

PSYCHOSOCIAL INFERENCES AND LEGAL REGULATION OF CONJUGAL RAPE

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Abstract

In this study, we sought to analyze issues related to the regulation of domestic violence against women and, in particular, the regulation of rape committed between spouses (marital rape). The awareness of the magnitude and severity of the phenomenon of domestic violence in Romania, which we are talking about in this paper, has recently developed, thanks to the campaigns that have been conducted to inform the public and that have promoted the adoption of Law no. 217/2003 regarding the prevention and control of domestic violence.

Moreover, we also want to consider that "The judiciary system's culture does not understand the women who have been assaulted by their partners and ended up killing them have been both victims and criminals."

Keywords: *domestic violence, rape, domestic rape, sexual abuse, marital rape*

Considerations about domestic violence

Considering that domestic violence is one of the oldest forms of violence, we believe that this is a social problem with a high degree of danger, some specialists seeing it as a "form of torture"[1]. We draw attention to this particularly serious phenomenon, because the social impact of this type of violence is widespread, as it affects both victims and those indirectly involved by family, witnesses or third parties who are aware of violence in family.

Moreover, this form of violence is often "behind the closed doors", being hidden by the victim, because of the fear of the aggressor, of the opprobrium of society, but also of the reticence of the judicial bodies to intervene in a field considered even nowadays "taboo."

For the purposes of Article 3 of the Council of Europe Convention on the Prevention of and Fight against Violence Against Women and Domestic Violence (Istanbul, 11.05.2011) domestic violence means all acts of physical, sexual, psychological

or economic violence occurring in the family or in the domestic unit or between former or current spouses or partners, regardless of whether the aggressor divides or shared the same domicile with the victim.

According to the UN Declaration on the Elimination of Violence Against Women (1993), violence against women (VAW) means "any act of gender-based violence that results in, or is likely to result in, trauma or physical, sexual or psychological suffering for women".

Definition of marital rape

Definition given by art. 3 par. (1) and (2) of Law no. 217/2003 on the prevention and control of domestic violence, as corroborated with the provisions of the current Criminal Code, is the following:

"(1) domestic violence represents any intentional act or omission, except for acts of self-defense or defense, physically or verbally manifested, committed by a family member against another member of the same family that causes or is likely to cause harm or physical, mental, sexual, emotional or psychological suffering, including the threatening of such acts, coercion or arbitrary deprivation of liberty.

(2) It also domestic violence preventing women from exercising their fundamental rights and freedoms."

The concept of sexual violence according to art. 4 let. d) of the same normative act is defined as "sexual violence - sexual assault, impositions of degrading acts, harassment, intimidation, manipulation, brutality in order to maintain forced sexual relations, conjugal rape;"

Family member, according to art. 5, means:

For the purposes of this law, a family member means:

a) ascendants and descendants, brothers and sisters, their children, as well as persons who have been became, according to the law, such relatives;

b) husband/wife and/or former husband/ex-wife;

c) persons who have established relationships similar to those of the spouses or between parents and children, if they live together;

d) the tutor or other person who exercises in fact or in law the rights to the child;

e) the legal representative or other person who cares the person with mental illness, intellectual disability or physical disability, except for those who perform these duties in the exercise of their professional duties.

The criminal law dictionary defines aggression as "the violent behavior manifested by one person, towards other persons" [2], and violence as an aggressive behavior that can be manifested on a physical or mental level and most often acquires criminal significance [3] "

The specialized literature contains different definitions of violence in various fields. Thus, in the psychiatric field, violence is a human action that involves the intensification of brutality, carried out with the help of force, which is directed against a person, situation, institutions, communities or against any other object, the action following which the object can be destroyed [4].

