

Freedom or Fetters? Penal Code Protection from Sexual Abuse for Developmentally Disabled People

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1 Introduction

Ever since Icelanders got their first penal code, The General Penal Code for Iceland of 25 June 1869, until the spring of 2007, sexual offenses were classified by the different methods used to perpetrate the deeds, and this determined how serious an offense was deemed to be. The provisions of the Penal Code applicable to sexual offenses against developmentally disabled people were the provisions of Article 194 on rape, Article 196 on taking advantage of a victim's reduced state to engage in sexual intercourse or other forms of sexual intimacy with the person and Article 197 on sexual offenses of an employee of an institution committed against an inmate at the institution. The provisions were as follows:¹

Article 194: Anyone who with violence or threats of violence forces a person to engage in sexual intercourse or other sexual acts shall be sentenced to imprisonment for not less than 1 year and up to 16 years. Violence includes the deprivation of freedom of action by confinement, drugs or another comparable means.

Article 196: Anyone taking advantage of a person's mental illness or other mental disabilities to engage in sexual intercourse or other sexual acts with the person, or taking advantage of other factors which render the person unable to resist participation in the act, or to understand its significance, shall be sentenced to imprisonment for up to 6 years.

Article 197: If a supervisor or employee in a prison, mental hospital, care centre, orphanage or other similar institution engages in sexual intercourse or other sexual acts with a resident of the institution, it is punishable by imprisonment for up to 4 years.

As shown by the provisions, their difference lay in the methods used to attain sexual intercourse or other sexual acts. If violence or threats of violence were employed, the offense was rape, which fell under Article 194. Offenses under that provision were the most serious sexual offenses and those most often tried before the courts. If the offense entailed misusing one's position with people not having the same possibility as adults generally have to defend against sexual assault, the offense was sexual abuse, which fell under Article 196. Sexual abuse was not deemed as serious as sexual intimacy obtained by violence or threats of violence. The goal was nevertheless the same in both instances, i.e., to pressure a person into sexual intimacy. Article 197 was the mildest provision, imposing punishment for sexual offenses in institutions, being invoked, among other things, if the victim was developmentally disabled. Both Article 196 and Article 197 were specially tailored provisions, probably set with the idea of increasing the Penal Code's protection of people at risk of harm because of incapacity, including developmentally disabled people. But have they done so?

1 The provisions of Chapter XXII of the General Penal Code, no. 19/1940 (GPC) on sexual offenses, were amended by Act no. 40/1992. Here the provisions are as they were from 1992 until the chapter on sexual offenses was amended by Act no. 61/2007.

2 Rape

The traditional definition of the concept of rape in Icelandic law has been that violence or the threat of violence has been employed to force a victim into sexual intimacy. Violence entails that a perpetrator employs a difference in strength to attain his will. Violence and threats often go together. Sometimes a little bit of physical violence is employed in the beginning that is then followed by threats of more violence if the victim does not yield. Violence can therefore often work as a threat of further violence. This can cause the victim to yield or reduce resistance. The limits in the provision on rape are imprisonment of not less than 1 year and up to 16 years. The custom in Icelandic law has been to mete out punishment at the lower end of the punishment scale for particular kinds of offenses.² Punishment for sexual offenses has been in accordance with this custom. The author's research on the sentencing in rape cases decided by the Supreme Court of Iceland in the period 1977-2002 shows that the sentences ranged from 1 to 2 years' imprisonment, and violence weighed heavily in determining the length of the sentences. If a lot of violence was employed, the sentence could be 2 years' imprisonment. If there were also other important offense-elevating or sentence-elevating circumstances, the sentence could go up to 4 years of imprisonment. If minimal violence was employed, the sentence approached the minimum of 1 year.³ It is nevertheless clear that in the last few years, the sentences for sexual offenses have become heavier. It is now commoner than before that a sentence for rape is imprisonment for 2 to 3 years.

