Section 6. Criminal law

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Some practical and theoretical aspects concerning the criminal acts of “sexual or homosexual relationships with minors” in the Albanian legislation

Abstract: The article aims to make an analysis of the legislation concerning the phenomenon of sexual or homosexual relationships with minors. The specter of sexual abusive acts includes a wider range of criminal acts such as rape and lesser sexual harassments. Through this thesis we will analyze only the criminal act of “Sexual and Homosexual relationships with minors” as regulated by the Albanian Criminal Code.

Keywords: pedophilia, crime, sexual act, shameful acts, minors, albanian legislation, Criminal Code.

Introduction

Crimes such as sexual or homosexual relations with minors are considered to be of a very high level of danger for the society, also representing one of the most common ways of criminal abuse of minors. The safety of freedom and sexual growth in society is very important for the minors and children physical integration in society. Thus being one of the pillars and basic most valuable rights this criminal figure or better say the study of such penal act is very important for the safeguard of such rights.

To achieve the principle we have today of such penal act there were many changes made by the legislative instances in order for its covered area to expand. When the Criminal Code of The Republic of Albania was first approved in 1995 this is how it regulated such crime: “*Sexual acts with minors that have not yet reached puberty or that are under fourteen years old is punished by law with five to fifteen years of incarceration.*”

In the cases when the sexual act is achieved by force or violence and as such the minor has severe health consequences the this act is punished with ten to twenty years of incarceration.

In the cases when the sexual act has lead to the death or the suicide of a minor then this crime is sanctioned with no less then twenty years of incarceration” [11].

During the practical application of this penal act it was clear that it couldn't effect homosexual acts with minors. Thus in order for the penal law to act in such specific cases it was important for the legislative to act [1, 113]. Such a legal vacuum was addressed with the the regulating law Nr. 8733 Date 24.01.2001 which changed the above mentioned context with the one we have today [11]. Thus even in the cases of homosexual acts with minors the regulation will be made the same by law.

Regarding the historical aspect of such penal act we need to understand that the incriminating

techniques of such crime derive from the older Criminal Codes which were implemented before the 90' in the Republic of Albania. Thus the Albanian Criminal Code of 1952 in its fourth chapter, section four stated about sexual crimes with direct object as follows:

- Violent sexual acts with minors (Article 165);
- Sexual acts with minors (Article 166);
- Bribing of a minor (Shameful acts) (Article 167);
- Sexual acts in the genus (Article 168).

In relation with the Criminal Act of "Sexual Acts with minors" this code provided and sanctioned that: *"Sexual acts with minor who are yet to reach the age of sexual maturity will be sanctioned with three up to fifteen years of jail."*

When the above mentioned acts are accompanied by violence or conducted by a group of people and resulting in severe health injuries for the minor those actions are sanctioned with ten up to fifteen years of jail" (Criminal Code. 1952. 166).

While the Albanian Criminal Code of 1977 [10] in its fourth chapter which was "Crimes against People and Families" in the third section of this chapter had provided and categorized such penal crimes as:

- Violent sexual acts (Article 97);
- Sexual acts involving minors (Female) (Article 98);
- Shameful Acts (Article 99);
- Sexual acts of the same gene (Article 100).

Regarding the part which regulates the penal act of "Sexual acts with minor girls" this code stated that "Sexual acts with a girl" who has yet to be 14 years old or achieve sexual maturity are condemned with up to fifteen years of imprisonment.

"Also this acts when if they have provided health complications or were made in group are sanctioned with no less than 10 years of incarceration and if the minor suicided due to this act then the penal condemned is by death" [10].

As we can see from the above mentioned Articles we can derive that The Criminal Code of 1977 has

about the same acts and sanctions as the 1995 Criminal Code.

The incrimination. Techniques of such Criminal Acts

This stereotype of crimes is conducted in an active way of having sexual or homosexual intercourse or sexual acts with the minor who has yet to be fourteen years old or yet to achieve sexual maturity. Thus the incrimination technique requests or is achieved only if we have active sexual or homosexual relations with the victim.

