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DESIDERATES OF EXERCISING THE FUNCTION OF DEFENDING THE VICTIM  
AND THE INJURED PARTY IN THE CASE OF INVESTIGATING SEXUAL CRIMES

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*Summary*

*The mechanisms for ensuring the rights of victims and injured parties in cases of sexual crimes need to be improved. In order to increase the protection of victims of sexual crimes, several measures are needed: establishing a form of legal assistance guaranteed by the state, ensuring psychological and medical counseling that ensures not only physical but also psycho-social recovery, strengthening the mechanisms for ensuring the right to privacy and protection of personal image, hearing victims in friendly conditions, establishing clear criteria for additional hearings of victims, avoiding (unnecessary) confrontations between the victim and the perpetrator during the examination of the respective crimes.*

**Keywords:** criminal trial, right to defense, sexual crimes, victim.

**Introduction.** One of the central themes of the contemporary world is the issue of human rights, especially the right to defense, of several participants in a criminal trial, especially the victim and the injured party. It should be noted that the protection of fundamental human rights and freedoms is an indisputable task of the state, and in order to ensure the defense of these rights, the state has created a vast system of surveillance and control measures, legal defense and procedural protection. Thus, criminal law is intended to ensure the legal framework appropriate to the defense of fundamental social values. The fundamental rights and freedoms of the individual include those concerning sexual freedom, that is, the possibility of the person, regardless of sex, to decide for himself regarding his sexual life, without fear of being prevented from exercising it. In the study, we aimed to investigate both the substantive legislative framework, which criminalizes sexual crimes, and the procedural legislative framework, which guarantees the rights of victims and injured parties throughout the process of investigating this category of crimes.

**Methods and materials applied.** The methodological basis of the research is represented by the general scientific provisions of logic, the general theory of state and law, the theory of criminal law and criminal procedural law. As general and particular scientific research methods, the following were applied: logical method, systemic method, analyt-

ical method, as well as other methods of knowledge and interpretation. The theoretical basis of the study is formed by multiple scientific works in the field of criminal procedural law and criminal law.

In the process of developing this article, we were guided by several normative acts, such as the provisions of the Constitution of the Republic of Moldova, the Criminal Code, the Criminal Procedure Code, etc., as well as provisions of international regulations in the field.

**Discussions and results obtained.** Ab initio, in accordance with the provisions of Art.1 paragraph (2) of the Criminal Procedure Code of the Republic of Moldova, “criminal proceedings aim to protect the individual, society and the state from crimes, as well as to protect the individual and society from illegal acts of persons with responsible positions in their activity related to the investigation of alleged or committed crimes, so that any person who has committed a crime is punished according to his guilt and no innocent person is held criminally liable and convicted” [1]. The issue of respecting and defending human rights has become increasingly important over time, leading to either the repeal or amendment of existing legal provisions that contravened the imposed requirements, or the adoption of new provisions, in accordance with the international commitments assumed. We reiterate, for example, the extensive amendments and additions made in recent years to the Criminal Code and the Criminal Procedure Code of the Republic of Moldova. Some of the innovations were brought to the Criminal Code by the draft Law on amending certain normative acts (ensuring the rights of victims in cases of crimes related to sexual life and domestic violence) No.321 of 22.07.2022 (voted as Law No.316 of 17.11.2022) [2], or, with reference to paragraph (1) of Art.132<sup>2</sup> of the Criminal Code (non-consensual sexual acts or actions of a sexual nature), from the projected provision of this norm it follows that a sexual act is considered to be the action of vaginal, anal or oral penetration of a sexual nature with any body part or object. A similar formulation is used in Art.152 (Rape) of the Criminal Code of Ukraine [3].

With specific reference to the right of defense of the victim and the injured party in the case of sexual crimes, first of all, it is important to note that, by sexual acts are understood all possible ways of obtaining sexual satisfaction – other than the act of vaginal, anal or oral penetration of a sexual nature of the body of another person with any body part or object – would be classified as sexual acts. When resolving criminal cases that are part of the category of crimes regarding sexual life indicated in articles 171 (Rape), 172 (Violent acts of a sexual nature), 173 (Sexual harassment), 175<sup>1</sup> (Seduction of a minor for sexual purposes) of the Criminal Code [4], the courts will take into account that for the purposes of the criminal law, the interpretation of the following notions is important: sexual intercourse represents a normal sexual act (in physiological terms) between persons of different sexes; Homosexuality represents the sexual act between people of the same sexual affiliation; satisfying sexual desire in perverse forms represents the practice of unnatural sexual acts, which aim to satisfy the sexual instinct through different procedures (anal-genital, oral-genital, oral-anal), between people of different sexual affiliation [5].

