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“Yes means Yes” Theoretical dilemmas and new definition of rape and sexual assault in Slovenian Criminal Law

Abstract: The legislation of crimes against sexual integrity was initially aimed at safeguarding specific interests such as the honour of the father, the family, virginity, and the social security of women. Accordingly, the extent of rape victims was for a long time limited only to women (e.g. under Article 100 of the Criminal Code of the Socialist Republic of Slovenia from 1977, the execution of rape was only possible as *immission penis in vaginam*). In modern society, legislators seek to protect the self-determination of the individual, sexual and physical integrity, and sexual autonomy. This reversal demonstrates that modern criminal law revolves around the essential question of whether sexual intercourse is engaged in through free choice, that is, autonomously. Domestic legislators have been put under the pressure of media campaigns and controversial case law to modernise criminal law accordingly. In the spirit of the reforms, the Republic of Slovenia in 2021 adopted the amendments of Rape and Sexual Assault in the Criminal Code (KZ-1H) consistent with the affirmative consent model (“yes means yes”).

Keywords: rape, offences against sexual integrity, the concept of coercion, “yes means yes”, consent to sexual intercourse, political laws

1. Introduction

1.1. The aim and thesis of this contribution

After media campaigns and protests in Slovenia, the amended Criminal Code (KZ-1H)¹ entered into force in 2021, amending Articles 170–172, which regulate rape, sexual assault, and sexual abuse of a vulnerable person. With the amendment, Slovenia abandoned the coercive model and joined a handful of countries that accept the affirmative consent model (“yes means yes”).²

The authors of this contribution acknowledge that criminal law should protect specific interests of victims³ and that the affirmative consent model has significant advantages, which are mainly reflected in filling the legal gaps of the previous model of coercion in Slovenia (for example victims who are asleep, immobility, exploitation of victim’s surprise). However, we stand behind the thesis that the imposition of specific interests without the scrutiny of legal experts can be problematic, especially in terms of legal certainty for both the victim and the alleged perpetrator of the amended provisions on crimes against sexual integrity.⁴

The first part of the article contains a description of proposals to change the coercion model in the Slovenian Criminal Code.⁵ The Slovenian legislator abandoned the previous model of coercion and initially advocated the veto model (“no means no”), but later, due to disapproval by non-governmental organisations, the affirmative consent model (“yes means yes”) was adopted in a shortened procedure. All three models will be

¹ Act Amending the Criminal Code (KZ-1H). Official Gazette of Republic of Slovenia, July 4, 2021, p. 5970.

² For example, UK, Ireland, Belgium, Cyprus, Luxembourg, Iceland, and Sweden. A. Błuś: *Sex without consent is rape. So why do only eight European countries recognize this?* 4 January 2019, available at: <https://www.amnesty.org/en/latest/campaigns/2018/04/eu-sex-without-consent-is-rape/> [accessed 20.11.2021].

³ In line with the modern understanding of criminal law and social relations, we will use two terms: *victim*, that will include all women, men and others against whom a crime has been committed, and *perpetrator*, which will include all women, men and others who have committed a crime.

⁴ In 2016, the members of the German Parliament (Bundestag) managed to reach an agreement with all political parties to base the reform of Article 177 of the StGB on the veto model. From a political point of view, it could be understandable that the amendment was adopted quickly, but Hörnle believes that from a legal point of view, this is regrettable because it would be better to pursue a comprehensive reform based on a careful review of the entire chapter on sexual offences. T. Hörnle: *The New German Law on Sexual Assault and Sexual Harassment*. “German Law Journal” 2017, 18(6), p. 1315.

⁵ Kazenski zakonik (Criminal Code). Official Gazette of the Republic of Slovenia, number 50/12 – 6/16 – 54/15, 38/16, 27/17, 23/20, 91/20).

described in the second part with a brief presentation of their advantages and disadvantages. The third part encompasses the examination of the amended changes in the statutory definition of sexual offences in the Slovenian Criminal Code towards the affirmative consent model, by challenging the individual factors of “consent” – being externally perceptible, clear, and free, as well as the capacity to consent. Conclusively, a critical view is given on the amended consensual definition of sexual offences in the Slovenian Criminal Law, due to lack of relevant jurisprudence and concerns over legal certainty. The case of Slovenia can present an example to other countries where there is a political pressure to adopt a new approach to sexual offences in criminal law without a prior and proper legal debate and analysis.

1.2. Proposals to change the coercion model in the Slovenian Criminal Code

The springboard for amending criminal legislation in Slovenia was the case law. In July 2017 when the coercion model was still in force⁶ the Appellate Court in Koper⁷ found a man guilty of coercion⁸ and sentenced him to 10 months in prison because he had sexual intercourse with a sleeping intoxicated family friend without her consent. In February of that year, the District Court in Nova Gorica first recognised the statutory elements of the crime of rape in the defendant’s conduct (Article 170 KZ-1). However, appellate judges considered that when the perpetrator uses force only after the initiation of sexual intercourse, the conduct does not fall within the scope of rape. Thus, in July they reclassified it to a milder act of sexual abuse of a vulnerable person (Article 172 KZ-1). Following the defendant’s appeal in November 2017, the Supreme Court⁹ ruled that the case does not fall within the ambit of sexual abuse of a vulnerable person. The accused began undressing the woman when she fell asleep but sexual intercourse had taken place when she was already awake and began to push the perpetrator away. Thus, the Supreme Court remanded

⁶ According to the coercion model, rape was committed when the perpetrator pressured the victim into sexual intercourse by force or threat (Article 170 Slovenian Criminal Code). *Kazenski zakonik* (Criminal Code). Official Gazette of the Republic of Slovenia, number 50/12 –6/16 – popr., 54/15, 38/16, 27/17, 23/20, 91/20).

⁷ Decision of the Appellate Court in Koper: VSK II Kp 46668/2015, 7.07.2017.

⁸ Coercion is not a crime against sexual integrity but is independently incriminated in Slovenian Criminal Code (KZ-1) in Article 132.

⁹ Decision of the Supreme Court of Slovenia: VSRS Sodba I Ips 46668/2015 z dne 16.11.2017.

the case for retrial to the Appellate Court. In a retrial in December of that year, the court found the accused guilty of coercion and sentenced him to 10 months in prison. The Appellate Court could not convict the accused of rape, as the court may not change the decision of the accused to his detriment according to procedural law.¹⁰

After this judgement, a wave of proposals to change the model of coercion into a model of consent has been introduced in Slovenia. The Ministry of Justice established an expert working group that studied the comparatively known models of consent (the affirmative consent model and the veto model). The working group initially proposed the veto model (“no means no”) and cooperated with the Bar Association, the Supreme Court, the Institute of Criminology, and interested non-governmental organisations. Most institutions agreed that the proposed amendment is substantively and technically demanding, and they expressed concern about the potential assessment of competent authorities of the circumstances that render the victim incapable of expressing rejection, as they may only consider circumstances outside the victim, not being aware of potential domestic violence.¹¹

However, no agreement was reached on the choice of the sub-type of the consent model. Representatives of non-governmental organisations insisted on defining the crime according to the affirmative consent model. Due to the disagreements, the 8th March Institute (Inštitut 8. marec) introduced the “yes means yes” campaign.¹² Pursuant to Articles 88 and 97 of the Slovenian Constitution, the signatures of at least 5,000 voters are required to propose a law (People’s Initiative).¹³ With the campaign, which was conducted mainly through social networking sites (Facebook, Instagram) and in which Slovenian celebrities (e.g. actors) participated, the movement managed to gather enough popular support to start changing the criminal law into the affirmative consent model. The essential difference of this procedure, compared to the proposal of the Ministry of

¹⁰ Slovenska tiskovna agencija (Slovenian Press Agency): *Sodba v primeru spolnega napada odmeva v javnosti*. 9 January 2019, available at: <https://www.iusinfo.si/medijsko-sredisce/dnevne-novice/234524> [accessed 20.11.2021].

¹¹ Proposal of Act Amending the Criminal Code, EVA: 2019-2030-0015, pp. 53–55, available at: <https://e-uprava.gov.si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=10377> [accessed 20.11.2021].

¹² The 8th March Institute campaign, available at: <https://www.samojapomenija.si/> and https://fotogalerija.dz-rs.si/datoteke/drugo/soj/razno/21_02_02_pobuda_-_Kazenski_zakonik.pdf [accessed 20.11.2021].

¹³ Constitution of the Republic of Slovenia. Official Gazette of Republic of Slovenia, number 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a.

Justice for the introduction of the veto model, is that legal experts (the Supreme Court, the Bar Association, the Institute of Criminology, legal scholars, and NGOs) did not have the opportunity to review the proposed amendment and provide comments like previously to the proposed veto model.

This contribution draws upon the thesis that legislation that has not been subject to expert review is problematic, especially in criminal law. Sexual intercourses are performed daily, so the question can often arise as to whether a sexual act met the statutory elements of a crime or not. Moreover, the sanctions for rape and sexual assault encroach on an individual's liberty. The regulation of these crimes must therefore be predictable and specific.¹⁴ The Supreme Court of the Republic of Slovenia emphasised that “the new incrimination was the result of public debate, which began with an incorrect interpretation of the statutory elements of criminal offences in one specific case before the court and was therefore unnecessary. We agree that the discussion was initiated in the case law, which due to misinterpretations cannot be an indicator of the shortcomings of the provisions of KZ-1, which regulate crimes against sexual integrity.”¹⁵ The problem in Slovenian legislation was therefore not in the coercion model itself, but in certain legal gaps in the law based on the coercion model.

2. Three approaches to the definition of rape and sexual assault in criminal law

In this part, three different models of criminal regulation of sexual offences will be presented in chronological order. First, the coercion model, followed by the veto model (“no means no”), and finally, the affirmative consent model (“yes means yes”). We will assess them by highlighting their most important advantages and disadvantages.

2.1. The coercion model

As the name implies, coercive treatment is an essential element of the coercion model.¹⁶ Apart from force and threat, some other forms of coercive action are possible, for example, exploitation of surprise, abuse of the

¹⁴ S. Conly: *Seduction, Rape and Coercion*. “Ethics” 2004, 115(1), pp. 107–110

¹⁵ Proposal of Act Amending the Criminal Code..., p. 55.

¹⁶ Decision of the Supreme Court of Slovenia: VSRS I Ips 31611/2014, 1.02.2018.

victim's vulnerability, deprivation of liberty, and psychological pressure.¹⁷ What is common to all the possible coercive practices is that they must be causally related to sexual conduct.¹⁸

In addition to the standard elements of coercion and sexual intercourse, criminal law theory of the coercive model considers another element – the lack of consent on the part of the victim,¹⁹ which is the key element in consent-based models.²⁰ Some legislators differ when it comes to detailed legal solutions on statutory elements from the established majority of legislation,²¹ however, one can see the fundamental idea behind the proponents of the coercive model is coercive treatment.²²

2.1.1. Other forms of coercive treatment

Some other forms of coercive behaviour not recognised in the Slovenian Criminal Code, such as the exploitation of victim's vulnerable position, fraud,²³ and surprise²⁴ can be traced for example in German, French, Polish, and Luxembourg law.

In addition to the use of force and threat, the German Criminal Code (Strafgesetzbuch – StGB)²⁵ in the fifth paragraph of Article 177 classifies as coercive the exploitation of a situation in which the victim through the prism of an objective observer is powerless and left at the mercy of the perpetrator. Following a decision by the Federal Court of the Republic of Germany (Entscheidungen des Bundesgerichtshofes in Strafsachen – BGHSt), the German legislator eventually introduced a broad interpretation of coercion or threat in 2016, also covering situations of surprise

¹⁷ For example, in Article 177 of the German Criminal Code (Strafgesetzbuch).

¹⁸ T. Hörnle: *The New German Law...*, p. 1310.

¹⁹ W. LaFave: *Criminal Law*. Eagan, Minn. 1996, p. 894.

²⁰ N.J. Little: *From No Means No to Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*. "Vanderbilt Law Review" 2005, 58(4), p. 1321.

²¹ S. Conly: *Seduction, Rape and Coercion...*, pp. 104–105.

²² D. Edwards: *Acquaintance Rape & the "Force" Element: When "No" is Not Enough*. "Golden Gate University Law Review" 1996, 26, p. 243.

²³ According to Deisinger, in the case when a man crawls into a woman's bed at night and is mistaken for her husband, the crime of rape is not committed since the statutory element of force or threat is not met. M. Deisinger: *Kazenski zakonik 2017, Posebni del s komentarjem, sodno prakso in literaturo*. Maribor 2017, p. 283.

²⁴ Like the fraud, "surprise" as (quasi-)coercive action is an extremely rare form in Slovenia. D. Korošec: *Spolnost in kazensko pravo...*, p. 168.

²⁵ Criminal Code of Germany, Strafgesetzbuch (StGB). Bundesgesetzblatt I 3322, Bundesrecht der Bundesrepublik Deutschland.

(*Überraschungsmoment*).²⁶ What is important here is promptness of the attack, which prevents the victim from reacting at all. An example is a male prisoner who, while showering with other men, bends down to pick up something while someone sticks an object into his body.²⁷ Similarly, the French legislature also took surprise into account when criminalising coercive actions.²⁸

The first paragraph of Article 197 of the Polish Criminal Law²⁹ includes fraud as coercive conduct,³⁰ when it stipulates that whoever, by means of violence, unlawful threat or deceit, induces another person to have sexual intercourse with them shall be punished by imprisonment. Fraud as a statutory element of sexual assault and rape can also be found in the Luxembourg Criminal Code.³¹

2.1.2. The active resistance of the victim: a non-requirement

As soon as coercion is present in the sexual act without the prior consent of another person, the criminal offence is committed, regardless of how long the sexual act lasts.³² Violence may start before or during sexual intercourse and coincide with it.³³

It is important to emphasise that the statutory element of coercion, on the other hand, does not necessarily include the active resistance of the victim. The coercive model thus does not require the victim to active-

²⁶ This illustrates the veto model, which requires the expressed rejection of the victim. German legislator recognised that this is not always possible and consequently adopted the second paragraph of Article 177, which regulates situations when the will cannot be expressed in the required manner.

²⁷ Broad interpretation of coercion was adopted by the German Federal Court (BGHSt 36, 145) in the case of a physician who, by taking advantage of the surprise, quickly inserted his erected phallus into the genital area of a patient, waiting for examination. D. Korošec: *Spolnost in kazensko pravo...*, p. 170.

²⁸ Criminal Code of France (Code pénal), available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20200722> [accessed 20.11.2021].

²⁹ Criminal Code of Poland (Kodeks karny), available at: https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf [accessed 20.11.2021].

³⁰ An explicit statutory element of coercion to sexual intercourse: “podstępem” (*podstęp* in Polish mean ‘trickery’, the word here is declined, in the instrumental case).

³¹ Criminal Code of Luxembourg (Code), Journal officiel du Grand-Duché de Luxembourg, available at: <http://legilux.public.lu/eli/etat/leg/code/penal/20190616> [accessed 20.11.2021]. Also: B. Harbeck: *Probleme des Einheitstatbestandes sexueller Nötigung, Vergewaltigung*. Nomos Verlag 2001, p. 220.

³² Decision of the Appellate Court in Koper: VSK II Kp 46668/2015, 7.07.2017.

³³ D. Korošec: *Spolnost in kazensko pravo*. Ljubljana 2008, p. 148.

ly resist the perpetrator in the sense of physical defence (e.g. scratching, kicking) and it is also not legally relevant whether the victim had an opportunity to resist the perpetrator. It is sufficient that the resistance could reasonably have been expected and the perpetrator sought to exclude it from the outset.³⁴ Consequently, victims who do not actively resist are also covered by the criminal law protection of the coercive model.³⁵

Such a finding is based on domestic³⁶ and international case law. In the *M.C. v. Bulgaria* case,³⁷ the European Court of Human Rights found that making law enforcement conditional on the requirement of physical resistance carries the risk that certain forms of rape will go unpunished, jeopardising the effective protection of an individual's sexual autonomy.³⁸ Thus, legislation on crimes against sexual integrity should be focused on consent and not coercion. However, it should be emphasised that this decision of the ECtHR does not exclude the appropriateness of the coercion model, but rather emphasises the importance of interpreting the concept of "force," "threat," and "consent" in practice.³⁹

2.1.3. Some principal advantages of the coercion model

The principle of legality in criminal law ensures that the perpetrator is aware of when he or she exceeds the limits of what is permissible.⁴⁰ Within the coercion model, the Slovenian Criminal Code has precisely and unambiguously foreseen and prescribed all the statutory elements that need to be fulfilled for the subsumption of an act under the crime of rape and sexual assault. This ensures legal certainty for both the perpetrator and the victim.⁴¹

³⁴ B. Bajda, T. Gabršček, J. Menart, J. Tarman, N. Vukša, A. Zrilič, A. Cesar, M. Loknar, T. Pirnat, T. Urbas, M. Zaletel, M. Ambrož, M. M. Plesničar: »*Ne pomeni ne*« – *ustreznejša obravnava spolne kriminalitete*. Ljubljana 2018, p. 10.