Our Criminal Code does not give a concrete definition to the statement "Sexual or Homosexual Acts". Regardless the Albanian Penal doctrine has defined this as a sexual intercourse between a male and a female [1, 114]. Such a meaning and interpretation has a confining character to it. Also the Albanian Penal area has expanded its approach within the European standard within this area of the Penal Law which consider sexual acts the penetration of a sexual organ in any part of the body.

Or the minor penetration regardless of the size with any object in the anal or genital parts of another person. Also the sexual act is not only understood as a physical union of two bodies of the same or different sex, but also every other act that even though it might not have a direct physical contact with the passive person (the victim in our case) it impacts the base and most principal sexual rights of this said person, in order to please and excite sexually the abuser.

With the "Sexual Act" notion we include all the actions oriented towards the erogenous zones which can greatly afflict the sexual freedom of the victim and the rights to have a free sexual determination of said person. This kind of sexual abuse might come with constriction, pressure or abuse of the sexually inferior victim.

In all those cases will be included every kind of touching, grabbing, pressing on the genital areas of the victim, which are vulnerable and able to incite sexual pleasure that even in a not absolute/or short period of time and with irrelevance to the fact if the victim has achieved sexual pleasure or not.

Should be said here that the jurisprudence [15] in Albania has broaden its horizons towards these new concepts and tendencies of the modern Penal Law. Some countries and their Penal. Legislation have defined the terms "Sexual Acts" and other terms related with such sexual acts.

In the concept of sexual act its also acknowledged and included the term "oral sex". Such statement was also involved in the judicial practice. Thus in the case The Court of Tirana stated that [19]: "... *In such case, This Court based on the Article 374 of the Albanian Procedure Penal Law, sees as appropriate to give a new legal definition to this legal fact from that what the persecutor is asking due to the fact that the defendant H.Q but having sexual intercourse (oral sex) with the citizen A.Q has consumed without a doubt the penal act of "Sexual and Homosexual relations with minors" Article 100 of the Criminal Code and as a result the defendant has to be accused not for the Paragraph two of Article 100 but for paragraph one of the same Article...* ".

For conducting such acts violence is not required. In order to consume such a crime its enough for both subjects to have sexual contact. The victim is not able to fully understand the character of such criminal acts and their consequences because of her young age and her young psycho-logic build. Sexual acts with a small girl even without physical or mental violence still are considered as a crime because the culprit in this cases takes advantage of the victim not fully understanding the circumstance she is in.

Important circumstances of Legal Qualification

This crime is executed in certain circumstances like:

a) The sexual or homosexual act derives or is executed by force. One of the elements that characterize or describes the criminal act of " Sexual or Homosexual relationships with minors" is that even tho there might be a consensual agreement between the subjects involved in such act due to affection, the criminal act will still be consumed. This is due to the fact that the minor child has not yet reached that phase of conscience to understand the character of hi/her acts and thus the consequences deriving

from it. But because of such cases mostly they are neglected due to the application of the criminal responsibility, but on the other hand its regarded as a gauge for the gravity of the sentence. So we deduce here that the term "agreement" can be considered as such only when the subjects are above fourteen years old and have reached the age of sexual maturity. There is no such agreement if a person with ether words or gestures expresses lack of agreement for doing or continuing such sexual act; Such agreement is reached with the involvement of another person on behalf of the victim; agreement is reached through fear, intimidation or threats and if such means don't include using of force, violent threats or serious exploitation; or cases of the victim being in no position to reach such agreement of having sexual acts because of reduced psychic or physical abilities due to alcohol, drugs or other chemical substances. Thus such person can not be considered physically or mentally capable to take any decision by him/her self. When we talk about violence or at least the concept we directly relate it to physical violence, which can be categorized as beating, hitting, small wounds, severe wounds, pushing, binding ect. Regarding the concept of violence Albania's High Court of Justice with the directive Nr.1 Dt. 14.03.1979 [19], 1) has evaluated or considered that: "*Beating, wounding, freedom deprivation, grabbing by the hair, laying on the ground and every other usage of physical violence against the victim which puts her in a situation where she cant object any sexual abuse will be considered as physical violence*" Physical violence in any form that it might be manifested is mainly used to submit and neglect any opposition coming from the victim. Violence here is used as a countermeasure to the resistance of the victim. The question here is that in the cases in which this violence is not used to subdue the victim in order to sexually abuse her but this violence is made for the sole purpose of the culprits sexual desires, how do we classify this in a legal standpoint?

