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THE NEW CONCEPT OF SEX-CRIMES IN CROATIAN CRIMINAL LAW

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ABSTRACT

The new Croatian Criminal Code entered into force on January 1 2013, introducing the new concept of sexual crimes into Croatian criminal law. The reform was, above all, motivated by the efforts of the legislator to follow international standards, especially the ones imposed by the European Union and Council of Europe. However, it is interesting that creators of the new Criminal Code did not follow the usual German model in the case of sex-crimes. Instead, they chose to model sex -crimes on the English example. Such a solution is untypical for the Croatian legal tradition. The new concept significantly expands criminal liability for sexual crimes in several ways. Typical examples can be found in the criminalization of negligent forms of rape and the incrimination of rape by deception. These types of sexual offence are atypical in continental law tradition. Until now, they have not been characteristic of Croatian criminal law and it will be interesting to see how the courts will accept and apply the new model. In this paper, the authors discuss these changes from a theoretical and also a practical point of view. They give a critical analysis of the new concept of sex crimes under the new Croatian CC and comment on some interesting cases from recent court practice in Croatia. Using the examples from case -law, the authors identify some of the main problems underlying the new concept.

Keywords: rape, deception, mistake of facts, consent, perpetration, mental capacity, age limit

INTRODUCTION

For the last twenty years, Croatian criminal law in the field of sex crimes has been characterized by a double trend. On the one hand is a trend of constant liberalization manifested through the decriminalization of certain behaviors. For example, homosexual relations, life in an extramarital community and incestuous activities have mostly been decriminalized (only incest is still punishable, but in a limited scope). On the other hand is a diametrically opposite trend: strengthening of repression in this sensitive area of criminal law. This strengthening can primarily be noticed in the regulation of new forms of criminal offences against sexual freedoms.

Croatian criminal law underwent significant reforms in 2011. In that year a new Criminal Code was passed by the Croatian Parliament. The new code introduced several important changes in the fields of sex crimes and, among others economic crimes, environmental crimes, the principle and the concept of guilt, statute of limitations etc. Probably the best proof for the scope of these changes is the fact that the legislator imposed an unusually long *vacatio legis* of almost two years. This time was given to practitioners to prepare themselves for the application of the new regulations. The new Criminal Code started to apply on January 1, 2013. Since this period, the verdicts reached by the courts have shown how the new solutions function in practice.

The purpose of this paper is to give a critical analysis of the new concept of sex crimes, three years after the new Criminal Code entered into force. This analysis will be given from

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both a theoretical and a practical point of view. First, the authors will present the most important changes in a brief analysis of the new concept. Second, they will analyze available case law. Third, they will identify and discuss the main issues revolving around the new concept of sex crimes and give their suggestions for future improvements.

REFORM OVERVIEW

The concept of sexual crimes has probably gone through most significant changes in this latest reform of Croatian criminal law. This fact was visible from the very beginning of the reform, when the sex crimes chapter of the new Criminal Code received a new title. Instead of the earlier title "*Criminal offences against sexual freedoms and morality*", the chapter was renamed "*Criminal offences against sexual freedoms*" (Chapter XVI). This change was explained by the fact that the term *sexual morality* can be misused as a ground for limiting of sexual freedoms, and can also be a potential cause of secondary victimization (Turković/Maršavelski, 2010, p. 513). The new title has therefore emphasized what is considered to be most important: protection of the right to sexual self -determination. Below, we will discuss the most important changes introduced into Croatian criminal law by this reform. In our opinion, these changes can be distilled into three main features: the new legislative concept of non-consensual sexual acts; the criminalization of negligent forms of non-consensual sexual acts; and raising the age limit for involvement in voluntary sexual acts.

The new concept of non-consensual sexual acts

As has already been pointed out, many changes have been made to the new chapter on sexual crimes. However, for the purposes of this paper, the attention will focus only on the most significant ones that change the character of these crimes in Croatian criminal law. Without any doubt, the first and most important such change is the adoption of the new legislative concept of non-consensual (involuntary) sexual intercourse. Involuntary sexual intercourse is criminalized through three criminal offences:

- Non-consensual sexual intercourse (Art. 152), as a basic offence;
- Rape (Art. 153), as the first qualified form, which is committed by the use of force or direct threat;
- Most severe criminal offences against sexual freedoms (Art 154), as the second qualified form, which is qualified either because of some special characteristics of the victim (victim closely related to the perpetrator, especially vulnerable victim etc.), because of the motive (hate) or because of the especially dangerous modus operandi of the perpetrator (i. e. the usage of weapons etc.).