³⁵ D. Edwards: *Acquaintance Rape...*, p. 16

³⁶ Decision of the Supreme Court of Slovenia: VS RS I Ips 333/2002, 27.06.2003.

³⁷ *M.C. v Bulgaria*, ECtHR, 4 December 2003, no. 39272/98, ECLI:CE: ECHR:2003:1204JUD003927298.

³⁸ *Ibidem*, paras. 166–170.

³⁹ B. Bajda et al.: »*Ne pomeni ne*«..., p. 61.

⁴⁰ M. Šepec: *Načelo zakonitosti v kazenskem pravu (The Principle of Legality in Criminal Law – The Concept of Maximum Certainty and the Concept of Supremacy of the Teleological Interpretation of the Criminal Law Norm)*. "Pravnik: Revija za Pravno Teorijo in Prakso" 2019, 74(7–8), p. 136.

⁴¹ S. Metts, B.H. Spitzberg: *Sexual Communication in Interpersonal Contexts: A Script-Based Approach*. "Annals of the International Communication Association" 1996, 19(1), p. 65.

Additionally, criminal law is about allocating risks and costs, and at some point, the ramifications caused by a behaviour outweigh the burden on the individual to comply with that law – it is supposed to act as an *ultima ratio* means of repression.⁴² On one hand, the coercive model allows a person greater personal freedom and the opportunity to explore sexual autonomy, and on the other hand, limits the unnecessary interference of criminal law.⁴³

2.1.4. Disadvantages of the coercion model

The traditional coercion model presupposes that someone reluctant to have sexual interaction will appropriately reject it.⁴⁴ In practice, there are different approaches to establishing coercion and consent. A Polish court held that rape did not occur because the 14-year-old victim did not scream during the non-consensual sexual assault. Despite the victim testifying that the act was non-consensual and that she tried to resist, judges overturned a rape verdict against the accused and found him guilty of sex with a minor.⁴⁵ Similarly, an Italian court ruled that saying ‘enough’ (Italian: *Basta*) was not a sufficient reaction to prove that the victim did not consent.⁴⁶ In Slovenian case law, defendants’ lawyers usually argue that the victim’s genital organ was moist or erected during sexual intercourse, which confirms that coercion was not present and thus the sexual intercourse was consensual.⁴⁷

As early as the 1970s, feminist circles warned that the model of coercion sets unrealistic standards about relationships as it creates the presumption that the victim (mostly female),⁴⁸ who did not actively resist

⁴² M.G. Leary: *Affirmatively replacing rape culture with consent culture*. “Texas Tech Law Review” 2016, 49(1), p. 45.

⁴³ J. McGregor: *Is this Rape? On Acquaintance Rape and Taking Women’s Consent Seriously*. “Law and Philosophy” 2016, 25(6), p. 55.

⁴⁴ M.M. Plesničar, M. Ambrož: »Sila, objektivno sposobna streti odpor«: *Empirična študija reprezentativnega vzorca pravosodne prakse v zvezi s kaznivim dejanjem posilstva, spolnega nasilja in spolne zlorabe slabotne osebe s pregledom možnih modelov novih zakonskih rešitev*. Ljubljana 2019, p. 70.

⁴⁵ Sąd Okręgowy we Wrocławiu, 5 listopada 2019 r. III K 93/19; Sąd Apelacyjny, 24 sierpnia 1920 r. II AKa 99/20, available at: <https://www.gov.pl/web/pr-wroclaw/wniosek-okasacjie-w-sprawie-gwaltu-na-14-letniej-pokrzywdzonej> [accessed 14.12.2021].

⁴⁶ Independent: Man acquitted of raping female colleague because she did not scream. 24 March 2017, available at: <https://www.independent.co.uk/news/world/europe/man-acquitted-rape-woman-not-scream-female-colleague-turin-court-diamante-minucci-a7648451.html> [accessed 20.11.2021].

⁴⁷ Decision of the Appellate Court in Koper: VSK II Kp 46668/2015, 7.07.2017.

⁴⁸ S. Brownmiller: *Against Our Will*. Simon & Schuster 1993, pp. 383–404.

the perpetrator, consented to sexual intercourse.⁴⁹ Susan Estrich explained that the model of coercion is based on “real rape” as a stereotype of what rape is and who can be described as a victim – usually, this involves a young victim being violently attacked and raped at night in a foggy street by a stranger. As opposed to “real rape”, there also exists “simple rape” that occurs at home, and does not involve any signs of force or resistance.⁵⁰ In this regard, studies also show that a more common reaction for the victim of a “simple rape” is to “freeze” rather than to actively resist.⁵¹ Expecting the latter from the victim is, from the critics’ point of view, unreasonable as it exposes the victim to an even more dangerous response by the perpetrator.⁵²

2.2. Consent-based models

Following the criticism of the coercion model, states’ legislators began to shift from it towards the consent-based models. In 2011, the Council of Europe adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).⁵³ Pursuant to Article 36 of the Convention, parties must take the necessary and appropriate legislative or other measures to ensure that sexual conduct against the consent of the victim is punishable. Accordingly, coercion is no longer a necessary element of rape or sexual assault under the consent-based models.⁵⁴

⁴⁹ The U.S. Supreme Court in Pennsylvania is in the 1994 case *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994) found that the lack of consent was not sufficient to subsume sexual conduct under the crime of rape, as it lacked an element of coercion. S.N. Polizzi: *When No is Not Enough: Force in Rape Statutes and the Epidemic of Underreporting*. “Law School Student Scholarship Paper” 2015, 784, p. 19

⁵⁰ S. Estrich: *Real Rape: How The Legal System Victimized Women Who Say No*. Cambridge, Mass. 1987, pp. 1–5.

⁵¹ S. Schwartz: *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*. “Loyola of Los Angeles Law Review” 1982, 16(3), p. 582.

⁵² S.A. Anderson: *Conceptualizing Rape as Coerced Sex*. “Ethics” 2016, 127(1), p. 84.

⁵³ Council of Europe: *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, November 2014, available at: <https://www.refworld.org/docid/548165c94.html> [accessed 23.11.2021].

⁵⁴ ECtHR in the very reasoning of the judgment in *M.C. v. Bulgaria*, as well as the Istanbul Convention, does not specify what the consent must be.

2.2.1. The veto model

The general idea of the veto model is based on words or acts by which the victim clearly rejects the sexual act. The model imposes a responsibility on the victim to express his or her disagreement. Otherwise, the law according to this model presupposes consent.⁵⁵

Under the pressure of criticism and influence of controversial cases from practice, proposals to change the criminal legislation to the veto model were introduced in several European countries. Under the coercive model, German courts ruled that the crime of rape is not committed when the statutory element of force or threat is not present. This was the case of German model Gine-Lise Lohfink, who during sexual intercourse with two men in 2012, consistently said “no”, which was also shown in a video before the court.⁵⁶ The court’s decision to acquit the accused men due to the lack of coercion upset the German public, especially as the court later even accused Lohfink of false accusations of rape and ordered her to pay a compensation to the accused of EUR 24,000.⁵⁷

According to the amended model, the German Criminal Code (StGB) based the definition of consent on the standard of “recognisable will”, which is not defined in the text of the Code and will thus have to be filled in case law.⁵⁸ German courts consider that the legal interest of sexual autonomy protected by Article 177 of the German Criminal Code includes the freedom of a person to decide for themselves the time, type, quality, form, and partner of sexual activity. According to the Berlin Higher Regional Court, if protection with a condom is required by the victim,⁵⁹ complying with the condition is important not only in terms of preven-

⁵⁵ M.J. Anderson: *Negotiating Sex*. “Southern California Law Review” 2005, 41, p. 1320.

⁵⁶ BBC: *Gina-Lisa Lohfink: German model fined for false rape claim*. 22 August 2016, available at: <https://www.bbc.com/news/world-europe-37158471> [accessed 20.11.2021].
The Cut: Why Germans Are So Angry About This Rape Case. 21 June 2016, available at: <https://www.thecut.com/2016/06/gina-lisa-lohfink-rape-case.html> [accessed 20.11.2021].

⁵⁷ In this case, the court “excluded with high probability that the model in the images [...] was under the influence of ‘knock-out’ drugs.” The toxicologist explained “she was ‘awake and oriented’, dancing, making phone calls, drinking, and always smiling at the camera.” B. Madea, F. Mußhoff: *Knock-Out Drugs*. “Deutsches Ärzteblatt International” 2009, 106(20), p. 341.

⁵⁸ B. Lanz: *Der Erkennbare Wille – Zur ‘neuen Vergewaltigung’ nach § 177 Abs. 6 Nr. 1 StGB*. 16 March 2017, available at: <https://www.benjamin-lanz.de/2017/03/16/der-erkennbare-wille-zur-neuen-vergewaltigung-nach-177-abs-6-nr-1-stgb/> [accessed 20.11.2021].

⁵⁹ Similar to the decision in *Julian Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

ting pregnancy and illness but also in terms of self-determination and sexual autonomy.⁶⁰

Under the influence of international law and media campaigns,⁶¹ Austria also introduced the veto model. Paragraph 205a of the Strafrechtsänderungsgesetz governs a crime of violation of sexual autonomy (*Verletzung der sexuellen Selbstbestimmung*), which is committed by anyone who has sexual intercourse with another person against his or her will (*gegen deren Willen*). Examples of the expressed will are clear verbal rejection as well as for example freezing and crying.⁶² The perpetrator is required to be at least aware of the possibility of acting against the will of the victim and nevertheless committing the act (possible intent).⁶³

Similarly, in response to the US case law,⁶⁴ the “no means no” model was proposed by Susan Estrich in her book *Real Rape*.⁶⁵ According to her theory,⁶⁶ every reasonable man is expected to understand that “no” means “no”.⁶⁷ However, Lynne Henderson, who also advocated for the veto model, did not agree with the standard of a reasonable man.⁶⁸ According to her theory, as soon as a person says “no” or demonstrates his disagreement for sexual activity, objective responsibility, or in other words indisputable presumption of negligence, is established.⁶⁹ This theory also addresses situations when the perpetrator claims that the victim’s signals were mixed or that the victim appeared to agree.⁷⁰

⁶⁰ Decision of the Higher Regional Court Berlin: KG 4-58/20, 27.07.2020.

⁶¹ Wiener Interventionsstelle: *Nein heißt nein! Zur Reform des Strafgesetzbuches*. 2016, available at: <https://www.interventionsstelle-wien.at/taetigkeitsbericht-2015-download> [accessed 20.11.2021].

⁶² L. Henderson: *Getting to know: Honoring Women in Law and in Fact*. “Texas Journal of Women and the Law” 1993, 2, pp. 67–68

⁶³ J. Oberlauer, K. Schmidhuber: *Die Verletzung der sexuellen Selbstbestimmung gemäß § 205a StGB*. “RZ – Österreichische Richterzeitung” 2015, 9, p. 176.

⁶⁴ Antioch College, Sexual Offence Prevention Policy, available at: <http://www.antioch-college.edu/about/policies-and-procedures/student-policies> [accessed 20.11.2021].

⁶⁵ S. Estrich: *Real Rape: How The Legal System Victimized Women Who Say No*. Cambridge, Mass. 1987.

⁶⁶ “Any sexual conduct disregarding the victim’s words, after the victim has clearly said “no”, can be nothing more than at least negligent.” S. Estrich: *Real Rape...*, p. 102.

⁶⁷ *Ibidem*, p. 103.

⁶⁸ “If it is reasonable to believe that ‘no’ means ‘yes’ and that female passivity is something natural, then there is no insured victim who freezes from fear and says nothing, as it falls outside the criteria of a reasonable man.” L. Henderson: *Getting to Know...*, p. 66; L. Henderson: *What Makes Rape a Crime*. “Berkeley Women’s Law Journal” 1987, 3(1), pp. 25–26.

⁶⁹ L. Henderson: *Getting to Know...*, pp. 67–68.

⁷⁰ D.A. Dripps: *Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent*. “Columbia Law Review” 1992, 92(7), p. 1797.

2.2.1.1. Advantages of the veto model

In connection to the theory of Susan Estrich, the veto model is equally applicable to the mutual relations of strangers as to acquaintances.⁷¹ In relation to this, it is argued that the advantage of the veto model is that verbal rejection is equally clear and understandable to each individual and understanding such a standard does not depend on knowing the partner and his behaviour.⁷²

However, the veto model also allows for the escalation of crimes and penalties. The use of force or the threat of force, as infringing upon physical and not only sexual integrity, may be considered an aggravating circumstance and in such a case it is a more serious crime than in the case of a sexual act without the use of force.⁷³

Finally, according to some, the veto model compared to the traditional coercion model also offers broader legal protection, as it protects victims who only verbally refuse sexual intercourse.⁷⁴ This is especially important since verbal resistance is a more natural and common response in female victims⁷⁵ rather than physical resistance.⁷⁶

2.2.1.2. Disadvantages of the veto model

a) Passivity of the victim

Research shows that the victim often does not say “no”, but remains silent or completely passive due to shock or fear (i.e. peritraumatic reaction).⁷⁷ In such cases, the veto model does not provide adequate protection to the victim,⁷⁸ as it requires that the victim at least verbally ex-

⁷¹ S. Estrich: *Real Rape...*, p. 103.

⁷² S. Gårdving: *Consent in rape law – a comparison of three models* (Master’s thesis). Faculty of Law, University of Lund 2010, pp. 30–31.

⁷³ D.A. Dripps: *Beyond Rape...*, pp. 1797–1800; S. Estrich: *Real Rape...*, p. 103.

⁷⁴ D. Bryden: *Redefining rape*. “Buffalo Criminal Law Review” 2000, 3(2), p. 396.

⁷⁵ S. Schwartz: *An Argument...*, p. 577.

⁷⁶ S. Estrich: *Real Rape...*, pp. 62–65.

⁷⁷ J. McGregor: *The legal heritage of the crime of rape*. In: *Handbook on Sexual Violence*. Eds. J.M. Brown, S.L. Walklate. Abingdon 2011, p. 72; C. McGlynn, V. Manuro: *Rethinking rape law: International and comparative perspectives*. Abingdon 2011, p. 20.

⁷⁸ Conversely, some emphasise that the consent-based models take an overly paternalistic approach. S.J. Schulhofer: *Taking Sexual Autonomy Seriously: Rape Law and beyond*. “Law and Philosophy” 1992, 11(1/2), pp. 72–73

presses the disagreement. According to critics, the mere fact of passivity should not in itself establish consensus.⁷⁹

b) The assumption of consent

In connection with the previous disadvantage, the model is also flawed because it stems from the presumption of consent to a sexual act.⁸⁰ By this, the model assumes that people always consent to sexual intercourse and with all persons. In everyday life, when people are constantly in contact in different situations, it is much more realistic to assume that people are not always interested in sexual intercourse.⁸¹ The presumption of consent dilutes the model's initial message, which is that the will of the other person should be considered in sexual acts and not only one's instincts in the hope that the other person does not resist.⁸²

c) Token or symbolic resistance (“no means yes”)

Social norms result in the fact that in practice “no” does not always mean “no”.⁸³ The first criticism of the veto model stems from the assumption that sometimes a reasonable woman will be able to understand the same behaviour differently than a reasonable man.⁸⁴ Men also ascribe too much significance to certain behaviours and circumstances such as women's clothing, her drinking alcohol, accidental touch, etc.⁸⁵ Moreover, a woman is perceived to be promiscuous if she is too sexually active and is even expected to display a certain degree of resistance (symbolic or token resistance).⁸⁶

However, according to one of the most frequently cited studies,⁸⁷ 39% of respondents have already resorted to symbolic resistance. At the same

⁷⁹ S.J. Schulhofer: *Consent: What It Means and Why It's Time to Require It*. “The University of the Pacific Law Review” 2016, 47, p. 668.

⁸⁰ Ibidem, p. 675.

⁸¹ S.J. Schulhofer: *Reforming the law of rape*. “Law & Inequality” 2016, 35, p. 341.

⁸² *Verdict: Making Sense of “Yes Means Yes”*. 29 October 2014, available at: <https://verdict.justia.com/2014/10/29/making-sense-yes-means-yes> [accessed 20.11.2021].

