

Kosovo *Sui Generis*: Criminal Act “Inducing Sexual Acts by False Promise of Marriage” and the 2019 Criminal Code

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Abstract

Article 233 of the most recent Criminal Code of Kosovo, enacted in 2019, includes the criminal act of “Inducing sexual acts by false promise of marriage.” According to this Code, this act is committed by a person deceptively and falsely promising marriage to induce a person between the ages of sixteen and eighteen years to engage in a sexual act. This paper has three primary goals. First, to present a normative chronology and analyze the elements of this criminal offense. Second, to present the degree of dangerousness and data on the number of persons convicted in Kosovo from 2003-2019, and thirdly, to justify the causes and the need for decriminalization. Therefore, the paper uses normative, historical-comparative, and objective analysis (reasonableness, teleological) to answer the research questions, including the literature review and personal communications with the former Deputy President of the Supreme Court of Kosovo by adopting a qualitative method.

Keywords: Criminal Code of Kosovo, False promise of marriage, Socio-cultural context, Normative Paradox, Social Paradox, Decriminalization

Introduction

In criminal law, the object of protection is summarized in a specific fundamental value: some good or some right. Among other rights, there is also a person’s right to decide for themselves about their sexual activity when they reach a certain age. In criminal law, the object of protection is summarized in a specific fundamental value: some good or some right. Among other rights, there is also a person’s right to decide for themselves about their sexual activity when they reach a certain age. The object of protection is defined from the norm, continuing with the act, the method, and the goods violated or damaged with this action (Lazarević, 1998, p. 443). The vital issue in Chapter XX of the Criminal Code of the Republic of Kosovo is the clear definition of the object of protection, consequently which values Article 233 – Inducing sexual acts by false promise of marriage protects.

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The societal control of sexuality has a wide range, from soft limitations to sentencing (Stojanović, 2009, p. 438). The changes regarding the meaning of sexuality and sexual morality should be accompanied by amendments to the criminal-judicial regulations (Stojanović, 2009, p. 438). In this regard, several decades ago in Kosovo, an action related to false promises of marriage was criminalized. This criminal act is committed when sexual intercourse is performed in exchange for a promise of marriage. Despite numerous changes over the decades, this act is still considered a criminal offense. This proves that despite visible changes to the issue of sexual morality, Article 233 of the Criminal Code has not adapted to these societal changes. The Criminal Code in Kosovo has gone through numerous changes since 1977 when the first Criminal Code of Kosovo came into power, with three other criminal codes subsequently enacted in the years 2004, 2013, and 2019.

The history of false promises of marriage as a criminal offense date back to 1951 when the Criminal Code of the Socialist Federal Republic of Yugoslavia was enacted. In Article 185 of this Code, within the chapter “Criminal Offenses Against the Dignity of Personality and Morality,” there was a provision for the criminal offense of “Seduction”, which states that *anyone who incites a female over the age of 14 to engage in the sexual activity shall be punished by imprisonment of three months up to two years, and the criminal proceedings shall be initiated using a motion* (Official Gazette No. 113/VI/1951, Federal People's Republic of Yugoslavia, Penal Code).

In 1977, all the federal units of the former Yugoslavia, including Kosovo, enacted their own criminal laws, adapting them to their specific needs. The federal units had the opportunity to independently decide on the respective criminal offenses, except for political offenses, which were centralized under the jurisdiction of the Yugoslav Federation. Within the criminal laws of the federal units, there were specific changes, primarily due to differing historical, social, and cultural contexts. These changes were particularly evident concerning the chapter on “Criminal Offenses against the Dignity of Personality and Morality,” including false promises of marriage. The criminal laws of Slovenia and Croatia, for instance, did not criminalize this particular act. Even Montenegro’s criminal law did not criminalize this act, despite the patriarchal specifics characterizing the region. The criminal codes of Serbia and Bosnia and Hercegovina have not included this act in their respective criminal codes for more than two decades. As for Albania, this criminal offense was only provided for in the 1928 Penal Code (Article 371 – “Anyone who, by persuading her, breaks the virginity of a girl under 20 years old, promising to marry her, shall be punished with imprisonment

from three months to one year. If he marries that girl, there will be no criminal offense. However, if the offender divorces this woman without her fault within five years of marriage, the criminal proceedings will be resumed"). However, as of 1945, Albanian legislation did not consider this act a criminal offense.

The Provisional Criminal Code of Kosovo entered into force in 2004. This Code included the criminal act "Sexual abuse of persons under the age of sixteen years," which incorporates the false promise of marriage. Article 198, parag.7 and 9 foresee that "*whoever, by a false promise of marriage, induces a person who is between the ages of 16 to 18 years in a sexual act shall be punished by imprisonment of three months to three years and criminal proceedings for the offense shall be initiated using a motion*" (UNMIK Reg, 2003/25).