Replying to this question should take in consideration various aspects such as the goal of such violent acts.

Thus if said violence is due to the victims resistance in order to oppose sexual acts towards her then we can classify this under Article 100 second paragraph of our Criminal Code. Unless in another scenario when this is a technique to impose sexual acts we can classify this in the first paragraph of the same Article.

b) Acts that have brought consequences such as death or suicidal of the victim. Lethal acts such as death or suicidal of the victim must have a direct connection with the violence and abuse that was made upon her. Hence these qualifying circumstances make this penal act have complicated structure as classified by the penal law. In cases when a clear description of such penal violation is lacking in the current form of our Criminal Code and legislation the penal doctrine and jurisprudence have at least tried to give some sort of conceptualization to it. A complicated sort of penal act is considered to be when the crime in itself is composed of two or more actions from the culprit. Each of those criminal actions in itself may very well be classified as a separate criminal act [2, 53]. In this case we are talking about a merge that the penal law does to different criminal acts in order to group them as a single entity. As a result this complex penal crime has as an integral part not only the merging of different criminal acts but all the actions and their criminal composition [3]. In specific cases when the elements of two criminal acts merge with each other to make a single crime can be illustrated with the common crime of "Murder which results with the death of the victim" In other cases a single criminal act can be considered as a qualitative circumstance of another act.

Thus the deliberate murder of a person falls under (Article 76) or even from carelessness (Article 85) of the Criminal Code. Those two crimes are considered as specific and separate acts but when it comes to the "Sexual or Homosexual relationship with minors" they might serve as complimentary acts to this crime which is ruled under (Article 100) paragraph 3. In this certain case the death of the young victim should have occurred during the sexual violation. There are

some conditions that should be met in order for such a specific crime to be considered as a complicated criminal act:

- The Article that describes such criminal act should include two or more actions (or inaction) in their natural concept to be classified as a crime. Such criminal deeds can be sanctioned only by law in order to give a single judgment for the specific crime.

- Two or more specified criminal acts sanctioned by the Criminal Code must be simultaneously affected by it. This complex criminal act must include in itself two or more targets.

- Such actions (inaction) that result in crimes should be executed back to back and for them to be considered as a single crime they should help achieve the same criminal goal. This makes it possible that the second criminal action derives from the first action or helps the function of the first one to make this crime possible [4, 27]. As we can see there is an organic and time connection between these actions [5, 363]. So if one person in a certain period of time abuses sexually of a child and then after the act is consumed he kills the victim, in this case said person has consumed two different criminal acts, "Sexual or Homosexual relationships with minors" and "Murder" in the real concept of both those acts.

In the above mentioned thesis the criminal act of "Sexual or homosexual relationship with minors" which in death of the victim is a straight complex penal crime because sexual acts with minor in itself is a crime even if it doesn't result in the death of said victim. On the other hand murder is a crime in itself and can be classified as such on its own.

Regarding such qualitative circumstances an important aspect of which is the mental stability of the active person which is connected to the murder of the child. Some authors state that outcomes such as the death or suicidal of the child might be a great deal caused by carelessness [1, 116], thus considering this criminal act as a complexity of two types of culpability. In any case such a statement is not entirely true or stable in its reasoning because in many cases the

mental state of the culprit that has caused the death, suicide or severe wounding of the victim is much more complex and its not considered as a simple form of guild by the legal doctrine.

In its complexity the feeling of guild should be understood as a very different approach that the culprits mind takes on criminal social consequences in the near or the future. There are some actions may those be active or passive that not only can cause criminal consequences in the present but might also be very dangerous for the future. Taking this form of guilt the culprit wishes and desires the outcomes that his crime might cause in the presents without taking in account that in the future such acts might result to an even more severe outcome.

For us to be in the circumstances of a more complex form of guilt its needed that the culprit with his actions must desire the near future outcome such as the sexual act. On the other hand the the future outcome such as the death of the child comes from carelessness. The culprit does not desire an outcome such as the death of the child but due to the circumstances and the actual facts he can predicts such an outcome. Its not easy to identify in such cases if the author is conscious about letting such future outcomes happen or its really a case of carelessness.

