

The Sexual Harassment in Greek Criminal Law (Law 3488/2006)

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Abstract

The present paper examines the problem of sexual harassment at the workplace. Firstly, it examines the real extent of the problem, then records the way this problem is faced within the European Union and finally analyses sexual harassment as an individual criminal offence according to the Law 3488/2006. The problems of the new law are studied and the introduction of a new criminal provision within the Greek Criminal Code is proposed.

1. Introduction

The first question which must be answered when a new criminal provision is examined is what kind of problem needs to be resolved. In other words, does sexual harassment at the workplace constitute today a social problem of such an extent that its special criminal treatment could be justified?

The evidence provided by related studies is enlightening. The first study which took place in the U.S.A, with a sample of 9,000 persons, showed that the 88% of the people asked had experienced sexual harassment. In equivalent studies in eleven European countries during the decade of 1987-1997, the percentage was 30-50%. In addition, in a smaller study which took place in Greece in 2003

by the Research Centre for Gender Equality (KETHI), the percentage of sexual harassment was found to be 10%.

Therefore, the problem exists and is serious. Although this problem concerns men up to a certain extent as well, sexual harassment still remains profoundly a female issue which reinforces and prolongs the stereotypes of the woman's role. Thus it constitutes a structural problem of modern societies.

2. Measures taken by the European Community

Despite the extent of this problem, the European Community began dealing with this issue relatively late, in the mid 80 's , when the European Parliament demanded via a resolution the enactment of a relevant directive from the European Committee (after the conduct of a requisite study).

The study which took place in 1987 indicated that the sexual harassment cases at the workplace were indeed a significant problem for million of women across Europe. The most affected groups were divorced and separated women, widows, young women and new entrants to the labour market as well as women with disabilities, lesbians or women belonging to racial minorities. Homosexual and young men were found also frequently victims of sexual harassment. The offenders were in many cases employers of the victim, but also colleagues or clients.

The first important text issued, based on this study, was a recommendation from the Committee on 27 November 1991, where the risk of sexual harassment at the workplace was described for the first time. As the Directive notes, this kind of behaviour does not only offend one's honour but can also have devastating effects upon the health, confidence and work performance. The stress and anxiety caused by the sexual harassment lead usually its victims to take time off work due to sickness, be less effective while working or leave their job to seek work elsewhere, something which limits their career prospects. Moreover, sexual harassment also affects the rest of the employees, even if they are not directly subjected to it, because it pollutes the entire working environment. Eventually, it has been proved that sexual harassment has negative consequences on the employers as well since it adversely influences the enterprise's performance.

Nevertheless, the exhaustive description of the phenomenon's consequences was not accompanied by an exhaustive description of the phenomenon itself, as one would expect. In the

recommendation only a vague and wide definition of sexual harassment was provided which included every “unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work”.

It took eleven years until an attempt was made in the Directive 2002 / 73 / EC for a new, narrower definition to be proposed, which is still based however on a series of evaluative and vague notions. In the recommendation it is specifically stated that sexual harassment presupposes an unwanted conduct of a sexual nature, which can be verbal, non-verbal or physical and should aim at or result to the violation of individual dignity, especially through the establishment of an intimidating, hostile, degrading, humiliating or offensive environment.

This Directive of 2002 has already been cancelled and replaced by the Directive 2006 / 54 / EC, which did not alter the definition of sexual harassment.

3. Measures taken by the Greek legislator

To the extent that the sexual harassment violates, as it has already been mentioned, significant human rights, one would expect that the Greek legal armoury would suffice itself, i.e. independently of the existence of any European directives.

Criminal provisions actually did exist. There were the provisions regarding offences of personal honour (Art. 361 of the Greek Criminal Code), Art. 337 of the Greek Criminal Code, which covers every serious insult of human dignity in the field of a person’s sexual life through the perpetration of indecent gesticulations or proposals regarding indecent acts, Art. 330 of the Greek Criminal Code, which covers the use of physical and psychological violence when an act or omission is to be achieved and finally Art. 343 and 347 of the Greek Criminal Code, covering sexual intercourse through power abuse within certain kinds of employment relationship.

Nevertheless, when the Greek legislator decided to deal with the issue of sexual harassment at the workplace, he ignored completely, as it was expected, the Criminal Code provisions, despite the fact that he had plenty of time to be properly prepared. Although he had to incorporate the 2002 Directive until 2005 the latest, the law 3488 was voted in the summer of 2006, i.e. when the particular directive, which was supposedly incorporated in the Greek Law, was already substituted by the new Directive (2006 / 54 / EC).

