the attempt is not possible.

3. The introduction of art. 218[1] of the Criminal Code

Regarding the act of rape committed against a minor, criminalized by the provisions of art. 218[1] of the Criminal Code, we note, first of all, that the basic version, from para. (1), takes the basic variant and the first aggravated variant from the current crime of sexual intercourse with a minor, from the contents of art. 220 para. (1) and (2) of the Criminal Code, with the mention that the perpetrator can only be an adult, regardless of whether he is male or female. For these reasons, the norm of criminalizing the act of sexual intercourse with a minor will be repealed as of January 1, 2024.

Secondly, in the aggravated version from para. (2) of art. 218[1] of the Criminal Code, the perpetrator is still only a minor, but the alternative ways of achieving the material element are committed by coercion, making it impossible to express his will or to defend himself or taking advantage of this state, as in the basic variant of the crime of rape, described in art. 218 para. (1) of the Criminal Code.

Thirdly, there is also a mitigated version, in art. 218[1] of the Criminal Code, in which the perpetrator is exclusively a minor, regardless of gender, and the alternative methods are carried out by coercion, making it impossible to express his will or to defend himself or taking

[1]For example, in the case of the crime of second-degree murder, provided in art. 189 para. (1) let. i) of the Criminal Code and in that of the crime of aggravated robbery, provided in art. 234 para. (1) let. g) of the Criminal Code.

[2]According to art. 179 of the Criminal Code: „(1) Weapons are the instruments, devices or parts declared as such by legal provisions. (2) Weapons are assimilated to any other objects that could be used as weapons and that were used for the attack".

advantage of this state. On the path of logical interpretation, using *per a contrario* reasoning, sexual intercourse, oral or anal intercourse, as well as any other acts of vaginal or anal penetration committed between minors is not a crime if coercion or inability to express or to defend oneself is not used or it is not taken advantage of this state.

Fourthly, in para. (4) of art. 218[1] of the Criminal Code, we find an aggravated variant common to all previous variants, created by taking over the various circumstances found in the aggravated variants of the crime of rape, described in art. 218 of the Criminal Code. From the perspective of the rules of legislative technique[1], we find that the legislator violates the rule[2] of avoiding repetitions, which leads to the existence of rules that are difficult to understand and apply to concrete cases. We consider that the crime from art. 218[1] of the Criminal Code was not necessary, given the fact that it does not bring anything new from the perspective of the regulation, but resumes assumptions already criminalized in the crime of rape, in the content of art. 218 of the Criminal Code, and already enshrined in the Romanian criminal legislation.

The increasing of the special punishment limits does not have the role to better protect the minor, from the perspective of his freedom and sexual integrity, but this role belongs to the fact of applying the punishment with speed, in such a way that it is a certainty that those who commit such acts will be punished.

Fifthly, the hypothesis from para. (5) of art. 218[1] of the Criminal Code is an assimilated variant to the aggravated variant from para. (4), in which five theses are described, which are differentiated, on the one hand, by the benefit pursued or obtained, namely: a remuneration, a material benefit or another advantage in kind, and, on the other hand, by the situation of the compulsion of the minor to live with the perpetrator. By "remuneration" we mean "payment"[3]. By "material benefit" we mean material "gain"[4], a concrete benefit, other than a payment. By "advantage in kind" we mean a benefit "in objects, in products (not in money)"[5]. The thesis of the coercion of the minor to live with the perpetrator, even when the perpetrator is a minor, may occur before, simultaneously or after the commission of the crime of rape because it is distinct from the compulsion necessarily preceding or, at most, concurrent to the commission of the crime of rape, in any of the ways of making the material element.

Sixthly, the aggravated version from para. (6) of art. 218[1] of the Criminal Code is a repetition of the aggravated version from para. (4) of art. 218 of the Criminal Code, which once again supports the fact that separate criminalization was not necessary.

Seventhly, the hypothesis of the non-existence of the crime in the case of the basic version of the rape committed on a minor, if the age difference between the perpetrator and the victim does not exceed 5 years, we consider it an appropriate special justifying cause in the conditions where the consent has not been flawed.

