THE LAW ON SEXUAL HARASSMENT – DISREGARDING FUNDAMENTAL PRINCIPLES

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KEY WORDS: Principles, Nullum crimen sine lege, Presumption of innocence, Introduction

The issue of sexual harassment has recently become topical among Georgian society. A whole new article to the Administrative Offences Code (AOC) of Georgia has been initiated and adopted (Article 166[1]) by Parliament this year. The whole process was constantly accompanied by pompous slogans about protection of human rights. However, in case of critical rethinking of this legislative innovation one's attention might be attracted by certain weirdness of the elements of this offence: "unwanted behavior of sexual nature committed against a person in public places that aims or/and causes violation of his/her dignity and creates frightening, hostile, humiliating, degrading or insulting conditions for him/her." A doubt might arise in terms of whether the above mentioned regulation fully follows the fundamental principles of law namely: nullum crimen sine lege and presumption of innocence.

This report is a humble attempt to present an academic opinion upon this uneasy matter. Namely the intention is to analyse the elements of article 166[1] AOC of Georgia through the prism of the above mentioned principles and find out whether is there full compliance between them or not.

Level of Social Danger

First of all, it should be emphasized that in general offences against sexual freedom are subject of criminal law rather than administrative law. So scientific thought on this matter is mostly developed by legal scholars of criminal law. Thus though the exact subject of this report is an article of AOC of Georgia, certain notions, ideas, opinions etc. are borrowed from criminal law.

Before addressing the main question, it is worthy to answer a more basic one – is there a real need to legally regulate sexual harassment in the first place? Leg-

islative approach to that kind of question should be in the first place based on the level of social danger of the act.[1] Legislators should consider the level social danger and come up with proportional solution. Unfortunately, there is no precise method of calculating the exact level of social danger. Nevertheless, it is absolutely necessary to at least consider the factors that make the act socially dangerous. Number one of these factors is of course the object of infringement – the specific value that is infringed by the offence. In case of sexual harassment, the object of infringement is sexual freedom of the victim. That literally means one's right to freely choose a person who he/she wants to be sexually intimate with.[2] Sexual freedom is by all means a very important, very personal and intimate value that is easy to damage and hard to restore. Plus, infringement of sexual freedom might have some unforeseeable results including: mental issues, problems within family relationships, etc.

Plus, there are other factors that should be taken in account as well. One of the most important of them is the specifics of prevention. In general sexual offences are by no means easy to detect, investigate, gather evidence and prosecute.[3] On the one hand sexual harassment is least problematic among other sexual offences (e.g. rape or enforcement of sexual behavior) in terms of the damage to the victim. While on the other hand proving the fact of Sexual harassment is the most difficult. After sexual harassment usually little to no evident trace is left which a version of the incident could be based on. Plus there are so many false reports as well.[4] Thus sexual harassment generates a very difficult task for the state in terms of both special and general prevention[5]. This factor undoubtedly increases the level of social danger.

To sum up sexual harassment bears significant level of social danger. This could be a good base argument for the necessity of its legal regulation.

Although the problematics of sexual harassment includes not only significant level of social danger, but the variable nature of this act as well. Possible cases of sexual harassment may include a significant variety of acts. It is a very hard task for the legislator to come up with elements of this offence that on the one hand include all possible cases and on the other hand do not violate fundamental principles.

Therefore, legal regulation of Sexual harassment requires a very neat, cautious and consistent approach which Georgian legislators might have failed to apply.

1 Tsereteli T., 2007. Problems of Criminal Law. I Vol. "Meridiani" publishing house, Tbilisi. p. 30-31.

2 Lekveishvili M., Mamulashvili G., Todua N., Gvenetadze N., 2019. Special Part of Criminal Law (Book one). 7th Edition. "Meridiani" publishing house, Tbilisi. p. 229.

3 Ishchenko E.P., Toropkov A. A., 2010. Forensics. Textbook. Second Edition, Revised, Supplemented. "Infra-M" publishing house, Moscow, p. 542-553.

4 Lonsway K., Archambault J., Lisak D., 2009. False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault. The National Center for the Prosecution of Violence Against Women.

5 Roxin, Arzt, Tiedemann, (2013). Introduction to Criminal Law and Criminal Procedure Law. 6th, New Edited Edition. C.F. Müller. p. 5-6.

