

VULNERABILITY IN CRIMINAL LAW

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ABSTRACT: *Legally enshrined, both at national and international level, obvious or not, vulnerability is present in criminal law, whether it is related to a state, a situation of a person or even to a category of persons. In the context of the legal definition of the term "vulnerable person", it is interesting to analyse the reason why, in the different criminalization hypotheses, the causes of the existence of vulnerability are distinct.*

KEYWORDS: *vulnerability; criminal law; different causes;; definition.*

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1. GENERAL CONSIDERATIONS ON VULNERABILITY IN CRIMINAL LAW

The present approach has arisen as a result of successive¹ amendments and additions to the Criminal Code² in recent years. The introduction, as a legislative novelty³, of the general aggravating circumstance relating to the state of obvious vulnerability of the passive subject, which the perpetrator takes advantage of in committing the crime, and the subsequent inclusion of the reference to this state in the basic or aggravated content of some offenses, although the causes that determined it were of the most diverse and non-exhaustive list, led us to address the issue of the meaning of this concept and the necessity or not of identifying the causes that generate it.

Vulnerable persons enjoy greater protection under criminal law. This assertion is supported, on the one hand, by the existence of a legal aggravating circumstance in the

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¹ We have in mind, in particular, the provisions of Law no. 217/2023 amending and supplementing Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Criminal Procedure Code, as well as Law no. 504/2002 on Audiovisual, published in the Official Gazette of Romania no. 634 of July 11, 2023, with subsequent amendments and supplements, as well as those of Law no. 248/2023 amending and supplementing Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania no. 673 of July 21, 2023.

² Law No. 286/2009 on the Criminal Code, published in the Official Gazette of Romania No. 510 of 24 July 2009, with subsequent amendments and supplements.

³ For details, see the Explanatory Memorandum to the Criminal Code in force, available at: <https://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf> (last accessed: November 27, 2024).

general part of the Criminal Code, more precisely in Article 77 lit. e)⁴ of the Criminal Code, which is generally applicable, and, on the other hand, by the existence of certain incriminations in the special part of the Criminal Code, in which the state or situation of these persons is dependent on the existence of the offense or the existence or not of an aggravated variant.

For the first situation, we consider, for example, the existence of the offense of aggravated murder, under art. 189 para. (1) let. i) of the Criminal Code, when the perpetrator takes advantage of the victim's condition, or the offense of aggravated robbery, under art. 234 para. (1) let. g) of the Criminal Code, or the offense of financial exploitation of a vulnerable person, under art. 247 of the Criminal Code.

For the second situation, we consider the existence of the aggravated variant, for example, in the case of the offense of rape, under Art. 218 para. (3²) let. d) of the Criminal Code, the offense of rape committed against a minor, according to art. 218¹ para. (4) let. b) of the Criminal Code, the offense of sexual assault, according to art. 219 para. (2²) let. c) of the Criminal Code, or the offense of sexual assault committed against a minor, according to art. 219¹ para. (3) let. b) of the Criminal Code.

However, in addition to these hypotheses, Title I of the Special Part of the Criminal Code contains an entire chapter, the seventh one, on trafficking and exploitation of vulnerable persons, containing rules criminalizing slavery, trafficking in persons, trafficking in minors, forced or compulsory labor, procuring, exploitation of begging, use of a minor for the purpose of begging, use of the services of an exploited person and use of child prostitution, as provided in art. 209 to 217 of the Criminal Code.

We consider that all natural persons, passive subjects of the offenses listed above, as set out in this seventh chapter, are in a state of obvious vulnerability, considering the very title of the chapter in question. Thus, we consider that the reference in the last sentence of art. 210 para. (1) let. b) of the Criminal Code, to the perpetrator taking advantage of the victim's obvious vulnerability, is redundant. Furthermore, we consider that the aggravated version of the crime of trafficking in minors is also redundant, according to the provision in the last sentence of art. 211 para. (2) let. e) of the Criminal Code, given the reference in the content of let. a) of para. (2) of art. 211 of the Criminal Code to the commission of the offense under art. 210 para. (1) of the Criminal Code, which refers to taking advantage of the victim's obvious condition. Now, regardless of the cause that gave rise to it, the state of obvious vulnerability has the same meaning, thus not justifying the creation of two provisions expressing the same idea. We also point out that, although the legislator uses the terms "state of obvious vulnerability" and "obviously vulnerable situation" of the person, in the content of the criminalization rules, their meaning is identical, the words "state" and "situation" being synonymous⁵.

