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Sexual Violence: Comparative Overview of German and Georgian Legal Perspectives[1]

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Abstract: The issue of sexual violence that this article was tasked to deal with is neither new nor devoid of a regulating legislative framework. Moreover, a number of scientists from different countries and institutions of the world have devoted their works to the topic under discussion, which has repeatedly been subjected to discussions in the European Court of Human Rights, International Criminal Court, and ad hoc tribunals.

However, this article aspires to analyze the normative framework for the regulation of sexual violence in line with Article 36 of the Istanbul Convention in Germany and Georgia after the ratification of the Convention in the last decade. The main focus of the study is the contentious interpretation of consent in sexual offences. Due to the inevitable legislation reforms concerning sexual violence, this academic work examines new trends on regulating this issue in Western countries, especially in Germany, considering the historical ties of Georgian Criminal Code to German law. The article discusses sexual violence in general, providing a brief review of sexual violence legislation, where it is mainly presented by considering the international legal framework. Sexual violence and other sexual offences according to Georgian and German criminal codes are presented in general terms and in a comparative manner. The article also explains rape in the light of its re-conceptualization, encompassing an analysis on sexual violence, including rape, especially in relation to consent. This, in

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turn, can prompt amendments to Georgian Criminal Code on the related issue, which currently does not comply with the standards on interpreting sexual violence, established by the Istanbul Convention and other important related international acts.

Keywords: *consent, the Istanbul Convention, gender-based violence, gender stereotypes, rape, sexual autonomy, sexual offences, sexual violence*

1. Introduction

Georgia and Germany, as ratifying countries of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention, 2011), are obliged to comply with this international treaty and accordingly amend their national laws. However, whether or to what extent they have fulfilled this obligation in relation to amending sexual violence law in their national legislation is the subject of examination in this article, which elucidates overall shortcomings and inaccuracies. Even though Georgia has made significant strides in recent years to improve its legislative framework for the protection of women against domestic violence and other forms of gender-based violence, the misleading understanding of the essence of rape still continues to remain a challenge due to its inaccurate wording in the Criminal Code. This misconception prompts investigations and criminal prosecutions to proceed the case incompetently by adopting a formalized, outdated approach to sexual offences, which fails to provide victims with effective means of defense. In other words, the legislation still falls short of the requirements of the Istanbul Convention for rape and other crimes of sexual violence with reference to the definition. Against this background, the study scrutinizes sexual offences in Georgian and German criminal law, as well as in international law, in an attempt to identify the best practices for the regulation of sexual offences and to encourage revision of the challenging concept of consent in sexual crimes.

At the commencement of this critical inquiry, Germany was selected as a benchmark for comparison for a specific reason. As it has been widely accepted, it is the purpose of the comparative study that guides the selection of jurisdictions for comparison (Bhat, 2015, p. 161). Correspondingly, the selection of Germany was stipulated by its unique role in the development of Georgia's criminal law. Thus, the interpretation of the concept of sexual

violence (rape) in the legislation of Germany, where drastic changes had to be made to sexual offences law to comply to the Istanbul Convention, could have served as an incentive for Georgian legislators to amend the national law.

This article allows the reader to closely observe the similarities between these two legislations on sexual offences, encouraging Georgian lawmakers, the endorsees, and receptionists of German criminal law, to reflect on the inevitable amending of Georgian law on the issue. However, this process requires special analyses and evaluation, which are also envisaged in this study. Only after a critical examination of the German law, it is possible for Georgia to elaborate on the powerful draft proposing changes on the respective issue—the outcome that constitutes the main goal of this article.

As Georgia is yet to establish an effective provision for defining, prosecuting, and punishing rape and sexual violence as forms of discrimination against women, the research aims to assist Georgian legislators and judiciary in addressing the stated task through a comparative analysis. The latter has been attained by examining the international and German legal frameworks and experience in related issues.

