

Fluctuating Definition of 'Consent' in Cases of Rape in the Southeastern Region of Kosovo

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Abstract

This research provides specific analysis on rapes and sexual assaults conducted in the South Eastern Region of Kosovo 2004-2013, aiming to shed light on social implications of this phenomenon and actions law enforcement entities put into effect. Rapes and sexual offenses certainly interrelate with existence of agreement/consent in sexual intercourse, therefore the typical definition of rape is considered when there is forced sexual intercourse without permission or agreement. In Kosovo's context, pre-war legislations have identified a significant number of offenses disregarding the expressed will from the victim, but with the deployment of UN Interim Administration such trend has evolved regulating the issue of consent in compliance with the international norms and standards. Nowadays, penal-judiciary focuses on offenses against sexual integrity primarily on (non)existence of consent. With the purpose to complementing international benchmarks, substantial legal reform is needed, in expanding the definition of rape and sexual offenses, compatible to EU standards such as clear delineation of consent amongst married couples etc. Obviously, the definition of what sexual offense infers, varies from social background, and perceptions, therefore viewpoints differ from cultural context, social development level, and/or socio-cultural perception Kosovar society has for sexuality is pivotal. But, another factor is prejudices and stereotypes society has for educational and socio-economic perspective on sexual offenses. Data and rationale on rapes, and other sexual offenses (sexual exploitation, jealousy, orgies, sexual assaults on interethnic hate), is provided but motives are explored describing and analyzing socio economic status of perpetrators, interethnic identity, employment status, educational and family background.

Keywords: consent, rape, sexual offense/assault, perpetrator, victim.

1. Introduction

It's essential to emphasize that due to seizure of Kosovo's autonomy from the oppressing regime of Serbia in 1989 Kosovo lacked legal judiciary instruments to regulate fundamental aspects that relate to criminal offenses including rape and sexual assaults. Under the brutal regime of Milosevic, Kosovo was undeveloped in many aspects. There was lack of information among Ethnic Albanians whereby Serbian legislation indirectly supported criminal assaults including ethnic rapes which clearly ended unreported, as victims were subject of threat from perpetrators. The treatment of victims in the criminal justice system of former Yugoslavia was questioned and impossible to process legally. Typically, during that time Kosovo had many cases of random rapes and assaults, where a stranger would show up from hiding in the bushes violating sexually a woman by using excessive force and in absolute terms all these offenses ended unreported from the fear of intimidation. With the deployment of United Nations Mission in Kosovo soon the Criminal Code and other related laws were promulgated regulating all criminal offenses including rapes which occurred prior, during, and after 1999 War in Kosovo. Under such circumstances, the Provisional institutions of United Nations Interim Governance in Kosovo followed by Kosovo Government promulgated Criminal Code regulating issues on Sexual Offenses against sexual integrity in the first years after the 1999 conflict in Kosovo. In the post war Kosovo, International Provisional Entities and Kosovo Institutions, adopted laws and set the foundation for implementation of these laws, thus legally channeling all criminal offenses, rapes and sexual assaults cases.

The rationale for this research work (period 2004-2013) is the bulk period as it offers sufficient statistics, data, evidences to study rapes and sexual assaults to analyze, compare, and understand the characteristics of phenomenon, therefore this period has been chosen as research topic aiming to provide contribution to the subject matter. Southeastern Region of Kosovo has been taken as a target area of this research being very representative and authentic for Kosovo, in many

aspects being a multiethnic, socially peaceful, and being typically representative to address issues and concerns that relate to the topic.

Obviously there has been an evolving process from 2004 onward, both legally and socially when it comes to implementing the law and criminal code in this region of Kosovo. The evolution process was apparent in cases that implied rapes and sexual assaults too, such progress is obvious not only in legal aspect but also in mental, medical and victim's socialization.

Before putting a major highlight on the analysis results and specific legal aspects of sexual assaults, the medical and social aspects are considered accordingly in the southeastern region of Kosovo by enabling access to counseling, psychotherapy and shelter to the victims of sexual assaults at the Center for Protection and Rehabilitation of Women and Children in Gjilan Municipality, a center which is established in 2004 by International Donor Agencies, but unfortunately providing limited services to victims from rapes and sexual assaults. In overall terms, statistics obtained from relevant institutions in Kosovo, prove an increasing public trust Kosovo citizens have with Law enforcement institutions, believing in fair trials and perpetrators are sentenced to jail accordingly.