Which brings us to a form of excessive self confidence. This happens because the culprit can't foresee that an outcome involving the death of the victim might really happen. In fact its hard to presume that the culprit doesn't foresee an outcome where the death of the victim might be eminent by forcing said victim to sexual abuse. If the death of the child is voluntarily caused by the abuser before, during or after the sexual or homosexual act then it will classify in death as a result of sexual abuse of minors.

The main question that emerges from our deductions here is will this crime be classified as “Sexual or Homosexual relationship with minors” and if so under which paragraph of said Article will it be sanctioned with?

I strongly believe the the legal qualification for such crime should fall under Paragraph I of Article 100 of our Criminal Code, because said outcome doesn't comply with the requests of Paragraph III for the same crime which is that of murder.

Some Practical problems shown by the subjective aspects of this Criminal Acts

The criminal act of “Sexual or Homosexual relationships with minors” as a defining characteristic has the direct and strong wish of the culprit to execute such crime. Which also defines the subjective part of the crime which revolves around the psyche of the culprit during the time of the crime [6, 143]. We can deduce here that the subjective more hidden parts of these kind of crimes its not a case of identifying certain facts but due to its metaphysical form we can only identify such variables through the concrete criminal actions that the culprit executes in such cases [7, 136].

In its incrimination techniques the legislator in Article 100 of our Criminal Code has not included or specified the certain psyche that the culprit should have when executing such criminal actions upon the victim regardless of her age or sexual maturity. This approach is not the same with other articles or Penal crimes stated in this same Code. For example Article 79 implies that “Deliberate murder against” ... b) a person with physical or psychological disabilities, seriously ill or pregnant when the qualities of said victim are apparent or known”. The concept “apparent or known” would be appropriate to specify also the characteristics of the child such as age or sexual maturity. Simply because the culprit must know that he is having sexual or homosexual actions with a minor or sexually immature child. Such knowledge or basic understanding is presumed only if the culprit knows the age or of the victim or her the sexual maturity is visible.

The question here is once again plain to see. Will it be considered as a crime if the culprit doesn't know the age or if the victim has reached sexual maturity? Will it be considered as a crime if the culprit doesn't understand that such sexual acts are classified as criminal?

In order to give the right answer to this question we must first shed some light on topics such as craze or guilt in the process of committing a crime.

In a situation of craziness or guilt we might face the fact that the culprit has no real knowledge about the gravity or the illegal activity he is about to commit, because he might not know such act is illegal. Take in account here cases when the violator doesn't know that the victim has yet to reach the age of fourteen or sexual maturity. The culprit might not know such facts because he might originate from a country which has a lower age gap for such sexual or homosexual acts. In the first scenario he might have a completely wrong picture of the facts while doing one thing he thinks is allowed he ends up doing something totally different. On the other hand on our second scenario the culprit knows and understand fully what he is about to do but is convinced that what he is doing is not prohibited by law [8, 294]. The fact of craze as a notion is categorized in three stages from a penal legal standpoint:

- Craze as a notion in our penal law is a sort of state when the culprit has no recollection or is completely oblivious of the fact that he is committing a crime or that is doing something gravely punishable. So its a plain dis function of the normal line of thought and a crazed psyche state of the culprit. Such are the cases when the author of said crime doesn't understand the characteristics of the criminal law [8, 294]. A state of intellectual craze is that part of the psyche that omits its intellectual counterpart. This general misconceptions of the culprit totally part his consciousness from the criminal act he is about to commit. So parts of the criminal consciousness and unconsciousness omit each other by making such crime not clearly determinable from the criminal law standpoint. Craze from a legal standpoint is the mistaken concept that the author has about what is allowed or not by the law. Only such form of craze is relevant and can omit guilt as a concept from a certain type of crime, while if such craze its unavoidable it can exclude a penal crime in itself. For

cases can be classified that author of the crime might have a crazed misconception they will be involved in the intellectual definition of said crime;