The Criminal Code of Kosovo entered into force in 2013. Article 240 of that Code provides the norm "Inducing sexual acts by a false promise of marriage," which provides that *whoever deceptively and falsely promises marriage to induce a person who is between the ages of 16 and 18 years to engage in a sexual act shall be punished by a fine or imprisonment of up to three years* (Official Gazette of the Republic of Kosovo No.19). The same norm, without any change in the title or description of the criminal offense, is foreseen in Article 233 of the Criminal Code of Kosovo enacted in 2019 (Official Gazette of the Republic of Kosovo No.2). According to this Article, this criminal offense is committed by an adult person inducing a person between the ages of 16 and 18 years to engage in a sexual act, promising to marry them, not intending to fulfill the promise. The promise to marry is the way, the means used to commit the criminal act. So, there is no force or threat used to commit the sexual act, but the promise to marry, and the sexual act is performed with the consent of the other person.

There must be a causal connection between the sexual act and the promise of marriage (Lazarević, 1998, p. 468). This criminal offense is considered to have only been committed if, in the moment of promise, the perpetrator is conscious that they will not fulfill the promise (Pihler, 1976, p. 78). If the promise of marriage is not false, thus, if there is a union in marriage between these people, then the criminal act under Article 233 of the Criminal Code of Kosovo would not exist. Anyone, regardless of their gender, could be the perpetrator of the criminal offense and could be in the role of the passive subject.

In the past, Seduction was foreseen as a criminal offense "to punish the seducer who using a promise of marriage, destroys the chastity of an unmarried female of previous chaste character, and who thus draws her aside from the path of virtue and rectitude, and then fails and refuses to fulfill his promise, a character

despicable in the eyes of every decent, honorable man” (Supreme Court, Manila, G.R. No. 42660, 1935).

A similar contextual and legal arrangement is also foreseen in Indian criminal law. In many cases, Indian courts have issued decisions in which sexual intercourse that occurs in exchange for a false promise of marriage is considered sexual assault and is referred to as “sex by deception” (Chan, 2022). This practice was criticized harshly, resulting in changes to the Criminal Code of India (1860). Among various proposed changes, it was suggested that Seduction should not be equated with rape but should be established as a distinct criminal offense. This draft law includes the criminal act “Sex by deception,” *which includes the act of sexual intercourse with a woman using deceptive ways or promises to marry without the intention of fulfilling this promise, which is punishable with imprisonment up to 10 years and a fine* (The Bharatiya Nyaya Sanhita, 2023). Human rights activists in this country consider an achievement that, according to the Indian Penal Code, this promise is not always qualified as rape, but the Code takes into account the consent known to be given under fear or misconception, Article 90 (The Indian Criminal Code 1860), arguing the reasoning in detail (Chan, 2022).

The normative paradox of the criminal act “Inducing sexual acts by false promise of marriage” through decades.

The criminal act “Inducing of sexual act by a false promise of marriage” is a consequence of previous legislation. Since 1951, this criminal offense has been transferred to the criminal codes of Kosovo without a thorough analysis of whether this act should continue to be incriminated. There are some very paradoxical facts throughout the decades of existence of the criminal act of false promise of marriage, such as:

- a) The essence of the legal description of this criminal act remains unchanged since the 1951 Criminal Code.
- b) The maximum sentence according to the 1951 Criminal Code was up to two years imprisonment, whereas with the subsequent legislation (1977, 2004, 2013, and 2019), the maximum sentence is up to three years imprisonment.
- c) In the 1951 and 1977 legislation, the prosecution was initiated by a private motion; in the 2004 Criminal Code prosecution is initiated using a motion, while in the 2013 and 2019 Criminal Code prosecution is initiated *ex officio* (considered a more serious criminal offense);
- d) According to the criminal legislation of 1951 and 1977, only a man could give a false promise to a girl or a woman, whereas in the criminal codes of

2004, 2013, and 2019, the perpetrator of the offense “Inducing sexual acts by false promise of marriage” could be anyone, regardless of their sexual orientation.

- e) According to the 1951 and 1977 legislation, the term “consent” means a voluntary agreement of a girl who is 14 years old.
- f) According to the Criminal Codes of Kosovo of 2004, 2013, and 2019, the term “consent” means voluntary agreement of a person who is 16 years old.

However, Seduction (excluding some countries in other continents) as a crime is outdated. Some legal decisions from over a century ago continue to be intriguing when the critical issues for verification were: “whether the promise was made at the time of the sexual act or immediately after,” whether there was a “high level of trust that he would marry her,” “whether the promise was repeated,” “whether the offender was engaged to another woman,” “that the marriage was promised in May, while the sexual act occurred in August,” and so on (Supreme Court, Manila, G.R. No. 42660, 1935). Since under the Criminal Code of Kosovo, this act is considered a criminal offense, the judicial process for the parties (subjects of the criminal procedure) involved can be not only inconvenient but also comical, as the offense appears archaic.