Eighth, the provision of criminalizing the attempt, contained in para. (8) of art. 218[1] of the Criminal Code, is a resumption of all assumptions from art. 218 of the Criminal Code, in the sense that, where possible, the attempt is punishable. For the reasons set out above, and in the case of the crime of rape committed against a minor, the act resulting in bodily injury, thus being a pre-intentional crime, the attempt is not possible, just as if the crime resulted in the death of the victim.

[1]Law no. 24/2000 regarding the rules of legislative technique for the elaboration of normative acts, republished in the Official Gazette of Romania no. 260 of April 21, 2010.

[2]It is a violation of art. 50 para. (1) sentence I of Law no. 24/2000, which stipulates that: "if a rule is complementary to another rule, to avoid repeating that rule in the text, reference will be made to the article, respectively to the normative act that contains it (...)".

[3]Available at: https://dexonline.ro/definitie/remunera%C8%9Bie(last accessed: December 13, 2023).

[4]Available at: https://dexonline.ro/definitie/folos/definitii(last accessed: December 13, 2023).

[5]Available at: https://dexonline.ro/definitie/natur%C4%83/definitii(last accessed: December 13, 2023).

4. Amendment of art. 219 of the Criminal Code

Regarding the crime of sexual assault, described in art. 219 of the Criminal Code, for reasons of criminal policy, the legislator considered it appropriate to increase by one year the special minimum limit of the prison sentence, starting on January 1, 2024, in the case of all incrimination options.

We find that all the changes made in the case of the crime of rape were also made in the case of the crime in question, for the same reasons of criminal policy. The attempt is criminalized in any of the variants in which it is possible, i.e. in the scenarios described in para. (1), (2) and (2^2) of art. 219 of the Criminal Code. We also maintain in the case of the crime of sexual assault that the attempt is not possible when the act resulted in bodily harm, as well as in the case where the result was the death of the person.

5. The introduction of art. 219^1 of the Criminal Code

Regarding the crime of sexual assault committed against a minor, described in art. 219^1 of the Criminal Code, the legislator followed the pattern from the norm of criminalizing the act of rape committed on a minor, from art. 218^1 of the Criminal Code, by reference to the crime of rape, from art. 218 of the Criminal Code, and created the norm in question by referring to the crime of sexual assault, from art. 219 of the Criminal Code. The particularity of this criminalization is given by the fact that the passive subject can only be a minor, regardless of gender, who has not reached the age of 16. In the basic version, from art. 219^1 para. (1) of the Criminal Code, the active subject is an adult, regardless of gender, an aspect that emerges from the interpretation of the norm, by reference to the mitigated version, from art. 219^1 para. (2) of the Criminal Code, in which the active subject is only a minor, i.e. a person who has not reached the age of 18, and the act is committed by coercion, making it impossible to defend himself or to express his will or taking advantage of this state.

In the basic version of the crime of sexual assault committed against a minor, the first sentence is taken from the current basic version of the crime of sexual corruption of minors, from art. 221 para. (1) of the Criminal Code.

Regarding the aggravated variants from art. 219^1 para. (3) and (4) of the Criminal Code, they are identical to the aggravated variants of the crime of rape committed against a minor, from art. 218^1 para. (4) letters a)-h) and (6) of the Criminal Code.

In art. 219^1 para. (5) of the Criminal Code we find a reason for the non-existence of the crime when an act of a sexual nature is committed, other than those provided in the case of the crime of rape committed against a minor, and the age difference between the perpetrator and the victim is 5 years or less.

In art. 219^1 para. (6) of the Criminal Code, the provision from art. 219 para. (4) of the Criminal Code, according to which if acts of sexual aggression were preceded or followed by acts characteristic of the crime of rape, the act constitutes rape. The reference to rape and not to rape committed on a minor is an additional argument for supporting the fact that the criminalization of art. 218^1 of the Criminal Code it was not a necessary one.