2. A brief review of international legal framework on sexual violence

Sexual violence is a concept that refers to all violations of sexual autonomy and sexual integrity. It is an exposure of humiliation, domination, and destruction of a victim (The Hague Principles on Sexual Violence, n.d.). International acts establish standards for combating sexual violence both during war and in peacetime. However, the assessment made regarding the definition and classification of sexual crimes in connection with international armed conflicts has opened the door to the refinement and redefinement of national legislations on the issue. Generally speaking, in times of war, international law protects civilians from rape and sexual violence through three complementary treaty regimes: International Humanitarian Law (IHL), International Criminal Law (ICL), and International Human Rights Law (IHRL), which recognizes gender-based violence against women as a violation of human rights. In addition, these treaty regimes are supplemented by customary international law, which in its turn, prohibits sexual violence (Moore & Chinkin, 2018, p. 179). Thus "sexual violence against women

has been recognized as a human rights violation under customary law, treaty law and also in the jurisprudence of international human rights courts" (Walby *et al.*, 2015, p. 117). Reconceptualization of rape has become one of the focal issues due to the enactment of the Istanbul Convention, cornerstone judgements of international courts and tribunals regarding the criminalization and prosecution of rape, and the efforts made by the UN Committee on the Elimination of Discrimination against Women (Jasiński, 2022, p. 12).

The Istanbul Convention, the most recent and powerful treaty to tackle violence against women in a broad sense of this term, which is applicable in times of peace and also in situations of armed conflicts (Istanbul Convention, Art. 2), specifically addresses the issue of sexual violence, including rape, under Article 36. This enables an accurate interpretation of the problem through (1) elaborating a precise and adequate definition of rape in line with the Conventions' provisions, and (2) acknowledging the treaty's explicit gendered character (Kherkheulidze, 2017, p. 27).

The abovementioned Article, which criminalizes non-consensual acts of a sexual nature, while establishing consent as a constructive element of the provision, refers to its voluntary nature, stemming from a person's free will, which must be assessed in the context of surrounding circumstances (Istanbul Convention, Art. 36). Such an interpretation of sexual violence finds its roots in the judgments of ad hoc tribunals, the International Criminal Tribunal for the Former Yugoslavia and the Rwanda Tribunal, recognizing a sexual act as rape in the situation of exploiting coercive circumstances by the perpetrator. It implies that victim's acquiescence to sexual intercourse may not be considered as being genuine if the existing circumstances precluded the possibility to give the consent of a voluntary nature. "The silence of the victim or lack of resistance does not mean the victim's consent" (Dekanosidze *et al.*, 2020, p. 11). This understanding of rape can be also supported by Article 6 of the Istanbul Convention, which requires for the application of gender perspective in the design and evaluation of measures taken for its implementation. Consideration of this particular and very important statement allows reading and comprehending gender-based nature of sexual violence against the background of the highly contentious definition of consent and its diverse conceptual models, as actively discussed in contemporary legal literature.

3. General comparison of sexual offences in Germany and Georgia

In general, identification of what qualifies as a crime is closely related to people's perceptions, which in turn, are shaped by various cultural and political factors (Jasiński, 2022, p. 11), as well as by societal values and understandings. When it comes to criminalization of sexual offences, the situation becomes even more tense because of the complex nature of the problem. Neither Germany nor Georgia have been immune to heated debates on the issue of sexual violence.

In the last two decades, there has been a noticeable sensitivity in German society regarding structural and implied pressures on women, who have had to tolerate unwelcomed sexual conduct (Weigend, 2022, p. 184). Also, in Georgia, after the ratification of the Istanbul Convention, significant amendments have been made to the country's legislation, including the Criminal Code, to ensure the gender-sensitive implementation of this international act (Khatiashvili, 2021, p. 10). Those recent developments regarding formulating sexual offences in the Criminal Code of Georgia (CCG) can be divided into two stages: before amending this chapter in 2017 according to the Istanbul Convention and afterwards, which has continued till the present (Gegelia *et al.*, 2020, p. 12). Nonetheless, sexual offences still follow that outdated model of understanding sexual violence, requiring physical violence or a threat of such violence or abuse of helplessness of a victim for the fulfillment of the elements of the crime of rape (CCG, Art. 137). Meanwhile, until inevitable amendments are introduced to bring Georgian law in compliance with the abovementioned Convention and related human rights standards, a special guidebook has been drafted for practitioner lawyers to provide recommendations on ways in which to interpret existing legislation of Georgia on the issue (Edgerton *et al.*, 2021, p. 5).