⁸³ K. Lockwood Harris: *Yes means yes and no means no, but both these mantras need to go: communication myths in consent education and anti-rape activism*. “Journal of Applied Communication Research” 2018, 46(2), p. 157; S.J. Schulhofer: *Unwanted Sex: The Culture of Intimidation and the Failure of Law*. Cambridge, Mass. 1998, pp. 59–68.

⁸⁴ S. Byers, K. Lewis: *Dating Couples' Disagreements over the Desired Level of Sexual Intimacy*. “The Journal of Sex Research” 1988, 24(1), pp. 23–24; S. Byers: *How Well Does the Traditional Sexual Script Explain Sexual Coercion? Review of a Program of Research*. “Journal of Psychology and Human Sexuality” 1996, 8(1–2), pp. 14–15.

⁸⁵ M.J. Anderson: *Negotiating Sex...*, pp. 117–120.

⁸⁶ S. Metts, B. Spitzberg: *Sexual Communication...*, p. 65.

⁸⁷ C. Muehlenhard, L. Hollabaugh: *Do women sometimes say no when they mean yes?* “Journal of Personality and Social Psychology” 1998, 54(5), pp. 872–879.

time, the majority (60%) never used this tactic. The authors of the study concluded that when a woman says “no”, there is a good chance that she also thinks so.⁸⁸

d) Nonverbal communication

Studies have shown that both men and women often use body language to express their consent or disagreement, for example, when the victim turns away, cries, is fearful, or tries to push the perpetrator away.⁸⁹ However, the message of body language is sometimes hard to grasp. Accordingly, critics emphasise that the law should not presuppose the existence of consent simply because there is no verbal refusal.⁹⁰

Considering this criticism, in some US states and Germany the victim is not usually required to say “no” or “stop,” but it is sufficient for the victim to indicate through action that his or her consent is not given.⁹¹

2.2.2. The affirmative consent model (“yes means yes”)

The core idea behind the affirmative consent model is the consent of all individuals involved in sexual intercourse, which deprives the sexual act of its illegality.⁹² If the words or actions of the other person do not present a clear “yes”, the sexual act is a criminal offence.⁹³ This is especially important from the point of view that unlike the veto model the perpetrator is responsible for the crime not only in the case when the victim objected to the sexual conduct but also in the case when the victim did

⁸⁸ D. Bryden: *Redefining Rape...*, pp. 388–389. S.J. Schulhofer: *Unwanted Sex...*, p. 260.

⁸⁹ D. Husak, C. George Thomas III: *Consent and Reasonable Mistake*. “Philosophical Issues (Social, Political, and Legal Philosophy)” 2001, 11, pp. 93–94.

⁹⁰ S.J. Schulhofer: *Consent...*, pp. 674–675; Pursuit (University of Melbourne): *More than Yes or No Question*. 23 March 2016, available at: <https://pursuit.unimelb.edu.au/articles/more-than-a-yes-or-no-question> [accessed 20.11.2021]; J. Bucher, M. Manasse: *When Screams Are Not Released: A Study of Communication and Consent in Acquaintance Rape Situations*. “Women & Criminal Justice” 2011, 21(2), pp. 130–135; C. Muehlenhard, T. Humphreys, K. Jozkowski, Z. Peterson: *The Complexities of Sexual Consent Among College Students: A Conceptual and Empirical Review*. “The Journal of Sex Research” 2016, 53(4–5), pp. 469–470.

⁹¹ T. Hörnle: *The New German Law...*, p. 1320

⁹² Affirmative consent risks establishing a new sexual norm. R. Torenz: *The Politics of Affirmative Consent: Considerations from a Gender and Sexuality Studies Perspective*. “German Law Journal” 2021, 22, p. 719.

⁹³ N.J. Little: *From No Means No to Only Yes Means Yes...*, p. 1345.

not express her will and due to various reasons remained passive (“*only yes means yes*”).⁹⁴

2.2.2.1. Consent

Consent to sexual intercourse is usually defined as the expressed will of a potential victim to participate in sexual activity.⁹⁵ Considering the affirmative consent model, consent represents an exception to the illegality of sexual intercourse.⁹⁶

States that decided to change criminal law in the direction of the affirmative consent model define the concept of consent differently. In England under the Sexual Offences Act (Article 74),⁹⁷ one can consent if he or she has voluntarily chosen to engage in sexual conduct, being able to make such a decision, which must be free. The law assumes that consent cannot be granted by persons under the age of 16 and persons with a mental disorder that impairs their ability to make decisions.⁹⁸ Inspired by the foregoing legislation, the Croatian Criminal Code⁹⁹ provides that consent is given if the person has voluntarily chosen to have sexual intercourse and has been able to make and express such a decision. Croatian legislator listed situations in which consent is presumed not to have been given, for example if sexual intercourse or equivalent sexual conduct is carried out using threats, fraud, abuse of subordinate or vulnerable position.¹⁰⁰

Social movements, especially FATTA and #MeToo, have made an important contribution to the establishment of this model in Sweden after the Swedish court¹⁰¹ acquitted three young men accused of raping

⁹⁴ B. Bajda et al.: »*Ne pomeni ne*«..., p. 33. T. Hörnle: #MeToo – *Implications for Criminal Law?* “Bergen Journal of Criminal Law and Criminal Justice” 2019, 6 (2), p. 130; S.J. Schulhofer: *Reforming the law of rape*..., p. 345.

⁹⁵ C. Roxin: *Strafrecht – Allgemeiner Teil*. München 1992, p. 461; similarly in Slovenia: D. Korošec et al.: *Veliki znanstveni komentar posebne dela Kazenskega zakonika (KZ-1)*. Ljubljana 2018, p. 1000.

⁹⁶ L. Bavcon, A. Šelih, D. Korošec, M. Ambrož, K. Filipčič: *Kazensko pravo. Splošni del. Uradni list*. Ljubljana 2011, p. 248.

⁹⁷ Sexual Offences Act 2003, available at: <https://www.legislation.gov.uk/ukpga/2003/42/contents> [accessed 20.11.2021].

⁹⁸ Article 74 Sexual Offences Act 2003, URL: <https://www.legislation.gov.uk/ukpga/2003/42/section/74> [accessed 15.08.2020].

⁹⁹ Croatian Criminal Code, The Official Gazette of the Republic of Croatia “Narodne novine”, No. 110 of October 21, 1997.

¹⁰⁰ Fifth paragraph Article 154 Croatian Criminal Code.

¹⁰¹ L. Wegerstad: *Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden*. “German Law Journal” 2021, 22(5), p. 742; Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO): *Baseline Evaluation*

a 15-year-old girl with a wine bottle by stating that: “people involved in sexual activities do things naturally to each other’s body in a spontaneous way, without asking for consent.”¹⁰² According to the Swedish Criminal Code (BrB),¹⁰³ a person must express their consent to sexual intercourse in words or body language, assuming that there is no consent if it is not clearly expressed.¹⁰⁴

2.2.2.2. Formulations of the affirmative consent model

In theory, many formulations of the affirmative consent model exist, differing in the form of consent (verbal, nonverbal), the scope (all sexual conduct or just sexual intercourse), the person who bears the burden of proof (prosecution or defendant), and which formulation is more or less sex regulatory.¹⁰⁵

a) Contractual consent

Proponents of the affirmative consent model developed a rather restrictive form, requiring consent in the form of a signed or even notarised contract.¹⁰⁶ Following this approach, certain apps were created, which allow everyone involved in sexual intercourse to confirm and revoke consent at any time through the application.¹⁰⁷ A similar app can also generate a QR

Report Sweden. 21 January 2019, available at: <https://rm.coe.int/grevio-inf-2018-15-eng-final/168091e686> [accessed 20.11.2021].

¹⁰² E. Hofverberg: *Sweden: Parliament Makes Lack of Consent the Basis for Rape Charges*. 3 July 2018, available at: <http://www.loc.gov/law/foreign-news/article/sweden-parliament-makes-lack-of-consent-the-basis-for-rape-charges-introduces-criminal-liability-for-negligent-sexual-assault/> [accessed 20.11.2021]. Regeringens proposition 2017/18:177, *En ny sexualbrottslagstiftning byggd på frivillighet*, available at: <https://www.regeringen.se/rattsliga-dokument/proposition/2018/03/prop.-201718177/> [accessed 20.11.2021]; Swedish Criminal Code, Svensk förtfattningssamling [SFS] 1962: 700.

¹⁰³ SFS 1962:700 Brottsbalken.

¹⁰⁴ L. Wegerstad: *Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden*. “German Law Journal” 2021, 22(5), p. 738.

¹⁰⁵ A spectrum of affirmative consent formulations from more sex-regulatory/prosecutorial to less sex-regulatory/lenient: A. Gruber: *Consent Confusion*. “Cardozo Law Review” 2016, 38, p. 431; B. Bajda: *Spolnost, pravo in družba v dobi #MeToo: Novejši modeli spolnega kazenskega prava*. In: *Zbornik 11. konference kazenskega prava in kriminologije [4. in 5. december 2018, Portorož]*. Ljubljana 2018, p. 27.

¹⁰⁶ J. Danaher: *Could there ever be an app for that? Consent Apps and the Problem of Sexual Assault*. “Criminal Law and Philosophy” 2018, 12(1), pp. 152–160; R. Mantock: *Consent is not a commodity. Tech will never make it one*. “The Femicide” 2019, URL: <https://thefemicide.com/news/consent-is-not-a-commodity/> [accessed 21.11.2021].

¹⁰⁷ LegalFling, URL: <https://legalflying.io/> [accessed 21.11.2021].

code, creating a certificate of authenticity of consent.¹⁰⁸ Additionally, it is even possible to find an application that requires potential sexual partners to record saying “yes” before the sexual intercourse takes place. Unless all partners say “yes” and the phone detects their faces, the application advises them not to have a sexual intercourse.¹⁰⁹

However, the seemingly solvable problem remained: even if the consent was recorded, it is impossible to determine with certainty whether the consent was free and valid.¹¹⁰ Thus, digital consents have not come to life in practice because of the unrealistic approach to sexual intercourse.

b) Verbal consent

The verbal consent model has been established at Antioch College in the US state of Ohio as part of a policy to prevent sexual violence on the student campus.¹¹¹ According to this version of the affirmative consent model, the one must obtain explicit verbal consent before sexual conduct.¹¹² Moreover, consent must be given at every stage of sexual interaction, which means that one consent must be obtained for example for kissing, another for touching, and so on (the “stop-and-ask” scenario).¹¹³ The controversial policy was heavily criticised; claims were made that it reduced sexual relationships to a set of questions and answers.¹¹⁴

c) Enthusiastic consent

That consent may be inferred from body language is an essential feature of the enthusiastic consent approach.¹¹⁵ Its proponents emphasise

¹⁰⁸ C.S. Brown: *uConsent app helps partner consent to hooking up*, 2018, URL: <https://www.androidauthority.com/uconsent-hookup-app-860484/> [accessed 21.11.2021].

¹⁰⁹ P. Luckhurst: *We-Consent is the new app that lets you say ‘yes’ to sex... is it useful or just plain creepy?*. 2015, URL: <https://www.standard.co.uk/lifestyle/london-life/we-consent-is-the-new-app-that-lets-you-say-yes-to-sex-is-it-useful-or-just-plain-creepy-10409525.html> [accessed 21.11.2021].

¹¹⁰ J. Danaher: *Could there ever be an app for that? Consent Apps and the Problem of Sexual Assault*. “Criminal Law and Philosophy” 2018, 12(1), pp. 153–160.

¹¹¹ Antioch College, Sexual Offence Prevention Policy, available at: <http://www.antiochcollege.edu/about/policies-and-procedures/student-policies> [accessed 20.11.2021].

¹¹² P. Reeves Sanday: *A Woman Scorned: Acquaintance Rape on Trial*. California 1997, pp. 272–277

¹¹³ A. Gruber: *Not Affirmative Consent*. “The University of the Pacific Law Review” 2016, p. 690.

¹¹⁴ For example in “New York Times”: “Ask First” at Antioch. 11 October 1993, available at: <https://www.nytimes.com/1993/10/11/opinion/ask-first-at-antioch.html> [accessed 20.11.2021]; R. Shibley: *Antioch’s Infamous Sexual Assault Policy*, 15 June 2007, available at: <https://www.thefire.org/antiochs-infamous-sexual-assault-policy/> [accessed 20.11.2021].

¹¹⁵ A. Gruber: *Consent Confusion...*, pp. 432–433.

that the partner must actively participate in sexual intercourse and that an enthusiastic “yes” reflects the tendency to conceive of sexuality as an exclusively hedonistic activity.¹¹⁶

The problem of this model is that it tries to regulate pleasure without considering that consensual sexuality can pursue different goals, such as reproduction, maintaining a partnership or marriage, improving the economic situation, etc.¹¹⁷ Moreover, enthusiasm is an emotionally marked concept.¹¹⁸ Catharine MacKinnon stated: “[...] politically, I call it rape whenever a woman has sex and feels violated.”¹¹⁹ Pursuant to this understanding, any sexual act in which one of the partners does not enjoy it is equated with rape. Thus, if both partners do not enjoy sex, both are victims and perpetrators at the same time.

d) Contextual consent

Contextual consent formulation is based on the idea that consent to sexual intercourse need not be expressed in words, much less in written forms.¹²⁰ It can be given implicitly if there is a clear cognitive will for a particular sexual activity¹²¹ according to all the circumstances of the specific case.¹²² Consent is given when the average person in the same circumstances could reasonably believe that the victim has consented to the sexual conduct (objective standard of assessment).¹²³

¹¹⁶ T.M. Millar Macaulay: *Toward a performance model of sex*. In: *Yes Means Yes: Visions of Female Sexual Power and a World without Rape*. Eds. J. Friedman, J. Valenti. Berkeley, Cal. 2008, p. 28.

¹¹⁷ B. Bajda et al: »*Ne pomeni ne*«..., p. 37.

¹¹⁸ A. Gruber: *Consent Confusion...*, p. 432; H. Corinna: *Driver's ed for the sexual superhighway*. 18 November 2010, available at: http://www.scarleteen.com/article/abuse_assault/drivers_ed_for_the_sexual_superhighway_navigating_consent [accessed 20.11.2021].

¹¹⁹ C.A. MacKinnon: *Feminism Unmodified: Discourses on Life and Law*. Cambridge, Mass. 1987, p. 82.

¹²⁰ State of New Jersey in the interest of M.T.S., 609 A.2d 1266 129 N.J. 422 (1992); S.J. Schulhofer: *The Feminist Challenge in Criminal Law*. “University of Pennsylvania Law Review” 1995, 143, p. 2181.

¹²¹ S.J. Schulhofer: *Consent...*, p. 668.

¹²² A. Gruber: *Consent Confusion ...*, p. 432.

¹²³ S.J. Schulhofer: *Unwanted sex...*, p. 272; M.J. Anderson: *Negotiating Sex*. “Southern California Law Review” 41, 2005, pp. 105, 114.

2.2.2.3. Advantages of the affirmative consent model

a) Wider scope of criminality and respect of sexual autonomy

Schulhofer is of the opinion that protection against coercion and protection of autonomy do not overlap completely.¹²⁴ On the one hand, if the perpetrator forces the victim into sexual intercourse, it also interferes with her sexual autonomy. On the other hand, not every intervention in sexual autonomy involves the use of force. Schulhofer illustrated this difference by analogy with offences against one's property.¹²⁵ If criminal law only criminalised force (robbery), a large proportion of gross encroachments on private property would remain outside the criminal zone, for instance, theft.¹²⁶ Analogously, the use of force or threat may be qualifying elements of rape and sexual assault, but they cannot be used to justify its incrimination.¹²⁷

Using the same analogy of theft, Schulhofer highlighted the protection of sexual autonomy as an important advantage of the affirmative consent model. Therefore, the perpetrator in the above case would be liable for the crime of theft. According to the veto model, this would not stand since all interventions are permissible until the victim says "no". Taking the computer would not be unlawful, as the victim did not expressly object to it.¹²⁸ The affirmative consent model is, therefore, the only model that consistently protects sexual autonomy.¹²⁹

b) Considering psychosocial aspects

When describing why victims did not respond or run away from the attack, they often say that they were "frozen."¹³⁰ In neuroscience, freezing has various manifestations.¹³¹ Extensive research has shown that four

¹²⁴ Ibidem, p. 99.

¹²⁵ Ibidem, pp. 99, 100, 277.

¹²⁶ L.A. Remick: *Read her lips: An argument for a verbal consent standard in rape*. "University of Pennsylvania Law Review" 1993, 141(3), p. 1111.