In psychology, the authors Svetlana Rusnac, Victoria Gonța, Svetlana Clivada, Ludmila Zmuncilă consider that "domestic violence is a powerful stimulus for inadequate conditions that in most cases lead to consequences no less serious than the act itself, under certain conditions even stronger.[5] "

Although the Romanian legislator uses the notion of domestic violence, the Romanian doctrine operates most often with the concept of domestic violence, equating them in meaning. The author Bodrug-Lungu Valentina, however, differentiates them by explaining that "the notion of domestic violence (domestic violence – engl.) is wider also covering the sphere of aggressive relations between concubines".[6] In her opinion, "domestic violence refers to all physical, sexual, psychological, economic and abusive actions in a legal family relationship."[7]

Comparative law issues of marital rape

Given that this type of rape is regulated differently internationally, we can see that all definitions of rape have common features, namely:

- Sexual constraint on the victim
- The absence of will.

Following the analysis of the various law systems on marital rape, we note that internationally, legislative reforms for preventing this kind of crime also have common

points, namely: In Europe, only Spain and Sweden incriminate domestic violence as specific offenses, in the case of countries such as Turkey, Germany, Belgium, the relationship between the victim and the aggressor constitutes an aggravating circumstance.

"The legal definition of rape involves sexual intercourse (vagina, anal or oral) by the use of force by a person without the consent of the other person. This definition tends to focus on the penetration of a particular hole by the penis or other object. Penetration is not, however, the central element in rape." [8]

At present, marital rape is sanctioned under the rules of common law. With regard to the burden of proof, the absence of consent is presumed when there were no prior relationships between those persons, unlike the situation where the persons are married or between them there were previous relationships, as the existence of consent is presumed. [9]

Under civil law rules, the victim may request a restraining order against the aggressor or, at the same time, orders with regard on the seizure of the marital domicile.

Thus, in Spain, after 1989, considering that the rape has as legal object the sexual freedom, both the doctrine and the judicial practice consider that only the respective person decides, and not someone else, when, how and with whom he or she has sexual relations. [10]

Beside the Swedish legislation, the Spanish one is the only one in Europe that inflicts through a specific offense the domestic violence. According to the law on the protection of victims of inhumane treatments, any person who has been physically or mentally abusive on his wife, ex-wife, or other persons with whom he or she maintains or has maintained family-like relationships, commits an offense of "torture and other crimes against moral integrity."

In Turkey, it is not considered rape maintenance of sexual relations with the wife using force, because, by virtue of the act of marriage, the woman is legally obliged to obey her husband and follow him in bed whenever required. [11]

Psycho-sociological issues of marital rape

Considering those above, we would like to point out that sexual violence is a traumatic phenomenon, whether it is just an incident or repeated cases in a certain period of time.

We will further notice that the consequences of this type of aggression are not limited to the immediate future, but can affect the life of the victim on long term, the consequences depending on age, personality, concurrence, the nature of the offense, but also the relationship between the victim and the aggressor . Also, as a result of such an experience, we can see that victims may be affected the physical, emotional, behavioral, social and professional functioning.

Also, the consequences of this phenomenon can also affect both children, who are often witnesses, and those persons close to the victim.

The consequences of aggression can be:

1. Physical: lesions, urogenital infections, pregnancy;
2. Mental: attempted suicide; shock, partial or even total amnesia, depression, anxiety; (self-blame, feelings of shame and humiliation, mistrust in one's own person, fear of intimacy in relationships), behavioral disorders (fear of strangers, situations/new places, losing someone dear, social isolation, fear of establishing relationships of any kind, difficulty in concentration, attention etc.)

Moreover, psychological research has highlighted that children themselves suffer such physical, psychological and sexual violence. Also, the lack of respect for the father in these cases disappears, leading to the loss of the male example, and the lack of respect for the abused mother outlines the lack of respect for the woman in general.[12]

As far as a man has suffered a nervous shock or fear dominates him, he is exhausted, weakened, the body loses its muscular strength and mental coordination. Continuous living in such a tension makes the body cease and hence the appearance in the beaten women the degenerative and mental illnesses in forms that are hard to manage.[13]