In Germany, even before the ratification of the Istanbul Convention, the Act to Amend the Criminal Code to Improve the Protection of Sexual Self-Determination entered into force, resulting in tangible reformation of German criminal law on sexual crimes. According to the new changes, the "No means no" rule was implemented, criminalizing any sexual act executed against the recognizable will of the victim. Accordingly, Article 177 of the Criminal Code of Germany (*Strafgesetzbuch*, StGB) constitutes as the central offence, covering many of the elements given in Article 36 of the Istanbul Convention. In its current version, Article 177 imposes criminal responsibility on "any

person who, against the apparent will of another person, performs or causes sexual acts to be performed on that person or causes that person to perform or tolerate sexual acts on or by a third person" (GREVIO, 2022b, para. 250). However, German legal scholars point out a considerable difference between Section 177 of StGB and Article 36(1) of the Istanbul Convention. While the Convention describes the core of misconduct in a simple manner as "engaging in non-consensual acts of a sexual nature," German law does not elaborate on it with a few words in a single paragraph, but is designed in a more complex way, encompassing several variations of sexual assault. More precisely, there are six versions of sexual assault merged in Article 177, in addition to subsections for aggravating circumstances including coercion, penetration, group offenders, and use of weapons (Hörnle, 2023, pp. 146–147). However, everything has its own reason and argumentation, among them complicated construction of this Article too, where the decisive factor would have been the ambiguity of the term "non-consensual," if translated literally as *nicht einverständlich*, and understood respectively. Such a wording would have confused German lawmakers and practitioners, because of two different types of consent, with different meanings and requirements, co-existing in German criminal law (see Bohlander, 2009, p. 82; Heinrich, 2019, para. 440). Consequently, as Germany adopted the "No means no" approach regarding sexual assault, its meaning could not be adequately represented by translating non-consensual as *nicht einverständlich* or *ohne Einwilligung* (Hörnle, 2023, p. 147), requiring the elaboration of noticeably extended and exhaustive provisions on the issue. Owing to such broadness of the newly formulated Article 177 in StGB, in this general overview only the core notion of its subsections will be briefly addressed for the purposes of comparison between this Article and the similar composition of crimes in the CCG.

As already mentioned, the central description of the offence in Article 177(1) of the StGB is conveyed by the words "against the other person's discernible will." In contrast to German sexual assault law, which makes a person's conspicuous will central in an assessment of sexual violence, CCG does not contain a similar declaration. The current formulation of unwanted sexual contact—even without penetration of any kind—does not rest on the perspective of the victim's "willingness," but rather legislation requires it to be committed through violence, under the threat of violence, or exploiting the victim's helpless condition (CCG, Art. 138, titled 'Another action of a sexual nature'). Such archaic and outdated methods have to be applied on the part of the perpetrator for the physical action of a sexual nature to be qualified

as a crime under Article 138. At the same time, the mentioned action must not contain elements of Article 137 (rape), otherwise it would be qualified as the latter. Anyway, the means for the commitment of both crimes (Arts. 138 & 137) are the same and remain to be as old as the patriarchal system which undermines protecting women's rights.

Section 177(2) of StGB covers the cases where communicating an adverse will is impossible, or simply unnecessary, as the offender knows from the very beginning that sex is not desired on the part of the victim. While this section is very interesting as a whole, from a comparative perspective, one subsection grabs our attention—the instance where both parties know that an employee's rejection of sexual demands would result in dismissal (Hörnle, 2023, p. 150). A similar offence is criminalized under Article 139 of the CCG and formulated as: "Coercion for penetration of a sexual nature into the body of a person, or for another action of a sexual nature."