- Such act of craziness in fact comes because the culprit in such cases not only thinks that the circumstances are not against the law but the acts he is doing its because of extreme needs or extreme defense;

- Craze from a legal standpoint consists in the ignorance of the culprit to identify such acts as forbidden by law. When the culprit has a misleading understand of what he is doing we are under the element of factic state of craziness, while on the other hand when the author of said crime doesn't understand that he is doing something against the law, we face a case of legal craze. The culprit knows what he is doing but doesn't think that such acts are illegal for example: A foreigner who comes from a country in which sexual or homosexual relationships are allowed after the age of 12. Therefore such person might not know that the penal laws in our country don't allow such acts. Such forms of craze not only have correlation to the penal Laws of our country but they have a whole range of impact on society itself.

So now in order to reply to the question posed to ourselves we must take into consideration the three key factors mentioned above. So in case of factic fault we can exclude the elements of consciousness and unconsciousness of such illegal act. So we can omit here the three types of guilt that are, direct fault, indirect fault and excessive self-esteem. The illegal act of "Sexual or Homosexual relationship with minors" is done in a direct way. So in the case a person who doesn't have knowledge that the victim is under fourteen and hes yet to achieve sexual maturity this person cant be held as culprit because we cant under rule this as a violation of the law.

Exactly the same statement was made by the Court of Tirana which in its ruling of the case Nr. 1524 Dt. 07.05.2015 states that: "... *Subjective part: The defiant in order to act under his own will knowing that the victim was under fourteen years old and still continues with the sexual act. But in other circumstances*

due to the complicate state of this case when because of outer looks or body shape the age and sexual maturity cant be certainly identified the author might start to doubt about the age of the victim.

In such cases its still regarded as an illegal act because the culprit had all the ways possible to find out about the age of the victim and her sexual maturity" [16].

If the physical attributes of the violated child are visible we are not under the situation of a factic type of guilt.

Regarding the facts such as knowledge of the age of the victims different Criminal Codes in different countries treat this problem in total diversity. For example the Italian Criminal Code under Article 609 states that: *" When the crimes described in articles 609 bis, 609 ter, 609 quater and 609 octies are executed agains a minor less than fourteen years old, also in the case of crimes committed under article 609, the culprit cant justify himself the argument of his lack of knowledge toward the victims age."* [14, 609]. As seen above the Italian Legislator excludes this lack of guild from such criminal acts.

On the other hand the Criminal Code of Kosovo in article 229 states that: *" 1. For the purposes of the Chapter, a mistake as to the age of the victim who is under the age of sixteen (16) shall not be a mistake of fact under Article 25 of this Code if the perpetrator was negligent in making such mistake.*

The perpetrator is not criminally liable because of a mistake of fact under Article 25 of this Code if he or she, for justifiable reasons, did not know and could not have known that the victim was under the age of sixteen (16)" [11, 229].

On one side this Criminal Code regulation demands from the culprit that he must gather all the information concerning the victims age in order not to fall under cases of factic guilt. But on the other hand it also justifies such crime if its committed under the effect of ignorance towards the victims age.

This leads us to some concerns about our Criminal Code who needs to set up some strict regulations regarding the involvement of the notion of guilt in such crimes.

In case case if juridical errors, which happen when the culprit has a wrong recollection of the law that leads us towards a situation of juridical craze. The culprit in such cases knows what he is doing but doesn't realize that his actions are against the law. For example a foreigner which has knowledge of his country restrictions to sexual activities with minors only under 12 years acts the same in another country who has a higher age bar. In this case we can refer to Article 4 of the Albanian Criminal Code that states: *" Ignorance of the law that punishes a criminal offense does not constitute a cause for exclusion from criminal liability, unless the ignorance is objectively unavoidable" [12, 4].*

In Tiranas Courts case Nr.1524 Dt. 07.05.2015 its stated that: *"... Subjective part: The defiant in order to act under his own will knowing that the victim was under fourteen years old and still continues with the sexual act. But in other circumstances due to the complicate state of this case when because of outer looks or body shape the age and sexual maturity cant be certainly identified the author might start to doubt about the age of the victim.*

In such cases its still regarded as an illegal act because the culprit had all the ways possible to find out about the age of the victim and her sexual maturity."