The new concept of involuntary sexual intercourse emphasizes the lack of the victim `s consent as the key point of criminal liability. Earlier case -law has shown that Croatian courts have often tended to require the victim to demonstrate physical resistance as a *condition sine qua non* of rape and similar crimes. A good example is the verdict of the Supreme Court of Croatia (verdict no. I Kž – 473/94) from 1994 in which it was clearly stated that "*the victim did not show resistance in a clear and undoubtful way, because she stopped resisting at the key moment when the naked defendant approached her and spread her legs."* As a consequence of this, the Court found that the defendant was not guilty of the criminal offence of rape. However, such practice was in direct opposition to the practice of the European Court of Human Rights in Strasbourg (ECHR). The ECHR has made it very clear in many verdicts that the physical resistance of the victim should not be considered as a necessary element of *actus reus* of involuntary sexual intercourses (see for example the verdict *M. C. vs Bulgaria, 4th Dec 2013,* para 166). Other relevant international standards also require incrimination of any non-consensual sexual intercourse, regardless of the physical resistance of the victim. This was the main reason why the new Criminal Code `s Art. 152 stipulated that the sexual act without consent should be a constitutive element of *actus reus*.

The Criminal Code has also defined when to presume that there is no consent of the victim. According to Art. 152, para. 3, legally relevant and valid consent exists "*if a person has decided to engage in a sexual act by his or her own will and was able to make and express such decision"*. Further on, para. 3 stipulates that it will be presumed (*praesumptio iuris tantum*) that such consent does not exist, especially "*if a sexual act has been performed by the use of threat, fraud, the abuse of position that makes the victim dependent to a perpetrator, the abuse of the inability of the victim to express rejection, or to a person who has been kidnapped"*. While most of these forms were already criminalized by the old Criminal Code, the fraudulent form is new in Croatian criminal law. That means that the Croatian legislator has decided to expand the criminal zone into the field of sex crimes by introducing liability for so -called rape by deception. The legislator, however, did not define what is to be considered as fraudulent behaviour. Is every misrepresentation of facts important enough to be qualified as fraudulent? In official commentary, the authors of the new Code claim that the prosecutor will have to prove that falsely represented facts were key for the victim to decide to have sexual intercourse (or any other sexual act) with the perpetrator (Turković et al., 2013, p. 207). This means that every misrepresentation of fact can be considered fraudulent, as long as the prosecution is able to prove a causal nexus between such fact (f. e. religion or ethnicity, marital status etc.) and a victim `s decision to have sex with the perpetrator. The *Kashour* case in Israel in 2010 is an illustrative example. A man from Jerusalem was convicted of rape because he told the victim that he was a Jewish bachelor instead of an Arab married man, as he was in reality.[3] It will be interesting to see how Croatian courts will interpret these types of cases when they appear. To our knowledge there haven `t yet been any similar cases in Croatian practice.

The negligent form of non-consensual sexual acts

The second very important change is that the legislator has decided to criminalize negligent form of non-consensual sexual offences. This is stipulated in Art. 152, para. 2, and Art. 153., para. 2. However, we must notice that the negligent form has not been criminalized for the most severe forms of non-consensual sexual acts in Art. 154. There is no explanation for this omission, so we must conclude that this has been done by a mistake. This solution is confusing because, if the legislator wanted to enlarge the criminal zone to give additional protection to the victim, *argumentum a minori ad maius* would be even more logical to criminalize negligent form of the most severe criminal offence of this type (Vuletić, 2016, p. 30).

The legislator stipulated liability for the perpetrator who mistakenly assumed that consent existed. That basically means that the Croatian legislator has introduced criminal liability for negligent form of rape. The model for this change has been found in the English Sexual Offence Act of 2003 (Turković/Maršavelski, 2010, p. 514) The English literature also concludes that this type of guilt should be qualified as negligence (Card, 2006, p. 111 and p. 311). Such a solution is new to Croatian legal tradition and has never been criminalized, either in Croatian or Yugoslavian criminal law. Moreover, the negligent form of rape cannot be found in the German, Austrian or Swiss criminal codes, or in any other code of continental Europe. The idea is to share the burden of proof in such cases. Prosecutors must prove sexual act(s) and one of the above- mentioned circumstances (for example the abuse of position), and the defendant must prove the existence of consent (Turković in Derenčinović et al., 2013, p. 162). In the next section, we will present recent case law to show how this solution has been accepted by Croatian courts.