1. Overview

To address social and legal challenges that relate to rapes and sexual assaults it's important to determine the scope and nature of the crime depending on how rapes are defined and measured. In overall terms, from the legal point of view most state jurisdictions define RAPE, sexual assault, and all forms of sexual violations, conducted by a perpetrator against a victim, via intercourse that needs inevitably prior consent. The most commonly referred definition probably all researchers use is the Wikipedia¹ which defines Rape as type of sexual assault usually involving sexual intercourse or other forms of sexual penetration carried out against a person, though different legislations, be it in Europe or overseas (U.S. Department of Justice) define rape as "Penetration by a sex organ of another person, without the consent of the victim"² which concludes that crucial to legal processing sexual violations is defining clearly whether the victim provided prior consent for such an action, or not. In line with these updated legal trends, Kosovo as a new country, has blended fairly with International standards by establishing legal foundation, adopting laws that regulate criminal offenses against sexual integrity. Kosovo's Criminal Code, chapter on sexual offense describes rape, as penetration of sexual organ of a person or with any object or another part of the body, followed with specific provisions on consent, specifying;

No consent is obtained when there is: lack of agreement to engage or to continue sexual act; the agreement was obtained by deception, fear or intimidation, the use of force, serious threat or exploitation; or when person is incapable of agreeing to the sexual activity because of diminished mental or physical capacity.

In many respect, the issue of consent/non-consent is key to proper legal analysis therefore the Criminal Code of Republic of Kosovo defines RAPE as an action "whoever subjects other person to a sexual act without such person's consent shall be punished by imprisonment". From practical point of view for every specific case judge has to examine carefully the motives affirming agreement was expressed by word or conduct. The criminal code of Kosovo substantially encompasses modern concepts related to all criminal sexual offenses and human rights³ whereby individuals decide freely on their respective sexual behaviors in respect to the Right on Dignity and Sexual Integrity of Human Beings⁴. That being said, Kosovo has progressed significantly, as in pre 1999 cases of sexual assaults were processed through customary law, in absence of legislation under dictatorship regime of Serbia. Post war time marked extensive progress in adopting laws and set the foundation for implementation of these laws, thus legally channeling all criminal offenses, rapes sexual assaults cases, regulating all criminal offenses accordingly.

Given the socio-economic context, Kosovo is considered a conservative society, thus punishment of rapes and sexual assaults often are often two folded; perpetrators receive the second punishment after imprisonment as these people face social public humiliation and somehow receiving the second "isolation" from community, perhaps not to a great extend in capital city but in regions and small municipalities such practice is applicable.

¹ <https://en.wikipedia.org/wiki/Rape>

² An updated definition of rape taken from the archives of the United States Department of Justice source: <https://www.justice.gov/archives/opa/blog/updated-definition-rape>

³ Article 23, Constitution of Republic of Kosovo, Prishtina, June 15, 2008.

⁴ Salihu, Ismet, Zhitia, Hillmi, Hasani, Fejzullah, *Komentari i Kodit Penal të Republikës së Kosovës, botimi 1, Prishtinë, 2014, fq. 605.*

For information and perusal, find herewith the overall statistics on criminal offenses against sexual integrity for the period 2004-2013

Table 1: figures on all reported criminal offenses in the Southeastern Region of Kosovo (period 2004-2013)¹

CRIMINAL OFFENSES AGAINST SEXUAL INTEGRITY 2004-2013	
Southeastern Region of Kosovo	
Rape	12 cases/incidents
Rape attempt	11 cases/incidents
Sexual assault	16 cases/incidents
Sexual offense with persons with disability and diminished or physical capacity	9 cases/incidents
Sexual offense with mistake of fact as to age of victim with children under 16 yrs old.	32 cases/incidents
Sexual offense by using the authority, public post or profession	1 case/incident
Incestuous relations	2 cases/incidents
Sexual offense by harming reputation	1 case/incident

The reported figures against sexual integrity in the southeastern region of Kosovo are considered far above the ground and very high. From the comparative point of view with the cases prior to 1999 and until 2004 (informal statistics) these figures are appalling, considering the total number of population of Kosovo (average 1.800 million citizens). The growing number of rapes and sexual assaults is noticed among college age (females) up to 16 years old, total 32 cases, which is an alerting situation, as high figures force decision makers to plan undertaking preventive actions.