Regulation of the marital rape in Romania

Prior to the appearance of Law no. 197/2000, in the absence of jurisprudence in the matter, the doctrine has ruled against the existence of this type of offense/aggression between spouses. In the specialty studies it was argued that the wife cannot be considered a victim of the rape, because the sexual relations with her husband are a marital duty, of which fulfillment can be achieved even by coercion and because with the marriage she has given her consent to this duty throughout the entire marriage.[14]

It was also appreciated that the act of marriage implies a woman's agreed restriction of her sexual freedom (even if in fact the husbands live separately) so it could not operate the provisions of art. 197 in the spouses' relationships.[15]

In relation to the above, we consider that the arguments used in the doctrine are not pertinent, as the consent of the wife at the time of marriage is a general consent to the acceptance of family-related customs.

The wife does not consent to the mutual duty of spouses to maintain sexual relations, not to be forced, constrained to have sexual relations, just as neither the law nor the "covenant" specifies anywhere, the number, the way and their periodicity.

With the Law no. 197/2000, the legislator incriminated marital rape, both in simple and aggravated form, also considering the possibility of sanctioning the rape committed by the wife over her husband, renouncing the idea that only the man can be considered a passive subject. Given the negative consequences that sexual intercourse can have on both children and family members, the offense committed in this way must be incriminated.

If before the changes on Penal Code occurred in 2000, where the man can become a passive subject, not just a circumstantiated active subject, the old wording of art. 197 Penal Code, stipulated: "sexual intercourse with a female person, (...) the active subject was qualified (the man)".

In view of the changes made to other offenses related to sexual life, we appreciate the fact that the phrase "of different sex or of the same sex" has been dropped in the wording of art. 218 of the new Criminal Code.

Thus, in the sense of the new Criminal Code, the rape offense provided by art. 218, is worded as follows:

"(1) Sexual intercourse, oral or anal intercourse with a person, committed through coercion, impossibility to defend himself or to express the will or to take advantage of this state, shall be punished by imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights.

(2) The same punishment shall be sanctioned to any other acts of vaginal or anal penetration committed under the conditions of par. (1).

(3) The punishment shall be imprisonment from 5 to 12 years and the prohibition of the exercise of certain rights when:

- a) the victim is in the care, protection, education, guard or treatment of the offender;
- b) the victim is a direct relative, brother or sister;
- c) the victim is a minor;
- d) the act was committed for the purpose of producing pornographic material;
- e) the act has resulted in body injury;
- f) the act was committed by two or more people together.

(4) If the deed has resulted in the death of the victim, the punishment shall be imprisonment from 7 to 18 years and the prohibition of the exercise of certain rights.

(5) The criminal action for the deed stipulated in par. (1) and par. (2) begins at the prior complaint of the injured party."

Rape has been regulated from the idea of penetration so that the content of this crime will include the sexual intercourse, oral sex and anal sex, respectively, no matter if heterosexual or homosexual.

In the previous regulation, the material element had a different sphere of coverage, constituting any means of obtaining sexual satisfaction by using sex or acting on sex, between persons of different sex or of the same sex, by constraining or taking advantage of the impossibility of the person to defend or express their will. [16]

In another opinion [17], it is argued that art. 218 also suffered changes on regards of the form of co-authorship in the criminal participation. Thus, if in the old regulation the co-authorship was not possible because the natural sexual intercourse with a female person could not be achieved simultaneously [18], the new regulation states that the co-authorship is possible, because the legislator refers to "sexual intercourse of any kind"

either that natural, unnatural sexual acts performed simultaneously or by several offenders.

Conclusions

Studies have shown that a "woman is more likely to be injured, raped or murdered by the man who is or was her partner than any other person." [19]

It is also considered that the one guilty of violence is not only the aggressor, but also the victim who always accepts its role. In psychiatric literature there is discussed the Stockholm syndrome also called the paradox attachment syndrome, that is to say, aggressive women who are subjected to violence, who are threatened and mistreated, see their own aggressor as a savior.

In my own opinion, I consider there would be welcome the proposal to set up crisis centers for rape situations that would function as integrated services, in accordance with art. 23 of the Istanbul Convention.

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