The age limit for voluntary sexual intercourse

The new Criminal Code has regulated sex crimes against children into a separate chapter (Chapter XVII: Criminal Offences of Sexual Abuse and the Exploitation of Children). This

3 Kashour v. State of Israel, Crim. C. (Jer.) 561/08 (2010) (Isr.)

was done because the creators of the new Code wanted to emphasize the protection of children against sexual abuse. This chapter has been modelled on the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

The new Criminal Code has adopted the new definition of child as "*every person who is younger than eighteen*" (Art. 87). When it comes to children as the victims of sexual abuse and exploitation, Chapter XVII differs between two categories of victims. The first category consists of children under the age of fifteen. These children are considered unable to give legally valid consent to engage into sexual intercourses. In the old Code, the age limit for valid consent was fourteen, and now it has been raised by one year. We may notice that such a solution is stricter then in some other continental European systems, For example, in Germany, where the age of consent is fourteen (Heller and Dubber, 2011, p. 278). Consequently, if a person commits sexual acts with a child younger than fifteen, they will be liable for sexual abuse of a child punishable by one to ten years in prison (Art. 158, para. 1). However, sexual acts between children are not punishable: there will be no criminal liability if the age difference between persons who perform sexual acts is not more than three years (Art. 158, para. 3).

The second category consists of children between the age of fifteen and eighteen. These children can give relevant consent for sexual actions. However, if someone commits sexual act(s) with such a child who has been entrusted to them for education, learning, safekeeping or similar, he or she will be criminally liable and punished with six months to five years in prison (Art. 159, para. 1).

RECENT CASE LAW

Sexual crimes are not at the top of the list of convictions. Official statistics for 2014 show that only 1.04% of all convictions for that year are convictions for sexual offences. Similar statistics apply toearlier years as well. Criminological debates in Croatia point to relatively large dark statistical figure as one of the key problems when it comes to sexual crimes. There are many reasons for this. Probably the most important reason is the fear of secondary victimization, which is why victims often decides not to report sexual crime (Derenčinović and Getoš, 2008, p. 61). In this section, we will examine recent verdicts in Croatian courts under Arts. 152, 153 and 154 of the Criminal Code. We have chosen these verdicts as the most interesting ones to illustrate the criminal policy of Croatian courts in the field of sex offences.

Croatian case law unfortunately shows examples of brutal sexual crimes, very often committed towards special categories of victims. One such example is the case of the defendant who committed several rapes during four months in 2014. The victim was mentally challenged person who lived with him in the same household. On several occasions during this period he beat her and forced her to have vaginal and anal sex with him. He was found guilty of seven crimes and convicted to five years and six months in prison (Varaždin County Court, no 2 K-33/14-59). Although the defendant was convicted and received a multi-year prison sentence, one may ask whether the penalty should have been even stricter due to the fact that he brutally and repeatedly abused a person with a mental disorder, especially if one bears in mind that the Criminal Code has prescribed a punishment of three to fifteen years for each such crime.

Another interesting verdict to debate is the verdict no Kov-41/15 (Split County Court). The defendant was found guilty of a criminal offence under Art. 154 para. 2 (the most severe criminal offence against sexual freedoms committed by the use of force and in a very humiliating way). According to the verdict, he and his two friends took a girl (aged 17) to the men's room of the bar where they were all drinking together and then held her by her hands and hair while forcing her to have sexual intercourses several times with each of them, despite the fact that she has shown verbal and physical resistance. What is interesting about this case is the fact that the defendant was given a parole, despite the fact that this was very serious crime, punishable by between three to fifteen years in prison. If he breaches the parole terms

he will be sent to prison but only for one year, which is also a very mild punishment. Such criminal policy is not adequate for this type of crimes.

In a very similar case (K-23/14, Zadar County Court), three defendants were found guilty, also under Art. 154 para. 2. They had sexual intercourses several times with a drunk victim and they used force. Although they had committed the same offence as in the previous example, they were given much stricter punishment. The first defendant was sentenced to four years and ten months in prison, the second to three years, and the third to one year. This shows that Croatian courts have very different criminal policy in similar criminal matters, which is not good for the reasons of legal certainty and the principle of *nullum crimen sine lege certa*.

