ISSN 1127-8579

Pubblicato dal 23/12/2015

All'indirizzo http://www.diritto.it/docs/37668-a-historical-view-of-sexual-offenses-in-the-albanian-law-from-the-albanian-customary-law-to-the-current-criminal-code

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A historical view of sexual offenses in the Albanian law from the Albanian customary law to the current criminal code

A HISTORICAL VIEW OF SEXUAL OFFENSES IN THE ALBANIAN LAW FROM THE ALBANIAN CUSTOMARY LAW TO THE CURRENT CRIMINAL CODE

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Abstract.

Sexual offenses create deep wounds in all developed societies. Controversially from other many penal crimes, these kinds of crimes damage the victim not only from the physical aspect, but also from the psychological aspect. The paper proposed analyses the normative evolution over sexual crimes throughout the years. It starts with the analysis of adjusting sexual crimes in the customary law, continues with the adjustments in the Penal Code of King Zog (year 1930), with adjustments in 1952 'Penal Code of the People's Republic of Albania' (1952) and ends with adjustments in the Penal Code of Socialist People's Republic of Albania (1977). This analysis does not include adjustments in the field of sexual crimes through Law no. 7895 of 27.01.1995 'Penal Code of the Republic of Albania' and latter modifications.

Key words: sexual offenses, Albanian law, Albanian penal code, victim.

1. Introduction.

This paper starts with an analysis of sexual crimes in Albanian customary law. This right is composed of unwritten rules created in specific circumstances, often particular, applied in different regions of Albania and which have remained in power and preserved today, but with some necessary modifications. This customary law is composed of canons from different regions of Albania like the Canon of Lekë Dukagjini applied in northern regions, Canon of Labëria applied in southern regions, Shartri of Idriz Suli, Canon of Skanderbeg, etc. This right reflects penal acts of sexual sphere, but the conception of these acts has been very different from the concept of these acts in the modern legislation.

The analysis continues with the modification of sexual crimes in 'Sexual Crimes in the Penal Code of Zogu' in 1930. They were configured by the legislation in ''Chapter I''-'Shame with violence, physical discouragement of minors, shameful acts,' of Title VIII-'Crimes against good habit and familial order'. This modification with the change of political system comes

applied no more and on 01.09.1952 enters in vigour the Law no. 1470 of 23.05.1952 "Penal Code of People's Republic of Albania". In chapter IV of this code entitled 'Crimes against the person', in subchapter IV reflected provisions of sexual crimes. With the change of political system in Albania, from monocratic-totalitarian into a democratic system, there happened various changes in the entire Albanian legislation. A series of modification and additions were made also to Penal Code of 1977, but the changes did not affect penal acts of sexual sphere.

The articles, predicting sexual crimes, remained unchanged until the Law no. 7895 of 27.01.1995 "Penal Code of Republic of Albania" came into power.

2. Sexual crimes in the customary law.

The customary law is composed of canons from different regions of Albania like the Canon of Lekë Dukagjini applied in northern regions, Canon of Labëria applied in southern regions, Shartri of Idriz Suli, Canon of Skanderbeg, etc.

Canon laws have served for more than five hundred years adjusting the behaviour of the society and self-governing of Albania's clans. Canons are part of spiritual and material culture of Albanian nation. They play an essential role in the history of Albanian people not only for the fact that they are old legal adjustments but also because these adjustments still exercise a significant effect on many Albanians inside and outside the country.

Sexual crimes in Albanian customary law, in the used canons, do not find a systematic provision[1]. In different canons these offenses were acts performed against women and girls like: touching their veil, touching them and sexual violation. These penal acts during that time were known as offenses against the dignity and honour mainly of the father of those girls (in case the girl was unmarried) and husband (in case the girl was married). Thus, they were not perceived as today, as offenses against the sexual liberty of every woman.

Canon rules towards penal acts of sexual background had as their object the preservation of the honour and dignity of the man of the family, because the woman was perceived within the

[1] See Shtjefën Gjecovi – "Canon of Lekë Dukagjini", Prishtinë 1972 and Ismet Elezi – "Canon of Labëria", Toena, Tiranë, 2002.

function of the man whether her father or her husband, they had the only right to require to the man food and clothes and the other rights were only obligations.

From the objective point of view penal acts were committed with acts consisting in touching their veil or touching the woman and sexual violation.

