

Warranties of Albanian criminal law for children protection from “indecent offences” and the Albanian judicial practice

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Abstract

This paper will focus on criminal acts of child sexual abuse (sexual offenses). In particular, will be analyzed the category of obscenity as a crime (*lat. luksuri*). This work will be analyzed under the perspective of the Convention on the Rights of the Child, to reflect the alignment of Albanian criminal law with the Convention, as a minimum guarantee to be provided by the States.

Special attention will be paid to the analysis of the criminal legislation, particularly to the offense *luksuri*, to see its adaptation in the Albanian transition period. There will be special attention to Albanian judicial practice in relation to sexual harassment/obscenity. These will be used to identify the needs of the Albanian legislation, because legislation must not only be written, but must above all be applied.

Keywords: sexual offenses, indecent offences, child physical integrity, moral integrity of children, sexual/homosexual relations with minors.

Introduction

Albanian criminal legislation has paid special attention to the violation of sexual freedom and personal dignity. However at the same time there is a distinction between “sexual offence” and “crimes against honor and dignity of the person”. If we refer to the practices of other countries like France, Criminal Law provides in section III sexual assault (articles 222/22 and 222/23); Italy in its Criminal Law provides offenses against public morality and good customs (Articles 519-544) and are positioned in Section IX; Switzerland’s Criminal Law stipulates in Chapter V of crimes against morality, sexual crimes (Elezi, 2005, 101). The Albanian Criminal Law has established in section VI “Sexual Offences”, and “Offenses against the honor and dignity” in section VIII of the second chapter “Criminal offenses against person”. This ranking is not inadvertently made, because in Albania these category of crimes are considered serious crimes, incompatible with the concept of honor and public moral. Special attention is paid to the protection of children, from *sexual offenses*, as a vulnerable target group, due to the incompleteness of the development of physical fitness, but also his personality. If we define the concept of *sexual offence*, we will understand those acts committed with intent, toward sexual freedom and affecting the health of women or men, protected by the criminal laws of criminal actions (Elezi, 2005, 102). Within this section are included *indecent offences*, which according to the forecast of the Albanian Criminal Law, section 108, provides that “*Indecent offences conducted with minors under the age of fourteen years, condemned with imprisonment up to five years*”¹

¹ Criminal Law No. 7895 dated 27.01.1995 amended by Law No. 8733 , dated 24.01.2001 , amended by Law 144/2013 Article 23 .

So in this Criminal Law, there is no specific provision to define, what is considered *indecent offence*, lacking descriptive norms "*prescriptive or descriptive norms, are those criminal law norms that make the definition of the criminal justice institutions or specific offenses*"(Elezi & Kaçupi & Haxhia, 2006, 21).

To define *indecent offences* can refer to the Albanian criminal law doctrine, where one of the professors of the Albanian criminal law, Prof. Elezi.I defines "*indecent offences (lat. Luksuri) will understand those ways of satisfaction of sexual lust, which do not contain any elements of another sexual offence . Such actions are, for example: touch the genitals of persons who have not attained the age of 14 or friction or other forms in order to satisfy the sexual lust, natural or unnatural acts* (Elezi, 2005, 118). Another definition for *indecent offence* is found by the authors Cipi and Meksi "*all forms of sexual gratification by adults without committing natural or unnatural sexual union with juveniles ... for example touching sexual organs of minors (girls and boys) with your hand or using any other part of the body from adults , etc*"(Cipi & Meksi, 2008).

If you will refer to foreign literature Criminological sexual abuse/sexual crimes are divided into several categories: 1. Forcible sexual assault, 2. Forcible Rape, 3. Incest, 4. Sexual/Homosexual relations with minor, 5. Exhibitory sex acts, 6. Obscenity, 7. Transvestism, 8. Sex Murder, 9. Sodomy, 10. Prostitution etc due to 17 categories (Hagan, 1993, 525). *Indecency offence* is considered action that is not sexual or homosexual act, but only an act that satisfies the lust, whether or not conducted in public. In foreign terminology *indecent offences* are contained within the notion of sexual harassment, but in this case we discuss unfulfilled sexual or homosexual acts. If we refer to the Convention on the Rights of the Child, Article 19 provides in the first point that: "*State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child ... including sexual abuse*", referring to a study analyzed by the Ombudsman in cooperation with the Centre of Practice and Integrated Legal Services (CPILS), which explains that the prohibitions related to the sexual exploitation of children include not only rape, but also other acts voluntarily or not, with children considered underdeveloped or not in an age appropriate to conduct a relationship, etc.²