In the same register of ideas, the sexual life of a person represents, in accordance with the decisions of the European Court of Human Rights, “an intimate aspect of private life”, recognizing the right of each person to have a sexual life of his choice, in accordance with his profound identity. Another definition of crimes concerning sexual life is offered by the Russian author Ia. Iakovlev, who specifies the following: “crimes concerning sexual life are socially dangerous acts, provided for by criminal law, which attack sexual relations and are characteristic of the sexual regime that has been created in society, consisting of the intentional commission, with the aim of satisfying the sexual desire of the subject or

another determined person, of sexual actions, which violate the normal sexual interests for this regime between persons of the opposite sex” [6, p.65].

We draw attention to the fact that sexual crimes represent the group of crimes, provided for in Chapter IV of the Special Part of the Criminal Code, committed intentionally, which attack the freedom and/or sexual inviolability of the person, as well as the normal moral and physical development of minors. The social danger arising from sexual crimes consists, first of all, in the harm caused directly to the victim, and secondly, in the destabilizing consequences they cause in social terms on the normal development of life. In regulating sexual crimes, the legislator has over time implemented the obligations assumed by the Conventions to which the Republic of Moldova is a signatory. In this context, the provisions of the Universal Declaration of Human Rights [10]; Convention for the Protection of Human Rights and Fundamental Freedoms [12]; International Covenant on Civil and Political Rights [11]; Charter of Fundamental Rights of the European Union [13]; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, adopted in Lanzarote on 25 October 2007 [14], a.o.

Thus, the Universal Declaration of Human Rights provides in Article 11, point 1): “Everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has been afforded all the guarantees necessary for his defence” [10]; International Covenant on Civil and Political Rights also states in Article 14, point 3) the following: “everyone charged with a criminal offence has the right, in full equality, to at least the following guarantees: ...to have adequate time and facilities for the preparation of his defence and to communicate with legal assistance of his own choosing; to be present at the trial and to defend himself in person or through legal assistance of his own choosing; if he does not have legal assistance, to be informed of his right to have one and, whenever the interests of justice so require, to be assigned legal assistance free of charge if he has no means of paying for it...” [11]; The Charter of Fundamental Rights of the European Union, which entered into force on 1 December 2009, with the Treaty of Lisbon, in Article 47 stipulates: “... everyone has the opportunity to be advised, defended and represented. Free legal aid shall be granted to those who lack sufficient resources, to the extent necessary to ensure effective access to justice” [13]; and in Art.48 paragraph (2) it is proclaimed that every accused person shall have the right to a defense [13]. With an element of comparative law, we must say that even the African Charter on Human Rights establishes in Art.7, point 1) letter c): “Everyone has the right to a defense, including the right to be defended by a lawyer of his own choosing” [15].

Violation of norms regarding sexual life poses a social danger, because acts that violate freedom or morality in this area are contrary to the interests of the entire society, any attack on the freedom of sexual life or its inviolability also representing an attack on the person’s right to bodily integrity and health, honor, and sometimes even to the person’s life itself. The person’s sexual life is an important social value, which is identified with the vital attribute of preserving the individual and the species, with the very reason for being of the person. It appeared with the person, as a social individual. Its character and forms have changed as the social structure has been reformed. Modern culture exerts influence on the person, causing him to perfect his sexual life [7].