Needles to say, but for each category as reported in table 1, presumably 20-25% are unreported incidents which is typical in under-developed countries like Kosovo. Current legislation applies strong penalties for rape assaults as article 229 of Criminal Code finds the sexual offenses of this kind criminally liable because of a mistake of fact under Article 25 of this Code² if, for justifiable reasons, did not know and could not have known that the victim was under the age of sixteen (16). Imprisonment from 2 to 10 years, from legislative authorities is an adequate legal prevention instrument to potentially downsize sexual offense cases with mistake of fact as to age of victim with children under 16 yrs old.

In cases when perpetrator is under 16 years, imprisonment is not applied, which potentially brings the need to amend legislation in lowering the age to find offenses criminally liable as a substantial number sexual offenses are registered in schools among the school mates. Perhaps a practice taken by some countries of European Union in lowering the age to 14 yrs old is to be considered seriously by legislators to halt this type of assault among juveniles and enable legislators to undertake concrete measures in preventing sexual assaults in schools.

Kosovo Government, Law Enforcement Institutions and all other relevant entities with the mandate to address the issue among juveniles have taken substitute preventive measures and applied information campaigns to diminish the growing rate of sexual assaults, but still it remains gangrene for Kosovar Society. However, the challenges ahead, prove that preventing rapes and all sorts of sexual assaults is a very sophisticated and complex process. It's rather a delicate process

¹ Statistical report on criminal Offenses, Kosovo Police, RID Regional Investigation Department, reporting period 2004-2013.

² <http://www.assembly-kosova.org/common/docs/ligjet/Criminal%20Code.pdf>

requiring reviewing carefully specifics and needs via multidisciplinary analysis to administer and manage properly such a delicate process.

Obviously rape entails a broad scope of complex processes that needs professional and skilled qualified experts to deal with it. Apparently this type of sexual assaults require more instruments post verdict as strong foundation via social improvement programs to address this critical society problem. Southeastern Region of Kosovo has limited practical resources to handle this growing numbers of rapes and sexual assaults in one Center, a center for Protection and Rehabilitation of Women and Children who primarily accommodate victims of domestic violence but unfortunately do not cover directly victims of sexual assaults. However, lack of educational programs and campaigns informing students in the primary and secondary schools is another piece that leads to the increasing number of sexual assaults with juveniles.

Sexual offense cases/incidents with persons with disability and diminished or physical capacity in the region are surprising and a very concerning issue for the community. In non-developed countries like Kosovo, which leans more to a typical traditional society, sexual offenses with disable people are rare phenomenon that in the past was not noticed, perhaps, it was unreported due to social delicacy and the harsh contradiction faced in society. From the social point of view Kosovar society still treats sexual assaults with persons of disability as the most disgraceful offense socially unacceptable and intolerable. In typical cases the social penalty results to isolation and abundance community imposes on perpetrator regardless of the court verdict, after finishing imprisonment.

From a statistical point of view rapes, rape attempts and sexual assaults (totally 39) as reported for this period of time, are considered rather high. From the overall observations a number of social factors contribute to this growing number of cases/incidents. Obviously, the adolescence time has dropped therefore nowadays in primary schools, girls that physically look grown-up are subject of sexual assaults and rapes. Sexual maturity among girls have reached to the levels of adulthood in a very accelerated pace that visually spurs and encourages males to seeking sexual intercourse, but it's not only the appearance that as primary motivation to conduct sexual assaults and rapes but also misleading signals that perpetrators wrongfully conclude to receiving consent from the partner, colleague or a friend.

Many of rape assaults definitely lack agreement or consent for sexual intercourse and very often the agreement of the victim is obtained by deception, fear of intimidation and other ways of using force, or threat for exploitation. Obtaining consent or having no agreement in a willingly sexual intercourse interlinks mostly with the motives perpetrators have in conducting sexual offense of any kind therefore, key to unlock this challenge is analyzing concisely and thoroughly the existence of consent/agreement in a sexual intercourse. Identifying true motives is key to definition of consent or agreement in cases of rape or sexual assaults in the southeastern region of Kosovo.