¹²⁷ S.J. Schulhofer: *Taking Sexual Autonomy Seriously...*, pp. 74–75.

¹²⁸ D. Bryden: *Redefining rape...*, pp. 403–407; D. Korošec: *Razum in volja pri privolitvi potencialnega oškodovanca v kazenskem pravu*. "Zbornik znanstvenih razprav" 1998, 58, p. 144.

¹²⁹ D.E. Roberts: *Rape, Violence, and Women's Autonomy*. "Chicago-Kent Law Review" 1993, 69, p. 385.

¹³⁰ S. Bieneck, B. Krahé: *Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard?* "Journal of Interpersonal Violence" 2011, 26(9), p. 1786; C. Perilloux, J.D. Duntley, D.M. Buss: *Blame attribution in sexual victimization*. "Personality and Individual Differences" 2014, 63, p. 83.

¹³¹ C. Quaedflieg, L. Schwabe: *Memory dynamics under stress*. "Memory" 2017, 26(3), p. 370; L. Wirz, M. Bogdanov, L. Schwabe: *Habits under stress: mechanistic insight across different types of learning*. "Current Opinion in Behavioral Sciences" 2018, 20,

roughly distinguished survival instincts exist¹³²: fight or flight,¹³³ reactive or attentive immobility,¹³⁴ frozen fright (tonic immobility, rape-induced paralysis),¹³⁵ and immobility due to loss of consciousness.¹³⁶

Tonic immobility manifests itself as a loss of the ability to move or call for help if a person is in danger.¹³⁷ In circles of critics of the coercion model, tonic immobility as a form of survival instinct has often been highlighted as a legal gap, since in the event of immobility there can be no coercion and thus statutory elements of rape cannot be fulfilled.¹³⁸

In a study conducted on psychiatric patients who had a history of childhood sexual abuse, as many as 52% of participants reported experiencing tonic immobility during the attack.¹³⁹ Victims describe fear, numbness, uncontrolled shaking, eye closure, and dissociation, feelings of being trapped and hopeless.¹⁴⁰

From the psychosocial point of view the responses to rape and sexual assault, which were not regulated within the model of coercion, fall within the scope of sexual offences under the affirmative consent model.¹⁴¹

p. 11; E.W. Kane: *The gender trap: Parents and the pitfalls of raising boys and girls*. New York 2012, pp. 14–20; L. Schwabe: *Memory under stress: from single systems to network changes*. “European Journal of Neuroscience” 2017, 45, p. 479.

¹³² K. Kozłowska, P. Walker, L. McLean, P. Carrive: *Fear and the Defense Cascade: Clinical Implications and Management*. “Harvard Review of Psychiatry” 2015, 23(4), p. 263.

¹³³ A. Gozzi, A. Jain, A. Giovannelli, C. Bertolini, V. Crestan, A.J. Schwarz: *A Neural Switch for Active and Passive Fear*. “Neuron” 2010, 67, p. 656.

¹³⁴ A condition that occurs at the very beginning of the attack when an individual becomes aware that there is a danger and typically lasts only a few seconds. C.H. Hillman, K.S. Rosengren, D.P. Smith: *Emotion and motivated behavior: postural adjustments to affective picture viewing*. “Biological Psychology” 2004, 66, p. 52.

¹³⁵ M. Abrams, B.A. Hons, N. Carleton, S. Taylor, G. Asmundson: *Human tonic immobility: Measurement and correlates*. “Depression and Anxiety” 2009, 26, p. 551.

¹³⁶ The individual experiences it as a lack of consciousness or complete loss of consciousness or as cerebral hypoxia which manifests itself as increased anxiety, panic, crying, moaning. H.S. Bracha: *Freeze, flight, fight, fright, faint: adaptationist perspectives on the acute stress response spectrum*. “CNS Spectrums” 2004, 9, p. 683; D. Tuerkheimer: *Affirmative Consent*. “Ohio State Journal of Criminal Law” 2016, 13(2), p. 457.

¹³⁷ In *People v. Iniguez*, 872 P.2d 1183 (Cal. 1994) the victim woke up in the middle of the night and saw a friend standing naked above her. The victim said she was “so scared she just laid there.” The US? Supreme Court convicted the perpetrator based on an expanded interpretation of “causing fear”.

¹³⁸ T. Hörnle: *The New German Law...*, p. 1310.

¹³⁹ J.M. Heidt, B.P. Marks, J. P. Forsyth: *Tonic immobility and childhood sexual abuse: a preliminary report evaluating the sequela of rape induced paralysis*. “Behaviour Research and Therapy” 2004, 43, p. 1165.

¹⁴⁰ K. Kozłowska et al.: *Fear and the Defense Cascade...*, p. 272.

¹⁴¹ T. Hörnle: *#MeToo...*, p. 130; S.J. Schulhofer: *Reforming the law of rape...*, p. 345.

Thus the affirmative consent model presents an advantage in filling legal gaps of the coercive model.

Proponents point out that, unlike the coercive and veto models, the affirmative consent model is beneficial for society as a whole, as it is gender neutral.¹⁴² In the same breath, many accuse this model of paradoxically consolidating the classical “patriarchal” logic, according to which the female’s role is reduced to passively giving or denying consent.¹⁴³

2.2.2.4. Disadvantages of the affirmative consent model

a) A vague standard of consent

The standard of affirmative consent is semantically broad and allows for a wider scope of instances in practice, but at the same time, it is not entirely clear with what content it can be filled.¹⁴⁴ First, emphasis should be made on the verbal consent formulation. A verbal “yes” in itself is not enough, it is important how the question is formulated. For example, what does *this* in *Is this okay?* refer to?¹⁴⁵

Even greater confusion arises when the law allows consent to be expressed nonverbally. For example, is consent to sexual intercourse present if partners move to the bedroom? In a survey of American students, 22% of respondents thought that indulging in the foreplay was an expression of consent – more often the view was that a partner communicated consent by providing a condom (40%) or by taking off their clothes (47%).¹⁴⁶

¹⁴² M.W. Wiederman: *The gendered nature of sexual scripts*. “The Family Journal: Counseling and therapy for couples and families” 2005, 13(4), pp. 496–500; L. Pineau: *A Response to my Critics*. In: *Date Rape: Feminism, Philosophy and the Law*. Ed. L. Francis. Pennsylvania 2008, pp. 222–225; C.L. Muehlenhard: *Examining stereotypes about token resistance to sex*. “Psychology of Women Quarterly” 2011, 35(4), p. 679.

¹⁴³ L. Lisjak Gabrijelečič: *Normiranje užitka: koncept pritrtilnega soglasja*. “Razpotja” 2014, 5(18), p. 30.

¹⁴⁴ M.A. Beres: *Sexual miscommunication? Untangling assumptions about sexual communication between casual sex partners*. “Culture, Health, and Sexuality” 2010, 12(1), p. 5.

¹⁴⁵ K.N. Jozkowski, Z.D. Peterson, S.S. Sanders, B. Dennis, M. Reece: *Gender Differences in Heterosexual College Students’ Conceptualizations and Indicators of Sexual Consent: Implications for Contemporary Sexual Assault Prevention Education*. “The Journal of Sex Research” 2014, 51, pp. 910–914; T. Humphreys: *Perceptions of Sexual Consent: The Impact of Relationship History and Gender*. “Journal of Sex Research” 2007, 44(4), pp. 311–314, 469, 475.

¹⁴⁶ The American Law Institute: *Model Penal Code: Sexual assault and related offenses*. Tentative Draft No. 1. 30. April 2014, available at: <http://www.prosecutorintegrity.org/wp-content/uploads/2014/12/Model-Penal-Code-April-30-2014.pdf> [accessed 20.11.2021], pp. 69–70.

Thus, the standard will have to be filled in case law. The case-law approach is problematic from the point of legal certainty and predictability of criminal law. Moreover, critics argue that with a vague standard the state opens a gate to excessively interfere with sexual practices that people find normal and that the affirmative consent model is part of the trend of sexual bureaucratisation.¹⁴⁷ For some, the requirements of the affirmative consent model are disruptive, uncomfortable, and “kill the atmosphere.”¹⁴⁸ According to Paglia, “yes means yes” laws are “sadly puritanical” and “hopelessly totalitarian”; their growing popularity is merely proof of how boring and meaningless sexuality has become.¹⁴⁹

b) Increasing the number of false allegations

The vagueness of standards opens the door to false accusations. It is true that they occur in all models¹⁵⁰ and research shows that they are unproblematic in practice since the proportion of false accusations ranges between 2% and 10%.¹⁵¹ However, critics warn that the problem of false accusations in the affirmative consent model is more pressing, as the broader definition of rape makes more individuals self-identify as victims.¹⁵² This situation can occur for example when one of the partners is “morally ambivalent” (because, for example, the partner is of the same sex, another race, not her husband or his wife).¹⁵³ The next morning, he/she feels guilty, convinces him-/herself that sexual intercourse has been forced and makes a complaint.¹⁵⁴ Proponents of the affirmative consent model would

¹⁴⁷ J. Gersen, J. Suk: *The Sex Bureaucracy*. “California Law Review” 2016, 104, pp. 881–948.

¹⁴⁸ D. Tuerkheimer: *Rape on and off campus*. “Emory Law Journal” 2015, 65, pp. 12–13.

¹⁴⁹ C. Paglia: *Free Women, Free Men: Sex, Gender, Feminism*. Pantheon, New York 2017, p. 273.

¹⁵⁰ K. Roiphe: *The Morning After: Sex, Fear, And Feminism On Campus*. Boston 1993, pp. 74–75; A. de Zutter, R. Horselenberg, P. J. van Koppen: *Motives for filing a false allegation of rape*. “Archives of Sexual Behavior” 2017, 47 (2), pp. 457–464.

¹⁵¹ D. Lisak, L. Gardinier, S.C. Nicksa, A.M. Cote: *False allegations of sexual assault: An analysis of ten years of reported cases*. “Violence against Women” 2010, 16(12), pp. 1319, 1329–1331; C.E. Ferguson, J.M. Malouff: *Assessing police classifications of sexual assault reports: a meta-analysis of false reporting rates*. “Archives of Sexual Behavior” 2016, 45(5), pp. 1189–1191.

¹⁵² N.J. Little: *From “No means no”...*, pp. 1357–1359.

¹⁵³ J. Halley: *The Move to Affirmative Consent*. 10 November 2015, available at: <http://signsjournal.org/currents-affirmative-consent/halley/>, pp. 266–267 [accessed 20.11.2021].

¹⁵⁴ K. Roiphe: *Date rape’s other victim*. 13 June 1993, available at: <https://www.nytimes.com/1993/06/13/magazine/date-rape-s-other-victim.html> [accessed 20.11.2021].

insist that it is not a crime, as only his/her expressed will to have sex is legally relevant.¹⁵⁵

c) Procedural aspects

Even greater criticism of the affirmative consent model stems from the procedural aspect of the burden of proof. Critics insist that the *de facto* burden of proof has been shifted to the accused¹⁵⁶ because in affirmative consent models any doubt about clear consent strengthens the prosecution's case and dictates a conviction.¹⁵⁷ The accused must therefore provide evidence of consent (in writing, in a video, message, victim testimonies, etc.). In this way, the affirmative consent model grossly interferes with the presumption of innocence and deprives the defendants of procedural guarantees, which are the basis of the principle of equality before the court and a fair criminal procedure.¹⁵⁸ Sexual intercourse usually takes place behind closed doors, so there are no witnesses. Additionally, recordings of sexual intercourse are usually not expected either.¹⁵⁹ Even if there were physical evidence (e.g. injuries) they can only prove that sexual intercourse took place, and not whether consent was given for it.¹⁶⁰ Thus the affirmative consent standard does not solve the "he said, she said" problem.¹⁶¹

3. Analysis of the new definition of rape and sexual assault in Slovenian criminal law

The recent criminal legislative amendment (KZ-1H) has altered the statutory definitions of three main sexual offences within the Slovenian

¹⁵⁵ E. Yoffe: *The uncomfortable truth about campus rape policy*. 6 September 2017, available at: <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/> [accessed 20.11.2021].

¹⁵⁶ A. Schow: *Judge rule university can't shift burden of proof onto the accused*. 10 August 2015, available at: <https://www.washingtonexaminer.com/judge-rules-university-cant-shift-burden-of-proof-onto-the-accused> [accessed 20.11.2021]; *Mock v. University of Tennessee at Chattanooga* (Davidson County Chancery Court, TN, filed August 4, 2015).

¹⁵⁷ M. Graw Leary: *Affirmatively Replacing Rape...*, pp. 49–55.

¹⁵⁸ B. Bajda et al.: »*Ne pomeni ne*« ..., p. 64.

¹⁵⁹ J. Witmer-Rich: *Unpacking Affirmative Consent: Not as Great as You Hope, Not as Bad as You Fear*. "Texas Tech Law Review" 2016, 49 (57), p. 53.

¹⁶⁰ D. Tuerkheimer: *Incredible women: Sexual violence and the credibility discount*. "University of Pennsylvania Law Review" 2017, 166, pp. 13–14.

¹⁶¹ M. Randall: *Sexual assault law, credibility and 'ideal victims'*. "Canadian Journal of Women and the Law" 2010, 22, pp. 407–423.

Criminal Code’s chapter “Criminal offences against sexual integrity”. Those being rape under Article 170, sexual assault under Article 171 and the sexual abuse of a vulnerable individual under Article 172 of the Slovenian Criminal Code.

However, the Slovenian criminal legislation had beforehand long followed the coercive concept of sexual offences, therefore the sudden introduction of the new affirmative consent definition, raises great concerns for determining the consensual legal standard, which, as an overly flexible standard, questions the legal certainty of such provisions. Additionally, since the Slovenian criminal law does not entail an established basis of case law regarding the newly adopted definition of affirmative consent, it is hard to presuppose in which way the judicial practices in Slovenia will evolve. Potentially, one possibility is that, pursuant to the fundamental principles of sovereignty and judicial independence, Slovenian courts will create completely individual standards for determining the affirmative consent. However, another possibility is that Slovenian courts will examine foreign practices regarding the affirmative consent and adopt similar standards or possibly even combine them with Slovenia’s newly and individually formed.

Accordingly, within this section, we will first shortly summarise the amendments within the Slovenian criminal legislation, and second, examine the existing jurisprudences from foreign practices and correspondingly challenge the affirmative definition of consent and its introduction into Slovenian criminal law.

3.1. Amended changes in the statutory definition of sexual offences in the Slovenian Criminal Code

The transition of the statutory definitions of rape and sexual assault into the affirmative consent model was implemented with the inclusion of two additional paragraphs. First being the definition of non-consensual sexual misconduct: “Whoever, without the consent of another person, engages in sexual intercourse or, with it equated sexual activity, shall be punished by imprisonment for a term between six months and five years” for rape under Article 170, and: “Whoever, without the consent of another person, achieves that the victim commits or suffers any sexual conduct, which is not covered by rape, shall be punished by imprisonment for a term not exceeding five years” for sexual assault under Article 171 of the Slovenian Criminal Code. And secondly, the amendment included a second paragraph which offers an identical definition of consent and was inserted within all

three articles of sexual offences,¹⁶² which will be closely examined in section 3.2.

The definitions of rape¹⁶³ and sexual assault¹⁶⁴ have both maintained the coercive concept in its subsequent paragraphs.¹⁶⁵ Those now represent a qualified version of an individual sexual offence, with a more severe punishment than the non-consensual misconduct from the article's first paragraph.¹⁶⁶

Furthermore, due to the amendment's liberal and politically oriented approach to gender identification, the spectrum of potential victims was broadened from the "person of the opposite or the same gender" to "another person", therefore, including individuals which identify as non-binary, etc

3.2. Challenging the definition of "consent"

The affirmative consent standard derives from the idea that individuals refuse to participate in sexual conduct, but do so, only if and when they freely express their will about it.¹⁶⁷ According to Herring, in the context of sexual misconduct, consent is required, because sexual activity is *prima facie* wrong,¹⁶⁸ as it involves potential use of force and risks to the physical integrity of the victim.¹⁶⁹ Under the Slovenian criminal legal theory a "free, informed and timely consistent" consent excludes the unlawfulness of the criminal offence.¹⁷⁰ However, the common law system speci-

¹⁶² The amended statutory definition of sexual abuse of a vulnerable individual pursuant to Article 172 will be explicitly analysed in section 3.2.

¹⁶³ Paragraph 3 of Article 170 of the Slovenian Criminal Code states: "Whoever coerces another person to have sexual intercourse or with it equated sexual activity, by using force or threat of direct attack on life or body."