It seems that Croatian courts generally have a relatively soft criminal policy toward sexual offenders. During our research we have studied several verdicts for non-consensual sexual intercourse under Art. 152 and mostly found parole sentencing, even when the circumstances of the act suggested that the perpetrator acted fraudulently or abused the fact that the victim was unable to resist. We can mention two such cases. In the first (Split Municipal Court, no K-677/14) the defendant sneaked into a sailing boat in a harbor at Bol Island in Croatia. The victim was sleeping naked so approached her and started to perform sexual acts on her naked body. She then woke up and started screaming and calling for help so he ran away. He was convicted, but sentenced to parole.

In the other case (Osijek Municipal Court, no 24 K-653/2015-15) the defendant met the victim in a bar and started trying to persuade her to have sex with him. After she rejected him several times he decided to deceive her, so he told her that father and his brother wanted to speak with her in his brother's house. She believed and went with him to the house. When they arrived, she saw there was no one there and tried to leave but the perpetrator had already locked the door. He told her to sit on the bed and started to kiss her and undress her and, although she repeatedly asked him to stop, had sexual intercourse with her. He was convicted to one year in prison, but the Court did not force him to serve the sentence. Instead he worked community service. In our opinion this case is interesting, not only because of the relatively lenient sentence, but also because of the arguable qualification of the defendant `s behavior as a non-consensual act under Art. 152: one can argue that the act described should be qualified as rape (Art. 153) because the victim repeatedly asked the defendant to stop. Instead, he continued to kiss her and undress her and have sexual intercourse despite the fact that she had actively (and above all verbally) resisted him. Such behavior can be qualified as the use of force, which is a constitutive element of the *actus reus* of rape, as a qualified form of non-consensual sexual intercourse.

Probably the most controversial case in our research was a verdict of Zagreb County Court (no 5-K-133/2013). This verdict has already been criticized in Croatian literature (Ritossa and Martinović, 2014, p. 535). The defendant was convicted for non-consensual sexual intercourse because he had sexual intercourse with the victim on the back seat of his car. She voluntarily entered his car, kissed him, removed her clothes and had sexual intercourse. However, later she claimed that she had agreed to have sex with him only because she saw a knife on the back seat when they were transferring from the front to the back. She claimed that seeing the knife caused fear and that she was afraid to reject sexual intercourse, although she did not say anything to the defendant or show him in any other way that she did not want to have intercourse with him. The Court convicted him under Art. 152. This case clearly demonstrates that the existing legislative definition of consent can be abused by excessively broadening the interpretation of consent (Ritossa and Martinović, 2014, p. 535). This is not acceptable because it questions the *nullum crimen* principle, and the subsidiarity character of criminal law in a very dangerous way.

CRITICAL COMMENTS ON THE REFORM

In the first two sections we have presented the main characteristics of the recent legislative reform of sex crimes in Croatian criminal law and also shown some illustrative examples from recent case law. In this section we will give our critical remarks on the new concept.

There is no doubt that the last reform of Croatian criminal law has introduced a significantly stricter regime of sex offences than the one it replaced. This claim can be supported by several facts. Above all, the new regime is based on the new concept of consent followed by a legislative definition of it, which was not the case in the old Criminal code. The new definition is based on the so-called "consent plus" approach, which requires each time that consent be given clearly and without any doubt by a person capable of making and expressing such a decision. This concept has already been criticized by Croatian authors. Ritossa and Martinović point out that this definition moves the focus from the quality of the consent to the capability of the person (victim) to give and express consent. They claim that such a solution is not sufficient because it puts certain categories of persons into the position of potential victims. They cite the example of mute persons who, because of their inability to speak, have potential problems in expressing their clear and direct consent (Ritossa and Martinović, 2014, p. 535). We agree with these remarks and may also add that the new concept of consent could limit the right to free engagement into sexual intercourses for certain persons, especially the mentally challenged. It is important to notice that persons with mental difficulties often have strong sexual urges, so is it justified to ask that a person who is not mentally incapable should *a priori* avoid engaging in sexual intercourse with a mentally challenged person because they can never be certain that they will not be charged and prosecuted for a criminal offence as a result? It has already been pointed out in the literature that it is not justified to emphasize the protection of "especially vulnerable groups" without a deeper examination of their vulnerability (Dubber and Hörnle, 2014, p. 765). Moreover, does the new concept actually imply that one should always ask for clear consent before having sex with someone? What should the quality of the consent be? Should it be verbally articulated, or even written? The above- mentioned verdict of the Zagreb County Court (5-K-133/2013) obviously indicates that one should never presume the existence of consent based only on victim `s behavior. These questions are not clearly answered by the Criminal Code which significantly diminishes the level of legal certainty. The *nullum crimen sine lege certa* principle, which is one of the basic principles underlying continental criminal laws, requires that everyone must know what they may or may not do. Only then does the law have the legitimacy to convict and punish perpetrators for their crimes. In our opinion, the existing regulation of consent for sexual intercourses and other sexual acts does not provide the required level of legal predictability.