THROUGH THE PRISM OF FUNDAMENTAL PRINCIPLES

Methodological Basis

Principles of nullum crimen sine lege and presumption of innocence of course belong to criminal law and criminal procedural law rather than administrative law in the first place. Adepts of certain schools might really stress on this. The thing is that this differentiation is purely formal. Boundary between administrative offences and less serious criminal offences[6] is so blurry, that same act might easily constitute an administrative offence in one country and less serious criminal offence in the neighbor country across the border.[7] This mostly happens because they are really close to each other in terms of the level of social danger. So, answering the question whether the principles should be applied to the specific issue one should look deeper than formal differentiation. Since principles are general ideas for guidance[8] they should be applied to the matter if they are applicable in terms of subject, problematics or methodology. The very same approach is established by European Court of Human rights "The Convention is not opposed to the Contracting States creating or maintaining a distinction between criminal law and disciplinary law and drawing the dividing line, but it does not follow that the classification thus made is decisive for the purposes of the Convention."[9] Thus it is definitely acceptable to check article 166[1] through the prism of principles nullum crimen sine lege and presumption of innocence.

Nullum crimen sine lege

The principle of nullum crimen sine lege states that the elements of the offence should be as precise as possible to ensure the freedom of individual and prevent voluntarism abuse of state power.[10] It most strongly states that criminal law must not be extensively construed to an accused's detriment, for instance by analogy.[11] This principle has largely been acknowledged not only by legal scholars, but established under the Constitution of Georgia (article 31, paragraph 9) and by European court of human rights in the scope of article 7 Convention for the Protection of Human Rights and Fundamental Freedoms. Not only the act must have been criminalized under national or international law by the time when it was committed, but the law must be clear, precise and easy to comprehend so the individual could foresee the

6 "An intentional crime or a crime of negligence for the commission of which the maximum sentence provided for under this Code does not exceed 5 years of imprisonment shall constitute a less serious crime" − Article 12 paragraph 2 Criminal Code of Georgia.
7 Tsereteli T., 2007. The work cited, p. 23.
8 Team of authors. Editors: Nachkebia g., Todua N., Criminal Law. 2018. General Part. III vol. "Meridiani" publishing house, Tbilisi. p. 51.
9 ECHR: Campbell and Fell v. UK, (Application no. 7819/77; 7878/77) 28 June 1984, §68.
10 Gamkrelidze O., 2013. Problems of Criminal Law. "Meridiani" publishing house, Tbilisi. p. 36-37.
11 Team of authors. Editors: Nachkebia g., Todua N., the work cited, p. 53-54.

legal consequences of his/her act: "the Court points out that Article 7 para. 1 (art. 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."[12] Furthermore the court made even deeper analysis of the issue: "the Court recalls that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see the Groppera Radio AG and Others v. Switzerland judgment of 28 March 1990, Series A no. 173, p. 26, para. 68). A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, p. 71, para. 37)." This approach is absolutely necessary for protecting individual's rights and security and enhancing the rule of law.[13]

In case of article 166[1] the legislators don't really seem to pay attention to it. It is hard to comprehend the exact and precise meaning of most of the elements of Sexual harassment namely: "behavior of sexual nature;" "unwanted;" "frightening;" "Hostile;" "Humiliating," "Degrading;" "insulting;" All these elements are based on value judgement. Do the legislators themselves have a clear idea before creating such elements of offence? They don't seem to. Can legal advisors bring clarity by interpretation of those words? Maybe. But there is no reason to be sure about it.

One cannot be sure even whether he/she should use objective or subjective test. This is important because subjective comprehension of these words by a victim or perpetrator might drastically differ from what is commonly accepted by the public.

If the court applies objective test – it will eventually have to tell the victim something like: "Well… Such behavior it is commonly accepted as normal, so we don't really care that you feel sexually harassed." That will contradict the very purpose of the law.

If the court applies subjective test − it will eventually have to tell the perpetrator something like: "Well… This person felt himself/herself sexually harassed so we don't really care whether you could foresee such reaction/result or not." That will contradict nullum crimen sine lege principle.

12 ECHR: CASE OF KOKKINAKIS v. GREECE (Application no. 14307/88) 25 May 1993 §52.

13 Rychlewska A., (2016). The Nullum Crimen Sine Lege Principle in the European Convention of Human Rights: The Actual Scope of Guarantees. XXXVI Polish Yearbook of International Law. p. 186.

The very same act easily might be completely normal for some people while completely unacceptable for others. The matter becomes even worse if cultural, ethnic and religious norms are brought in. For example − a cheek kiss (French – la bise) is usually considered completely normal and non-sexual in France while really unacceptable in United States. On the other hand, a hug is mostly acceptable in United States while really unwelcomed in France.

The worst of the elements in terms of value judgement is the word "unwonted". How can one understand that his/her act is unwanted? Should one ask permission before committing every single action? That's not realistic. Normally one would understand that his/her behavior is unwanted after being told or by relevant action. So what if one person takes an action towards another, the other person says like: "No, stop it!" and the first one stops. Guess what? According to article 166^1 AOC it is a sexual harassment anyway.