The right to defense of the injured party and the victim is a basic, theoretically and normatively based principle, as expressly provided by the legislator in Art.17 of the Criminal Procedure Code: “(1) Throughout the criminal trial, the parties (suspect, accused, defendant, injured party, civil party, civilly liable party) have the right to be assisted or, as the case may

be, represented by a chosen defense attorney or by a lawyer who provides legal assistance guaranteed by the state, under the terms of the law. (2) The criminal investigation body and the court are obliged to ensure that the participants in the criminal trial fully exercise their procedural rights, under the terms of this code. (3) The criminal investigation body and the court are obliged to ensure that the suspect, accused, defendant has the right to qualified legal assistance from a defense attorney chosen by him or from a lawyer who provides legal assistance guaranteed by the state, independently of these bodies, under the terms of this code and the legislation in force. When hearing the injured party and the witness, the criminal investigation body is not entitled to prohibit the presence of the lawyer invited by the person heard as a representative” [1]. The same is also provided for in the provisions of Art.58 paragraph (3) point 10) and point 11) of the Criminal Procedure Code: “The victim also benefits from the following rights: 10) to be defended from actions prohibited by law in the manner provided for the defense of persons participating in the criminal trial. 11) To be assisted, in the procedural actions carried out with his participation, by a lawyer of his choice;” [1].

The same applies to the rights of the injured party expressly enshrined in Art.60 paragraph (1) point 18 of the Criminal Procedure Code: “The injured party has the following rights: 18) to be represented by a lawyer of his choice, and if he does not have the means to pay for the lawyer, to be assisted, under the law, by a lawyer who provides legal assistance guaranteed by the state” [1]. Developing the idea, we consider that the most sensitive aspect is the guarantee of the rights of the defence counsel in the criminal prosecution. In the case of *Vaudelle v. France* [16], the European Court of Human Rights emphasized that the system of the Convention for the Protection of Human Rights and Fundamental Freedoms [12] imposes on States in certain cases the obligation to adopt positive measures to effectively guarantee the rights enshrined in Article 6, including the obligation to be informed of the cause and nature of the accusation against the person suspected of having committed a crime. States must show diligence in order to ensure that individuals effectively enjoy the rights guaranteed by Article 6 of the Convention in their entirety [16].

In another order of ideas, in order to ensure full respect and defense of the rights and interests of victims or injured parties (in the case of domestic violence or sexual violence crimes), the legislator, through Government Decision No.173 of 29.03.2023 [9], created a mechanism for the defense of the violated rights and freedoms of these categories of persons, establishing in this regard the Family Justice Center of the Police and Minimum Quality Standards. With the establishment of the Center, victims have expanded possibilities in the defense of their rights and counseling. The beneficiaries of the Center are offered primary legal counseling in the following areas: specific legislation on immediate or long-term protection in cases of violence; victim rights; support in obtaining a protection order; legislation on the act of marriage and divorce; parental rights; legislation on migration; criminal legislation, provisions on medical and social insurance; support in obtaining a lawyer from the National Council for State-Guaranteed Legal Assistance and, if necessary, support in completing legal documents.

An undeniable role of the defense is ensured at the same time by establishing the circumstances of the imputed criminal act, or rather the activity in the criminal evidence, carried out by the defense, but which differs in certain particularities from the activity of the accuser in the criminal evidence. Or, in accordance with Art.94 paragraph (1) point 2) of the CPC: “in the criminal trial, data that were obtained by violating the right to defense of the suspect, accused, defendant, injured party, witness cannot be admitted as evidence and, therefore, are excluded from the file, cannot be presented in court and cannot be used as the basis for the

sentence or other court decisions” [1]. Therefore, the defense is entitled to participate in the evidence, being necessary for this purpose a certain volume of procedural rights. However, by establishing psychological contact with the victim of these categories of crimes, in some cases, the defense attorney, through the injured party, could more easily administer some evidence, as the victim offers him a greater dose of trust and, respectively, provides detailed descriptions of the circumstances in which the criminal act was committed.

Due to the state of anxiety (fear), victims often feel embarrassed in front of the criminal investigation body and are reserved in presenting the entire criminal picture, or, in their view, some subtleties are not important for the criminal case, therefore, in his speech with the victim, the defense attorney must be very attentive to any detail provided by the victim, and then proven, since these during the criminal investigation could contribute to the discovery of the crime and the establishment of the truth.

In our opinion, the discovery and efficient and effective investigation of crimes depends almost entirely on the degree of competence and professionalism of the criminal investigation body, manifested from the initial stage of the investigations, from the stage of the investigation at the scene. The aspects tend to be complicated due to the limited time period, in which the material traces remain unaltered at the scene of the crime, as well as due to the psychological consequences and aftereffects likely to alter the statements of the victim, the injured party, witnesses, etc. And one of the solutions that we consider useful would be the widespread application of forensic methods and means, which on the one hand help preserve the variable forms of evidence, and on the other hand give them a demonstrative and obvious character.