Such ruling derives from Article 4 of our Criminal Code in conjunction with Article 100/1 which clearly states that ignorance of the law that punishes a criminal offense does not constitute a cause for exclusion from criminal liability, unless the ignorance is objectively unavoidable [16].

There are cases when the judges in their ruling have misinterpreted the the concepts of actual fault and juridical fault. So for example juridical guilt can not be excused with the reason of cultural marriage even if the wife is under 14 years of age. In its ruling Nr. 2301 Dt. 24.06.2015 Tiranas Courts stated that: *"Its been nearly one month since I got to know the Citizen name Vosa Shaqiri. I fell in love with her at first sight. She accepted me thus we agreed for her to come and live with me just like a married couple. I asked about her age and she told me that she was 15. I took her home during December 2014 and my family gladly accepted*

her. I asked her to sleep with me but at first she was reluctant. She told me she had never slept with anyone else. After five days we decided to have sexual intercourse. After having sex with her I saw that Vosa was not a virgin. Our last sexual relationship ended on the 23rd January 2015” [17].

The defendant and his lawyer had the same arguments directed to the court stating that marriage and sexual relationships at this age were common to said communities culture.

Conclusion

1. Albanian Criminal Code does not give a concrete dimension to the statement “Sexual or Homosexual Acts”. Regardless the Albanian Penal doctrine has defined this as a sexual intercourse between a male and a female. Such a meaning and interpretation has a confining character to it. Also the Albanian criminal area has expanded its approach within the European standard within this area of the Criminal Law which consider sexual acts the penetration of a sexual organ in any part of the body, or the minor penetration regardless of the size with any object in the anal or genital parts of another person. Also the sexual act is not only understood as a physical union of two bodies of the same or different sex, but also every other act that even tho it might not have a direct physical contact with the passive person (the victim in our case) it impacts the base and most principal sexual rights of this said person, in be for pleasing and exciting sexually the abuser.

2. For conducting such acts violence is not required. In order to consume such a crime its enough for both subjects to have sexual contact. The victim is not able to fully understand the character of such criminal acts and their consequences because of her young age and her young psycho-logic build. Sexual acts with a small girl even without physical or mental violence still are considered as a crime because the culprit in this cases takes advantage of the victim not fully understanding the circumstance she is in.

3. There is no such agreement if a person with ether words or gestures expresses lack of agreement

for doing or continuing such sexual act; Such agreement is reached with the involvement of another person on behalf of the victim; agreement is reached through fear, intimidation or threats and if such means don’t include using of force, violent threats or serious exploitation; or cases of the victim being in no position to reach such agreement of having sexual acts because of reduced psychic or physical abilities due to alcohol, drugs or other chemical substances. Thus such person can not be considered physically or mentally capable to take any decision by him/her self.

4. In its incrimination techniques the legislator in Article 100 of our Criminal Code has not included or specified the certain psyche that the culprit should have when executing such criminal actions upon the victim regardless of her age or sexual maturity. This approach is not the same with other articles or Penal crimes stated in this same Code.

5. In case of factic fault we can exclude the elements of consciousness and unconsciousness of such illegal act. So we can omit here the three types of guilt that are, direct fault, indirect fault and excessive self-esteem. The illegal act of “Sexual or Homosexual relationship with minors” is done in a direct way. So in the case a person who doesn’t have knowledge that the victim is under fourteen and hes yet to achieve sexual maturity this person cant be held as culprit because we cant under-rule this as a violation of the law.

6. This leads us to some concerns about our Criminal Code who needs to set up some strict regulations regarding the involvement of the notion of guilt in such crimes.

7. In case if juridical errors, which happen when the culprit has a wrong recollection of the law that leads us towards a situation of juridical craze. The culprit in such cases knows what he is doing but doesn’t realize that his actions are against the law. For example a foreigner which has knowledge of his country restrictions to sexual activities with minors only under 12 years acts the same in another country who has a higher age bar. In this case we can refer to

Article 4 of the Albanian Criminal Code that states: *does not constitute a cause for exclusion from criminal liability, unless the ignorance is objectively unavoidable.*.”
“Ignorance of the law that punishes a criminal offense

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