To sum up article 166^1 Administrative Offences Code of Georgia holds a significant danger in terms of violation of nullum crimen sine lege principle that is a fundamental principle recognized by legal science, Georgian positive law and international human rights case law.

Presumption of innocence

Presumption of innocence has a long and history[14] is largely recognized by legal science,[15] established under Constitution of Georgia (article 31 paragraphs: 5,6,7;) and acknowledged by European court of human rights in the scope of article 6.2. of Convention for the Protection of Human Rights and Fundamental Freedoms. It states that „A person shall be presumed innocent until proved guilty, in accordance with the procedures established by law and the court's judgment of conviction that has entered into legal force." The court's "judgment of conviction shall be based on incontrovertible evidence." And of course the evidence is the key factor in this regard. To prevent arbitrary judgement and therefore guarantee the fair trail legal scholars have created several basic rules about the standards of evidence. One of the most prominent of them is that − no evidence should have a predetermined force.[16] For example, one can't say that:

- testimony of two witnesses will be enough to find a person guilty of theft
- or testimony of two witnesses plus material evidence (the stolen object) will be enough to find a person guilty of theft

14 Pennington K., 2003. Innocent Until Proven Guilty: The Origins of a Legal Maxim, 63 JURIST: STUD. CHURCH L. & MINISTRY 106.

15 De Jong F., Leonie Van Lent L., 2016. The Presumpton of Innocence as a Counterfactual Principle. Utrecht Law Review, Volume 12, Issue 1 (January).
Laliashvili T., 2015. Criminal Procedure of Georgia. General Part. "World of Lawyers" publishing house, Tbilisi. p. 110-112.
Team of authors, main editor: Giorgadze G., 2105. Commentary on the Criminal Procedure Code of Georgia. American Bar Association, Tbilisi. p. 49-59.

16 Ibid, p. 112-117.

- or even testimony of two witnesses plus material evidence (the stolen object) plus person's fingerprints on the stolen object will be enough to find a person guilty of theft.

This approach is absolutely necessary to guarantee the presumption of innocence since the right approach to examination of evidence ensures that a person will be convicted only if there is enough evidence to prove him/her guilty beyond reasonable doubt. Compliance of the evidence with the "beyond reasonable doubt" standard should be verified by the judge considering every specific case. If any evidence does have a predetermined force that might make the judge predisposed. Thus an individual might be easily convicted simply because of the presence of that particular evidence even if it is not enough for "beyond reasonable doubt" standard in terms of that specific case.

While in case of sexual harassment the legislators don't seem to care about that principle. Almost all of the elements of this offence are formulated in such manner that the only evidence which may prove their presence or absence is the testimony of the alleged victim. Those are again: "behavior of sexual nature," "unwanted," "frightening," "Hostile," "Humiliating," "Degrading," "insulting." All these elements as said before are based on value judgement. Thus it might depend upon the alleged victim's testimony alone whether a person will be found guilty or not. So, this evidence has a predetermined force in this regard.

To sum up article 166[1] Administrative Offences Code of Georgia holds a significant danger in terms of violation of principle of presumption of innocence that is a fundamental principle recognized by legal science, Georgian positive law and international human rights case law.

Additional Parallel

All said above seems to be dangerously similar to Criminal Code of the Soviet Russia that was used for bloody repressions committed by Joseph Stalin and his companions in 1930s. Namely article 58 part 1 stated: "The actions will be considered counter-revolutionary as well while not having the above mentioned purposes (that is to wreck Soviet government – P.G.), nevertheless contains an attempted infringement on the main political and economic achievements of the proletarian revolution." The very same thing seems to have happened during 1930s. The wording "political and economic achievements" was unclear and imprecise thus average individual was unable to foresee which specific act might have constituted this criminal offence. Therefore, the very fact of "attempted infringement" could be proved by no other evidence apart from the assertion of the government itself. That criminal code with those approaches was the one relying on which Soviet government shot and imprisoned thousands of people. Can modern state and society be better?

Conclusion

To sum up, a contradiction between the article 166[1] Administrative Offences Code (AOC) of Georgia and the fundamental principles of law namely nullum crimen sine lege and presumption of innocence is rather apparent. Legislators should consistently and courteously rethink the elements of this offence through the prism of above mentioned principles. Considering the very nature of sexual harassment, it is obvious that the Value judgement cannot be completely excluded but should be reduced as much as possible to at least prevent violation of fundamental principles and enhance the rule of law.

NOTES:

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18. Ibid, p. 112-117. (In Georgian)