¹⁶⁴ Paragraph 3 of Article 171 of the Slovenian Criminal Code states: "Whoever uses force or threatens another person with a direct attack on life or body and thus forces him to commit or suffer any sexual conduct referred to in the first paragraph of this Article."

¹⁶⁵ Paragraphs 3–6 of Article 170 and paragraphs 3–6 of Article 171 of the Slovenian Criminal Code.

¹⁶⁶ Imprisonment for a term between: one and ten years (Article 170) and six months and ten years (Article 171).

¹⁶⁷ T. Hörnle: *#MeToo...*, pp. 115–135.

¹⁶⁸ This reflects the so-called alternative view on the sexuality, contrary to the orthodox view, which claims that sexual penetration is not wrongful in itself and thus does not require justification.

¹⁶⁹ J. Herring: *Rape and the Definition of Consent*. "National Law School of India Review" 2014, no. 26(1), p. 63.

¹⁷⁰ L. Bavcon, A. Šelih, D. Korošec, M. Ambrož, K. Filipčič: *Kazensko pravo: Splošni del*. Ljubljana 2013, p 207.

fied that the consent to sexual conduct differs from the understanding of consent in other, non-sexual areas of law.¹⁷¹

Correspondingly, with the amendment of Articles 170, 171, and 172 of the Slovenian Criminal Code a new definition of consent, relating exclusively to sexual offences was introduced, as *inter alia*: “individuals consent if they agree to sexual intercourse or with it equated sexual conduct (or other sexual activities under Article 171 and 172 of the Slovenian Criminal Code) with their *externally perceptible, undoubtable and free will* and have the *capacity* to accept such decision” (emphasis added).¹⁷²

Nonetheless, being faced with consent defined in such a vague manner, unlike other obvious legal incriminations (such as regarding homicide under Article 115 of the Slovenian Criminal Code),¹⁷³ one cannot reduce the complexity of this consensual legal standard to the simple opposition between ‘yes’ and ‘no.’¹⁷⁴ Therefore, it will be left to the Slovenian courts to efficiently determine when a consent is externally perceptible, undoubtable, and free. Consequently, this drastic change in the Slovenian criminal theory and jurisprudence, problematically orients towards the “thin ice principle”, meaning that: “[...] those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they will fall in.”¹⁷⁵ Thus, until Slovenian courts establish an extensive jurisprudence on this consensual legal standard (which at the moment does not yet exist due to the amendment having been recently introduced), individuals will have to engage in sexual activities without being certain when their conduct will represent an offence and when it will not. And that conflicts with principles of legal certainty and predictability of legal norms, as criminal rules should provide legal certainty over flexible standards.

However, it is presumed that for the purpose of fulfilling the consensual legal standard, Slovenian courts will, at least to some extent, resort to existing foreign jurisprudences on that matter. Accordingly, by considering the latter, the following section will examine individual factors of “consent” – namely: being externally perceptible, undoubtable, and free, as well as having capacity to consent.

¹⁷¹ A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan, G.J. Virgo: *Simester and Sullivan's Criminal Law: Theory and Doctrine*. Oxford 2016, p. 47.

¹⁷² Paragraph 2 of Article 170, 171, and 172 of the Slovenian Criminal Code.

¹⁷³ Homicide in Article 115 of the Slovenian Criminal Code is defined as: “Who takes someone’s life, shall be punished by imprisonment for a term of five to fifteen years.”

¹⁷⁴ N.S. Helal: “*I Have the Freedom and Capacity to... Or Do I?*”: *Challenging the Definition of “Consent” under the Sexual Offences Act 2003*. Graduate working paper. London School of Economics and Political Science. London 2015, p. 3.

¹⁷⁵ J. Altena-Davidsen: *Skating on thin ice: A misleading metaphor*. Leidenlawblog, available at: <https://www.leidenlawblog.nl/articles/skating-on-thin-ice-a-misleading-metaphor> [accessed 16.11.2021].

3.2.1. The “externally perceptible” element of consent

The slogan of the affirmative consent model, “Only yes means yes”, deceptively gives the impression, that consent can only be expressed verbally.¹⁷⁶ This is however not the case, although the externally perceptible element should in fact be narrowly interpreted. Considering the English case law,¹⁷⁷ consent is a positive act, therefore if a victim does nothing (e.g., silence or non-resistance)¹⁷⁸ in response to the defendant’s proposal, there is no justification for sexual conduct, since no consent was given.¹⁷⁹ Accordingly, individuals cannot subtract their validly given consent on the basis of their non-expressed mental reservations, since only the victim’s externally perceptible consent is relevant.¹⁸⁰ However, this does not apply to consenting under pressure (see section 3.4.2.1d)).

The victim’s consent can be communicated with words, or otherwise (actions or gestures)¹⁸¹ affirmatively indicating willingness to sexual conduct, before it takes place.¹⁸² Although disunity exists regarding whether non-verbal clues reflect unwillingness or desire for sexuality.¹⁸³ Kramer has observed that from the viewpoint of a man who subscribes to the traditional model of female submission, the lack of resistance may reflect an affirmation.¹⁸⁴ Similarly, in the case of *Bromwich*, the defendant mistakenly understood victim’s raised eyebrows as a communication of willingness to engage in sexual activity.¹⁸⁵ Therefore, it is crucial to distinguish between communicated agreements which are valid consents, and those verbal or other signs which are legally irrelevant.

¹⁷⁶ S.F. Colb: *Making Sense of “Yes Means Yes”*. “Verdict Justia” 2014, available at: <https://verdict.justia.com/2014/10/29/making-sense-yes-means-yes> [accessed 18 November 2021].

¹⁷⁷ R (on the application of F) v The Director of Public Prosecutions and “A” [2013] EWHC 945 (Admin) and R. v. Larter and Castleton, 1995 Crim LR 75.

¹⁷⁸ Such absence is intended to emphasize the freedom of the victim’s agreement – element of the freedom of consent. D. Ormerod QC, K. Laird: *Smith and Hogan’s Criminal Law*. Oxford 2015, p. 821.

¹⁷⁹ J. Herring: *Rape and the Definition of Consent...*, p. 64.

¹⁸⁰ *Ibidem*, p. 72.

¹⁸¹ Consent can be expressed through safe words, which must be beforehand agreed-on between the parties.

¹⁸² Consent as considered under sexual offences, relates to willingness and not to desire.

¹⁸³ K. Ewen: *When “Yes” Really Means Yes: Have Great Sex with Affirmative Consent*. The Gottman Institute, available at: <https://www.gottman.com/blog/yes-really-means-yes-great-safe-sex-affirmative-consent/> [accessed 15.11.2021].

¹⁸⁴ K.M. Kramer: *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rape*. “Stanford Law Review” 1994, no. 47, p. 121.

¹⁸⁵ *Bromwich* [2012] EWCA Crim 673, para. 12.

Prior sexual conduct does not in itself imply permission for intercourse. Someone who engages in intense sexual foreplay should always retain the right to say “no” to intercourse.¹⁸⁶ It is argued that only unambiguous body language should suffice to signal affirmative consent.¹⁸⁷ Some scholars concur that: “A propositioned woman who disrobes, may not have given verbal consent, but has ‘affirmatively’ manifested her intentions, and that should suffice.”¹⁸⁸ What we face here is another legal ambiguity in fulfilling just one element of the consensual legal standard, therefore, other elements such as consent being undoubtable and free, have to be simultaneously considered, complicating the ruling.

3.2.2. The undoubtable element of consent

Universal fulfilment of the undoubtable consensual legal standard is shown to be very difficult, since it is undoubtable that sexual interactions are fluid and variable, therefore the barrier between non-verbal consenting and not consenting is blurred.¹⁸⁹ Schulhofer argues that individuals consent if they cooperate in ascending intimate foreplay.¹⁹⁰ Bryden, on the other hand, argues that a valid consent already derives from a person following someone in a private space and taking off their clothes.¹⁹¹ Furthermore, surveys have shown that 40% of students consider opening a condom package as an undoubtable consent.¹⁹² Accordingly, “consensual doubtlessness” as a legally indeterminate element, could be interpreted as: “the initiator of the sexual conduct undertaking reasonable measures to make sure the other person consented, having regard to all the circumstances, including steps the initiator undertook to ascertain consent.”¹⁹³

However, it is questionable which actions may indeed constitute incriminating sexual conduct (unexpected kiss, touch, etc.).¹⁹⁴ Therefore, consent is undoubtedly expressed when it is given specifically and separately for every individual conduct and right before the activity. However, we must not forget that such consent can be withdrawn at any time.

¹⁸⁶ K.M. Kramer: *Rule by Myth...*, p. 113.

¹⁸⁷ J. Witmer-Rich: *Unpacking Affirmative Consent...*, p. 53.

¹⁸⁸ D.P. Bryden: *Redefining Rape...*, pp. 317–479.

¹⁸⁹ American Law Institute, MPC: *Sexual assault and related offences...*, pp. 69–70.

¹⁹⁰ S.J. Schulhofer: *Unwanted Sex...*, pp. 272, 273.

¹⁹¹ D.P. Bryden: *Redefining Rape...*, p. 389.

¹⁹² Washington Post-Kaiser Family Foundation, Poll: *One in 5 women say they have been sexually assaulted in college 2015*, available at: <https://www.washingtonpost.com/graphics/local/sexual-assault-poll> [accessed 16.11.2021].

¹⁹³ The Crown Prosecution Service: *Rape and Sexual Offences...*

¹⁹⁴ B. Bajda et al.: »*Ne pomeni ne*«..., p. 51.

Therefore, in doubt whether a consent to sexual conduct is given, every individual must make sure if the other individual consents (the “stop-and-ask” principle).¹⁹⁵ Mere assumption that an individual consents to a certain sexual conduct does not suffice, since each new level of sexual activity requires consent.¹⁹⁶ Consent which decriminalizes sexual activity can only be given at the time in question of the sexual act.¹⁹⁷ Any other prior consent or even prior intercourse does not derogate from incriminating subsequent non-consensual intercourse.¹⁹⁸

Nonetheless, it is uncommon to obtain such undoubtable consent, since many initial consensual sexual interactions are non-verbal. Individuals often express their consent to sexual conduct by intentionally not resisting or by maintaining passive during the initiator’s pursuit of sexual interaction. Consequently, the offence was committed, however it will never be punished because no complaint will be brought.¹⁹⁹ Accordingly, this raises a very problematic gap between social practices and legal norms as it reflects the inefficiency of such a legislation, which sets out provisions that are not expected to be fully adhered to.²⁰⁰

3.2.3. Is affirmative consent shifting the burden of proof?

Pursuant to Slovenian Criminal Law, the defendant must act with at least eventual intent (*dolus eventualis*) to commit sexual misconduct and have reasonable belief that his actions are contrary to the victim’s objectively recognisable will (relevant *mens rea* element, employed in relation to the absence of consent).²⁰¹ Thus, contrary to the Croatian Criminal Code, mere negligence does not suffice for committing concerned sexual offences.²⁰²

¹⁹⁵ Ibidem, p. 52.

¹⁹⁶ That includes retaining one consent for kissing, then retaining new consent for foreplay, etc. R. Kramer-Bussell: *Beyond Yes or NO: Consent as sexual process*. In: *Yes Means Yes!: Visions of Female Sexual Power and a World without Rape* 2019, p. 44.

¹⁹⁷ Non-consent of the victim represents an aspect of the *actus reus* of sexual offences.

¹⁹⁸ D. Ormerod QC, K. Laird: *Smith and Hogan’s Criminal Law...*, p. 822.

¹⁹⁹ E. Klein: “Yes Means Yes” is a terrible law, and I completely support it, available at: <https://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it> [accessed 22.11.2021].

²⁰⁰ B. Bajda et al.: »Ne pomeni ne«..., p. 28.

²⁰¹ J. Hörnle: *The New German Law...*, pp. 22–23.

²⁰² Š. Vuletić, P. Šprem: *Materijalopravni aspekti kaznenog dijela silovanja u hrvatskoj sudskoj praksi*. “Policija i sigurnost” 2019, 28, pp. 130–155.

Under the English criminal law, the defendant will likely be acquitted if he mistakenly²⁰³ and reasonably believes that the victim was consenting.²⁰⁴ Thus, regarding all circumstances (for instance the steps undertaken by the defendant to ascertain the other individual’s consent), corroborated by sufficient evidence, the court must withdraw from subjective, stereotypical beliefs based on which defendant verified his assumption of consent.²⁰⁵ Furthermore, as determined in the *R v B*,²⁰⁶ the defendant’s (delusional) belief that a victim was consenting cannot be considered a reasonable one when the defendant is suffering from a psychotic illness or a personality disorder. Another moot point on this matter is the consideration of “reasonable belief” when the defendant intentionally has intercourse but mistakes the identity of the sexual partner. Accordingly, in *Whitta*,²⁰⁷ the consideration in such cases, lies on whether a reasonable sober (not intoxicated) person would realise he is penetrating an individual different from the one whose consent he thought he had.

Due to the difficulty of proving that consent was in fact granted, some cynically argue that regardless of the consensual informality, the defendant will (for his own protection) have to obtain a contractual consent or one recorded in the mobile app.²⁰⁸ Such exaggerated course of action could however successfully protect the defendant against potential unfounded allegations.

3.3. Capacity to consent to sexual activity within the consensual definition

Consideration of the existence or nonexistence of victim’s capacity to consent to sexual activity,²⁰⁹ is fundamental in establishing whether the victim’s consent can be validly given (resulting in impunity of the sexual conduct), and consequently, distinguishing the committed offence.

²⁰³ The subjective test of mistake – considering the facts as the defendant believed them, however unreasonable that belief might have been, which was used in the *DPP v Morgan* [1975] UKHL 3, no longer applies to sexual offences.

²⁰⁴ J. Horder: *Ashworth’s Principles of Criminal law*. Oxford 2019, p. 349.

²⁰⁵ *Ibidem*, pp. 365, 366.

²⁰⁶ *R v B* [2013] EWCA Crim 3.

²⁰⁷ Attorney General’s Reference No 79 of 2006 (*Whitta*) [2007] 1 Cr App R (S) 752.

²⁰⁸ S.J. Schulhofer: *Reforming the Law of Rape...*, p. 350.

²⁰⁹ Under the principle of autonomy individuals should be allowed to make decisions for themselves and that those should be respected by others (unless the decision involves harming another). J. Herring: *Rape and the Definition of Consent...*, p. 66. Accordingly, nothing in the Slovenian legislation allows a decision regarding consent to sexual conduct to be taken on behalf of anyone.

Within the statutory definition of sexual offences the consensual capacity is only regarded as the victim's "ability to make a choice of whether agreeing to sexual intercourse."²¹⁰ Further on, a person's capacity is within the Slovenian Criminal Code only addressed in Article 29, as *inter alia*: "ability to understand their own actions and having control over their conduct," which complies with the theoretical view on the consensual capacity, which focuses on the victim's ability to "understand the meaning and implications of their decision."²¹¹ This involves the consideration of objective facts, more precisely psychological rather than physical elements. Pursuant to the so-called functional common law test,²¹² used to assess the capacity to consent to sexual activity, the person must have the ability to "(i) understand relevant information; (ii) retain that information; (iii) use that information in making a decision; and (iv) to communicate that decision."²¹³ Specifically, in *D Borough Council v. B.*, and other cases,²¹⁴ it was held that the capacity to consent to sexual relations is act-specific, and not person- or situation-specific. Furthermore, the consensual capacity requires the understanding and awareness of the (a) the mechanics of the act, (b) existence of health risks involved, for instance sexually transmissible infections, and (c) that sex between man and woman may result in pregnancy.²¹⁵ Consequently, valid consent cannot be given if the individual is incapable of understanding the nature of the act, to which the consent is apparently given.²¹⁶

3.3.1. Vulnerable individual's incapacity to consent to sexual conduct

It is established that the necessity of assessing the victim's consensual ability (by an expert witness), lies within the degree and/or nature of the individual's impairment.²¹⁷ This prevails in examining the consensual

²¹⁰ Paragraph 2 of Article 170, 171, 172 of the Slovenian Criminal Code.

²¹¹ Law Reform Commission: Report Sexual Offences and Capacity to Consent 2013, available at: https://www.lawreform.ie/_fileupload/Reports/r109.pdf [accessed 18.11.2021], p. 52.

²¹² Also adopted in several other jurisdictions. For instance, the Mental Capacity Act 2005 (Ireland), section 17 of the Sexual Offences (Scotland) Act 2009 and section 138 of the New Zealand Crimes Amendment Act 2005.