On the other hand, it is noteworthy that the Supreme Court of Iceland seems not to have reviewed any judgments where sentencing for rape was done under Article 194, and the victim was mentally deficient, i.e., developmentally disabled or mentally ill. Offenses against them appear always to have been tried under Article 196 as sexual abuse, which was a much milder offense than rape under Article 194. The argument was, most likely, that violence had not been employed, and the offense was therefore not rape. However, it can then be asked: What is violence? Threatening behaviour or orders to a developmentally disabled person can suffice for perpetrators to achieve their aim, and such behaviour often entails threats of violence that would be sufficient to bring the behaviour within the rape provision of Article 194. The question must therefore arise whether it could be that the provision of Article 196 on sexual abuse has led to those guilty of raping developmentally disabled people receiving milder sentences than those committing such offenses against healthy individuals.

2 Exceptions to this are wilful manslaughter and egregious narcotics violations.

3 For further details, see: Ragnheiður Bragadóttir: "Ákvörðun refsingar í nauðgunarmálum." (Sentencing in rape cases) *Útljótur* 1999, p. 82, and the same: "Refsingar í nauðgunarmálum." (Sentencing in rape cases) in *Rannsóknir í félagsvísindum IV*. (Research in Social Sciences IV.), Faculty of Law, Reykjavík 2003, p. 42.

3 Abuse of Developmentally Disabled People

Article 196 made it punishable to take advantage of a victim's reduced condition, where the person could not resist the deed or understand its significance. Engaging in sexual acts with developmentally disabled people was not punishable per se, but rather abusing the person's condition in this sense, cf. the phrase "taking advantage of". There was no requirement in the provision regarding how gross the abuse had to be. It was left to the discretion of the courts each time whether the procedure employed to attain sexual intimacy entailed abuse. This included assessment of the victim's condition and health each time and ability to make decisions, in addition to the perpetrator's behaviour, which had to include abuse. The outcome depended on whether the sexual intimacy would not have occurred if the victim had not been developmentally disabled.

The first decades after the entry into force of the Penal Code of 1940 saw few, if any, tests of this provision. In the period 1986-1989 the Supreme Court of Iceland handed down four judgments convicting for sexual intercourse with developmentally disabled women. Several such judgments have also been handed down in recent years. Violations of Article 196 were punishable by imprisonment of from 30 days to 6 years. Here the same applied as for violations of Article 194: sentencing for the violations was at the lower end of the punishment scale. In the period 1986-1998, it was common that a sentence for violation of Article 196 was several months' imprisonment, partially suspended. In recent years, however, sentences for these violations have become heavier, and the commonest sentence is 12 to 15 months' imprisonment without suspension.

The following judgement is an example of a perpetrator's threatening behaviour, entailing threats of violence if the victim had not yielded.

H 2003:2398 (no. 47/2003). X was a 47-year-old retarded woman living alone in an apartment with the support of social services. She had known M for several months because she was very attached to his children and therefore came often to his home. One evening M visited her, and she invited him in since she regarded him as her friend. He gave her a package which proved to contain a sex device. He used this device on X and had her participate in various sexual activities that she did not dare to resist since she was afraid and feared that M would beat her. M finally had sexual intercourse with her against her will, and her attempts to push him away were useless. M was deemed to have taken advantage of X's mental deficiencies to get his way, and he was convicted of violating Article 196 of the Penal Code. The sentence decided was 18 months' imprisonment.

Here, the deed should have been indicted under Article 194 on rape. The inevitable conclusion is that the provision in Article 196, specifically intended to protect the mentally ill and mentally deficient, had the opposite effect, so that they actually enjoyed poorer legal protection than healthy people. Supporting this conclusion is the fact that no judgments appear to have been handed down by the Supreme Court of Iceland where there was sentencing for rape under Article 194, and the victim was mentally deficient.