Enlisted below are the identified motives that led to criminal offenses against sexual integrity.

Table 2: Motives on reported criminal offenses in the Southeastern Region of Kosovo (period 2004-2013)¹

Motives identified leading to criminal offense against sexual integrity in the Southeastern Region of Kosovo Reporting period 2004-2013			
No.	Description	Number	Remark
1	Sexual Motives	59	
2	Sexual exploitation	8	
3	Jealousy	1	
4	Sexual Orgies	2	New in the Kosovo context

¹ Statistical report, Kosovo Police, RID Regional Investigation Department, reporting period 2004-2013.

5	Ethnic hate	1	A group of local Serbs sexually assault native Ethnic Albanian girl to openly express interethnic hate against Albanians
6	Money benefit	2	
7	Love motive	3	Perpetrator exhausts all the chances in receiving love from the partner, thus to reach out its objective conducts criminal offense to win the heart of the partner justifying the offense claiming to commit such action to receive deserving love
8	Low sexual motives	3	
9	Pedophilia	1	
10	Marriage motives	2	Similar to offenses with love motive, but the only the final objective is to conclude the process with marriage

Application of sexual orgies is definitely new in Kosovo context; such phenomenon was never reported in the past. Probably, this is a reflection of copy paste syndrome youth tries to replicate in Kosovo, from what they see on TV or what they believe is a trend in the western world. Such phenomenon, probably, comes as influence from internet as a vast majority of youth follows porn sites and try to apply sexual orgies considering a common and fancy. Kosovo is a traditional oriented society leaning more towards national conservatism therefore such social gatherings that encompass open sexual intercourse are socially unacceptable and prohibited.

Yet another category that is considered sensitive in the eyes of the community is the criminal offense against sexual integrity conducted on basis of ethnic hate. These incidents are very sensitive as people still live with the flashbacks of rape and sexual assaults prior and during 1999 conflict that paramilitary and military forces committed against innocent females in Kosovo.

Fact wise, during the reporting period of this research, criminal offense against sexual integrity on basis of ethnic hate is only one offense that engages two ethnicities (Serb and Albanian) as all other offenses are conducted within the same ethnic community.

Chart 1¹ shows the breakdown of numbers divided per ethnic background of perpetrators engaged in rapes and sexual assaults. Majority of perpetrators are Kosovo Ethnic Albanians as they are dominating community in social life of Kosovo. Under category other foreign citizens are engaged in criminal offense.

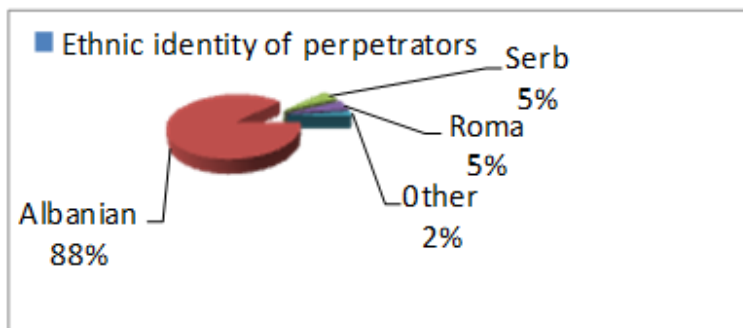


Chart 1: Motives on reported criminal offenses in the Southeastern Region of Kosovo (period 2004-2013)

¹ Breakdown of figures per ethnicity, Kosovo Police, RID Regional Investigation Department, reporting period 2004-2013.

Yet the main motive identified leading to criminal offenses against sexual integrity in the Southeastern Region of Kosovo is the sexual stimulus. Perpetrators enter forcibly to an intercourse to fulfill sexual desires and fantasies, but in most cases sexual assaults occur because they find the female sexually attractive, but also a decent percentage of perpetrators find themselves bossy and macho despite the fact that their social status is very low.

Find herewith the table describing the social/economic status of perpetrators:

Chart 2.1 The statics unveil a fact that majority of perpetrators belong to middle class category of people and almost half of them also being poor. Poor social and economic status definitely sets certain impediments and barriers in male – female relations perhaps this is the reason of having such a big gap with rich people.