While such a conduct constitutes a sexual assault in German criminal law and is punished under the same Article 177 (albeit another section applicable for punishing rape, Art. 177 (6)), in Georgia, analogous conduct is criminalized under independent Article (139) and, regrettably, in the eyes of the society and the legislator amounts to minimized threat to sexual autonomy. The corresponding perception, in turn, emboldens the perpetrator, oppresses the victim, perpetuates gender-based violence, and disregards the gravity of this crime. This interpretation emerges from Georgian doctrine and theory, where all actors are concentrated on the constitution of the crime, dividing the crime composition into formal and material types. Given that this is the offence of a formal composition, inducing criminal responsibility upon a sole fact of coercion, further development of the event is not taken into consideration. In turn, this means that any subsequent sexual act, which occurs even as a result of such preceded coercion precludes responsibility for committing rape. Eventually, it implies that even coerced engagement in sexual intercourse, including penetration, will not be qualified as rape and will not be assessed as such. The necessity for changing of this provision substantially, both in terms of harsher punishment and qualification, is irrefutable. It is crucial to comprehend that Article 139 encompasses three different crimes: (1) coercion which results in penetration; (2) coercion to engage in any other act of a sexual nature resulting in physical contact of a sexual nature; 3) sexual coercion (a mere fact) falling short of penetration or any other physical contact of a sexual nature (Dekanosidze *et al.*, 2020, p. 14).

As it is explained in GREVIO's report,

> the difference between Article 139 and Articles 137 (rape) and 138 (physical contact of sexual nature) is that the former does not require the threat of violence but threats of a more general nature, such as the threat of damaging property or of disclosing defamatory information or information on the victim's private life. Article 139 is also aimed at perpetrators who rape or commit any other non-penetrative act of sexual violence by abusing the victim's material, official or other kind of dependence on them. (GREVIO, 2022a, para. 255)

In the light of such discrepancies, GREVIO's concern that Georgia's legislation currently criminalizes two different types of acts of rape by two diverse and inconsistent provisions and penalties, is rational. Accordingly, GREVIO reasonably concludes that inappropriate, albeit currently applicable definitions on rape and sexual violence, as well as "the differences in their sentencing ranges reinforces the myth that rape always involves physical force or threat thereof" (GREVIO, 2022a, para. 256).

Nonetheless, the similarity between these two Articles—Article 177(2) of the StGB and Article 139 of the CCG—is based on the common view and interpretation that for the application of such Article, labeled as "sexual assault" in German law, implicit threats should be proven and not only the reluctance to have unpleasant sex, or the aim to benefit from such an intercourse for socioeconomic advancement (on the German and Georgian perspectives, see Hörnle, 2023, p. 151; Lekveishvili *et al.*, 2023, pp. 315–323).

In relation to defining and interpreting sexual offences called "sexual abuse," Professor Hörnle has assessed the reform implemented in 2016 as hasty and short-sighted in some aspects which, among other issues, refers to sexual abuse related to a child victim, which is referenced in a broad range of respective Articles from 174, 176–176d to 182 of StGB (Hörnle, 2023, pp. 152–153).

The mentioned articles are interesting from the perspective of the comparison of two compositions of the crime from the CCG—Articles 140 and 141. Article 140 is formulated as penetration of a sexual nature into the body of a person under 16 years of age, which implies punishment of consensual intercourse due to the minor age of the victim (Kherkheulidze, 2022, pp. 119–123). From the German perspective, such an action can be punished under Section 176c of the StGB—aggravated sexual abuse of children, as far as the offender is 18 years of age or older and "has sexual intercourse with a child or performs

similar sexual acts on a child or has similar sexual acts performed on them by the child which involve penetration of the body" (StGB, Art. 176 (c)). Article 141 of the CCG, called the Pervert Act, reiterates the spirit and wording of provision from StGB, condemning sexual abuse of children without physical contact with the child, Section 176a, making criminally liable a person, who

> performs sexual acts in the presence of a child or has a third person perform sexual acts on them in the presence of a child; causes the child to perform sexual acts, unless the act is subject to a penalty under Section 176 (1) no. 1 or no. 2; or influences a child by means of pornographic content (Section 11 (3)) or pornographic speech (StGB, Art. 176 (a)).