The new provision on sexual harassment at workplace appeared evidently unusually desultory. In fact, the only thing the Greek legislator did was to copy in the Article 3 of the draft law the exact sexual harassment definition of the 2002 Directive and then render “each act of sexual harassment” a criminal offence. In the explanatory statement of the draft law, the introduction of the new criminal provision was justified by the fact that sexual harassment is conceptually different from the insult of sexual dignity, as described in Article 337 of the Criminal Code; although it is not clarified where exactly does this difference lie. Moreover, there was no reference whatsoever to crimes of illegal violence or sexual intercourse through abuse of administrative authority.

Nonetheless, the provision was obviously vague, since the definition of sexual harassment in the 2002 Directive includes, as already stated, a series of evaluative notions with an indefinite content. A compliment as well as winking or staring at somebody can be regarded as sexual harassment, if it is assumed that the perpetrator of the aforementioned acts aimed at creating a threatening, hostile, humiliating or aggressive environment. It is noteworthy that such wide definitions ‘allowed’ an employee to accuse the mayor of a small town in the U.S.A. for sexual harassment, because of an impressionist painting - depicting a woman with her breast exposed - which had been hung in the town hall. The employee argued that this painting offended her dignity through the establishment of a humiliating environment and the painting was taken away at once.

The vagueness of this provision was also noted by the Members of the Scientific Committee of the Greek Parliament who commented in one of their reports that the EU Directives usually contain open-wide definitions, because they are addressed to states with different legal systems and aim at covering and producing reference points and contact with distinct national legislations. They merely provide general directions for the national legislators and consequently their verbatim incorporation is not required. On the contrary, in the area of substantive criminal law, it is absolutely necessary to adapt the Directives’ definitions to the principle of legality, which dictates the introduction of explicit criminal provisions that will clearly describe the punishable behaviour.

Notwithstanding, that doubts expressed by the Scientific Committee of the Greek Parliament are not usually taken into consideration, in this case the provision was eventually withdrawn and (via an amendment filed just one day before voting the draft law) the legislator abandoned the

concept of 'sexual harassment' as defined in Article 3 of the new law. According to the novel definition, sexual harassment is considered to be "the perpetration of the action prescribed in Article 337 para. 1 of the Greek Criminal Code, when it occurs while taking advantage of the victim's working position or the position of a person in search of a job". Thus, although at first the legislator had declared that Art. 337 of the Greek Criminal Code did not suffice for every act of sexual harassment, ultimately not only did he limit the scope of sexual harassment within the boundaries of Art. 337, but defined, moreover, sexual harassment as a special form of offending the sexual dignity. This demonstrates the complete confusion which still exists on the concrete content of the sexual harassment concept.

In relation with this new provision the following remarks should be made:

- For the crime's perpetration, indecent gesticulations or proposals regarding indecent acts are required, as it has already been stated. As "indecent gesticulations" are considered acts which contain physical contact and concern sexual life without having the gravity of sexual intercourse (which is defined as indecent "act"). Hence, a kiss on the lips or a caress on the breasts or thighs is considered as an indecent gesticulation. On the contrary, the proposal concerning indecent acts does not require physical contact but should necessarily concern serious acts in the field of sexual life, such as the sexual intercourse or its 'substitutes'. Hence, any proposals concerning acts of minor importance, such as a kiss or a caress on the breasts, cannot be regarded as forms of sexual harassment.

This fact emerges the first problems; in the Criminal Code offending of sexual dignity (in Art. 337) and personal honour (in Art. 361) bear the same sentence. The principle of proportionality would command the same penalty for behaviours of the same gravity when they are performed under the same conditions. But this is no longer possible, since the employment terms are not taken into account in the 'honour crimes'.

- A *sine qua non* requirement for the implementation of Art. 337 of the Greek Criminal Code and consequently the provision on sexual harassment is that the offence of one's dignity in the field of sexual life must be "rough". A "rough" offence is one which is performed in an extremely impolite way and results to the degradation of one's honour.

Nevertheless, the roughness of an offence is hard to be proved. For instance, in a Greek Supreme Court case (Areios Pagos 844/2001, Poinika Chronika 2002, p. 318), the employer of a

young woman was charged with offending her sexual dignity because, after dictating a text, he hugged her and tried to touch her breasts. The Greek Supreme Court partially quashed the decision on the ground of vagueness, because it was not clarified whether the employer had really touched the woman's breast or whether had hugged her below her breast while telling her "let me touch your breasts". Hence, according to the Greek Supreme Court the chosen version of the events would determine whether the offence of sexual dignity was "rough" or not.