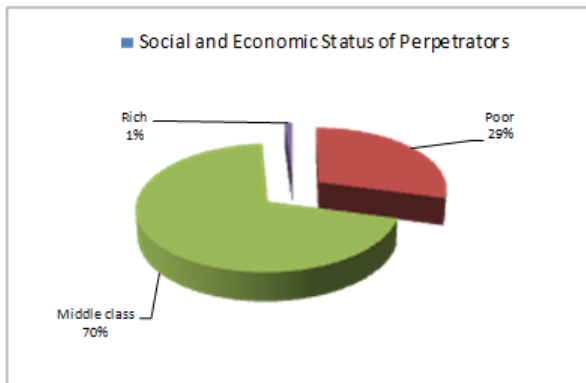


Chart 2: Social and Economic Status of perpetrators in the Southeastern Region of Kosovo (period 2004-2013)

In overall terms most of the perpetrators are of provincial mindsets that act quickly. Their tough lifestyle makes them too aggressive in reaching personal milestones in sexual life, therefore as soon as they read “misleading signal” or flirt from females they are ready to undertake sexual offense, without having a second thought. Tough social life they undergo is an indicator that they become more violent and perhaps social frustration is more dominant in their character.

Chart 3; Employment status of perpetrators prove that out of total number of perpetrators as reported 30 of them are unemployed and a vast majority employed in the private sector have poor social and economical status

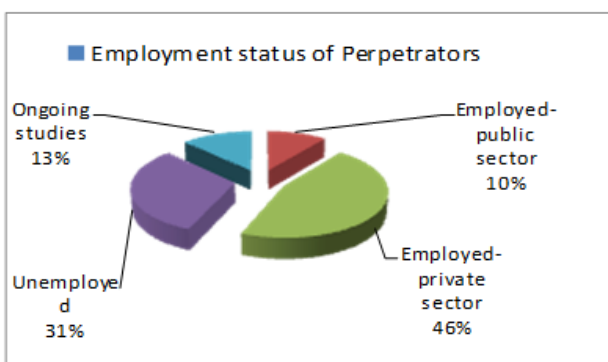


Chart 3: Data on Employment status of Perpetrators (period 2004-2013)²

¹ Socio-economic status of perpetrators, Kosovo Police, RID Regional Investigation Department, reporting period 2004-2013.

² Employment status of perpetrators, Kosovo Police, RID Regional Investigation Department, reporting period 2004-2013.

The reason of having few sexual offenses only 10 in the public sector is that Central and Local government and other public institutions apply code of conduct and code of ethics based on which all public servants are supposed to respect it accordingly. Apart of legal sanctions in case of sexual assault employees of the public sector, lose their job and also face double public humiliation. The restraining instruments applied form public state institutions (administration, schools, hospitals etc) have contributed in downsize number of rapes and sexual offenses but unfortunately private sector remains yet untouched.

Chart 4 on educational background of perpetrators is evidence that perpetrators have limited educational background and most of their offenses are conducted on basis of limited knowledge on consequences and the negative impact this offense brings in life.

Perpetrators educational background is an indication that sexual motive is the primary reason why they engage in such process.