The active subject of these penal acts was that every man at a certain age, not precisely specific, but usually limited to ability, had a weapon. Normally, the boy who had a weapon was considered adult and had penal responsibility[2] (regarding adulthood, it is different in different regions).

Regarding honour, the customary law does not have scales of acts committed or innocence forms. Honour was considered extremely important and everywhere ruled the traditional concept that life of a person is worth nothing without honour[3].

In the customary law sexual violation against the wife was not considered as a penal act since the sexual relationship was one of the obligations of the wife toward her husband, his honour, submit to him and fulfill the obligations of the union, and she couldn't complain about the violation from the man of the house[4].

Article 601/d of the Canon of Lekë Dukagjini states: "Honour is taken away to the husband…d) to violate his wife and leave". Thus it is very understood that the violation to a woman was the violation of honour of the family man. And this violation according to the Canon of Lekë Dukagjini was condemned to death. This is clear under the articles 922 and 929 of this canon where article 922 states that everyone who kills the person who has violated weapons and the wife starts a blood feud and article 922 states that who violates a girl or a woman and escapes without being killed and goes abroad the person is marked with a flag.

As a conclusion it is important to mention the fact that the customary law reflects penal acts of the sexual sphere, but their conception has varied as before mentioned. The customary law did not protect the free disposal of sexual sphere, but first it protected the honour of the man

[2] Shtjefën Gjecovi-Canon of Lekë Dukagjini, "Highlander becomes adult-writes Joviqeviq-when takes the rifle, when he reaches 15-16 years old. " " The father is forced to buy weapons to sons once they reach the age (HCJ -21 of 60) "I.Elezi-" Age of criminal responsibility was usually assigned at 14-15 years, when the person was able to bear arms.."

[3] Ismet Elezi-The Customary Law of Labëria, Canon of Lekë Dukagjini (articles 91-97), Canon of Skënderbeu (p.3348-3359). "Honor is the greatest, most beautiful Albanian fortune"(p.3349)

[4] Shtjefën Gjecovi-Canon of Lekë Dukagjini, articles 32-33.

of the house, whose property was the wife, so a woman and everything related to her was perceived a thing owned by a man.

3. Sexual crimes according to the penal code of King Zog.

The first penal code in Albania identifies with the penal Code of the Kingdom (Penal Code of Zog) projected on basis of the Italian Penal Code model.

Sexual crimes in this Penal Code of Zog in 1930 were configured by the legislator in 'Chapter I'-Shame with violence, physical demoralization of minors, shameful acts,' of Title VIII-'Crimes against good custom and family order'.
Chapter I included articles 364-376, which did not have "nomen juris".
Article 364-"Whoever keeps by force or by fear a woman or a man, puts shame on his/her, this person will be condemned to heavy sentence from 3 to 10 years.
The same punishment will be exercised upon the person, who puts shame on a woman or a man, who in the time of guilt:
-was less than 15 years old
-was less than 18 years old, if the culprit is the first born child, the tutor or the teacher of the person who has been violated
-being condemned was trusted to the culprit to be transported or watched
-due to a mental sickness or physical sickness or due to any other reason does not depend by culprit act or by the effect of tricky means used by this person, who was not under the conditions to act against.

Article 365-"When one of the acts in paragraph I, number 1 and 4 of the above article, has been committed abusing the authority, trust or family relationships, the culprit is punished according to case in paragraph I with heavy sentence from 6 to 12 years and in other cases with heavy sentence from 8 to 15 years."
Article 366-"Whoever using means or abusing by the situation or circumstances, under the article 364, with a woman or a man, these acts which are not stated in that article, are punished with heavy sentence from 1 to 7 years.

If the act is committed abusing with the authority or trust or family relationships, heavy sentence, in case the act is committed with violence or exercising fear, which starts from 2 to 10 years;

If the act is committed abusing the authority or trust or family relationship, heavy sentence, in case the act is committed using violence or threat, from 2 to 10 years; and in predicted cases of number 1 and 4 of article 364, from 4 to 12 years.''

Article 367-"When one of the acts predicted in above articles is committed in collaboration, at the same time, of two or more persons, the sentence in those articles adds to one third.''