However, at the workplace it is of minor importance whether the offence is actually "rough". Even if the employer in this case had hugged the girl below her breast and asked her to touch it, it is important that along with the indisputable - "rough" or not - offence of her honour, her freedom to work at that workplace - as it stems from her unalienable right to work - has been violated. This element cannot be evaluated under the new law, since these types of behaviour can be regarded only as common offences of personal honour, punishable according to Article 361 of the Greek Criminal Code.

- In addition, according to the new law, in order for a sexual harassment to take place, the offender must commit the aforementioned acts while "exploiting" the victim's working position or the fact that the victim is in search of employment. It is accepted that "exploitation" takes place when the offender is taking advantage of a situation, that is to say he/she uses it as an opportunity to achieve a certain aim. An abuse of an administrative authority is not necessary according to the law. So the crime might be committed even by colleagues or clients as well as senior officers.

However, this equalization totally ignores the fact that in the latter case the act does not merely offend one's dignity but primarily one's sexual freedom.

- Finally, the provision on sexual harassment, as it was formed, does not include its gravest form, i.e. the actual perpetration of sexual intercourse through abuse of an administrative authority or the person's need for a job. Hence this behaviour is still treated according to the general criminal provisions which already existed since the introduction of the Greek Criminal Code.

Yet, their enforcement does not confront all the serious acts of sexual harassment, which leads unavoidably to absurd results. Thus, nowadays, if an employer takes advantage of his working relationship with a male employee and commits buggery with him, his act is punishable by imprisonment from three months to five years, as an offence against sexual freedom. On the contrary, if the employer, under the same conditions, has sexual intercourse with a female

employee, the act is not punishable in principle as a sexual offence and can only be considered as a form of illegal violence, under Article 330 of the Greek Criminal Code, if it can actually be proved that the victim was threatened. The punishment for this crime is imprisonment from ten days to one year. Nonetheless, this lenient punishment does not take into account the grave consequences of this offence on the victim's life. Only the abuse of the administrative authority by a civil servant is nowadays punishable as an offence against sexual freedom related to both sexes (Art. 343 of the Greek Criminal Code) but even this article does not cover acts that offend a person in search of work.

Hence, one can come to the conclusion that the criminal provision added to the Greek Law regarding sexual harassment gives rise to serious questions as far as the principles of legality and proportionality are concerned, while it simultaneously keeps the female criminal protection lower than the one provided to men. For this reason, it is encouraging that during the parliamentary discussion on the draft law, the Minister of Employment stated that in the future modifications of the Greek Criminal Code a new provision on the sexual harassment should be introduced. This is, to the best of my knowledge, the first time that a criminal provision is voted and at the same time the need for its abolition is stressed.

4. Proposals

However, the new criminal provision should indeed be abolished and replaced by another provision in which the content of the punishable behaviour could be clearly delineated while, at the same time, the principle of proportionality could be respected. The following elements should be taken into consideration before the introduction of this new criminal provision:

a) Sexual harassment is an offence in the field of sexual life, so its formation could become a part of Chapter 19 of the Special Appendix of the Greek Criminal Code, as other European legislators have already done.

a) Sexual harassment cannot be treated as a unified punishable behaviour because it consists of two clearly separate acts: a) the offence of the victim's honour within the sexual sphere and b) the offence of the sexual freedom through direct or indirect blackmail by superiors or generally persons capable of influencing one's career.

b) As far as acts which offend one's honour are concerned, the common criminal provisions appear totally sufficient; therefore there is no need for an additional article. However, as far as acts containing direct or indirect blackmail are concerned, things are different; in this case, indeed a new criminal provision is required which will essentially cover the "area" between rape and illegal violence and will punish every indecent gesticulation or even a proposal for its perpetration, provided that the above acts are committed by persons capable of influencing the victim's career. Moreover, the perpetration of indecent acts through blackmail by the above mentioned persons must be regarded as an aggravating circumstance.

Nevertheless, despite the perspective of this alteration, the legislator's choices, in the field of the Greek criminal law, provokes justified concerns about the existing possibilities of confronting the problem of sexual harassment. The confrontation of this problem presupposes in the first place the development of preventive policies and these can only be based on a true and sincere state interest to invert the traditional stereotypes regarding the role of the two sexes. However, in this particular case, the state appeared via its representatives to consider the enactment of the new law as a typical fulfillment of its EU obligations. This stance cannot allow any optimism regarding future policy on sexual harassment.