In art. 219^1 para. (7) of the Criminal Code the attempt is sanctioned for the crimes from para. (1) and (2) of art. 219^1 of the Criminal Code, an aspect that is found correspondingly for the crime of sexual assault.

Considering the way in which the norm of criminalization was created in art. 219^1 of the Criminal Code, by referring to the criminalization of the act of sexual assault, from art. 219 of the Criminal Code, for the same arguments as in the case of the crime of rape committed against a minor, we claim that a separate incrimination is not necessary, but the one from art. 219 of the Criminal Code.

6. The introduction of art. 219² of the Criminal Code

Regarding the norm of criminalizing the act of determining or facilitating sexual acts or of a sexual nature between minors, contained in art. 219² of the Criminal Code, we would like to make some clarifications.

First of all, although from the marginal name of this incrimination the alternative ways of achieving the material element would be the determination, respectively the facilitation, in the norm of incrimination there is only one normative way, respectively "the determination", which is why the text should be amended by adding "facilitation".

Secondly, the reference in the marginal name to "sexual acts" and to "acts of a sexual nature" differentiates between acts specific to the act of rape and those specific to the act of sexual aggression. We consider it appropriate to use the phrase "sexual acts of any nature" because it is a phrase already enshrined in Romanian criminal law.

Thirdly, "determination" as a way of committing a crime has the value of an act of instigation that benefits from distinct criminalization.

On the one hand, from the perspective of sanctioning this behaviour, we find that reference should only be made to the sanction from art. 218[1] para. (3) of the Criminal Code because, in the case of para. (1) and (2) from the same article, the active subject of the crime of rape committed on a minor can only be an adult. On the other hand, the facilitation by an adult of such acts by minors who have not reached the age of 16, without coercion, making it impossible to defend themselves or express their will or taking advantage of this state, has no criminal relevance.

The same reasoning is also valid for determining the commission of any act of a sexual nature, other than those from paragraph (1) of art. 219² of the Criminal Code. Relative to paragraph (3) of art. 219² of the Criminal Code, the provision was necessary in the context of the relationship between the acts characteristic of the crime of rape and those of sexual assault. The active subject can only be an adult, which means that any of the behaviours described in para. (1) and (2) of art. 219² of the Criminal Code, committed by a minor, has no criminal relevance.

7. Amendment of art. 221 of the Criminal Code

Regarding the crime of sexual corruption of minors, provided in art. 221 of the Criminal Code, in the basic version, committing an act of a sexual nature, other than those provided in art. 218 of the Criminal Code, constitutes a crime only if it is committed with intent, by an adult on a minor who has not reached the age of 16, and only if there is one of the four circumstances, found in letters a)-d) from para. (1) of art. 221 of the Criminal Code. In this context, we consider that the norm from para. (5) of art. 221 of the Criminal Code, relative to the non-existence of the crime if the age difference between the perpetrator and the victim does not exceed 5 years, must be repealed, if it will enter into force as it is drafted at this moment, because it cannot be conceived that it is a behaviour allowed by law the fact of having an act of a sexual nature, other than those from the crime of rape between family members or for the purpose of producing pornographic materials or when the minor under 16 is in the care of the perpetrator if the age difference is 5 years or less.

Moreover, such a cause of non-existence of the crime is not found even if the same behaviours, under the same circumstances, are committed against a minor aged between 16 and 18, which creates a situation of differential treatment by the law, against the provisions of art. 16 of the Romanian Constitution[1].

[1]Available at: https://legislatie.just.ro/Public/DetaliiDocument/1413 (last accessed: December 15, 2023).