Criminal act “Inducing of sexual act by false promise of marriage” and social paradox.

Kosovo is continuously striving to establish an equal society for its people, including gender equality. However, despite efforts to find contemporary formulations in line with the European countries’ legislation, Article 233 of the Criminal Code contradicts and undermines such efforts. Among others, the criminal offense “Inducing sexual acts by false promise of marriage” is also contradictory: on the one hand, it reflects an ancient mindset (giving consent to engage in sexual activity in “exchange” for marriage), and on the other hand, it does not define the sexual orientation of the perpetrator and the victim. In exchange for a sexual act, it is not only a man who may promise marriage to a woman; a woman may promise marriage to another woman, a man to a man, and a woman to a man.

For a long time, the main issue regarding sexual offenses was how to regulate these matters by law. So, where is the boundary between actions that are “allowed” and those “not allowed”? This boundary, especially in recent decades in Europe, has significantly shifted through the legislative reform of these countries.

The criminal legislation in Kosovo, especially after 1999, has begun to undergo reforms regarding sexual offenses: decriminalizing homosexuality,

raising the age of consent for sexual activity from 14 to 16 years, and removing the gender boundaries concerning the perpetrator and the victim. These are all significant changes, yet the Criminal Code still qualifies the false promise of marriage as a criminal offense, which is prosecuted *ex officio*.

The primary function of criminal legislation, above all, is the protection of the individual. Criminal legislation provides for the physical protection of an individual and the protection of all other values. In this context, the question arises: what is the function of the criminal offense of “Inducing sexual acts by false promise of marriage” under Article 233 of the Criminal Code of Kosovo? Which values, which individuals it protects, and whom it protects from? This article intends to provide criminal-legal protection to individuals between 16 and 18 years, who fall prey to deception. However, deception involves the promise of marriage: if sexual activity occurs, they will marry. So, marriage is conditioned on sexual activity, and the consent for sexual activity stems from the condition of marriage. According to Article 233 of the Criminal Code of Kosovo, both individuals condition each other. If the legislator intends to protect “sexual integrity,” as this chapter is named, this criminal offense conflicts with that goal. Sexual integrity is the right to own one’s body, which refers to complete control over own body (Cox et al., 2021). According to Article 233, a person has control over their body and gives consent for a sexual act by fulfilling the legal criteria of the age because they are 16 years old (Article 225, Parag.1/1).

The other issue is related to the situation when, according to the law, the perpetrator and victim marry. Although, in such instances, the criminal offense under Article 233 is not committed, the question arises as to what the meaning of marriage under those conditions is because, in such cases, the “promisor” is obligated to marry to avoid criminal liability. In such cases, both individuals could be considered victims. One is bound to keep the promise and marry because they would face criminal prosecution if not. The other is bound to marry because they are engaged in sexual activity. Indeed, in such cases, marriage becomes compulsory for both individuals. From the beginning, such marriages have a flawed foundation based on conditional terms imposed on each other. Therefore, marriages under such conditions are destined to fail. Decades ago, Kosovo’s court applied an interesting approach: legal proceedings in cases of sexual assaults would often end in reconciliation between the perpetrator and the victim, to have them get married. In most cases, however, these marriages ended within a few months (Lumezi, personal communication, January 27, and March 30, 2016). The other issue pertains to the change in the marriage view. This has to do with changing the structure and transformation of the family (Giddens, 1986, p. 116

and 117) and the deinstitutionalization of marriage (Hull et al., 2010, p. 33). Family and religious traditions have lost their influence, and as a result, the social norms that define and guide people's behavior within the institution of marriage are weakening (Hull et al., 2010, p. 34).

In philosophy, promise or commitment is a moral category. As an action, a promise generates a moral obligation (Allen, 2022). In practice, a promise (when made freely, without coercion) is a social norm that the promisor is obligated to fulfill (Molina, 2019, p. 86) because the act of promising creates an expectation in the promisee (Patterson, 1992). When a promise is not fulfilled, the promisee is disappointed, and this is morally wrong – the theory of expectation and the theory of overreliance (Patterson, 1992). Scholars of deontological ethics believe that a promise must be kept, even if fulfilling it would cause more harm than benefit (Županc, 2015, p. 9-11). The criminal offense under Article 233 of the Criminal Code of Kosovo demonstrates the opposite because fulfilling a promise to marry in such circumstances would be more harmful than not fulfilling it. Fulfilling the promise is a paradigm; it does not arise from the motivation to get married, but it is the result of giving a promise that must be kept, which, in this case, cannot explain why the promise of marriage is obligatory (Cureton, 2007, p. 10-12). The legislator, in wanting to protect sexual morality, ironically reveals amorality. Marriage on these conditional foundations is an obligation, and it is built on shaken trust and respect. Therefore, such sexual promises and conditions should not be protected by law, especially for individuals who are over 16 years of age and, according to the law, have the right to decide for themselves regarding giving or withholding consent for a sexual act. Marriage is not an institution that defends sexual morality. The other issue, the promise does not have a normative nature; therefore, judicially does not produce an obligation.