Nonetheless, noticeable differences can be found between Georgian and German constructions of the mentioned articles due to some aspects. Namely, the Pervert Act, according to the CCG, even though it can be committed by an adult, without violence and against a person who has not reached the age of 16 years, could still entail non-violent touches of a sexual nature (Lekveishvili *et al.*, 2023, pp. 327–328), and thus, encompass physical contact as well. Other measures by German legislators, taken due to sensitivity towards women's issues have led to the criminalization of "sexual harassment of another person by touching him or her in a sexually connoted way (Art. 184(i)) and participating in a group of persons who harass another person in order to commit an offense against him or her, if a sexual offense is committed by any group member (Art. 184(j))" (Weigend, 2022, p. 184). However, these provisions are deemed inappropriate for comparison due to the inconsistency with the chapter on sexual offences in the CCG.

4. Re-conceptualization of rape

4.1 Germany

How rape and other forms of sexual violence are defined and punished within criminal law has been an important point in political and scholarly debates in many European countries. Discussions have been held around the contentious issue on whether the harm caused by rape is best articulated through criminalizing it, based on acts of violence and coercion, or upon lack of consent (Skilbrei, Stefansen & Bruvik Heinskou, 2020, p. 10). Recently, the shift from force and coercion towards consent in the conceptualization of rape has led to the development of varied legislative models—among them "No means no" and "Only yes means yes"—also named as affirmative consent

(Wegerstad, 2021, p. 736). Whilst according to the "No means no" model, sex is considered consensual until one person says no, with the "Only yes means yes" approach, sex is only defined as consensual when all participants have explicitly agreed (Torenz, 2021, p. 719). "In Germany a new offense based on non-consent was simply added to the existing scheme focused on coercion" (Jasiński, 2022, p. 18). While in the past, the protection of public morals used to be a declared aim of criminal prohibitions of sexual offences, in Germany, since 1973, the rationale for such condemnation is to protect the sexual autonomy of the persons involved (Weigend, 2022, p. 183). Nowadays, a person's autonomy and free will stands at the center of sexual violence analysis, where autonomy, as a significant right safeguarded by the German Constitution, boldly advocates for a consent-based approach (Hörnle, 2023, p. 142). Rape as a term still remains to be used in the German criminal code, even though now it is perceived and assessed as a form of sexual assault that involves bodily penetration. "This crime no longer presupposes a coercive act by the offender, a core feature of rape until 2016. Under current law, rape only requires one of the six versions of sexual assault plus penetration" (Hörnle, 2023, p. 152).

Eventually, summarizing the changes in sexual assault law has led to the inference that although sexual offenses were revised, the distinction according to the severity has been preserved as: rape—*Vergewaltigung,* sexual assault—*sexueller Übergriff*, and sexual coercion—*sexuelle Nötigung* (Jasiński, 2022, p. 19). Nonetheless, it is debatable whether the conceptualization of the new offences under the wording "sexual acts committed against the recognizable will of the victim" fully complies with the standard criminalization of all non-consensual sexual acts as required by Article 36 of the Istanbul Convention, stressing on voluntarily given consent as well as on assessing action considering the context of the surrounding circumstances. Whilst under the wording of Article 177 of StGB it becomes "legally challenging if not impossible to prosecute the perpetrator in cases where the victim remains passive but does not consent" (GREVIO, 2022b, para. 252).