Violations of Article 196 of the Penal Code were very serious offenses entailing gross mistreatment of victims. As stated herein at the beginning, offenses committed with violence or threats of violence, i.e., rape, were viewed more seriously by the legislature and thereby in court cases. It is nevertheless difficult to argue that sexual intercourse brought about through physical violence is a more serious offence than sexual intercourse with a developmentally disabled woman who is defenseless and cannot help herself. It must be deemed that this emphasis on physical violence as a factor in such deeds had become obsolete and did not reflect the reality experienced by the victims of the offenses. The most serious thing about sexual offenses is that the deed violates people's sexual freedom, freedom to act, right of privacy and right to make decisions about sex. This entails violence in the broad sense of the word, violence that is more serious than violence as a means to an end in Article 194. It was therefore not right to distinguish between particular offenses against people's sexual freedom, depending on what method was employed in accomplishing the act. The courts appear to have endorsed this viewpoint, as can be seen in the fact, that punishments for violations of Article 196 arose more rapidly in recent years than punishments for violations of Article 194. This led to the difference in sentences for abuse and rape decreasing, almost to nothing, when it was decided to substantially amend provisions of the Penal Code on sexual offenses.

In the spring of 2005 the author was entrusted with drafting a parliamentary bill amending specified provisions in the sexual violation section of the General Penal Code, no. 19/1940, cf. Act no. 40/1992, as amended. The parliamentary bill proposed reducing this emphasis on the methods used to accomplish deeds and that a new and expanded definition of the concept of rape should be legalised. The substance of Article 196 was merged into the provision for rape in Article 194, thereby no longer distinguishing between offenses against people's sexual freedom on the basis of whether violence or abuse is employed. The parliamentary bill became Act no. 61/2007. The new rape provision is as follows:

Article 194 of the Penal Code, cf. Article 3 of Act no. 61/2007: Whoever has sexual intercourse or engages in other sexual acts with a person by exercising violence, threats or another kind of unlawful compulsion is guilty of rape and shall be sentenced to imprisonment for no less than 1 year and up to 16 years. Violence includes the deprivation of freedom of action by confinement, drugs or another comparable manner.

Taking advantage of a person's mental illness or other mental handicap to engage in sexual intercourse or other sexual acts with the person, or taking advantage of other circumstances which render the person unable to resist the deed or understand its significance, is also regarded as rape and entails the same sentence called for in paragraph 1.

The provision's substantive description of sexual offenses against a developmentally disabled people and others unable to defend against the deeds has not per se been amended. Nevertheless, since this violation is now defined as rape and is part of the rape provision in Article 194, the scale of punishment for offenses against the provision will now be higher than before the amendment of

the act. The new rules emphasize that these violations can be as serious as rape in the traditional meaning and even more serious. Developmentally disabled people therefore without doubt enjoy the same protection of the Penal Code as others in this regard. But how will Article 197 protect them?

4 Sexual Offenses Against Institutionalized People

Article 197 makes all sexual contact between employees and inmates in specified institutions punishable by law, and there is no requirement to show that abuse was involved in particular instances. The listing of institutions in Article 197 is not exhaustive, cf. the wording “or another similar institution”. The Supreme Court of Iceland has only invoked this provision twice for violations against developmentally disabled women, and no broad conclusions can therefore be drawn from the judgments.⁴ In both instances, the holdings nevertheless arouse suspicion that the provision is not applied to the advantage of developmentally disabled people. The first judgment was in 1993.

H 1993:2242. M was convicted of violating Article 197 of the Penal Code, cf. Article 5 of Act no. 40/1992, by having sexual intercourse or engaging in other sexual acts with a 32-year-old retarded woman; M was an employee in a commune for handicapped people, where the woman was an inmate. The woman lived with two other retarded individuals in the home, which was serviced by the area Office for the Affairs of Handicapped People, on the basis of the Act no. 59/1992 on the affairs of handicapped people. The judgment of the Supreme Court states: “The communes and other places covered by the act must be regarded... as institutions in the meaning of Article 197 of the General Penal Code, no. 19/1940, cf. Article 5 of Act no. 40/1992. The accused had duties of trust to follow that are the basis of this punitive provision.” M was sentenced to five months’ imprisonment, three of which were suspended for two years.

It emerged during the case that M had abused the condition of the woman, who had the maturity of a 6- to 9-year-old child. Article 196 should have at least been employed regarding the violation, even Article 194 on rape. But because the event was connected with an institution, indictment and conviction under Article 197 was allowed to suffice. The provision that was supposed to provide developmentally disabled people with additional protection therefore accomplished the opposite.