Moreover, it is clear that persons are vulnerable only if the state or situation in which they find themselves is manifest, i.e. obvious. This gives rise to two points that we wish to mention. First of all, we consider that no one can plead error with regard to the victim's state of vulnerability, regardless of the cause that gave rise to it, given its obvious nature.

⁴ According to art. 77 letter e) of the Criminal Code, it is an aggravating circumstance "the commission of the crime by taking advantage of the state of obvious vulnerability of the injured person, due to age, health, disability or other causes; (...)"

⁵ For details, see: <https://www.dictionardesinonime.ro/?c=stare> (last accessed: November 27, 2024).

Secondly, if the legislator always specifies the "obvious" nature of the vulnerability, we consider that the reference could have been made to the category of "obviously vulnerable persons". In the explanatory memorandum⁶ to Law⁷ no. 202/2024 on amending and supplementing Law no. 286/2009 on the Criminal Code, it talks about the "increased vulnerability of certain segments of the population in search of better life opportunities"⁸. In contrast to the possible causes of the obvious vulnerability of persons expressly provided in the Criminal Code, we note that in the explanatory memorandum the state of vulnerability is based on the low standard of living of the population.

Taking into account the rules of legislative technique⁹, according to which the words used in legal texts have the meaning of everyday speech¹⁰, and the fact that "in normative language the same concepts are expressed only by the same terms"¹¹, we consider that, in the absence of a legal definition in the Criminal Code, the meaning of the term "vulnerable" is that of the Romanian Explanatory Dictionary, namely "who can be easily injured physically or morally"¹².

2. THE CONCEPT OF "VULNERABLE PERSON" IN CRIMINAL LAW

Although used in the heading of Chapter VII of Title I of the Special Part of the Criminal Code, namely in the marginal heading of art. 247 of the Criminal Code, relating to the financial exploitation of a vulnerable person, the term in question does not have a legal definition in this normative act.

There is, however, a legal definition of the term "vulnerable person" in Romanian legislation, in the sense that it means "minors, unaccompanied minors, disabled persons, elderly persons, pregnant women, single parents with minor children and persons who have been subjected to torture, rape and other serious forms of mental, physical or sexual violence"¹³. Although this legal definition is relevant to the area covered by the legislative act in which it is found, it is nevertheless important from the perspective of the different situations or causes that give rise to the vulnerability of these persons, namely their age, whether young or old, with reference to minors and elderly persons, their state of health or infirmity, with reference to disabled persons¹⁴, and other causes, with reference to pregnant women, single parents with minor children or persons who have been subjected to various serious forms of violence, as expressly stated in the relevant provision. Essentially, the

⁶ Available at: <https://www.cdep.ro/proiecte/2024/200/70/2/em308.pdf> (last accessed: November 27, 2024).

⁷ Published in the Official Gazette of Romania no. 607 of June 28, 2024.

⁸ For details, see paragraph 6 of the explanatory memorandum to Law No. 202/2024, available at: <https://www.cdep.ro/proiecte/2024/200/70/2/em308.pdf> (last accessed: November 27, 2024).

⁹ Law No. 24/2000 on the legislative technical norms for the drafting of normative acts, republished in the Official Gazette of Romania No. 260 of 21 April 2010, with subsequent amendments and supplements.

¹⁰ According to art. 36 paragraph (4) sentence I of Law no. 24/2000.

¹¹ According to art. 37 paragraph (1) of Law no. 24/2000.

¹² Definition available at: <https://dexonline.ro/definitie/vulnerabil/definitii> (last accessed: November 27, 2024).

¹³ According to art. 2 let. z) of U.G.O. no. 194/2002 regarding the regime of foreigners in Romania, republished in the Official Gazette of Romania no. 421 of June 5, 2008. In accordance with this definition, the General Inspectorate for Immigration provides explanations, on its website, regarding this category of persons. For details, see: <https://igi.mai.gov.ro/persoanele-vulnerabile/> (last accessed: November 27, 2024).