In such situations, the solution could be the interpretation stemming from ICL and IHRL that "once coercion or the inability to give genuine consent has been established, examination of consent is unnecessary" (Edgerton *et al.*, 2021, p. 13). A related shortcoming from the amended German sexual assault law resonates with criminal procedural aspects. The current construction of Article 177 of the StGB lays the groundwork for criminal proceedings to "focus on the actions of the victim rather than

those of the accused, creating room for gender stereotypes and rape myths to resurface" (GREVIO, 2022b, para. 252). This means that, "[i]nternational instruments focus also on aspects tending to receive less attention in the German system and thus creating various problems within the practice in relation to: gender stereotypes and the acceptance of the structural nature of gender-based violence" (Wolf & Werner, 2021, p. 805). States must ensure that interpretations of rape legislation and subsequent prosecutions are not affected by gender stereotypes and myths. Also, it is equally important to comprehend that prosecution of rape "requires a context-sensitive assessment of the evidence to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed" (The Council of Europe Convention, 2011, para. 192). While some of the victims can possibly resist rape boldly and even physically fight back, others may experience physical numbing (Möller, Söndergaard & Helström, 2017, p. 932). Failure of substantive criminal law to define and interpret sexual crimes adequately undermines the duly investigation and prosecution of such cases.

4.2 Georgia

Sadly, while the whole Western world, from Germany to the Unites States, engages in in-depth discussions on how to define consent in its multifaceted interpretations—ranging from attitudinal to affirmative consent—the country of Georgia, and its criminal legislation, epitomizes a conservative state with outdated views and regulations on the issue of sexual violence through preserving a violence-based definition of rape.

The current wording of Articles 137 and 138 restricts their application only to cases which are committed by means of violence, threats of violence, or abuse of the helplessness of the victim, thereby obstructing justice for the victims of sexual violence (Edgerton *et al.*, 2021, pp. 5–6) in cases where none of the abovementioned three criteria are met, even though a non-consensual sexual act has taken place.

GREVIO calls on Georgia's authorities to amend the provisions of the Criminal Code on rape (Art. 137) and other sexual violence offences (Arts. 138 & 139) so as to fully incorporate the notion of the lack of freely given consent, as required by Article 36 of the Istanbul Convention, and to consider it in practice, including in cases where given circumstances preclude valid consent. GREVIO also urges to introduce the provision that would cover the intentional conduct outlined in Article 36 (1c), of the Istanbul Convention (GREVIO, 2022, para. 261).

In the process of amending the sexual offence regulations in the CCG, it is crucial to consider Germany's amended sexual assault law, as well as international criminal law standards and the case-law of the ECtHR. It is crucial to comprehend that with respect to the penalization of rape, the contemporary standard is to punish non-consensual sexual acts without requiring proof of physical resistance (Rudolf & Eriksson, 2007, p. 509). "The European Court based its finding that Bulgaria had violated its positive obligations under the ECHR primarily on the fact that the Bulgarian judicial authorities took physical resistance rather than lack of consent, as the central defining element of rape" (Cusack & Timmer, 2011, p. 341). Hence, in alleged rape cases, the element that needs examination is acquiescence, which must be voluntary and stemming from victim's unsuppressed will. At the same time, it must be evaluated in the genuine context of the surrounding circumstances. While such understanding was formulated in the context in which citizens were raped during armed conflicts, "it also reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse" (*M.C. v. Bulgaria* [2003], paras. 102–107, 163). All that has been mentioned above, including Germany's experience in recent amendments to sexual assault law and related shortcomings, will contribute to successfully amending Georgian law on sexual offences.

5. Conclusion

The present article analyzed the similarities and divergences between the sexual assault regulations in the criminal codes of the two countries in general, in a comparative manner. Special emphasis has been placed on the interpretation of the model of "consent" that Germany has chosen after the ratification of the Istanbul Convention. Whereas Germany has already managed to amend its criminal law following the adoption of "No means no" approach to defining of sexual violence, Georgia has yet to implement such a change. This comparison and examination of recent changes in Germany's sexual assault law could be applied in the elaboration of a valid legislative framework on the issue, which would meet international standards as set by the respective Article of the Convention. Georgia is a country which overtly declares its commitment to European values, among them those within the legal scope, and thus conforming to the regional treaties on women's issues is crucial for maintaining its European course.

In conclusion, the article sought to learn lessons on conceptualizing of sexual violence (including rape) from the approaches of Germany's jurisdiction. The attained results, in return, have demonstrated both the differences and similarities between Georgian and German criminal laws and called for inevitable amendments to the respective Georgian legislation.

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