The above-mentioned Act no. 61/2007 amended Article 197, changing the designations of institutions in accordance with the currently operating institutions that are looking after the people that the provision is intended to protect, in addition to specifying the institutions in greater detail than before. The new provision is as follows:

4 Article 197 of GPC has only been applied in three Supreme Court judgments. The third and final judgment was handed down 4 December 2008 (no. 334/2008). There M, who was the director, treatment counsellor and manager of Christian meetings at a drug treatment and rehabilitation facility, was convicted of sexual offenses against four women who were inmates at the facility. His sentence was imprisonment for 2 years and 6 months.

Article 197 of GPC, cf. Article 6 of Act no. 61/2007: If a supervisor or employee of a prison, another institution under the auspices of the police, the prison administration or child protection authorities, the psychiatric ward of a hospital, a home for mentally handicapped people or other similar institution has sexual intercourse or engages in other sexual acts with an inmate of the institution, it is punishable by imprisonment for up to 4 years.

One institutional category mentioned in the new provision is homes for mentally handicapped people since it is right to legalise this clearly. The provision did not previously mention developmentally disabled people. Service institutions for the handicapped, on the other hand, are not in the provision's list of institutions. One criticism leveled at the provision is that its protection does not extend to mentally handicapped people working all day at the service institutions. Some people therefore believe that the protection should be expanded so that it also covers these people. The argument for this is the rapid development in the affairs of handicapped people and services for them, including that of replacing institutions where people reside around the clock with protected workplaces and day-care and rehabilitation institutions.⁵

In drafting the parliamentary bill for Act no. 61/2007, this changed situation and developments regarding caregiving and places for handicapped people were kept in mind. Article 197, on the other hand, is a specially drafted provision, completely forbidding employees at specified institutions from engaging in sexual intimacy with inmates, the penalty being up to 4 years' imprisonment. The nature of some institutions listed in the provision is such that people are often placed there against their will. Regarding handicapped people, the provision primarily pertains to circumstances when the handicapped person receives services at an institution operating around the clock or a home and is therefore, to a certain extent, not free, or is at least dependent on his surroundings in an entirely different way than someone obtaining day-services from an institution. This is the historical background of the provision, and in this regard, reference can be made to the institutions listed in the provision, cf., for example, prisons.

If service institutions or protected workplaces for handicapped people fell under the provision of Article 197, employees' sexual intimacy there, whether handicapped or not handicapped, would be punishable, completely without regard to the status of the parties' will. An employee's status vis-à-vis a service recipient at a protected workplace is different than an employee's status at a closed institution, and the self-determination of the handicapped person in the former place is much greater. There is not the same risk of abuse and therefore not the same need of protection by the Penal Code as when a closed/24-hour institution is involved. The goal of services for handicapped people is that they get to live their life as similarly as possible to healthy people and as independent of their handicap as possible. Do they then not have a right to establish relations

⁵ This viewpoint emerged in an opinion of the Director of Public Prosecutions, dated 25 October 2006, to Althingi's General Committee on the parliamentary bill to amend the chapter on sexual offenses in the General Penal Code, no. 19/1940, letter no. 133/10, received 27 October 2006.

with people, whether at their workplace or outside it, like other people, without punishment unequivocally accompanying such acquaintances? It must be reiterated here that the prohibition against the sexual intimacy of parties in Article 197 of the Penal Code is absolute. It is also necessary to remember the new provision of paragraph 2 of Article 194 of the Penal Code, cf. Article 3 of Act no. 61/2007, defining as rape *taking advantage* of a person's mental illness or other mental handicap to engage in sexual intercourse or other sexual acts with the person. This provision pertains completely without respect to where this intimacy occurs. If an employee of a protected workplace becomes guilty of sexually abusing a recipient of services, this provision pertains to the employee's offense. Sentencing for this offense can involve up to 16 years' imprisonment, a much heavier sentence than for violation of Article 197. In addition, in considering elevation of the perpetrator's sentence, it can be taken into account that he has been guilty of a breach of confidence and misuse of position, see, for example, the provisions of Article 70, subparagraphs 1 and 3, GPC.⁶ It is therefore clear that the legal protection of handicapped people is in no way reduced under the newly passed Act no. 61/2007; rather, just the opposite. The same rule applies in Danish law, cf. *U 1992:140 H*, where it was held that a protected workplace did not fall under Article 219 of the Danish Penal Code, among other things because of the conditions for admittance, and that only daycare was involved.⁷

The second holding of the Supreme Court of Iceland, where Article 197 was thought to apply because of an offense against a developmentally disabled woman, is from the spring of 2007.

