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Criminal Liability for Rape and its Place Within the System of Crimes Against Sexual Freedom and Sexual Inviolability Under the RF and Some Foreign Countries Criminal Codes

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The subject matter of the article is to provide a comparative analysis of criminal liability for rape and other actions of sexual character and to make a conclusion on ways of improvement of liability norms for these types of crimes on the basis of current legislation of Criminal Codes of Russian Federation, Holland, Spain and Germany.

Keywords: rape, penetration, female, sexual, actions, abuse, twelve.

Point of view

Criminal-legal protection of sexual relations traditionally developed throughout centuries in Russia assumes severance of a rape corpus delicti where only a female person is recognised a victim. Presence of the given corpus delicti in the RF Criminal code testifies special care of the society, the state on provision of normal natural sexual relations between man and woman which paramount value is prolongation of mankind and human society existence. None of the crimes provided by chapter 18 of the RF Criminal code has such consequences as might be caused by rape, namely undesirable pregnancy, abortion, birth of not desired children. Passage of Federal law №215-FL on July 27, 2009 and p.4 of article 131 of RF Criminal code as well have strengthened liability for rape and toughened punishment

for rape of the minor for rape entailed death of the victim by negligence, for rape of the victim under fourteen. One qualifying circumstance earlier provided by p.2 of article 131 of the RF Criminal code, namely rape of obviously minor, and nowadays, provided by p. 3 of article 131 of the RF Criminal code rape of the minor has undergone changes. Operating edition of p. 3 of article 131 of the RF Criminal code does not contain indications on an imputed knowledge sign. If earlier the given kind of rape was punished by four to ten years of imprisonment then according to the enacted law rape of the minor is punished by eight to fifteen years of imprisonment with deprivation of the right to occupy certain posts or to be engaged in certain activity for the term up to twenty years or without that. Part 4 of article 131 of the RF Criminal code provides liability for

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rape: entailed death of the victim by negligence; the victim under fourteen. Earlier enacted law provided punishment from eight to fifteen years of imprisonment for such kinds of rape. After passing the named changes these actions (p. 4 of article 131 of the RF Criminal code) are punishable with twelve to twenty years of imprisonment with deprivation of the right to occupy certain posts or to be engaged in certain activity for the term up to twenty years or without that and with restriction of freedom for the term up to two years. Similar changes have been made in article 132 providing liability for violent actions of sexual character committed towards persons of both sexes. There was a differentiation of liability of a guilty person depending on a victim's age committing nonviolent actions of sexual character (sexual intercourse, lesbianism and homosexuality) committed towards persons under sixteen, provided by article 134 of the RF Criminal code, and also at committing libertine actions towards similar persons provided by article 135 of the RF Criminal code. Besides, article 135 provides such forms of accompliceship, as a group of persons, a group of persons in preliminary collusion and the organised group as qualifying circumstances. And article 134 of the RF Criminal code has been replenished with a special kind of releasing of criminal liability due to marriage of the parties.

Despite such essential changes in legislation aimed at protection sexual freedom and sexual personal immunity there is an urgent problem of improvement of these norms, including providing liability for rape, increase in their efficiency. In the course of globalisation study of foreign countries' legislation is also an important link on the way of RF criminal legislation improvement.

Example

The criminal code of Holland provides liability for sexual crimes in section XIV – offences against public morality. Under the

Dutch Criminal code article 242 the term “rape” is used in a wider meaning and includes the act of violence or another action or threat of violence or threat by other action forcing another person to obey actions, containing or including penetration into a body by a sexual way. It follows, that not only a sexual intercourse with violence or threat of its use form rape *corpus delicti* under the Dutch Criminal code, but also if other actions characterised by penetration into a body by a sexual way took place, moreover a considerable quantity of ways of such penetration have been registered. Not only violence or threat of its use but threat by other actions is referred to them either. Such are signs of the general *corpus delicti* of rape, where persons of both sexes are liable both for sexual intercourse and other actions of sexual character “containing or including penetration into a body by a sexual way”. Article 243 of the Dutch Criminal code is a special norm containing signs of rape of the person who is obviously unconscious or physically incapable of resisting or suffering mental deficiency or mental disease to such a degree that is not capable or insufficiently capable of showing or expressing the will on the given matter or showing resistance. In this case it is a matter of rape with use of helpless condition of the victim (he / she).

Article 244 of the Dutch Criminal code provides liability for actions containing or including penetration into a body of a person under twelve by a sexual way. We highlight that all kinds of rape which are available in the RF Criminal code, are also contained in the Criminal code of Holland. However, the Dutch Criminal code in terms of public danger equalizes actions containing or including penetration into a body by a sexual way with use of violence, threat of its use or other action committing towards a person of age and the same actions, containing or including penetration into a body by a sexual way committed towards the juveniles under