²¹³ Law Reform Commission: Report Sexual Offences and Capacity to Consent 2013..., p. 52.

²¹⁴ *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam) [2006] 2 FLR 968 and *Local Authority X v MM and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443.

²¹⁵ *D Borough Council v B* [2011] EWHC 101 (Fam) [2012] Fam 36, para. 42

²¹⁶ *R v Fletcher* (1886) LR 1 CCR 39.

²¹⁷ *A Local Authority v AK* [2012] EWHC B29 (COP), para. 19.

capacity of “vulnerable persons” under Article 172 of the Slovenian Criminal Code. Individuals with disabilities have long been viewed as “vulnerable” who must be protected from sexual conduct and who cannot be trusted to protect themselves, since they cannot validly shape or express their will (at their elementary level).²¹⁸ This indisputably regards children younger than 15 years of age.²¹⁹

Nonetheless, Article 12 of the Convention on the Rights of Persons with Disabilities,²²⁰ recognises vulnerable individual’s sexual consensual capacity as an acknowledgement of that individual’s “legal agency” and their “right to legal capacity on an equal basis.” However, if individuals lack the potential to understand and agree to sexual acts, they are considered incapable to consent. Therefore, their legal capacity and legal agency as such are not recognised, at least during the occurrence of sexual acts.²²¹ Accordingly, in the case of *H*,²²² due to victim’s mental state, she was deemed as lacking consensual capacity over sexual actions and due to that, restrictions were placed to prevent her from engaging in sexual relations.

Sexual abuse of a vulnerable individual is defined in Article 172 of the Slovenian Criminal Code as: “Whoever has sexual intercourse or commits any other sexual act or conduct with another person without their consent, by abusing their mental illness, temporary mental disorder or serious mental underdevelopment (retardation), due to which they are unable to give consent (weak person), shall be punished by imprisonment for a term of one to eight years.”²²³ Following: “Whoever in the circumstances of paragraph 1, otherwise affects the sexual integrity of a weak person, shall be punished by imprisonment for a term not exceeding five years.”²²⁴ Consent is universally defined under paragraph 2, as already analysed in Chapter 3.2.²²⁵ According to the Slovenian Criminal Code Commentary, Article 172 is conceptually assuming inability to consent or reject sexual conduct. It regards “vulnerable persons with obvious inability to control their reason and will, including those whose possible

²¹⁸ M. McCarthy: *Sexuality and Women with Learning Disabilities*. London, 1999; A. Arstein-Kerslake, E. Flynn: *Legislating Consent: Creating an Empowering Definition of Consent to Sex That is Inclusive of People With Cognitive Disabilities*. “Social & Legal Studies” 2015, no. 1–24, p. 3.

²¹⁹ Article 173 of the Slovenian Criminal Code.

²²⁰ United Nations: “Convention on the Rights of Persons with Disabilities.” Treaty Series 2515, December 2006.

²²¹ A. Arstein-Kerslake, E. Flynn: *Legislating Consent...*, p. 4.

²²² *Local Authority v H* [2012] EWHC 49 (COP).

²²³ Paragraph 1 of Article 172 of the Slovenian Criminal Code.

²²⁴ Paragraph 3 of Article 172 of the Slovenian Criminal Code.

²²⁵ The amended definition merely replaced the element of coercion with consent.

dispositions with their own sexual integrity do not reflect their sexual autonomy and self-determination.”²²⁶ Consequently, the victim’s consent is already neutralised if the defendant satisfies the element of “abuse of the victim’s vulnerable state”, therefore any sexual act will most likely be criminalised.²²⁷

In Jenkins,²²⁸ a care worker was acquitted of the charge of raping a woman with severe learning disabilities who had consented (she “fancied” the care worker), however did not understand the consequences of sexual intercourse, which could result in pregnancy. Nonetheless, the relevant proposition in the case in question would be that the autonomy of a person with mental disability in engaging in sexual activity could be recognised with impunity in cases of apparently consensual conduct of those who lack a sufficient understanding of the consequences in order to have consensual capacity in non-exploitative circumstances or where only one party lacks capacity, and this occurs in non-exploitative circumstances.²²⁹

The Slovenian amended definition is consequently unclear about whether a vulnerable person’s consent to any sexual act with another non-vulnerable person is *per se* invalid, due to their mental disability (mental illness, temporary mental disorder, or severe mental underdevelopment). Neither is it clear if the victims who are considered as vulnerable individual’s will be individually subjected to the *functional common law test*.

3.3.2 Intoxicated consent

Particularly difficult cases concern victim’s consensual incapacity due to intoxication. The relevance of victim’s intoxicated state varies whether it has resulted in “unconsciousness, involuntary stupefaction or lack of capacity to consent.”²³⁰

Not particularly wanting sex and being unable to show reluctance due to intoxication, concerns two very different legal situations.²³¹ Therefore

²²⁶ D. Korošec, K. Filipič, S. Zdolšek: *Veliki znanstveni komentar posebnega dela Kazenskega zakonika (KZ-1)*, 1. Knjiga. Ljubljana 2018, p. 1000.

²²⁷ G.H. Murphy: *Capacity to consent to sexual relationships in adults with learning disabilities*. “Journal of Family Planning and Reproductive Health Care” 2003, no. 29(3), pp. 148–149.

²²⁸ R v Jenkins [2000] English Central Criminal Court.

²²⁹ G.H. Murphy: *Capacity to consent to sexual relationships in adults with learning disabilities...*, pp. 148–149.

²³⁰ J. Horder: *Ashworth’s Principles of Criminal law...*, p. 367.

²³¹ A. Clough: *Finding the Balance: Intoxication and Consent*. “Liverpool Law Review” 2019, no. 40, pp. 49–64, 52.

the specific facts of each case must be examined (ideally by an expert witness) in deciding whether consent is deemed to have been given, alongside the mental states of both parties. That includes the influence that the defendant's intoxication had on him holding a reasonable belief regarding the victim's consent.²³² Simply being (heavily) intoxicated does not remove one's ability to consent, nor does mere consciousness qualify for the capacity to consent. The intoxication threshold therefore, must result in an individual losing its capacity to consent due to intoxication.²³³ However, if the defendant causes victim's involuntary intoxication which results in her doing something only due to the substance's disinhibiting effects, lack of consent will be presumed.²³⁴

3.3.2.1 Unconsciousness as consensual incapacity

The English jurisprudence has established that the victim's intoxication resulting in unconsciousness generally renders their consensual capacity, resulting in incapacitation.²³⁵ By way of exception, consent is considered as valid if it has been undoubtedly intimated in advance, as in *Pike*²³⁶ where a prostitute has agreed to be rendered unconscious to gratify the desire of the defendant – her client. The incapacity to consent is presumed when the victim is prevented from resisting due to the intoxicating substance, and the defendant is (or should have been) aware of the victim's condition.²³⁷ Similarly, victim's physical disability in the state of sleep or other unconsciousness, would normally constitute consensual incapacity, therefore the defendant was perpetrating a “very serious wrong”²³⁸. The Croatian case law²³⁹ treats sexual assault of sleeping victims as the clearest example of the crime of sexual intercourse without consent.²⁴⁰ A similar decision was made by the Municipal Court in Split when the perpetrator was convicted of a crime without consent after he entered the closed ship's cabin while the victim was sleeping and penetrated her genitals

²³² R v Bree [2007] EWCA Crim 256, [2008] QB 131 para. 34.

²³³ R v Bree [2007] EWCA Crim 256, [2008] QB 131 para. 34.

²³⁴ A.P. Simester et al.: *Simester and Sullivan's Criminal Law...*, p. 481.

²³⁵ Ibidem, p. 480. And R. v. Malone, 1998, 2Cr App R 44.

²³⁶ R v Pike 1961 Crim LR 114 and 547 (CA).

²³⁷ Provision of 8 S261(a)(3) California Penal Code 2005 in A. Clough: *Finding the Balance...*, p. 52.

²³⁸ Larter v. Castleton [1995] Crim LR 163.

²³⁹ KO 1628/2013, 16.8.2013.

²⁴⁰ Š. Vuletić, P. Šprem: *Materijalopravni aspekti kaznenog dijela silovanja u hrvatskoj sudski praksi...*, p. 131.

with his tongue. He continued with the act until the victim woke up and chased him away screaming.²⁴¹

Another troubling result of such affirmative consent model is that even in cases of a well-established romantic relationship, if one of the partners is severely intoxicated to the point of unconsciousness and the other individual proceeds with intercourse (without this being an established practice between the individuals), he has committed an offence.²⁴²

3.3.2.2. Challenging the consensual incapacity caused by voluntary intoxications

Studies have shown that alcohol consumption can increase the willingness to engage in sexual activity in both men and women, especially with a new potential partner.²⁴³ However, the main question in intoxication instances is (by considering all the relevant facts in a specific case), whether the victim had the consensual capacity,²⁴⁴ or has it evaporated well before the victim became unconscious. This is nonetheless fact-specific and depends on the actual state of mind,²⁴⁵ and other factors such as the metabolic rate of the concerned individuals.²⁴⁶ For instance in *Gardner*, the victim's severe intoxication, resulted in her not even recollecting defendant's sexual conduct, therefore the court decided on her consensual inability.²⁴⁷ However, evidence of lacking recollection of events cannot in and of itself be determinative of the consensual capacity. Moreover, pursuant to *Bree*,²⁴⁸ absence of victim's physical resistance is

²⁴¹ K 677/2014, 14.7.2014.

²⁴² J. Herring: *Rape and the Definition of Consent...*, p. 74.

²⁴³ J. Norris, S. Stoner, D. Hessler, T. Zawacki, W. George, D. Morrison, K. Davis: *Cognitive Mediation of Alcohol's Effects on Women's In-the-Moment Sexual Decision Making*. "Health Psychology" 2009, no. 20, p. 26.

²⁴⁴ R v Seedy Tamedou EWCA Crim [2013] 954.

²⁴⁵ R v Bree [2007] EWCA Crim 256, [2008] QB 131 para. 34.

²⁴⁶ Some argue that a victim is capable of consenting legally as long as she is capable of walking, talking or vomiting. The level of intoxication required in order to negate capacity has been described as unbelievably high.

²⁴⁷ R. v. Gardner, 2005 EWCA 1399.

²⁴⁸ The defendant (B) contended that he had reasonably believed that the victim (C) was consenting as she had undressed herself, appeared willing and been conscious throughout the event. He argued that she even moaned, as he understood it, with pleasure during the sexual intercourse. C did have the capacity to consent, and had made it as clear as possible, given her inebriated state, that she did not consent to sexual intercourse with B. The Appellate Court however acquitted him of the charges.

not to be equated with consent²⁴⁹ and it is crucial to consider whether she in the state that she was, understood her situation and was capable of making up her mind.²⁵⁰ If the victim nevertheless remains capable of choosing whether to have intercourse, and agrees to do so, there is no misconduct. Similarly, in *Dougal* case²⁵¹ the victim’s inability to remember whether she consented or not, resulted in the defendant’s acquittal. When willingly engaging in sexual activity that would have been refused had the victim been sober, the consent is considered as valid, since an intoxicated consent is still a consent.²⁵² Further on, in cases where the defendant knew of the victim’s intoxication, at the time of their sexual conduct, his knowledge causes an evidential presumption that the victim’s consent was not given.²⁵³ However, where it appears that there was a misunderstanding between the parties regarding the consent, the alleged victim’s moral behaviour will affect the perception on the matter.²⁵⁴

The Slovenian consensual definition relating to sexual conduct does not define the consensual incapacity under intoxication, nor does it differentiate between cases of voluntary intoxication, involuntary intoxication, and unconsciousness. This results in infinite circumstances of human behaviour which are subjected only to a changeable and unpredictable legal test within future jurisprudence. Once again, such drastically new affirmative consent model raises great concerns of legal certainty and would require further statutory explanation. Nonetheless, this sudden elevation from the coercive concept of sexual offences might still result in some judges to presume consent in the absence of positive dissent.²⁵⁵

3.3.2.3. Effect of intoxication on defendant’s criminal liability

Pursuant to the *Heard* case,²⁵⁶ the defendant could not exculpate himself by relying on his intoxication, since the sexual assault represented a “basic intent offence”, which could only be committed with the

²⁴⁹ P.N.S. Rumney, R.A. Fenton: *Intoxicated Consent in Rape: Bree and Juror Decision-Making*. “The Modern Law Review” 2008, no. 71(2), pp. 279–290.

²⁵⁰ R v Lang (1976) 62 CrAppR 50.

²⁵¹ R v Dougal [2005] CC

²⁵² R v Bree [2007] EWCA Crim 256, [2008] QB 131 para. 34.

²⁵³ A. Martin, T. Storey: *Unlocking Criminal Law*. Routledge 2013, p. 398.

²⁵⁴ A. Clough: *Finding the Balance...*, p. 55.

²⁵⁵ A. Clough: *Finding the Balance...*, p. 56.

²⁵⁶ R v Heard [2007] EWCA Crim 125. The defendant was detained by the police while intoxicated. They took him outside where he danced suggestively and took his penis out and rubbed it on one of the officer’s thighs. The defendant could not recall the incident. He was convicted of sexual assault.

defendant's intention to act. Similarly, pursuant to the *Grewal* case,²⁵⁷ defendant's intoxication can only be relevant regarding "his belief in whether the victim was consenting" but it cannot be relevant whether that belief was reasonable (one must look at the matter as if he was sober). Accordingly, voluntary intoxication does not, as such, negate *mens rea* for the offence and nor does it subtract criminal liability (irrespective of the fact that the defendant would not have acted this way when sober or having no recollection of his actions).²⁵⁸

However, apart from intoxication, the relevance of mental disorder or medical condition to the reasonableness of defendant's belief in the victim's consent depends upon an objective test of psychiatric evidence.²⁵⁹ For instance in the 2013 case *R v B*,²⁶⁰ defendant's delusional psychotic illness did not affect his ability to understand whether the victim was consenting.

3.4. Freedom to consent to sexual activity within the consensual definition

According to Smith and Hogan, the term *freedom* is considered too vague, to define the element as crucial as consent, as it is heavily context-dependent (economic freedom, existential freedom,²⁶¹ religious freedom,²⁶² etc.).²⁶³ It is argued that such factual or attitudinal definition regards what the victim felt, rather than what she expressed.²⁶⁴ Accordingly, doubt arises over the correlation of "consent" and "submission", for instance, a victim reluctantly engaging in sexual intercourse, due to her fiancé's threat to break off the engagement.²⁶⁵ Pursuant to *Robinson* case,²⁶⁶ the division between latter, is a matter for the jury applying its common sense, how-

²⁵⁷ *R v Grewal* [2010] EWCA Crim 2448, para. 30.

²⁵⁸ J. Horder: *Ashworth's Principles of Criminal law...*, p. 367.

²⁵⁹ N. Wortley: *Reasonable Belief in Consent under the Sexual Offences Act 2003*. In: J. Clough: *The Role of Subjectivity in Determining 'Good Reason' to Possess a Bladed Article*. "The Journal of Criminal Law" 2013, no. 77, pp. 184–188.

²⁶⁰ *R v B* [2013] EWCA Crim 3.

²⁶¹ Out of despair contesting to sexual intercourse to gain 3.25£ to buy food. *R v Kirk* [2008 EWCA Crim 434].

²⁶² Individual of a strict religious institution agrees to sexual activity with an elder, whom she has in all other respects been thought to never question.

²⁶³ D. Ormerod QC, K. Laird: *Smith and Hogan's Criminal Law...*, p. 822.

²⁶⁴ J. Horder: *Ashworth's Principles of Criminal law...*, p. 362.

²⁶⁵ D. Ormerod QC, K. Laird: *Smith and Hogan's Criminal Law...*, p. 823.

²⁶⁶ *R v Robinson* [2011] EWCA Crim 916.

ever within the Slovenian judiciary, the determination would be left to the judge ruling in each particular case.

The consensual freedom broadens the perception of the challenged definition, questioning whether the victim’s consensual agreement concerns simple assent to an act, or entails a full consensus, based on knowledge of the essential details.²⁶⁷ Similarly, one questions whether the range of “consensual choice” extends to the informed consent which results in consensual invalidity, if the defendant conceals a fact material to their sexual encounter.²⁶⁸ Consequently, the central concept of consensual freedom, resembles the vagueness and contestability of the statutory definition, since the “freedom of decision-making may be greater or less, depending on the impact of any deception, threats or other perceived pressures, and the question is what degree of impairment should be taken to mean that any apparent consent was not free.”²⁶⁹ However, with Slovenia not having an unequivocally established stance on interpreting the new definition, the following sections will consist of three main views on consensual freedom: firstly, the extremely restrictive approach, secondly, the intermediate approach, and lastly, the Herring’s “extreme” theory on consent.