¹⁴ The phrase "persons with disabilities" is legally defined in art. 2 para. (1) of Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities, republished in the Official Gazette of Romania no. 1 of January 3, 2008, with subsequent amendments and supplements.

causes of a person's state of obvious vulnerability are also revealed in the above-mentioned definition, as they are found in the case of the general aggravating circumstance in art. 77 let. e) of the Criminal Code, or in the rule criminalizing the act of aggravated murder, according to art. 189 para. (1) let. i) of the Criminal Code, or of the rule criminalizing the act of aggravated robbery, in accordance with the provision of art. 234 para. (1) let. g) of the Criminal Code. These aspects converge on the idea set out in the first section of this paper, in the sense that the meaning of the term "vulnerable" is the one commonly used.

At international level, there are legal provisions on the meaning of the term "vulnerable person". Thus, at the European Union level, paragraph 33 of the Preamble to Regulation¹⁵ (EU) 2018/1862 states that „persons in need of protection on grounds of age, disability or family situation should be considered vulnerable"¹⁶. This regulation also includes two of the causes that can be the basis of a person's obvious vulnerability under Romanian criminal law.

In Irish law there is the National Review Office (Children and Vulnerable Persons) Act 2012¹⁷, which provides the definition of a "vulnerable person", which is "a person, other than a child, who : a) suffers from a mental disorder as a result of mental illness or dementia; b) has an intellectual disability; (c) suffers from a physical impairment, whether as a result of injury, illness or age; or (d) has a physical impairment which is of such a nature or degree (i) that it restricts the person's ability to protect himself or herself against harm from another person, or (ii) that it makes the person need assistance with activities of daily living, including dressing, eating, walking, bathing and toileting"¹⁸. Also in this piece of legislation we notice that reference is made to the causes of a person's vulnerability, such as age, health, disability or other causes.

In Singapore law, there is the Vulnerable Adults Act 2018¹⁹, which has the legal definition for the phrase used, as follows : „, "vulnerable adult" means a person who - (a) is 18 years of age or over; and (b) is, by reason of mental or physical infirmity, disability or incapacity, unable to protect himself from abuse, neglect or self-neglect (...)"²⁰ . The causes that may give rise to a state of vulnerability are exhaustive, namely: mental or physical infirmity, disability or incapacity.

The Spanish Criminal Code²¹ uses the term "particularly vulnerable person"²² and, although it has no legal definition, the legislator lists, as in Romanian criminal law, the causes which may underlie the situation of the person in question, namely: age, illness and

¹⁵ Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, available at: <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32018R1862> (last accessed: 27 November 2024).

¹⁶ Ibid.

¹⁷ Available at: <https://www.irishstatutebook.ie/eli/2012/act/47/section/2/enacted/en/html> (last accessed: 27 November 2024).

¹⁸ Ibid.

¹⁹ Available at: <https://sso.agc.gov.sg/Act/VAA2018> (last accessed: 27 November 2024).

²⁰ Ibid.

²¹ Available at:

https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf (last accessed: 27 November 2024).

²² Ibid.

disability. It is true that in the criminal code, depending on the specifics of certain offenses, these three causes may be joined by others, such as personal situation or pregnancy, but, contrary to the Romanian legislator's choice, the list of causes that generate the person's particular vulnerability are exhaustive. There is no reference to the category of "other causes", as it is the case in Romanian criminal law. Moreover, many of the offenses in the Spanish Criminal Code refer to the passive subject as to a "particularly vulnerable person", without expressly indicating the cause of the state of vulnerability²³. In the Romanian Criminal Code there is only one situation in which reference is made to taking advantage of the state of obvious vulnerability of the passive subject, without indicating any cause generating it, namely in the case of the basic variant of the crime of trafficking in human beings, according to the provisions of art. 210 para. (1) let. b) of the Criminal Code.