Article 368-"Whoever bribing offends a person under 16 is punished to heavy sentence from 1 to 30 months and is fined 50 to 200 gold CHF. If the crime is committed by lying, or the culprit is the first child or is the teacher, tutor or guard whether temporarily, the person is punished to heavy sentence from 1 to 6 years and is fined 100 to 3000 gold CHEF.

Article 369-"Crimes predicted in above articles, if committed against a woman, are pursued only in search of that person who has the right to a civil suit, but the request is acceptable within a year from the day of crime or from the day that a person knows about the offense to charge instead of the victim.

Quitting the civil suit doesn't have any effect if this is performed after the trial has commenced.

Pursuits are executed mainly when the guilt:

1) is committed against a man;
2) has caused the death of the regretted person or that guilt is committed with another act for which has been determined a punishment against the personal freedom for a period of time not less than 30 months;
3) is committed in a public place or a place open for the public;
4) is committed abusing the power of the father or tutoring authority.

Article 370-"Whoever in offensive relationships with one of the parents or the younger siblings, with the sister or brother, whether biological or not, or with cousins, is punished to heavy sentence from 8 months to 3 years.

If the guilt is committed causing public scandal, heavy sentence form 1 to 5 years.

In both cases, the person cannot appear in public offices."

Article 371-“Whoever convincing consumes the virginity of a girl less than 20 years old, promising marriage to her, on her request or on the request of the person in her name that performs the civil suit, the culprit is punished to heavy sentence from 3 months to 1 year.
If the culprit marries her, the legal quests against him, stop, even if there is an execution of the verdict and penal effects. But in case the culprit within 5 years from the day of marriage, divorces the girls without a reasonable cause, the pursuits restart and come applied other legal effects.”
Article 372-“Whoever in cases shown in above articles puts shame on good customs with the acts committed in public places or places open for the public, is punished to heavy sentence from 3 to 30 months and is fined 50 to 500 gold CHF.”
Article 373-“Whoever puts shame on good customs by paperwork, drawings or other shameful things, sharing or spreading them, selling them in public places or places open for the public, singing in gramophones, importing them or transporting them outside the country, or inside the country from one place to another of the republic, are punished to heavy sentence to 1 year and to a heavy fine up to 100 gold CHF.
Items containing disgraceful views are confiscated and disappeared.
Article 374- "Whoever for profit in public places or places open to the public engages with women to attract people and make them available to clients for embarrassment or just for fun as well as women who engage themselves or make the above listed offenses are punishable by heavy sentence of 1 to 6 months or internment of 3 to 12 months, and in each case a fine of up to 1000 gold CHF.
Article 375-“Those who harass females or males, verbally or by acts, are punished to heavy sentence up to one month. If this harassment is provoked by the offended the punishment is a fine up to 200 gold CHF.
Article 376- "Those who enter with women's garments in places where there are women and they have been cast away, for only this offense, they get punished to one month imprisonment."
From the study of this chapter of the Criminal Code of Zog, it is evident that Article 372 deals with offenses against sexual sphere, and the following articles are about the distribution of pornography materials, public houses etc.

Also very notable is the fact of similarity of these provisions with those of Italian Penal Code of 1889.

As it can be understood, this chapter is a wide holder of a variety of offenses, in which are introduced different types of offenses that have a very heterogeneous and different object from each other. Offenses are figures that to me are completely different from the structure and specificity of the legal object.

Sexual crimes enter the title of offenses against the good custom and family order and the object, because for that the time the good custom and family order are essential legal goods to any civil society, which complement each other and therefore are together and under the protection provided by criminal law.

With "good habit" were understood ethical and legal rules that served to maintain the limits necessary for security, freedom and sexual integrity and their offense, although outside the family is reflected in the family order.

With the "family rule" were understood the rules that ensured the integrity of sexual relationship in the family and their relations imposing the implementation of legally-natural laws of generations.

So in the same chapter are classified different types of offenses, where many of them consider the family order as the most important and some others consider the good custom as the most important, because the legislator cannot divide their consequences.

The main object of criminal tutelage was social and public interest, while the defence of the active subject was a secondary tutelage object.

And the main criticisms can be made in this regard that the legislator regarding sexual crimes in this period first protects the public interest and then the inviolability of the person, thus the need to protect more of a social interest that an individual's personal interest .

These articles provide various hypotheses of sexual intercourse or sexual harassment that were legally punished despite the existence or not of violence, intimidation and taking in view the matter of age of the passive subject or the subject’s mental and physical conditions and interpersonal relations that connected active and passive subjects.