Likewise, Article 34 of the Convention stipulates the obligation of states to protect the child from all forms of sexual exploitation and sexual abuse. In this context includes not only the realization of actions involving sexual or homosexual acts, but any kind of action that is not perceived by the child, as satisfying of sexual lust. However, the Convention does not prescribe what is considered *sexual/homosexual relation with minors* or *indecent offence*, but as a general international act, it is inclusive and not exclusive in legal guarantees, which obliges states parties to undertake all the measures to protect children from abuse or sexual abuse. In this point of view, state parties, must detail their legislation with prescriptive articles, for the sexual or homosexual offences against minors, or *indecent offences*. In this way the legislation can be applied correctly by institutions and there will be a unified juridical practice all over the country.

² Albanian Legislation and Convention on the Rights of the Child, Comparative Study , supported by the joint project for Institutional Strengthening of Sub- Section on the Rights of the Child, between the Ombudsman and Save the Children, with the support of SIDA. Tirana 2007. pg 155.

Albanian Criminal Law, “*indecenty offence*” and Legal Practice

The 1995 Penal Code provides in Article 108 *indecenty offence*. According to the article “*Carrying out indecent acts with minors who have not attained the age of 14 shall be punished with imprisonment up to five years.*” So this type of crime is categorized on the basis of the importance of the injured subject that are children, who have not reached sexual maturity, by setting the age limit. However, this article does not specify which are the indecent acts included in the *indecent offenses*. This is left to the interpretation of law practitioners referring to the legal doctrine as a source of law. Scientific or doctrinal interpretation of criminal law is carried out by researchers of the theory of criminal law through the commentaries of the penal code, or monographs, articles, etc. (Elezi & Kaçupi & Haxhaj 2006). According to the Albanian doctrine, the objective side of the offense “*indecent offences (lat. luksuri), includes those acts of satisfaction of sexual lust, which contain no element of any other sexual crime*”. Another meaning of the objective side of the *indecenty offence* is given by two forensic researchers Bardhyl Cipi and Sokrat Meksi, such as: “*all forms of sexual gratification by adults without committing natural or unnatural sexual union with juveniles ... it can be by touching the genitals of minors (girls and boys) with hand or any other part of the body of adults, etc.*” (Cipi & Meksi, 2008). If we refer to Decision No. 559, dated 02.06.2004 of the Tirana District Court, the defendant V.D is declared guilty and sentenced to 7 months and ten days of imprisonment. In these decision is identified the physical situation of genital organ of child by forensic expertise, and it results that the hymen of genital organ of the child is not destroyed. On the other hand the court did not consider as attempted sexual abuse of minors, the act against the girl, and the court referred to the explanations of the child in the presence of a child psychologist, concluded that the child had no knowledge of the sexual relationship. In these conditions the court has established its conviction that is not the case of an attempted sexual abuse, but of an indecent action. If we refer to the provisions of Article 100 of the Albanian Criminal Law, sexual or homosexual relations with minors and Article 108 indecent offence there is a difference. Article 108 has to do not with sexuality and sexual integrity of the victim, and not with his health and life, but simply with child sexual development. If we refer to the legislation of the new state of Kosovo, there is a more precise description regarding the sexual act in Article 192, paragraph 3 “*sexual act means penetration of the sexual organ in any part of the body of the person or penetration in anal or genital opening of the person, by any object or any other part of the body*” (Kosovo Penal Code, 2003).³ The accurate prediction of law does not permit intervention for a more accurate categorization of the offense by the legal doctrine and different interpretations by practitioners of law.