In the French Criminal Code²⁴, the concept of "particular vulnerability" of a person is found, but differently from the Romanian Criminal Code, the causes are limitatively provided and they are always identical, regardless of the rule of criminalization in which they are found, whether it is the crime of murder²⁵ or the crime of assault causing death²⁶, rape²⁷, trafficking in human beings²⁸ etc. These causes are: "age, illness, infirmity, physical or mental disability or pregnancy"²⁹. Another interesting aspect to note in the French Criminal Code is the fact that the person's particular vulnerability is either obvious or known to the offender. Thus, in contrast to the Romanian legislator's choice, the person's condition is either obvious, so that no one can plead error as to its existence, or it is known to the perpetrator.

3. CAUSES OF THE STATE OF OBVIOUS VULNERABILITY IN CRIMINAL LAW

As we stated at the very beginning of this paper, one aspect that we consider interesting to analyze is the causes that generate the state of obvious vulnerability of the passive subject, both to establish whether the exhaustive enumeration of those causes in the context of each incrimination in the content of which we find this reference is relevant or not, and to establish whether the error may be made in the knowledge of the causes that generated that state, when the question of criminal liability of the perpetrator is raised.

An analysis of the content of the incriminating rules shows that a person's obvious vulnerability has many different causes. On the one hand, the legal provisions relating to the circumstances that determine the apprehension of the offenses of aggravated murder and aggravated robbery in 2023 were supplemented³⁰ by taking over the content of the general aggravating circumstance from art. 77 let. e) of the Criminal Code.

²³ Ibid.

²⁴ Available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/ (last accessed: November 27, 2024).

²⁵ Art. 221-4 of the French Criminal Code.

²⁶ Art. 222-8 of the French Criminal Code.

²⁷ Art. 222-24 of the French Criminal Code.

²⁸ Art. 225-4-1 of the French Criminal Code.

²⁹ For details: see the French Criminal Code, available at:

https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/ (last accessed: 27 November 2024).

³⁰ We are considering the provisions of Law No. 248/2023.

On the other hand, the causes of the state of vulnerability in the offenses of rape, rape committed against a minor, sexual assault and sexual assault committed against a minor are not identical. It is understandable that age is not taken into account as a cause of vulnerability for offences infringing sexual freedom and inviolability where the passive subject is a minor, as this condition is under-understood. However, we consider that it is not justified to include pregnancy as a cause of the victim's vulnerability in the offense of sexual assault, given that the same paragraph considers the offense to be equally serious when committed against a pregnant woman, just as in the case of rape. However, another question that arises in this context is whether pregnancy can be considered as a cause of vulnerability in general, irrespective of the rule of criminalization in which it is provided. We consider that such an approach is not necessary, as pregnancy is a natural stage in a woman's life and does not deprive her of any of her capacities. We consider that the existence of the aggravated variant of rape or sexual assault, when committed against a pregnant woman, is related to the disastrous effects that such behavior can have on the development of pregnancy.

In the case of offenses that infringe sexual freedom and inviolability, another cause is "disease", which is different from the cause of "state of health" in art. 77 let. e) of the Criminal Code, and art. 189 para. (1) let. i) and art. 234 para. (1) let. g) of the Criminal Code. Although the terms used are not synonymous, as in the example given in the first part of this paper, we consider that the interpretation of the rule should be identical because a person's vulnerability is not generated by his or her good health, but by the opposite, i.e. by the state of illness. We believe that the legislator should pay more attention to the need for a uniform manner of expression in criminal law in general.

Another discussion is whether, following the above pattern, disability, as a cause of vulnerability in art. 77 let. e) of the Criminal Code, can be considered to have the same meaning as "physical or mental disability", a cause of vulnerability, in the case of offenses infringing sexual freedom and inviolability. As there is no legal definition in the Criminal Code for these terms, we will consider their medical meaning, and from a medical perspective, they are synonymous³¹.

The "situation of dependence", another cause of the state of vulnerability, present in the case of the offenses of trafficking in minors and rape and sexual assault, including when the latter are committed against a minor, has been explained in the specialized literature (Ionaș, Măgureanu, Dinu and Rotaru, 2024)³². Given that it can be generated by the use of psychoactive substances or alcohol, or by the emotional and/or financial dependence to the offender, we consider that it can be considered as a cause of the state of obvious vulnerability in all cases where these causes are listed in the rule.