They believed that in certain circumstances the passive subject cannot properly understand the situation and opposes what is happening and who had sexual relations or sexual harassment with such subjects should held criminal responsibility regardless of whether the person had exercised physical or psychological violence.

There are two divisions of sexual crimes: on one hand, the performance of sexual intercourse and on the other hand the sexual harassment that differ mainly by the fact that in terms of the latter the goal of the passive subject is not the performing of sex.

The legislator of that period admits that passive subject may be a female as well as a male and also pays a special importance, also to the protection of children in the sexual aspect as well as from actions that might corrupt the morals of children.

There are provided qualifying set of circumstances in which occur offenses like cooperation, abuse of authority, etc., which provide a more severe punishment.

Find their regulation in the Criminal Code of 1930, rape of minors and adults, those abusing office, gender relations, sexual harassment offenses, shameful conducts in public places etc.

These articles, as was seen above, regulates almost all figures of penal acts of today Criminal Code, but not all offenses are separate images, but can be provided as specified circumstances.

Also, this chapter introduced some procedural adjustments such as, exercising prosecution to appeal for the offenses set forth in Article 364 to Article 368 when the passive subject is female.

4. Sexual offenses according to Law no. 1470, date 23.05.1952.

On 01.09.1952 entered into force the Law no. 1470 of .23.05.1952 "Criminal Code of the People's Republic of Albania".

In Chapter IV of the Code entitled "Crimes against the person" in Section IV reflected predictions for sexual crimes. The subchapter of sexual crimes consisted of 4 articles, Articles 165-168, which reflected crimes committed against the sexual sphere. These articles didn't have titles (nomen juris), but reflected sexual intercourses committed with violence or taking advantage of the inability of the victim (Article 165), sexual intercourses with persons who have not reached sexual maturity (Article 166), works embarrassing people who have not reached sexual maturity (Article 167) and sex on gender (Article 168).

In the Criminal Code the main thing that stands out is the classification of sexual crimes in the chapter of crimes against the person, which speaks to the fact that in those years the object of these crimes was the preservation of sexual inviolability of women.

This is a very important fact about the evolution of a legal and social opinion, about the great importance given to women and about the importance the state had for the preservation of sexual integrity of the woman.

In the Criminal Code, such offenses were not properly arranged, since the same article provided the offenses against women who have reached sexual maturity with violent intercourses with unable people etc. For the communist spirit of that period which led the life

of the state, many offenses in the sexual area were not provided because they were not accepted as concepts from the political system. The legal terminology was poor and the same article predicted different legal situations.
It had not yet started to be used the concept of "minor" and to define a minimum age for the victim, but the legal provisions were based on the achievement of sexual maturity.

Women were divided into two categories, having reached sexual maturity and those who had not reached sexual maturity. For women who have reached sexual maturity for the existence of a criminal offense provided by Article 165, it was necessary to use physical or psychological violence (intimidation), while the legal qualification of penal act of sexual relations taking advantage of the inability of the victim it didn't matter whether the handicapped was created by the offender in order to achieve the own objective or it was objectively an inability of the victim. These circumstances served only to be taken into account by the Court in determining the sentence.

On the objective view, this group of offenses were committed through the acts committed by the offender for the purpose of sexual intercourse, while on subjective view; fault must exist in the form of intent.

Sexual act was considered performed when reached full sexual union, whether it came or not due female defloration.

Regarding the offense provided by article 98 of the Criminal Code (year 1977), having sex with girls who have not attained the age of 14 years or who have not reached sexual maturity, the object in this offense is twofold and seeks protection of the sexual sphere of the girl and her sexual normal development. The element of violence, in this crime, is an aggravating circumstance, because, for the legal qualification, it is sufficient the conduction of sexual intercourse, as a girl who has not reached sexual maturity is not capable and has not reached that kind of general development to understand the importance of sexual act and the consequences of it on her health. Also, she is very easily manipulated and vulnerable to the adults around her. As noted above, there is an innovation of the Criminal Code consisting of the introduction of the age criteria. The offense is reprehensible, even if, the girl has reached the age of 14 years old, but has not reached sexual maturity.