Increased strictness of the new regime can also be seen through the fact that the new Code has introduced negligent forms of non-consensual sexual intercourse and rape. We have already pointed out the illogical solution that these negligent form haven`t been incriminated by the most severe forms of sexual offences (Art. 154). Moreover, we have difficulty imagining how it could even be possible to act with negligence in cases of rape? The crime of rape in Croatian criminal law implies that the perpetrator has used either physical force or threatened direct usage of such force. In that kind of circumstance, it is not clear what the legislator had in mind when it regulated a situation in which a perpetrator may not be conscious that he or she is acting without consent of the victim. Is it possible to use force or to threaten someone and still think that this person agrees to whatever you are forcing him or her to do? Such a claim is just not empirically correct or logical. That is why it is not clear why the negligent form of rape has been criminalized. It seems that the only effect will again be to increase legal uncertainty.

Finally, the increased strictness of the new regime is also visible from the fact that the legislator decided to raise the age of consent for involvement in sexual intercourse from

fourteen to fifteen. The age limit varies from state to state. The overview of comparative law in Europe shows that countries decide to set the age limit between fourteen (for example Germany, Hungary, Italy, Portugal, Serbia, etc.) and eighteen (Malta, Turkey and the Vatican City). This decision of the legislator is above all based on estimating of the average age of children's psychological maturity. However, it can also be influenced by other factors (state politics, different lobbies, etc.). We will not argue whether it was good or bad to raise the age limit. This question requires more detailed psychological and sociological research and is beyond the scope of this paper. However, we must notice that this important change has not been explained in any of the scientific papers or comments on the Criminal Code written by the members of work group responsible for drafting it. The fact remains that this change expands the zone of criminal liability.

INSTEAD OF A CONCLUSION, SUGGESTIONS *DE LEGE FERENDA*

The previous sections have pointed to the main features of the latest reform of sexual delicts in Croatian criminal law. A critical overview of the changes and of the relevant case law was also given. Based on the presented material, we will try to give our suggestions for future legislative changes.

Above all we strongly argue for repeal of negligent forms of sexual crimes. As we explained above, the negligent form brings confusion to the theory and practice of criminal law. It also causes legal uncertainty. Moreover, negligence is not in the nature of sexual crimes, as crimes which are always committed with *dolus directus*. The main goal of these crimes is to express aggression, to humiliate the victim and to satisfy sexual urges. That is why it is not to be expected that these crimes will be committed through negligence. The negligent form allows criminalization and punishment for behaviour which should not be treated as a criminal offence due to the subsidiarity principle. The negligent forms of sexual crimes is not in the tradition of continental Europe and none of the countries which have traditionally been a role models for Croatian criminal law have a similar categorization.

The next problem in our opinion is the legislative definition of consent in Art. 152 para. 3 of the new Criminal Code. As we already explained, this definition implements the *consent plus* concept, which requires three cumulative elements for legally valid consent: willingness of the consent, capability to make the decision and capability to express the decision. As Ritossa and Martinović correctly point out, it is arguable whether willingness of the consent should be an element. Earlier practice did not give gravity to unwillingnes of the consent if it was only of internal nature and was not in any way manifested. As we have already shown through the example of the Zagreb County verdict, the new case law tends to require both internal and manifested willingness, which introduces too wide a definition of criminal liability for sex offences. It also favors the outdated theory that the state has the obligation to protect the sexual freedom of those people who are unable to decide for themselves (Ritossa and Martinović, 2014, p. 536). We agree with the argument of Ritossa and Martinović and strongly suggest that the definition of consent should be erased in future reforms of the Croatian Criminal Code.

Finally, we believe that the legislator should limit the courts` ability to impose parole sentences and other alternatives for a prison sentence in cases of sexual crimes. These crimes are among the most difficult and most dangerous, and imposing such lenient sentence is not in accordance with the purposes of punishment, especially not with general and special deterrence in mind. It would be desirable for the legislator to cancel the possibility of parole, at least in cases of rape and the most severe criminal offences against sexual freedoms.

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