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Actualité législative publié le **01/03/2022**, vu **1240 fois**, Auteur : Rift

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#Viol #Women #Macron #Definition
Article published on February 20, 2022 at 3:05 pm

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In November 2017, in the wake of the Weinstein affair, President Macron declared violence against women a "major cause of the five-year term." Among the laws passed since then, some have transformed the legal definition of rape. A few weeks before the 2022 presidential election, Me Navy, a lawyer at the Paris Bar, presents the elements of rape, an emblematic incrimination often at the heart of public debate.

Rape is currently defined in articles 222-23 and following of the Penal Code. To be characterized, this crime classically supposes the meeting of a material element (I) and an intentional element (II). Both have been reformed during the last quinquennium and together form the legal definition of rape.

I. The materiality of rape

The material element of rape presupposes a material act, which can be an oral-genital act or an act of sexual penetration (A), as well as an absence of consent by the victim (B).

A. An act of sexual penetration or an oral-genital act

Historically, the characterization of the material element of rape necessarily required an act of sexual penetration [1] (1). On the existence of a sexual penetration depended the departure between the crime of rape and the criminal qualification of sexual assault other than rape. Since the law n° 2021-478 of April 21, 2021, the rape can also be characterized in case of oral-genital act (

2).

1. The act of sexual penetration, a historical constitutive element

As we shall see, the act of sexual penetration can now be committed either on the person of the perpetrator or on the person of the victim. It remains that the notion of act of sexual penetration had to be clarified by the criminal chamber of the Court of Cassation.

For certain behaviors, the qualification of act of sexual penetration has never posed any difficulty. This is the case for penetration of the vagina by the penis, or vaginal coitus, which constitutes the archetypal act of sexual penetration in the sense of our criminal law.

But do other types of penetration allow the characterization of rape? The notion of sexual penetration, which is at the heart of the incrimination of rape, has never been and still is not defined by the law. The jurisprudence, and in particular the criminal chamber of the Court of Cassation, has therefore defined the contours of this concept, case after case.

It thus emerges from the jurisprudence that the following acts also constitute an act of sexual penetration, within the meaning of articles 222-23 and following of the Penal Code

- fellatio, understood in the restricted sense of oral penetration by the penis [2],
- anal intercourse, or sodomization, which is the penetration of the anus by the male sex [3],
- anal penetration by a foreign body other than the penis, but only when it occurs in a sexualized context [4],
- digital penetration of the female sex, i.e. the introduction of one or more fingers into the vagina [5].

On the second question, who must undergo the act of sexual penetration to characterize rape, the rule has recently evolved.

Until the summer of 2018, in fact, only the act of sexual penetration committed on the person of the victim could allow the qualification of rape [6]. Since the law n°2018-703 of August 3, 2018, known as the Schiappa law, the act of sexual penetration can now be committed both "on the person of the perpetrator" and "on the person of the victim" [7]. In other words, this means that it is now irrelevant, for rape to be constituted, whether the perpetrator has sexually penetrated his victim or whether the victim has been led to sexually penetrate her attacker. For example, this means that a man can be considered a victim of rape if he was forced to sexually penetrate his

attacker, even though he himself did not undergo any sexual penetration on his own person.

2. The oral-genital act, innovation of the law of April 21, 2021

On the amendment of the senator Esther Benbassa, and against the government's opinion [8], the law n° 2021-478 of April 21, 2021 has extended the material scope of rape to oral acts.

This addition should allow the characterization of rape in case of cunnilingus, that is to say any stimulation of the female sex by the mouth or the tongue. The purpose of Ms. Benbassa's amendment was to counter the previous position of the Court of Cassation, which had decided, in a resounding decision, to exclude the qualification of rape on the grounds that the defendant's tongue had not penetrated the victim's vagina "sufficiently deeply to characterize an act of penetration" [9]. This case law is now contra legem.

Moreover, this means that fellatio, this time understood in a broad sense to include any oral stimulation of the penis, whether or not there is oral penetration, can now be considered a crime of rape.

On the other hand, oral-anal acts, or anilingus, should a priori remain excluded from the material scope of the incrimination. Similarly, sexual touching that does not involve oral sex or penetration, such as a hand on the sex, breasts or buttocks, continues to fall under the criminal offence of sexual assault other than rape.

B. Lack of consent by the victim

In principle, rape requires proof of the victim's lack of consent (1). However, since the entry into force of the law of April 21, 2021, this demonstration is no longer necessary in the case of rape of a minor under the age of 15 (2).

1. The demonstration of the absence of consent

If rape requires a "total absence of consent of the victim" [10], the legislator requires, in order to be convicted, that this absence of consent be manifested by violence, coercion, threat or surprise [11]. While violence and threats do not call for any particular remarks, it is appropriate to dwell for a moment on the notions of coercion and surprise.

As regards coercion, this is assessed by the courts in a concrete manner, i.e. with regard to the victim's capacity to resist [12], the law specifying that it may be physical or moral [13]. The law specifies that it can be physical or moral [13]. Physical coercion is easy to apprehend, being characterized in particular when the perpetrator holds the head of his victim so that the latter performs fellatio on him [14]. 14] Moral coercion, on the other hand, was found in the case of a young, shy and reserved employee of 18 and a half years of age, who had been raped by a despotic and tyrannical manager [15].

As for surprise, according to the Cour de cassation, it consists in surprising the victim's consent [16]. 16] There is thus surprise when the perpetrator uses a stratagem intended to conceal his identity and his physical characteristics in order to obtain from his victim an act of sexual penetration. In this case, a sixty-year-old man used the photo of a young model to seduce several women on a dating website. The 68-year-old man then organized parties where his victims had to be blindfolded [18]. Another example of surprise is when the perpetrator knowingly takes advantage of the victim's misidentification to have sex with her. This is the case when a man enters "the bedroom and bed of a sleeping woman whose husband was absent, and takes advantage of the woman's mistake to perform the act of copulation" [19].