The offense of sexual gender relations, provided by Article 100 of the Criminal Code, was considered as an offense that rarely happened and that was a serious and reprehensible

phenomenon especially from social morality of that time. It did not require the existence of violence, but it was sufficient the sexual intercourse in a straight line or between siblings. This offense competed in any other cases with sexual crimes.

5. Sexual crimes according to penal code of year 1977.

On 01.10.1977 the law "Penal Code of the Socialist People's Republic of Albania" entered in vigour.

In chapter IV of this code entitled "Crimes against the person"; the subchapter "Crimes against health" was a reflection of prediction of sexual crimes. Sexual crimes were composed of 4 articles, articles 97-100[5], which reflected crimes committed in the sexual sphere. With the empowerment of the new Penal Code, each penal act had a title (including sexual offenses), and sexual crimes were not much modified from the previous Penal Code and it reflected "Sexual relationship with violence" (article 97), "Sexual relationship with minor girls" (article 98), "disgraceful acts" (article 99) and "Gender sexual relationship" (article 100).

This Penal Code conserved the classification of sexual crimes in the chapter of crimes against the person and the continuance of the same object of these penal acts that was the conservation of woman sexual inviolability and health.

In this Criminal Code was made an effort for systemization as best of these offenses, but their systematization still leaves much to be desired as the same article provides the offense with adult women sexual relationship and sexual violence with incapable persons, etc. The new Criminal Code also permeated by the same spirit of Marxist-Leninist socialist and even in the code several crimes in the sexual sphere were not predicted. There was a step forward in legal

[5] Article 97- Violence sexual relations: "Sexual intercourse committed with violence or taking advantage of the victim's inability to protect, is punished: by deprivation of liberty for up to ten years. The same acts committed in cooperation how and when they caused serious health consequences are punished: by deprivation of liberty not less than ten years, and when they result in suicide or death of the victim, even to death. "

Article 98- Sexual relations with minors: "Sexual intercourse with a girl who has not reached the age of 14 years or who has not reached sexual maturity is punished: by deprivation of liberty for up to fifteen years. The same acts committed with violence, in cooperation or when they have caused serious consequences for health, are punished: by deprivation of liberty not less than ten years, and when they result in suicide or death of the victim, even death. "

Article 99- Obscene acts: "Shameful acts conducted with persons who have not attained the age of 14 years, shall be punished: by deprivation of liberty up to five years."

Article 100- Sexual gender relations: "Sexual intercourse between persons who are related in direct line, or between siblings, is punished: by deprivation of liberty up to five years."

terminology being introduced the concept of collaboration, etc., but still the same article predicted different legal situations.
The novelty was the introduction of this code, in addition to not reaching sexual maturity, the age criterion that determined the age of 14 years and the introduction of the term "minor". Already, legal provisions were based on the age criterion and the criterion of reaching sexual maturity.

Women, already divided into three categories, in those aged 14 years and who have reached sexual maturity, in those who have not attained the age of 14 years and those who have reached 14 years but have not reached sexual maturity. For women who had reached the age of 14 years old and had reached sexual maturity, for the existence of a criminal offense provided for in Article 97, it was necessary to use violence. From this article were removed the words ‘physical violence’ and ‘threats’, but with the same concept of "violence" they meant existence of physical violence and psychological violence (threat), while the legal qualification of the offense of sexual relations taking advantage of the inability of the victim, it didn’t matter if the inability was created by the offender in order to achieve the own objective or inability of the victim was objectively. These circumstances served only to be taken into consideration by the Court in determining the sentence. Criminal sanctions were hardened after being added to an aggravating circumstance (when the harmed person suicide or the situation caused the death of the victim) which stipulated the death penalty to the perpetrator.

On the objective view, this group of offenses committed through the acts committed by the offender for the purpose of sexual intercourse, while on subjective view, fault must exist in the form of intent.

Sexual act was considered as performed when reached full sexual union, whether it came or not due to female defloration.

Regarding the offense provided by article 98 of the Criminal Code (year 1977), having sex with girls who have not attained the age of 14 years or who have not reached sexual maturity, the object in this offense is twofold and seeks protection of the sexual sphere of the girl and her sexual normal development. The element of violence in this crime is an aggravating circumstance, because for the legal qualification it is sufficient the conduction of sexual intercourse, as a girl who has not reached sexual maturity is not capable and has not reached that kind of general development to understand the importance of sexual act and the

consequences of it on her health. Also she is very easily manipulated and vulnerable to the adults around her. As noted above, there is an innovation of the Criminal Code consisting of the introduction of the age criteria. The offense is reprehensible even if the girl has reached the age of 14 years old, but has not reached sexual maturity.