The repeal of para. (2^1) of art. 221 of the Criminal Code is appropriate in the context of the new rules from para. (1) and (2) of the same article.
Considering the new vision of the legislator, the modification of para. (3) of art. 221 of the Criminal Code relative to the age of 16 of the minor is appropriate, as well as in the case of the rule from para. (4) of the same article.
In the Explanatory Memorandum to Law no. 217/2023 it is stated that a new hypothesis of sexual corruption of minors has been introduced, including when the act of a sexual nature is not committed, an aspect found in art. 221 para. (4^1) of the Criminal Code. The active subject can only be an adult, regardless of gender, who must know that the one they are inciting is a minor who has not reached the age of 16. From the perspective of the material element, the action of "inciting" has the value of an act of instigation, as a form of criminal participation, which is criminalized separately, as an act of authorship. The act must be carried out by means of remote transmission, via electronic communication or social networks. We believe that the legislator should have in mind only the reference to the means of remote transmission, an aspect already established by the criminal legislation, which also involves electronic communication, but is not limited to this, but also social networks, the latter being included in the communication electronics, but not identical to it. Therefore, the connection that exists between the means of remote transmission and electronic communication is from part to whole, just like that between electronic communication and social networks.

"Any act of a sexual nature" referred to by the legislator in the context of this rule is the one that circumscribes the crime of sexual corruption of minors, in the basic version. If the legislator had wanted to include those corresponding to the crime of rape, he would have used the phrase "sexual acts of any nature", just as he used in the rules from paragraph (3) and (4) of art. 221 of the Criminal Code.
Changing the content of para. (6) of art. 221 of the Criminal Code, in the sense of the criminalization of the attempt for the crimes provided in para. (1)-(4) of the same article, is in agreement with the legislator's new perspective.

8. Amendment of art. 222 of the Criminal Code

Regarding the modification of the content of the rule of criminalization of the act of recruiting minors for sexual purposes, from the content of art. 222 of the Criminal Code, this was necessary in the context of the other incrimination norms that were modified regarding the minor's age of 16. It is a separate criminalization of an act of preparation by reference to a crime of rape committed against a minor (art. 218^1 of the Criminal Code), sexual assault committed against a minor (art. 219^1 of the Criminal Code) or child pornography (art. 374 of the Criminal Code) because the phrase "sexual act of any nature" refers both to sexual acts corresponding to the crime of rape, and to those of a sexual nature corresponding to the crime of sexual assault. On the other hand, we note that the legislator maintains the reference to the acts provided in art. 374 of the Criminal Code, under the conditions in which the crime of child pornography does not depend on the age of the minor, but only on his status as a minor, i.e. on the person who has not reached the age of 18^1.

9. Amendment of art. 222^1 of the Criminal Code

Regarding the common aggravated version, from art. 222^1 of the Criminal Code, it was necessary to change the norm, in the sense that the reference should be made exclusively to the acts of sexual corruption of minors and the recruitment of minors for sexual purposes, because, on the one hand, the norm contained in art. 220 of the Criminal Code will be repealed,

[1] For details see Rotaru M. (2022), *Some Considerations Regarding the Offense of Recruiting Minors for Sexual Purposes*, *Provided in Article 222 of the Romanian Criminal Code*, the Juridical Current Journal no. 2/2022, p. 117.

simultaneously with the entry into force of the rule from the article in question, and, on the other hand, the aggravating hypotheses contained in the rule from art. 222^1 of the Criminal Code are provided separately in the case of the criminalization rules for acts of rape and sexual assault, including when they are committed against a minor.

10. Conclusions

We agree with the constant modification and addition of criminalization rules to ensure the best protection from the perspective of criminal law of social values, but we believe that they must be done in accordance with the rules of legislative technique and with an overall vision of criminal provisions in order to avoid the use of new terms or phrases, synonymous with those enshrined in the legislation, and which could give rise to arbitrary interpretations.

REFERENCE

Law no. 24/2000 regarding the rules of legislative technique for the elaboration of normative acts, republished in the Official Gazette of Romania no. 260 of April 21, 2010;
Law no. 241/2005 regarding the prevention and combating of tax evasion, published in the Official Gazette of Romania no. 672 of July 27, 2005;
Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania no. 510 of July 24, 2009;
Law no. 217/2023 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, of Law no. 135/2010 regarding the Criminal Procedure Code, as well as the audiovisual Law no. 504/2002, published in the Official Gazette of Romania no. 634 of July 11, 2023;
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