2. An exception - The case of the 15 year old minor

Since the law n° 2021-478 of April 21, 2021, defended in the Senate by Eric Dupond-Moretti, any sexual relationship between a minor of 15 years of age and an adult is henceforth considered as rape, as soon as the difference in age between the adult and the child is at least five years [20].

In the context of this new crime of rape, it is no longer necessary to prove violence, coercion, threat or surprise in order to characterize the offense. Until now, if it was not possible to prove one of these manifestations of lack of consent, the public prosecutor had to fall back on the criminal qualification of violation of a minor under 15 years of age, which would have resulted in a sentence of 7 years' imprisonment and a fine of 100,000 euros [21].

The major change is that the prosecutor, in the context of a sexual relationship between an adult and a minor of 15 years of age, no longer has to demonstrate the absence of consent of the victim to characterize the crime of rape. The absence of consent is ipso facto deduced from the fact that the minor had not reached the age of 15 years at the time of the facts.

This five-year age difference condition, necessary to characterize this new definition of rape, is sometimes referred to as the "Romeo and Juliet clause". With this reservation, it seems that the legislator wished to avoid the sudden and brutal over-criminalization of youthful love affairs between a 13 or 14 year old girl and a young man who had just celebrated his eighteenth birthday.

That said, the second paragraph of Article 222-23-1 of the Penal Code provides that this age difference condition is not required when the sexual relationship is paid. This paragraph contributes to the objective of combating the prostitution of certain young girls of 13 or 14 years of age who, under the influence of an 18 or 19 year old boyfriend who acts as a pimp, are sometimes pushed into prostitution [22].

II. The moral element of rape

The moral element of rape presupposes, in any event, the will of the perpetrator to perform the act of penetration or oral sex (A). In principle, the accused must also be aware of the victim's lack of consent (B).

A. Willingness to perform the act of penetration or oral sex

According to the formula established by article 121-3 of the Penal Code, "There is no crime or offence without the intention to commit it". Rape thus supposes, in all cases, the will of the perpetrator to perpetrate or to have perpetrated the act of sexual or oral penetration.

But is this mere willingness to commit the act sufficient to obtain a conviction? It depends.

B. Awareness of the victim's lack of consent

In principle, in order for the criminal court to convict, it must also be shown that the perpetrator was aware of the victim's lack of consent [23]. Thus, the Court of Cassation was able to rule out the qualification of rape in a case where the victim's behaviour had led the accused to believe that the sexual relationship was consensual [24].

As an exception, in the context of a sexual relationship between a minor of 15 years of age and an adult, we have seen that the perpetrator's knowledge of the victim's lack of consent becomes irrelevant [25]. In this case, the defence of claiming that the accused thought that the victim was a minor and consented can no longer be used to avoid a finding of guilt.

Does this mean that the accused will have no defence? Probably not. As the Court of Cassation has already held in the case of sexual assault on a minor of 15 years of age [26], the error of the perpetrator as to the age of the victim is considered to be an error of fact, which is then an obstacle to the characterization of the offence. In the case of a rape of a minor under 15 years of age, the defendant will therefore have every interest in trying to show that he made a legitimate error of appreciation of the victim's age at the time of the crime [27].

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1. L. n° 80-1041, 24 Dec. 1980
2. Crim. 22 Feb. 1984, n° 83-95.053 P
3. Crim. 12 Jan. 2000, n° 99-81.635 P
4. Crim. 6 Dec. 1995, n° 95-84.881 P ; Crim. 27 April 1994, n° 94-80.547 P
5. C. assises Ille-et-Vilaine, March 25, 2021
6. L. 80-1041, Dec. 23, 1980, art. 1
7. Art. 222-23, para. 1, art. 222-23-1, para. 1, C. pén.
8. Report n°3796 on the bill, adopted by the Senate, to protect young minors from sexual crimes
9. Crim. 14 Oct. 2020, n° 20-83.273
10. Crim. 20 June 2001, n° 00-88.258
11. Art. 222-23, para. 1, C. pén.
12. Crim. 8 June 1994, n° 94-81.376 P
13. Art. 222-22-1, para. 1, C. pén.
14. Crim. 8 June 1994, n° 94-81.376 P
15. Crim. 8 Feb. 1995, n° 94-85.202
16. Crim. 23 January 2019, n° 18-82.833 P

17. Crim. January 23, 2019, n° 18-82.833 P
18. "Jack S., accused of rape by surprise, was sentenced to eight years in prison," Le Monde, October 29, 2021, https://www.lemonde.fr/societe/article/2021/10/29/accuse-de-viols-par-surprise-jack-s-a-ete-condamne-a-huit-ans-d-emprisonnement_6100363_3224.html (accessed on 20/02/2022)
19. Crim. June 25, 1857, "Dubas" decision
20. Art. 222-23-1, al. 1, C. pén.
21. Art. 227-25, C. pén.
22. Report n°3796 on the bill adopted by the Senate to protect young minors from sexual crimes
23. Crim. 11 Oct. 1978 : D. 1979. IR 120.
24. Ibid
25. Art. 222-23-1, C. pén.
26. Crim. 7 Feb. 1957 : Bull. crim. n° 126 ; RSC 1957, 638, obs. Hugueney
27. Cf. Montpellier, Jan. 17, 2008: JCP 2008. IV. 1787.