3.4.1. The extremely restrictive approach to consensual freedom

The extremely restrictive approach is based exclusively on the individual’s expressed will, without considering deception, coercion or any other factors that could influence the validity of the given consent. The affirmative consent model derives from the consent given *in context*, to the point that from the situation itself, the defendant could have concluded whether the victim consented to the sexual act or not.²⁷⁰ The defendant relies on the victim’s externally perceptible and undoubtable consent, expressed either verbally, nonverbally or as a qualified consent.

However, the extremely restrictive approach seems to be too narrowly focused and therefore not used in the jurisprudence, as pursuant to the *Malone*²⁷¹ and *Hysa* case,²⁷² “There is no requirement that the absence of consent has to be demonstrated or communicated to the defendant for

²⁶⁷ D. Ormerod QC, K. Laird: *Smith and Hogan’s Criminal Law...*, p. 823.

²⁶⁸ This doctrine of informed consent was declined by the English Court of Appeal in the *R v E.B.* [2006] EWCA Crim 2945.

²⁶⁹ J. Horder: *Ashworth’s Principles of Criminal law...*, p. 363.

²⁷⁰ E. Murphy: *No Means No: A Critical Examination of the Effectiveness of the “Yes Means Yes” Law*. “Thomas Jefferson Law Review” 2017, 39(2), p. 106.

²⁷¹ *R v Malone* [1998] 2 Cr App R 447.

²⁷² *R v Hysa* [2007] EWCA Crim 2056, para 16.

the *actus reus* of rape to exist.” It is argued that the concept of consensual agreement should be interpreted as emphasising the victims’ perception of their choice, with freedom having a crucial role.²⁷³

3.4.2. The intermediate approach on consensual freedom

The Slovenian Criminal Code in its affirmative consent definition, *inter alia*, only conditions the consent to be expressed “freely”, without it regarding any circumstances (e.g. deceit or mistake) through which it would be conclusively presumed that the victim did not validly consent to the relevant act (and that the defendant did not believe that the victim consented).²⁷⁴ Once again, such “drastic vague regulation” threatens the legal certainty of both the defendant and the victim as it will be left to the Slovenian jurisprudence to define when a circumstance has a legally relevant effect on the consensual freedom. For that reason, the following (sub)sections will examine the existing theories on the influence of circumstances which vitiate victim’s consensual freedom.

3.4.2.1. Influence of deception, mistake, and pressure on the victim’s consensual freedom

Difficulties concerning consensual freedom arise from the victim’s agreement to sexual activity obtained by the defendant’s deception regarding either nature or purpose of the activity as well as the defendant’s intentional impersonation of someone known (personality) to the victim.²⁷⁵ Such circumstances are in the English Criminal Law concerned as “conclusive presumptions,”²⁷⁶ in which the absence of consent will be conclusively and indisputably presumed, if the prosecution establishes the relevant factual basis.²⁷⁷

²⁷³ J. Horder: *Ashworth’s Principles of Criminal law...*, p. 363.

²⁷⁴ Such instances and their legal regulation are expressively defined in Section 76 of the English Sexual Offences Act 2003.

²⁷⁵ Section 76 of the English Sexual Offences Act 2003.

²⁷⁶ However, it seems that the rebuttable and conclusive presumptions do not apply to attempts and conspiracy to commit sex offences. J. Rodwell: *Problems with the Sexual offences Act 2003, [2005], Crim LR 290.*

²⁷⁷ J. Horder: *Ashworth’s Principles of Criminal law...*, p. 349.

a) Influence of deception regarding the nature of the sexual activity

Although deception regarding the nature of the activity generally negates the victim’s consensual freedom, implicit in the concept is the distinction between the essence of the act and its non-essential attributes.²⁷⁸ Deception as to the essential attribute of the nature of the act disregards the victim’s freedom of consent. That was in the *Williams* case,²⁷⁹ where the victim consented due to defendant representing the (sexual) act as a medical procedure of improving her singing voice, however her not knowing the conduct would result in defendant intentionally penetrating her with his penis.²⁸⁰ Similarly due to defendant’s deceitful betrayal as a representative for a breast cancer survey, as he demonstrated how to carry out a self-examination in the *Tabassum* case,²⁸¹ the nature of the act consented to, a breast examination, was so fundamentally different that it rendered any apparent consent entirely inoperative.

Contrarily, if the essence of the act is not dubious to the victim, her consent will not be undermined when influenced by “non-essential attributes” regarding the nature of the act.²⁸² They do not vitiate the victim’s consent and are for instance the non-disclosure of sexually transmitted diseases²⁸³ as in *R v EB*,²⁸⁴ *Dica*,²⁸⁵ and *Konzani*,²⁸⁶ as well as the defendant’s abuse of his suicidal threats to deceive the victim into intercourse as in *Jheeta*²⁸⁷ (consensual freedom was in the present case invalidated by the defendant’s pressure).²⁸⁸

²⁷⁸ D. Ormerod QC, K. Laird: *Smith and Hogan’s Criminal Law...*, p. 838.

²⁷⁹ *R v Williams* [1923] 1 KB 340 CA.

²⁸⁰ A.P. Simester et al.: *Simester and Sullivan’s Criminal Law...*, p. 474.

²⁸¹ *R v Tabassum* [2000] 2 Cr App R 328.

²⁸² A.P. Simester et al.: *Simester and Sullivan’s Criminal Law...*, p. 474.

²⁸³ However, the victim did not consent to the risk of infection, therefore, if the infection had occurred, the defendant would have committed an offence of transmitting infectious diseases under Article 177 of the Slovenian Criminal Code

²⁸⁴ *R v EB* [2006] EWCA Crim 2945.

²⁸⁵ *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257.

²⁸⁶ *R v Konzani* (Feston) [2005] EWCA Crim 706, [2005] 2Cr App R 14.

²⁸⁷ *R v Jheeta* [2007] EWCA Crim 1699, [2008] 1 WLR 2582.

²⁸⁸ In the case of *Jheeta*, soon after the defendant and the victim started to have regular sexual relations, the former started sending text messages to the victim threatening to kill or kidnap her. The victim did not know who was sending her the messages, and the accused offered to go to the police station on her behalf and file a report. When the victim wanted to end the relationship with the accused, she started receiving messages from the “police” (in fact they were messages from the accused) that the accused would kill himself if she did not have sex with him and that otherwise she will be punished. The victim received about fifty such messages in four years and had sexual intercourse with the

Similarly, the non-use of a condom as such, does not alter the nature of the sexual activity and consequently, does not vitiate victim's consent.²⁸⁹ Nonetheless, had the victim consented explicitly on a certain condition (e.g. the use of condom in *Assange*,²⁹⁰ ejaculation outside of her vagina in *R (F) v DPP*²⁹¹) and the defendant deliberately breached this condition, the consensual freedom would have been invalidated.²⁹² However, accordingly to new case law *Lawrance*,²⁹³ ostensible consent can be vitiated by deceptions which are closely connected to the nature or purpose of sexual intercourse. The close connection must be interpreted narrowly. Accordingly, lying about using a condom represents a sufficiently close connection, due to its physical change of the nature of penetration. Contrarily, lying about fertility does not vitiate the consent, as the deceit is not sufficiently closely related to the performance of the sexual act.²⁹⁴

However, doubts over the consensual validity are raised regarding reverse instances of such deception when the victim specifically requests the non-use of condom, but the defendant covertly uses it, unbeknownst to the victim, or where a defendant uses a thinner, "riskier" condom than the victim requested. Legal scholars claim that dealing with such instances should be done by relying on the general definition of consent.²⁹⁵

Moreover, defendant's deception regarding their gender does not as such (without very careful consideration) alter the nature of the act, but according to the *McNally* case²⁹⁶ if the deception is active, it vitiates the

defendant whenever she received the message. Eventually, the victim discovered the truth, and the accused was convicted of the crime of rape under 76(1)(a) SOA (2003). The Court of Appeal ruled otherwise, namely it based its decision on Article 74 2003 SOA since the crime of rape was committed as there were threats that the perpetrator would have killed himself and that the victim would be punished.

²⁸⁹ A.P. Simester et al.: *Simester and Sullivan's Criminal Law...*, p. 475.

²⁹⁰ Julian Assange v Swedish Prosecution Authority [2011] EWHC 2849.

²⁹¹ R (on the application of F) v The Director of Public Prosecutions and "A" [2013] EWHC 945 (Admin).

²⁹² A.P. Simester et al.: *Simester and Sullivan's Criminal Law...*, pp. 474, 484.

²⁹³ R v Jason Lawrance [2020] EWCA Crim 971.

²⁹⁴ R v Jason Lawrance [2020] EWCA Crim 971, para. 20, 36, 37, 43.

²⁹⁵ J. Horder: *Ashworth's Principles of Criminal law...*, p. 356.

²⁹⁶ Justine McNally [2013] EWCA Crim 1051, [2014] QB 593, para. 23–27.

The facts of this case are undeniably unusual. The parties engaged in a number of sexual activities without the woman knowing that the defendant was a transgender male (anatomically still a woman), secretly using a strap-on dildo which resembled a penis and penetrated the victim without her knowledge of this tool. The victim argued that had she been aware of that fact, she would not have consented, and therefore, she did not have the freedom to make an adequate choice to engage in the sexual act with a man or a woman.

consent even without the victim’s expressed precondition (it is argued that this also applies to actively lying about HIV).²⁹⁷

Nonetheless, the English Court of Appeal undertook a “common sense” approach regarding deception (e.g. defendant’s wealth cannot vitiate victim’s consent), however it is difficult to draw a clear line regarding which deception will have the consent-invalidating effect. Hence, the courts will be confined into case-by-case decisions regarding deception or mistake vitiating consensual freedom. Undoubtedly, this is a highly unsatisfactory position for the law on sexual offences.

b) Influence of deception regarding the purpose of the sexual activity

Deception regarding the purpose of the activity is often indistinguishable from a deception about its nature. For instance in the *Linekar* case²⁹⁸ prostitute’s consent to sexual intercourse was not vitiated by the defendant’s deception about the payment for her services, as the court ruled that she was undeceived about either the nature (she understood that she consented to sexual intercourse) or the purpose of the act (to achieve sexual gratification).²⁹⁹ Contrary, in the *Devonald* case,³⁰⁰ defendant’s deceit over his identity vitiated the victim’s consent both regarding the nature and purpose of the sexual act.³⁰¹ However, the vitiating effect of the judgement only applies in other cases, if the victim has entirely appreciated the defendant’s purpose. The purpose in *Devonald* was humiliation of the victim,³⁰² and in *Bingham*³⁰³ obtaining sexual gratification for the defendant.³⁰⁴

²⁹⁷ However, some argue that when a victim thinks that the defendant is a male and is in fact a female, consent is not necessarily vitiated, even if the victim would not have engaged in the relevant activity had she known the truth. A.P. Simester et al.: *Simester and Sullivan’s Criminal Law...*, p. 485.

²⁹⁸ R v Linekar [1995] Crim LR 320.

²⁹⁹ J. Horder: *Ashworth’s Principles of Criminal law...*, p. 355.

³⁰⁰ R v Devonald [2008] EWCA Crim 527.

³⁰¹ The victim (a 16-year-old boy), who had jilted defendant’s daughter, was induced into masturbating on a web camera with the defendant’s intention to use that act to humiliate him.

³⁰² Which was not obtained.

³⁰³ R v Bingham [2013] EWCA Crim 823. The defendant extorted the victim with her naked photos into her engaging in sexual acts through a webcam.

³⁰⁴ The second purpose which was not obtained was the “victim’s standing up for herself” regarding the extortion over her naked photos.

A legally relevant deceit regarding the purpose of the sexual activity in the *Piper* case,³⁰⁵ applied to the instance where the victim consented to being measured by the defendant, allegedly to determine her modelling potential for posing in a bikini, whereas the true purpose of the act was the defendant's sexual gratification. Further on, deceitful ulterior purpose reflects in *Melliti*³⁰⁶ where the victim was deceived into intercourse by obtaining a lucrative modelling contract and the *Papadimitropoulos* case,³⁰⁷ where the defendant deceived the victim into having sexual intercourse in order to consummate their (false) marriage.³⁰⁸

Conclusively, for the consensual vitiating effect the deception over defendant's purpose of the act, must be comprehensive,³⁰⁹ and must be the only explanation for the victim's participation in the sexual conduct. Problematically enough, a fundamental concern is being raised over sexual offences becoming over-inclusive.³¹⁰

c) Influence of deception regarding the identity

The conclusive presumption of non-consent arises in instances when the defendant intentionally impersonates someone known to the victim, to obtain consent. Such personal acquaintance exculpates someone who exploits strong resemblance to certain somebody or has established a personal relationship, even with persons stretching beyond physical cognition (fake online accounts in *Devonald* and *Bingham*) and this personalisation induces consent.³¹¹ That was confirmed in the *Whitta* case,³¹² where the court determined that mistake as to the identity can vitiate the consensual freedom.

³⁰⁵ R v Piper 2007 EWCA Crim 2131.

³⁰⁶ R v Melliti [2001] EWCA Crim LR 1563.

³⁰⁷ Papadimitropoulos v The Queen [1957] HCA 74–98 CLR 249.

³⁰⁸ Even a man who deceives a woman into thinking that he loves her and suggests sexual intercourse as a way of expressing their love is deceiving her as to the purpose of the act.

³⁰⁹ A.P. Simester et al.: *Simester and Sullivan's Criminal Law...*, pp. 476, 477.

³¹⁰ J. Horder: *Ashworth's Principles of Criminal law...*, p. 349.

³¹¹ A.P. Simester et al.: *Simester and Sullivan's Criminal Law...*, p. 477.

³¹² Attorney General's Reference No 79 of 2006 (Whitta) [2007] 1 Cr App R (S) 752.

d) Influence of coercion and pressure

The Slovenian criminal tradition has (before the amendment) sturdily followed the coercive concept³¹³ of sexual offences. From the Slovenian extensive jurisprudence on that matter, it can be concluded that all the coercive elements (e.g. use of force or threats towards the victim herself/himself, her relatives, her things/matters of great importance), vitiate the consensual freedom.

The same vitiating effect can be caused by circumstantial pressure. Consideration must rely on case-by-case basis, for instance, a homeless woman, in need of shelter starts working in a brothel and as long as she possesses consensual freedom and capacity to engage in sexual activity, the brothel keeper will not be *per se* accused of sexual misconduct.³¹⁴ The already mentioned *Jheeta* case, represents such a pressure-vitiated consent.³¹⁵

Other instances of pressured consent are incriminated as “Violations of sexual integrity through abuse of position” under Article 174 of the Slovenian Criminal Code. It concerns victims of sexual misconduct who regardless of their apparent willingness harbour inward revulsion due to the dominant position (e.g. teacher, guardian) of the defendant, however the victims lack freedom to consent in legal terms. In the *W* case,³¹⁶ the court defined “reluctant consent” as the victim’s submission to a demand, which they feel unable to resist, but without lacking capacity or freedom to make a choice.

The Slovenian Criminal Code does not provide an exhaustive list of instances leading to sexual misconduct that would vitiate the victim’s consent, neither does the English SOA and other countries with the affirmative consent model. The legal standards are to be developed through jurisprudence by determining the legal relevance of instances which influence the consensual freedom. This once again proves the vagueness of this freedom definition in the Slovenian Criminal law.

³¹³ The coercive circumstances that vitiate consent are under Section 85(2) of the SOA concerned as rebuttable presumptions which give rise to a rebuttable presumption of non-consent. Next to the coercive circumstance, the act states: “victim’s unlawful detainment; victim’s state of sleep or otherwise unconscious state at the time of the act; victim’s incapacity of communicating the (non-)consent due to their physical disability; victim’s involuntary intoxication.”

³¹⁴ A.P. Simester et al.: *Simester and Sullivan’s Criminal Law...*, p. 477.

³¹⁵ The Crown Prosecution Service: *Rape and Sexual Offences...*

³¹⁶ *R v W* [2015] EWCA Crim 559, para. 34.