The dynamics and changes in society cannot be influenced through criminal legislation. Moreover, criminal legislation must adapt to changes. The criminal act “Inducing of sexual act by false promise of marriage” is a victimless crime. In many countries worldwide, *Mala Prohibita* includes several acts and, as such, has been decriminalized (Brown and Davis, 2016, p. 3 and 4). Decriminalization also occurs when it comes to non-violent offenses (Nikolić-Ristanović and Konstantinović-Vilić, 2018, p. 88 and 143). Therefore, rightfully, the Council of Europe's Report decades ago emphasized that “criminal legislation must cut off dead branches” (Milutinović, 1984, p. 295).

The need for decriminalization

Having in mind the societal changes, it is imperative to analyze these factors: a) the weight, or rather, the level of risk posed by the criminal offense

“Inducing sexual acts by false promise of marriage,” and b) the data from the judicial authorities regarding the number of convicted individuals in Kosovo.

- a) The weight of a criminal offense is determined by the level of risk, which is manifested by specific consequences that objectively do not exist in this criminal offense. This is because, according to Article 233 of the Criminal Code of Kosovo, this offense does not entail harm or endangerment of any value.
- b) As for the data related to the number of convicted individuals, this criminal offense is very rare based on the material analyzed since 1951. The practice has shown that in most cases, the offenders and victims knew and were socializing with each other; victims would go to the offender’s home, spend one or more nights there, and sometimes even cohabit for several months (Pihler, 1979, p. 78 and 79). Only after such relationships would fail (often leading to the victim moving out of the offender’s house) did the victim or her relatives initiate legal proceedings against the person with whom she had spent some time (Pihler, 1979, p. 78 and 79). Furthermore, the practice has shown that these situations mainly occur in rural areas (Nikolić-Ristanović, 1989, p. 45). In most cases, the defendants attempted to persuade the court that their promise of marriage was not false but that the condition for marriage was for the girls to have been “*virgo in tacta*,” even though such a condition is illegal because it is immoral (Pihler, 1979, p. 79). Within scientific circles, there have been calls for the decriminalization of this criminal offense for several decades (Memedović, 1975, p. 107; Srzentić et al., 1981, p. 766; Stojanović, 1996, p. 23). Research has demonstrated that in Kosovo, from 2003 to 2019, six individuals were convicted of committing the criminal offense “Inducing sexual acts by false promise of marriage,” of which four received conditional sentences and two were fined (Jonuzi – Shala, 2011, p. 110-112; KAS, 2019).

Socio-legal movements also necessitate movement towards decriminalization, one form of which is *de jure* decriminalization, which should also occur for Seduction (Cunha, 2004, p. 52). Unlike over-criminalization, decriminalization has been marginalized and reduced only by removing certain criminal offenses (Delić, 2018, p. 143) This means that unjustified neglect of decriminalization and the assertion of criminalization as the primary instrument of legislative reform is a consequence of the “great delusion” of the legislator, claiming that decriminalization weakens the protective function of criminal law, which is not true (Delić, 2018, p. 143).

Conclusion

Decriminalization is a fundamental instrument for shaping criminal law, especially concerning offenses with which the state aims to protect sexual morality, particularly in cases involving victimless crimes. In addition to this argument, the statistical analysis of the number of people convicted of this criminal offense is insignificant.

Undoubtedly, the criminal offense “Inducing sexual acts by false promise of marriage,” as provided in the Criminal Code of Kosovo, serves as a paradigm and, at the same time, is not in line with the reality of Kosovo. Inducing sexual acts with a false promise of marriage falls under the category of *Mala Prohibita* because such an act, in and of itself, is created by the will of the legislator. In this context, the fact is that the value violated by this criminal offense cannot be identified. Therefore, decriminalization of this criminal offense in Kosovo is necessary, just as it has occurred with homosexuality, propagandistic actions, defamation, libel, and some other acts.

The teleological (purpose-oriented) and the statistical argument should have been sufficient to justify the necessity of decriminalizing this criminal offense.

Declaration of conflicting interests

The author declared no potential conflicts of interest concerning the research, authorship, and/or publication of this article.

Funding (If any)

The author received no financial support for the research, authorship, and/or publication of this article.

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Notes

UNMIK - United Nations Mission in Kosovo

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