twelve, but here without violence, threat of its use or other actions. Under the Dutch Criminal code such actions are punished by twelve years of imprisonment, or the fifth category fine. Under the RF Criminal code there are essential differences in punishment for rape of a person of age (on p. 1 of article 131- three to six years of imprisonment) and for sexual intercourse and other actions of sexual character with the person under twelve years of age (p. 3 of article 134 provides punishment by seven to fifteen years of imprisonment with deprivation of right to occupy certain posts or to be engaged in certain activity for the term up to twenty years or without that and with restriction of freedom for the term up to two years or without that). Article 245 of the Dutch Criminal code singles out the category of victims suffered from similar actions under sixteen more exact from twelve to sixteen years if the guilty is not married her. Punishment is provided for not more than eight years of imprisonment or the fifth category fine. But these cases are instituted by the complaint within a limitation period. In this case the matter is the obscene actions containing or including penetration into a body by a sexual way. Subsequent articles concern only obscene actions. Article 246 provides liability for the person who by the act of violence or another action or threat of violence or threat by other action forces another person to execute or to obey obscene actions. He is found guilty of an obscene attack and is subject to term of not more than eight years of imprisonment or to the fifth category fine. Article 247 recognises the victim suffered from similar actions both the person who is unconscious or physically not capable of resisting or expressing the will to the given matter or showing resistance, and the person under sixteen, not married to the guilty, or not married to the third party who is tempted on committing or submission to such actions. Punishment in these cases is not more than six years of imprisonment or the fifth

category fine. It should be noted, that under the Dutch Criminal code liability for obscene actions with minors in comparison with the Criminal code of Russian Federation (article 135) is regulated in more detail. Articles 249 and 250 of the Dutch Criminal code specify the following perpetrator of obscene actions commissions towards minors: parents, adoptive parents, trustees, tutors, persons to whom minors are entrusted for training or supervision, the public employee, the director, the doctor, the teacher, the supervisor, prison officer, the state reformatory, the state agency responsible for guardianship and protection of children, the orphanage, the hospital or charitable establishment, persons working health or social sector. Such differentiation of perpetrators is worth our domestic legislation attention and is from our point of view a good sample to follow as it will contribute to minors' rights protection to a greater degree.

The criminal code of Spain contains section XIII "Crimes against sexual freedom" comprising five chapters: "On sexual aggression", "On sexual abuse", "Victimization of sexual character", "Crimes connected with prostitution dealing", "General provisions to the previous chapters". The Criminal code of Spain lacks a concept rape replaced by the term sexual aggression which also includes an encroachment on sexual freedom of another person with violence or intimidation, that already in itself forms corpus delicti of this crime and (article 178) is punished by one to four years of imprisonment. If sexual aggression consists in physical sexual intercourse by introduction of an item of oral or anal penetration it is punished by six to twelve years of imprisonment (article 179). The conclusion is that the Spanish legislator as well as the Dutch one does not distinguish between the given crime victims' sex and also interprets the objective party widely, without restricting to the natural sexual intercourse as provided by

article 131 of RF Criminal code where the female person is recognised a victim.

According to article 180 punishment term in cases of commission of the act provided by article 178 increases considerably (imprisonment from four to ten years), and in cases of commission of the act provided by article 179 – for the term from twelve to fifteen years in the presence of following circumstances :

1. If use of violence or intimidation is of particular humiliating or offensive character;
2. If an act is committed by three or more persons operating in a group;
3. If a victim is especially vulnerable, considering her age, illness, status;
4. If a crime is committed with the use of ties of relationship by the ascending, descending relative or brother (sister) – the full, as a result of adoption or through affinity;
5. If the guilty used especially dangerous means able to entail death or any bodily harm provided by articles 149 and 150, irrespective of punishment which could be imposed for causing death or physical injuries.

If two or more above-stated circumstances are present, punishment is imposed closer to the higher top limit of the sanction. The comparative analysis of the stated circumstances together with those considered constructive or qualifying signs under the RF Criminal code allows to draw a conclusion that basically they are identical, except for the circumstances, concerning ties of relationship and as it was marked earlier, liability for similar acts is higher in the Dutch Criminal code as well. The Criminal code of Spain singles out such a concept, as sexual abuse. Its version is physical sexual intercourse by introduction of an item whether by oral or anal penetration, but here without violence or intimidation, without victim's consent or with consent which has been received, but under the guilty person's clear superiority limiting freedom of the victim. Thus, sexual

abuse is recognised actions committed without a victim's consent:

1. Against persons under twelve;
2. Against insane persons or abusing their mental derangement (articles 181, 182).

It should be noted that contrary to article 134 of the RF Criminal code where liability is provided for actions of the sexual character committed towards the persons under sixteen with consent or deceit, in the Criminal code of Spain the criminal liability is provided for similar actions towards persons above twelve but under sixteen if the deceit (article 183) is thus only used. At the same time the lowest age level of the minor being important for qualification is 12 years under the Criminal codes of Holland Spain, and Russian Federation as well. In addition to such actions as sexual aggression and sexual abuse encroaching sexual freedom of a victim article 185 of the Spanish Criminal code says about obscene exhibitionist actions, but only towards persons under sixteen or suffering mental diseases.