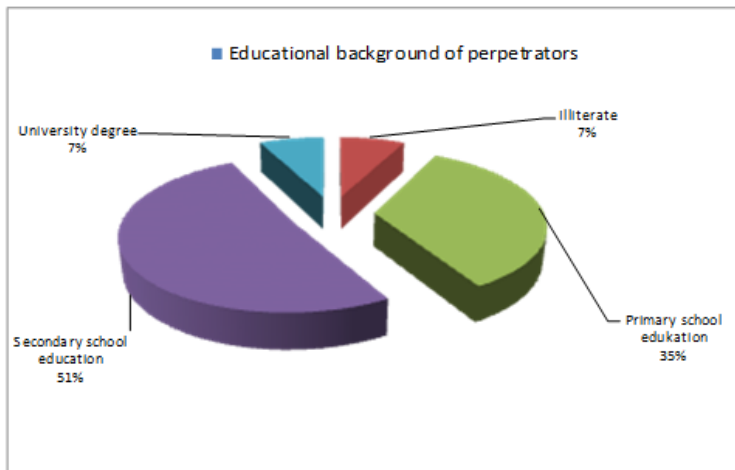


Chart 4: Data on Employment status of Perpetrators (period 2004-2013)¹

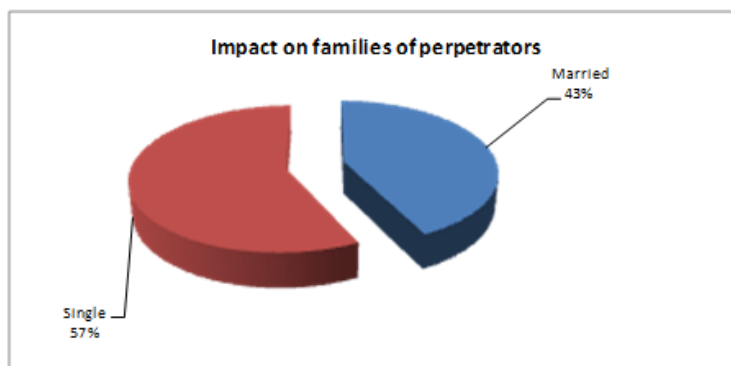


Chart 5: impact on families of Perpetrators (period 2004-2013)²

¹ Educational background of perpetrators, Kosovo Police, RID Regional Investigation Department, reporting period 2004-2013.

² Impact on Families; Report, Kosovo Police, RID Regional Investigation Department, reporting period 2004-2013.

Data on sexual offenses (see chart 5) family impact gives an idea of the weight family members carry as they face stigmatization from community. The most affected group of the family are children totally 84 in the southeastern region of Kosovo that are stigmatized on daily basis, in schools, playground, neighborhood etc.

The data on impact of families highlight a new trend which in the past it was a belief that only single men were potential to conducting sexual assault but apparently the figures show almost the same numbers of perpetrators that marriage didn't impede them to conduct criminal offense against sexual integrity.

2. Conclusions

Legal and judiciary framework in processing the phenomenon of rapes and sexual assaults mark a considerable progress in Kosovo, but social and cultural trend in meeting international standards yet remain subject of improvement. Sexual offenses indicate more than the perception itself on social aspect and viewpoints on consequences this phenomenon brings to society. The most serious consequences to reflect in public life are psychological and social aspects. Consequences may be of ruinous nature and affect work performance, setting impediments in personal development, restrictions and problems in family relations due to social stigmatization from community and perhaps the lack of courage to discuss and report sexual assaults at the relevant authorities.

All the-afore mentioned difficulties in Kosovo context, produces nervous breakdown, damaging psychological health which may result to psychological disorder. This sort of bad mental health certainly affects family relations and the welfare of the children as descendants of the family.

In conservative society like Kosovo, presumably reporting figures on sexual offenses and rapes are low, and it is vital to highlight a number of factors that contribute to low reporting rates: initially, very often sexual offense is viewed as unimportant totally neglecting the need to report regardless of the crime weight. It is to admit, that there are cases victims do not report offenses from the fear of losing the job, not letting alone reporting sexual harassment which cases must be reported based on code of ethics.

The root causes of sexual assaults may be numerous, but in current context enlisted find herewith major causes that lead to sexual assaults and offenses: sexist tone addressed to females in social environments, portraying females as source of sexual exploitation (sometimes in media outlets), gender domination and other circumstances that are created in working environment. It is true, that consequences of sexual assaults may be immense for both perpetrator and victim; life disorganization, stress, depression, health problems, social disintegration, isolation, public abundance, pressure, divorce, internal conflicts to dismissal from work etc.

It is of high importance to reach an enhanced awareness point among community in informing them on disincentives of sexual assaults and disadvantages such criminal offenses bring to society. Awareness campaigns of this kind may contribute substantially in reducing the number of sexual assaults in every sphere of life. Another key instrument to be used in disseminating information on halting sexual offenses in community are media outlets and their influence they have via public debates, publishing reports on sexual assaults etc. Apparently, the necessity is to mobilize citizens in preventing sexual assaults by all means starting in family, schools, workplace, media outlets, not letting alone genuine efforts should be made to act in such spirit at the law enforcement institutions, police, attorney office, in particular at judiciary to sentence maximum penalties for perpetrators. If judicial verdicts are maximal the chances of repetition are minimal and vice versa.

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