From the existing practice it results that most often the victims of sexual crimes are people from vulnerable social strata, minors, or people with certain disabilities. Some of these categories of victims consider such sexual assaults to be normal, either because they do not perceive them as illegal due to their age, due to their health, or in some cases out of fear of being subjected to further and more serious abuses. Therefore, in such situations the defense attorney needs a longer time to discuss with his client (victim) in order to get to the essence of the problems and to establish precisely the period since such assaults began, so that later the criminal investigation body, when qualifying the facts, can incriminate with certainty the number of episodes committed and their category. In this case, the defender, in addition to his role of defending the fundamental rights and freedoms of the person, also plays the role of a psychologist, because in order to get to the heart of the problem, as we mentioned, it is necessary to establish psychological contact so that the victim can fully disclose what happened.

Thus, in this case, the defense attorney that the legislator has provided for the investigation of these categories of crimes, occupies the role of state prosecutor and together with the criminal prosecution body contributes to the administration of evidence in order to prove the guilt of the perpetrator, as well as the defense of the fundamental rights and freedoms of the victims of sexual crimes.

Through his contribution, the defense attorney submits requests and requests to various state institutions, as a result of which evidence is administered and damage to the honor, dignity and reputation of the victims of the categories of crimes mentioned above is avoided to the maximum. Analysis of contradictions, detection of defects and unilateralism, detection of inadmissibility of the accumulated evidence – all these means cannot be used by the defense, without the administration of its own evidence [8]. We conclude that the criminal process has a series of fundamental principles that mark its entire development.

The European Court of Human Rights seeks to strike a fair balance between the personal integrity of the applicant and the rights of the defence. In the Court's view, criminal proceedings concerning sexual offences have often been perceived as a real ordeal (torture) for the victim, especially when she has been confronted against her will by the defendant. These characteristics are even more prominent in a case involving a minor victim. Therefore, in such proceedings certain measures may be taken to protect the victim, provided that they can be reconciled with the proper and effective exercise of the rights of the defence [17, p.30].

In the case of *Y. vs. Slovenia*, the Court emphasised that, as a rule, the rights of the defendant under Article 6 §§ 1 and 3 (d) of the Convention require that he be given sufficient and appropriate opportunity to challenge and question a witness who is giving evidence against him, either when he is called to give a statement or at a later stage of the proceedings. On the other hand, in the Court's view, a person's right to defend himself does not translate into an unlimited right to use any kind of arguments in his defence. Thus, since a direct confrontation between defendants accused of violent sexual offences and their alleged victims entails the risk of further traumatising the latter, in the Court's view, cross-examination carried out personally by the defendant must be subject to a more careful assessment by the national courts, all the more so the more intimate the questions are [18].

Victims of sexual crimes are usually female, who are already in a vulnerable position. Their level of vulnerability will increase exponentially if the perpetrator comes from the victim's social circle or entourage, which will intensify her feeling of helplessness. Due to traumatic experiences, victims of sexual crimes are particularly prone to feelings of embarrassment and humiliation. In these circumstances, criminal prosecution bodies must demonstrate maximum sensitivity in approaching the case and respect the victim's natural desire to protect her personal integrity.

**Conclusions.** We believe that the protection of victims of sexual crimes is a fundamental imperative of a fair and efficient criminal justice system. The right to defense of the victim and the injured party must not only be formally proclaimed, but also concretely ensured through functional institutional mechanisms, friendly judicial procedures and effective psycho-legal support measures.

In this context, it is necessary to strengthen the normative and institutional framework regarding the defense of fundamental social values, such as sexual inviolability, psycho-physical integrity and dignity of the person. State-guaranteed legal assistance measures, psychological and medical counseling, hearing victims in protected conditions and avoiding procedural re-victimization are essential elements for achieving real and efficient protection of injured persons.

At the same time, the role of the defense attorney takes on an expanded dimension in the process of investigating these crimes, going beyond the traditional limits of a passive defense, in the sense of an active participation in the management of evidence and supporting the procedural interests of the victim. The defense activity must be perceived in this context as a complex approach to the defense of fundamental rights, but also as a direct contribution to the achievement of the procedural truth.

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