Section XIII of Criminal code of Germany¹ provides "Criminal actions against sexual self-determination" where sexual actions, sexual compulsion and rape are separated out. Rape according to p. 2 § 177 is recognised penetration into a body with violence or threat or under the threat of real danger to life and health or using a situation where a victim is left to the mercy of the guilty defenselessly. Similar actions, as a rule, fall within especially grave case and are punished by not less than two years of imprisonment. We have to note, that p. 1 of article 131 of the RF Criminal code gives understanding of rape in a narrower sense, limiting it to sexual intercourse with violence or threat of violence to the victim or to other persons or using a helpless condition of the victim.

As qualifying circumstances of sexual compulsion and rape the Criminal code of Germany singles out the following: the principal's

possession of the weapon and other dangerous items; presence of other items and means to overcome a victim's resistance; presence of threat of causing heavy bodily harm. Similar actions are punished by not less than three years of imprisonment. If the principal at committing an act uses weapon or another dangerous item, or inflict heavy bodily harm to a victim, or puts a victim in danger of causing her death – similar actions are punished by not less than five years of imprisonment. § 178 singles out a special *corpus delicti* of compulsion to sexual actions and rape entailed death of a victim by negligence. Punishment in this case is far more severe than under the RF Criminal code in a similar case – life imprisonment or imprisonment for the term of not less than ten years. Under the RF Criminal code in cases where rape has entailed a victim's death by negligence or causing heavy bodily harm, HIV-infection or other heavy consequences, and also if the victim is under fourteen and the guilty knew about it punishment is provided in the form of eight to fifteen years of imprisonment. Especially it is necessary to emphasise circumstance the Criminal code of Germany pays a great attention to i.e. the character of mutual relations between the guilty and the victim at qualification of sexual actions which are neither sexual compulsion, nor rape. § 174 provides criminal liability of persons for sexual actions towards those under guardianship (persons under sixteen who are entrusted for education, training or social care), and also persons under eighteen who are entrusted for education, training or for social care to the guilty or are in his service or at work or if the victim (he or she) is a blood or adopted child, is under eighteen. §174 provides criminal liability for sexual actions towards inmates subject to administrative responsibility or in-patients or those needing help. § 174 provides *corpus delicti* of a crime comprising sexual actions connected with the official's use

of his office position. § 174c provides signs of criminally-punishable sexual actions connected with use of relations on consultation, treatment and service. Three paragraphs (§ 176, 176a, 176b) single out sexual actions towards children (under fourteen). Thus, sexual actions are understood as actions connected with penetration into a body of the victim (he or she) as well. Absence of sexual compulsion is the only feature distinguishes them from rape. § 179 provides liability for sexual actions towards persons incapable of resisting. § 180 provides liability for complicity in sexual actions of juveniles under sixteen according to the German Criminal code. The person under eighteen is recognised a victim in cases where similar actions are committed for compensation or towards a person entrusted for education or upbringing or for social work purpose or being subordinate to him in terms of office or labour relations.

On the basis of the stated above it is possible to draw a conclusion that criminal codes of Holland, Spain and Germany contain liability for rape which is similar to the RF Criminal code understanding. The same is with Criminal codes of many other countries of the world. However, in some Criminal codes the uniform *corpus delicti* of the crime has been formed without dividing victims into sexes, uniting all kinds of violent sexual penetration, including those with various items use. Liability for these actions is only partially provided by articles 131, 132 of the RF Criminal code. Besides, these Criminal codes provide liability for all actions containing or including penetration by a sexual way without violence towards a victim, committed towards persons under sixteen, while under the RF Criminal code the list of these actions is limited by the sexual intercourse, homosexuality and lesbianism also towards the persons under sixteen (article 134 of the RF Criminal code). At the same time it is typical to all above-named Criminal

codes to take into account mutual relations between the guilty and the injured person which influence public danger of a crime essentially.

Conclusion

The above-stated allows to consider traditional and quite justified existence of the rape *corpus delicti* in the Russian Federation Criminal code. But work on its perfection is required. In particular, it is necessary to return to perpetrator differentiation of rape on criminal and corrective punishments used to be in Criminal Set of laws being in effect in Criminal codes of many

countries of the world including Holland, Spain, Germany. It is necessary article 134 to provide criminal liability for all nonviolent actions of sexual character connected with penetration into a body by a sexual way towards persons under sixteen. It is the legislator's approach that is required primarily in terms of protection of the minors' rights being proved by history and practice. It is deemed, that differentiation of the perpetrator of the criminal liability depending on relationship and any other dependence of the victim should be a matter of concern towards all crimes of sexual character aimed against minors.

¹ FRG Criminal Code on 15.05.1871 edition on 13.11.1998 (further. changes. art. 3 on 02.10.2009) <http://www.gesetze-im-internet.de/bundesrecht/stgb/gesamt.pdf>

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**Уголовная ответственность за изнасилование
и его место в системе преступлений
против половой свободы
и половой неприкосновенности по УК РФ
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Т.В. Долголенко

На основе действующего законодательства УК РФ, УК Голландии, УК Испании, УК ФРГ дается сравнительный анализ уголовной ответственности за изнасилование и иные действия сексуального характера, что позволило сделать вывод о путях совершенствования норм об ответственности за эти виды преступлений.

Ключевые слова: изнасилование, проникновение, женский, половой, сексуальные, действия, злоупотребления, двенадцать.