There are not too many criminal decisions regarding indecenty offence, according to the legal practice of Judicial District Court of Tirana, from the moment of the adoption of the Penal Code of 1995 until today. Respectively for 2016 an issue, three issues in 2015, four issues in 2014, four issues in 2013, two issues in 2012, no issue in 2011, two issues in 2010, no issue in 2009, two issues in 2008, three issues in 2007, two issues in

³ The Republic of Kosovo. Gazette / no. 44 Law Nr. 03 / L - 002 on amending and supplementing the Provisional Criminal Code of Kosovo.

2006 and no issues from 2005 to 1995.⁴

If we refer to decision No. 443, dated 20.04.2012 of the Tirana Appeals Court, clarified the meaning of *indecent offence* and stated that the action of kissing on the lips as a shameful act. This is because the only evidence is the child's declarations and considered by the court as a misunderstanding. According to the court the indecent offence, due to its nature, generally is carried out without a trace, which could produce evidence. If we refer to the decision of the Tirana District Court No. 712 dated 19.05.2008, it provides another way of achieving the objective side of this crime, through oral intercourse of genital organs between an adult and juvenile. Also the kiss on the lips or genitals of minors is determined by the court as indecent offence. Another way of realization of the objective side of the offense is also considered the appearance of the genitals in the presence of children.⁵

To define indecent offence against children in the Criminal Law, can be used the new added definition of sexual harassment provided by article 108 /a Albanian Criminal Code, according to which:

*"Performing behavior of a sexual nature, that violate the dignity of a person, by any means or form, creating an intimidating situation or a hostile one, or a degrading scene, or a humiliating one or offensive situation, constitutes a criminal offense and is punished by one to five years"*⁶ So the above definition, can be used to define the *indecent offence* by adding the purpose to satisfy the sexual lust.

With the 2014 amendments of Albanian Criminal Law, *Article 108, was regulated as follows:*

"The same act, if committed against a minor who has not attained the age of fourteen, with which the author has family relationship, punishable by five to ten years.

Deliberate involvement as a witness in acts of a sexual nature, of a child who has not attained the age of fourteen or a minor who has not reached sexual maturity, is a criminal offense and punishable by one to five years.

The proposal made by an adult, by any means or form, to meet a minor who has not attained the age of fourteen or a minor who has not reached sexual maturity, with the purpose of committing any of the offenses set forth in this section or in section VIII of Chapter II of the Code, constitutes a criminal offense and punishable by one to five years.

With this amendment to the criminal law, is provided a guarantee to minors, who have not reached sexual maturity. With these amendments, the preparatory phase or the proposal to encourage children is classified as an indecent offence.

Conclusions

Albanian Criminal Code provides *sexual crimes* in a special section from the *offenses against morality and human dignity*. However there is no definition regarding *sexual crime, sexual or homosexual act* like other legislations (for example Kosovo Criminal Code). This may also provide a more efficient application of this section by

⁴ Statistics archive issues of the Tirana Judicial District Court, <http://www.gjykatatirana.gov.al/> (19.5.2016).

⁵ Decision of the District Court of Tirana No. 3526 dated. 16/10/2015.

⁶ Criminal Code of Republic of Albania , Article 108 / a

practitioners of law. To ensure a more effective protection of children who have not reached sexual maturity, Albanian Criminal Code has provided specific provisions on *sexual offences*, which are addressed to this target group, one of which is the Article 108 about *indecent offences*.

Referring to the Convention on the Rights of the Child ratified by the Albanian State, is predicted the obligation of state Parties to protect children through national legislation and national institutions, not only by protecting them from sexual abuse, but also against their mistreatment. In this context, the Albanian legislator has amended Article 108, in relation with the specific subjects or situations where the child may have been a witness of the actions that violate his honor, personality or his sexual development, or even in cases of incitement of minors to carry out such actions between them. However, in the Albanian Criminal Code, there is not a definition regarding *indecency offences*.

The Albanian Juridical Practice, has shown that in several situations, which have the same circumstances, the same actions against minors are considered sometimes sexual crime and sometimes not. In this sense, it is of great need a definition of indecent offences in the Albanian Criminal Code, in order to unify the judicial practice.

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