The same reasoning applies in the case of the cause represented by the "state of physical or mental incapacity", which is also explained in the specialized literature (Ionaș, Măgureanu, Dinu and Rotaru, 2024)³³, and which is present at this time only in offences where the situation of dependence is also mentioned.

³¹ For details, see: https://www.sfatulmedicului.ro/dictionar-medical/infirmiate_5918 (last accessed: November 27, 2024).

³² For details, see Alexandru Ionaș, Alexandru Florin Măgureanu, Cristina Dinu, Mihaela Rotaru, *Criminal Law. Special Part, 2nd edition, revised and added*, Universul Juridic Publishing House, Bucharest, 2024, pp. 152-153.

³³ Ibid.

We agree with the opinion expressed in the literature (Ionaș, Măgureanu, Dinu and Rotaru, 2024)³⁴ on the unpredictability of the application of the rule when we consider "any other causes", with reference to the state of obvious vulnerability.

Another aspect that should be established is the need for the perpetrator to know or be able to realize, at the time of the commission of the act, the cause underlying the victim's state of obvious vulnerability. The state of the victim, from the perspective of the criminal law, is obvious. In general, the underlying causes are also observable by any person, being matters that are easy to ascertain at a simple glance by the person in this situation, when they manifest themselves on the body of the person in question. This is the case, for example, of age, whether it is too young or too old, of infirmity, when it is physical, of physical handicap, of illness, when it is manifested on the person's body, of pregnancy, when it is visible, being advanced. For the other causes, namely psychic handicap, the situation of dependency, only a person who knows the person in question will be able to know the exact cause generating the state of obvious vulnerability. Considering these aspects, we believe that it is essential in the application of the criminal law to concrete causes the obviousness of the state of vulnerability and not the cause that generates it. Thus, we consider that it is not necessary for the perpetrator to also know the cause that determined the person's situation.

4. INTERPRETATION OF THE NORM OF INCRIMINATION OF THE ACT OF PATRIMONIAL EXPLOITATION OF A VULNERABLE PERSON, FROM THE PERSPECTIVE OF THE OBVIOUS STATE OF THE PASSIVE SUBJECT

In the case of the crime of patrimonial exploitation of a vulnerable person, provided in art. 247 para. (1) of the Criminal Code, a state of obvious vulnerability is generated by four causes. The first three are identical to the first three in the provision of art. 77 let. e) of the Criminal Code, the difference being that relative to the relationship of dependence towards the perpetrator. Unlike other hypotheses when we consider the obvious vulnerability of the person, here we no longer consider the institution of dependence, but strictly the relationship of dependence towards the perpetrator, an aspect that cannot be unknown to the person who commits the act, given his capacity as a creditor towards the debtor victim, in the case of lending money or goods, within the meaning of the norm of incrimination. We believe that this distinct hypothesis greatly restricts the scope of applicability of the norm, leaving out of criminalization the hypothesis in which the perpetrator takes advantage of a situation of dependency of the obviously vulnerable debtor, this dependency being towards a psychoactive substance or alcohol, thus being able to take advantage of his condition and, under these conditions, exploit him patrimonially.

Moreover, under the conditions of the aggravated variant of art. 247 para. (2) of the Criminal Code, we believe that putting the passive subject in a state of obvious vulnerability can also be achieved by other means, for example, through acts of physical or psychological violence against the person, in order for the perpetrator to carry out his patrimonial exploitation. We propose *de lege ferenda* to review the content of this incrimination in order to bring it into line with the rest of the hypotheses in which the causes of the state of vulnerability are mentioned.

³⁴ Ibid.

5. CONCLUSIONS

We consider the obvious nature of the situation or state of vulnerability to be the aspect to be taken into account from the perspective of holding criminally liable the one who either takes advantage of it or puts the passive subject in that state. The legislator's option to expressly specify the causes of this vulnerability only provides predictability from the perspective of applying the norm to concrete causes, however, we believe that the enumeration should be exhaustive and take into account the same hypotheses, because the meaning of the notion of vulnerability is the same, wherever it is used in the criminal law. We also consider that the different causes that generate a person's state of vulnerability do not belong to the specifics of the incrimination, given the norm in which they are provided, but to the different draft laws, initiated by different persons, without an objective justification for the existence of these distinct causes.

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