The offense of sexual gender relations provided by Article 100 of the Criminal Code was considered as an offense that rarely happened and that was a serious and reprehensible phenomenon especially from social morality of that time. It did not require the existence of violence, but it was sufficient the sexual intercourse in a straight line or between siblings. This offense competed in any other cases with sexual crimes.

These little changes came as a result of a greater importance and of a particular attention given to the emancipation of women in those years in every area of life which had its impact on the Criminal Code also.

It is worth mentioning the fact that as of 1952 Criminal Code as well as Criminal Code of 1977, the doctrine and jurisprudence were permeated significantly by Marxist-Leninist teachings of the party's work and teachings of party leader Comrade Enver Hoxha, a fact completely understandable and acceptable to the political system, monocratic of that time.

6. Conclusions.

This paper analysed the changes in the adjustment of sexual crimes in the Albanian justice. It was clearly evidenced that the modification of these penal acts was perceived differently in different legal acts. Even the Albanian customary law reflects penal acts in sexual sphere but their conception has been very different because the customary law did not protect the free disposal of sexual sphere, but protected firstly, the honour of man beside whom was the woman, therefore the conception of woman and everything around her was in terms of a property of husband.

It was analysed how in sexual crimes, in King Zog Code, were included in the title of penal acts against good will and family order, because for that time good will and family order were judicial goods essential in every civilized society, which complement one another, therefore they go together under the protection of penal law. The main object of penal

tutoring in this system was the social and public interest, whereas the protection of the active subject was a secondary object of tutoring. Precisely in this direction the author expresses her criticism because the legislator, regarding sexual crimes in that period, firstly it protects the public interest and then the person's inviolability. There were predicted different hypothesis of sexual relationship or sexual assaults that were condemned by criminal law, independently of the existence of violence or fear and which were of importance in function with passive subject age or subject's conditions, mentally or physically, and the interpersonal relations that connect active with passive subject. The legislator of that time admits that the passive subject may be a woman as well as a man and also it pays a special importance on children's protection whether from sexual relationships or actions that can corrupt child's moral. Almost all the figures of penal acts of today Penal Code find their adjustment in the Penal Code of Zog, but not all of them are figures of only penal acts, but may be predicted as specific circumstances.

In the Penal Code of 1952 the main obvious thing is the classification of sexual crimes in the chapter of crimes against the person, which states the fact that in those years the object of these penal acts was the protection of sexual inviolability of the woman. This is an important fact of evolution of judicial and social thought, of a great importance given to the woman and about the importance of woman sexual inviolability in state's eyes. In this Penal Code these penal acts were not systemized well because the same article predicted the penal act against the women who had achieved the sexual maturity in sexual relationship with violence with incapable persons etc. For the communist spirit of that period which guided the entire state life, many penal acts in sexual sphere were not predicted because they were not accepted as concepts by the political system. The jurisprudential terminology was poor and the same article predicted different judicial situations. Yet, the concept 'minor' was not in use, as well there was not determined a minimal age for the victim, but the legal provisions were based in the achievement of sexual maturity.

With the change to the Penal Code of year 1977, sexual crimes did not have a lot of essential modifications from the previous Penal Code and it reflected 'Violent sexual relationships' (article 97), 'Sexual relationships with minor girls' (article 98), 'Disgraceful acts' (article 99) and 'Gender sexual relationships' (article 100). This Penal Code conserved the classification of sexual crimes in the chapter of crimes against the person and the continuance of the same object of these penal acts that was the conservation of woman sexual inviolability and health. Even though this Code made an effort to a better compilation of these penal acts, in reality

their compilation is poor. Also the new Penal Code had the same socialist inspiration of Marxist-Lenininist thus even in this code many penal acts of sexual sphere were not predicted. There was a step forward in the jurisprudential terminology including the concept of ‘collaboration’ etc., but yet the same article predicted different judicial situations. The innovation of this code was the inclusion, besides not having achieved sexual maturity, of the age criterion determinig years 14 as the minor age, thus including the concept ‘minor’ also.

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