H 31. 5. 2007 (no. 666/2006): M was accused and convicted of having sexual intercourse twice with K, a retarded woman, taking advantage of her handicap to do so. The woman worked in a protected workplace (greenhouse), where M was a support representative. Paragraph 2 of Article 194 and Article 197 were applied to his offense, and he was sentenced to two years' imprisonment.

When this judgment was handed down, the provisions of the General Penal Code on sexual offenses had been amended, cf. Act no. 61/2007, and offences against developmentally disabled people had been defined as rape. Here, it would have been sufficient to apply only paragraph 2 of Article 194 on rape to the offense, since M abused K's condition. Nevertheless, the prosecutorial

6 Article 70 GPC: "When punishment is specified, the following points should be taken specifically into account: 1. The importance of what the offense was directed at... 3. The degree of risk created by the deed, especially taking into consideration when, where and how it was done." In his book *Viðurlög við afbrotum (Punishment of Offences) (1992)*, Jonatan Thormundsson says that the provision in sub-paragraph 1 means the importance (value) of the object of the deed or the defence need of the victim of the deed, specifically mentioning a child in this regard. Clearly a handicapped individual can also fit into this category.

7 Greve, Vagn, Jensen, Asbjørn and Nielsen, Gorm Toftegaard: *Kommenteret straffelov, speciel del*, København 2005, p. 272.

authority and the courts go farther, deeming that Article 197 also applies. The author disagrees because the greenhouse cannot be an institution in the meaning of the provision. Therefore M should have been acquitted of the charge under Article 197. Had M not abused K's condition, their relationship would not have been punishable. Here, the court therefore goes too far in its construction of Article 197. Nevertheless, this was innocuous because the judgement correctly cited Article 194. On the other hand, the reference to Article 197 raises concern over the provision being overused, and instead of protecting developmentally disabled people, it could diminish their personal freedom.

In an effort to protect developmentally disabled people and other handicapped people against sexual violence, care must be taken not to go so far as to reduce their right to self-determination. The protection may not be turned into its opposite and reduce handicapped people's human rights, their rights to act and enjoy the quality of life in accordance with their development and ability, like other members of the community. It should be mentioned that before 1992, there was an unequivocal ban against engaging in sexual intimacy with developmentally disabled people. This view was later regarded as too extreme, and this was changed by enacting Act no. 40/1992, so that this condition by itself is no longer sufficient to constitute an offense, but the perpetrator must abuse the condition of the handicapped person in this regard. If the group of victims in Article 197 were expanded from what it is, there would be an unequivocal ban against a handicapped individual/employee and a non-handicapped person, e.g., at a protected workplace, having an intimate relationship, as stated above. People can have different opinions regarding how suitable such a relationship is, but it should not be punishable if there is no abuse, and both parties want the relationship. On the other hand, it is necessary to set rules for employees regarding relationships between employees and service recipients in such workplaces and to see to it that everyone is informed of and follows them.

5 Conclusion

For a long time, the Penal Code did not go far enough in protecting developmentally disabled people against sexual offenses. Both the legislature and the courts have improved the situation, and these individuals now enjoy the same protection under the Penal Code as healthy people do. Nevertheless, in trying to protect the handicapped, care must be taken not to carry things so far that protection becomes a fetter.

* This is a revised version of my article *Beskyttelse af mentalt retarderede mod seksualforbrydelser*, which was published in *Ikke kun straf... Festskrift til Vagn Greve*, Jurist- og Økonomforbundets Forlag (2008).

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