3.4.3. Jonathan Herring's theory on consent as a full expression of the victim's will

Lastly, the consensual freedom will be considered from the “extreme” approach, that is the Herring’s approach on the influence that certain circumstances have on the alleged victim’s consent. According to Herring, individual’s free consent to sexual activity, can only be validly given by closely assessing all the information, that could potentially affect their decision, as to the point of them making a decision that they otherwise would not have made, had they known that information, which the defendant was (should have been) in possession of at the time.³¹⁷ For instance, a wife would not have consented to sexual activity, had she known that her husband had been a homosexual, or a very religious man would have not consented had he known that the woman is no longer a virgin, regardless of her having lost her virginity as a result of rape.³¹⁸ Herring argues that the defendant’s withholdment of every such information based on which an individual decides, renders null and void the validity of consent, and results in unlawfulness of the sexual conduct, regardless of how strongly the defendant wants to maintain his beliefs a private matter.

As David Archard argues: “[...] consent must be informed to be valid.”³¹⁹ Within the required “informed consent” the person consenting must contain all the relevant material facts as otherwise they cannot give an informed consent to something of which they are ignorant. Individuals “do not need to know everything, but only everything that would make a real consensual difference.”³²⁰ Herring asserts that for an individual to engage in sexual conduct, knowing that others would not have been consenting, had he revealed a certain fact about himself, amounts to a fundamental lack of respect for the victim’s sexual autonomy and therefore should be crucial in determining the non-existence of consent.³²¹ However, in exceptional cases, the *mens rea* requirement ensures that the defendant will not be prosecuted when he did not realise (or could have not realised) that his partner would regard a particular fact as fundamental to their consent.³²²

³¹⁷ Herring argues that particularly deceptions use the victim’s own decision-making powers against herself/himself, consequently rendering her/him an instrument of harm against herself/himself.

³¹⁸ J. Horder: *Ashworth’s Principles of Criminal law...*, p. 349.

³¹⁹ J. Herring: *Mistaken sex. Criminal law review*. London 2005, p. 9.

³²⁰ *Ibidem*.

³²¹ Accordingly, to Herring, an individual who has sexual intercourse separately with two individuals, neither of them knowing about the other, is accordingly to Herring a serial rapist, if neither of the individual’s would have gone ahead had they known the truth.

³²² J. Herring: *Mistaken sex...*, p. 8.

Since freedom cannot be defined practically in terms of totally unconstrained choice, this approach risks making the consensual concept in sexual offences unduly strict, potentially resulting in even greater risks to legal certainty.³²³

4. Conclusions

The law on sexual offences protects the right to sexual autonomy and integrity of every individual.³²⁴ Since physical contact of sexual nature carries an enormous significance in all societies, representing both some of the most precious and the most dreadful moments in life of an individual, the protection of these rights is an essential part of every criminal code. However, the choice of legislative regulation has been in the recent years drastically influenced by social movements such as #MeToo and campaigns for the introduction of the “only yes means yes” model (in Slovenia under the auspices of the 8th March Institute). Consequently, in Slovenia those resulted in an amendment of the existing coercive definition of sexual offences into the affirmative consent model. The proposed and accepted amendment was extremely political in nature, not reviewed nor commented by legal experts (Supreme Court, Bar Association, Institute of Criminology, legal scholars, and NGOs). That resulted in an excessive interference with the defendant’s legal presumption of innocence and disregarded his procedural guarantees, upon which a fair legal trial is build. The amendment did not sufficiently consider some of the fundamental principles of criminal law, familiar to law students and legal academicians, which distinguish between clear rules that provide legal certainty and overly flexible standards which do not. Within the realm of legal concepts it should be essential to de-emotionalise the debates on statutory regulation and to move beyond the “exclusive focus on the victim’s perspectives.” Criminal prohibitions should be fairly balanced between what is expected from individuals on both sides, as well as importantly focus on their interaction.³²⁵

While challenging the amended definition of sexual offences in the Slovenian Criminal Code, one quickly ascertains that due to the well-established tradition of the (former) coercive model of sexual offences in Slovenian Criminal Law, there is an important lack of relevant jurisprudence on the matter of affirmative consent. The consensual definition

³²³ A.P. Simester et al.: *Simester and Sullivan’s Criminal Law...*, p. 475.

³²⁴ R v Osolin [1993] 4 S.C.R. 595 and K. Carney: *Rape: The Paradigmatic Hate Crime*. “Saint John’s Law Review” 2001, p. 315.

³²⁵ T. Hörnle: *#MeToo...*, p. 124.

as the *externally perceptible, undoubtable, and free will* raises great concerns over legal certainty, as it problematically orients towards the “thin ice” principle. Especially problematic is the overly vague determination of consensual freedom and its different approaches, which result in very different conclusions. Further on, contrary to the English Criminal Law, the Slovenian definition does not define in what instances a certain circumstance vitiates the given consent (e.g. deceit regarding the nature or purpose of the sexual act, mistake as to the identity). And lastly, regarding the victim’s consensual capacity, it is unclear which criterion Slovenia will use to assess if someone was even capable to consent to sexual conduct, before examining whether their consent was externally, doubtlessly and freely expressed. Moreover, uncertainties arise from the new regulation of consensual capacity of vulnerable persons under Article 172 of the Slovenian Criminal Code, which applies that individuals with “serious mental underdevelopment, due to which they are unable to give consent” are automatically unable to participate in any sexual relations. Nevertheless, some positive changes have been made. The previous coercive model of sexual offences did not indisputably apply to instances where victims, due to their state (e.g., tonic immobility, severe fear, unconsciousness, sleep), could not dissent or resist against the defendant’s sexual conduct. However, the recent affirmative consent model now offers protection particularly to those victims.

Even so, the amended definition poses great challenges before the Slovenian judiciary, and some argue that it might potentially result in a judicial epilogue. Regardless, the general public therefore remains far from a proper social understanding of those legal issues and the law’s role in addressing them. The case of Slovenia can therefore be an example for other countries where there is a political pressure to transform criminal offences regarding sexual intercourse without a prior and proper scientific legal debate and analysis.

Bibliography

Books and articles

- Abrams M., Hons B.A., Carleton N., Taylor S., Asmundson G.: *Human tonic immobility: Measurement and correlates*. “Depression and Anxiety” 2009, 26, pp. 550–556.
- Anderson M. J.: *Negotiating Sex*. “Southern California Law Review” 2005, 41, pp. 101–138.
- Anderson S.A.: *Conceptualizing Rape as Coerced Sex*. “Ethics” 2016, 127(1), pp. 50–87.

- Arstein-Kerslake A., Flynn E.: *Legislating Consent: Creating an Empowering Definition of Consent to Sex That Is Inclusive of People with Cognitive Disabilities*. "Social & Legal Studies" 2015, no. 1–24, pp. 225–248.
- Bajda B., Gabršček T., Menart J., Tarman J., Vukša N., Zrilič A., Cesar A., Loknar M., Pirnat T. Urbas T., Zaletel M., Ambrož M., Plesničar M.M.: »*Ne pomeni ne*«– *ustreznejša obravnava spolne kriminalitete*. Ljubljana 2018.
- Bajda B.: *Spolnost, pravo in družba v dobi #MeToo: Novejši modeli spolnega kazenskega prava*. In: *Zbornik 11. konference kazenskega prava in kriminologije* [4. in 5. december 2018, Portorož]. Ljubljana 2018, pp. 23–38.
- Bavcon L., Šelih A., Korošec D., Ambrož M., Filipič K.: *Kazensko parvo: Splošni del*. 6th Edition. Ljubljana 2013.
- Beres M.A.: *Sexual miscommunication? Untangling assumptions about sexual communication between casual sex partners*. "Culture, Health, and Sexuality" 2010, 12(1), pp. 1–14.
- Bieneck S., Krahé B.: *Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard?*. "Journal of Interpersonal Violence" 2011, 26(9), pp. 1785–1797.
- Bracha H.S.: *Freeze, flight, fight, fright, faint: adaptationist perspectives on the acute stress response spectrum*. "CNS Spectrums" 2004, 9, pp. 679–685.
- Brownmiller S.: *Against Our Will*. Simon & Schuster 1993.
- Bryden D.: *Redefining rape*. "Buffalo Criminal Law Review" 2000, 3(2), pp. 317–479.
- Bucher J., Manasse M.: *When Screams Are Not Released: A Study of Communication and Consent in Acquaintance Rape Situations*. "Women & Criminal Justice" 2011, 21(2), pp. 123–140.
- Byers S., Lewis K.: *Dating Couples' Disagreements over the Desired Level of Sexual Intimacy*. "The Journal of Sex Research" 1988, 24(1), pp. 15–29.
- Byers S.: *How Well Does the Traditional Sexual Script Explain Sexual Coercion? Review of a Program of Research*. "Journal of Psychology and Human Sexuality" 1996, 8(1–2), pp. 7–25.
- Clough A.: *Finding the Balance: Intoxication and Consent*. "Liverpool Law Review" 2019, 40, pp. 49–64.
- Conly S.: *Seduction, Rape and Coercion*. "Ethics" 2004, 115(1), pp. 96–121.
- Danaher J.: *Could there ever be an app for that? Consent Apps and the Problem of Sexual Assault*. *Criminal Law and Philosophy* 2018, 12 (1), pp. 143–165.
- Deisinger M.: *Kazenski zakonik 2017, Posebni del s komentarjem, sodno prakso in literaturo*. Maribor 2017.
- de Zutter A., Horselenberg R., van Koppen P.J.: *Motives for filing a false allegation of rape*. "Archives of Sexual Behavior" 2017, 47 (2), pp. 457–464.
- Dowds E.: *Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force*. *The Modern Law Review* 2020, 83, pp. 35–63.
- Dripps D.A.: *Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent*. "Columbia Law Review" 1992, 92(7), pp. 1780–1809.

- Edwards D.: *Acquaintance Rape & the "Force" Element: When "No" is Not Enough*. "Golden Gate University Law Review" 1996, 26, pp. 241–300.
- Estrich S.: *Real Rape: How The Legal System Victimized Women Who Say No*. Cambridge, Mass. 1987.
- Ferguson C.E., Malouff J.M.: *Assessing police classifications of sexual assault reports: a meta-analysis of false reporting rates*. "Archives of Sexual Behavior" 2016, 45(5), pp. 1185–1193.
- Gårdving S.: *Consent in rape law – a comparison of three models (Master's thesis)*. Faculty of Law, University of Lund 2010.
- Gersen J., Suk J.: *The Sex Bureaucracy*. "California Law Review" 2016, 104, pp. 881–948.
- Gozzi A., Jain A., Giovanelli A., Bertollini C., Crestan V., Schwarz A.J.: *A Neural Switch for Active and Passive Fear*. "Neuron" 2010, 67, pp. 656–666.
- Graw Leary M.: *Affirmatively Replacing Rape Culture with Consent Culture*. "Texas Tech Law Review The Catholic University" 2016, 49(1), pp. 1–56.
- Gruber A.: *Consent Confusion*. "Cardozo Law Review" 2016, 38, pp. 415–458.
- Gruber A.: *Not Affirmative Consent*. "The University of the Pacific Law Review" 2016, 47, pp. 683–707.
- Harbeck B.: *Probleme des Einheitstatbestandes sexueller Nötigung, Vergewaltigung*. Nomos Verlag 2001.
- Hillman C.H., Rosengren K.S., Smith D.P.: *Emotion and motivated behavior: postural adjustments to affective picture viewing*. "Biological Psychology" 2004, 66, pp. 51–62.
- Herring J.: *Mistaken sex. Criminal law review*. London 2005.
- Herring J.: *Rape and the Definition of Consent*. "National Law School of India Review", Student Advocate Committee 2014, 26(1), pp. 62–76.
- Heidt J.M., Marks B.P., Forsyth J.P.: *Tonic immobility and childhood sexual abuse: a preliminary report evaluating the sequela of rape induced paralysis*. "Behaviour Research and Therapy" 2004, 43, pp. 1157–1171.
- Henderson L.: *Getting to know: Honoring Women in Law and in Fact*. "Texas Journal of Women and the Law" 1993, 2, pp. 41–73.
- Henderson L.: *What Makes Rape a Crime*. "Berkeley Women's Law Journal" 1987, 3(1), pp. 193–229.
- Helal N.S.: *I Have the Freedom and Capacity to... Or Do I?": Challenging the Definition of 'Consent' under the Sexual Offences Act 2003*. Graduate working paper, London School of Economics and Political Science. London 2015.
- Horder J.: *Ashworth's Principles of Criminal Law*. 9th edition. Oxford 2019.
- Hörnle T.: *#MeToo – Implications for Criminal Law?*. "Bergen Journal of Criminal Law and Criminal Justice" 2019, 6 (2), pp. 115–135.
- Hörnle T.: *The New German Law on Sexual Assault and Sexual Harassment*. "German Law Journal" 2017, 18 (6), pp. 1309–1330.
- Humphreys T.: *Perceptions of Sexual Consent: The Impact of Relationship History and Gender*. "Journal of Sex Research" 2007, 44 (4), pp. 307–315.

- Husak D., George Thomas III C.: *Consent and Reasonable Mistake*. "Philosophical Issues (Social, Political, and Legal Philosophy)" 2001, 11, pp. 86–117.
- Jozkowski K.N., Peterson Z.D., Sanders S.S., Dennis B., Reece M.: *Gender Differences in Heterosexual College Students' Conceptualizations and Indicators of Sexual Consent: Implications for Contemporary Sexual Assault Prevention Education*. "The Journal of Sex Research" 2014, 51, pp. 904–916.
- Jozkowski K.N.: *Barriers to Affirmative Consent Policies and the Need for Affirmative Sexuality*. "University of the Pacific Law Review" 2016, 47, pp. 741–772.
- Kane E.W.: *The gender trap: Parents and the pitfalls of raising boys and girls*. New York 2012.
- Korošec D., Filipič K., Zdolšek S.: *Veliki znanstveni komentar posebnega dela Kazenskega zakonika (KZ-1)*, 1. Knjiga. Ljubljana 2018.
- Korošec D.: *Razum in volja pri privolitvi potencialnega oškodovanca v kazenskem pravu*. "Zbornik znanstvenih razprav" 1998, 58, pp. 143–165.
- Korošec D.: *Spolnost in kazensko pravo*. Ljubljana 2008.
- Kozłowska K., Walker P., McLean L., Carrive P.: *Fear and the Defense Cascade: Clinical Implications and Management*. "Harvard Review of Psychiatry" 2015, 23 (4), pp. 263–287.
- Kramer K.M.: *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rape*. "Stanford Law Review" 1994, no. 47, pp. 115–157.
- Kramer-Bussel R.: *Beyond Yes or NO: Consent as sexual process*. In: *Yes Means Yes!: Visions of Female Sexual Power and a World without Rape* 2019, pp. 43–52.
- LaFave W.: *Criminal Law*. Eagan, Minn. 1996.
- Leary M.G.: *Affirmatively replacing rape culture with consent culture*. "Texas Tech Law Review" 2016, 49 (1), pp. 1–56.
- Lisak D., Gardinier L., Nicksa S.C., Cote A.M.: *False allegations of sexual assault: An analysis of ten years of reported cases*. "Violence against Women" 2010, 16(12), pp. 1318–1334.
- Lisjak Gabrijelčič L.: *Normiranje užitka: koncept pritrtilnega soglasja*. "Razpotja" 2014, 5(18), pp. 27–31.
- Little N.J.: *From No Means No to Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*. "Vanderbilt Law Review" 2005, 58(4), pp. 1321–1364.
- Lockwood Harris K.: *Yes means yes and no means no, but both these mantras need to go: communication myths in consent education and anti-rape activism*. "Journal of Applied Communication Research" 2018, 46(2), pp. 155–178.
- MacKinnon C.A.: *Feminism Unmodified: Discourses on Life and Law*. Cambridge, Mass. 1987.
- Madea B., Mußhoff F.: *Knock-Out Drugs*. "Deutsches Ärzteblatt International" 2009, 106(20), pp. 341–347.
- Martin J., Storey T.: *Unlocking Criminal Law*. 7th Edition. Routledge 2013.
- McCarthy M.: *Sexuality and Women with Learning Disabilities*. London 1999.

- McGlynn C., Manuro V.: *Rethinking rape law: International and comparative perspectives*. Abingdon 2011.
- McGregor J.: *Is this Rape? On Acquaintance Rape and Taking Women's Consent Seriously*. "Law and Philosophy" 2016, 25(6), pp. 663–672.
- McGregor J.: *The legal heritage of the crime of rape*. In: *Handbook on Sexual Violence*. Eds. J.M. Brown, S.L. Walklate. Abingdon 2011.
- Metts S., Spitzberg B.H.: *Sexual Communication in Interpersonal Contexts: A Script-Based Approach*. "Annals of the International Communication Association" 1996, 19(1), pp. 49–92.
- Millar Macaulay T.M.: *Toward a performance model of sex*. In: *Yes Means Yes: Visions of Female Sexual Power and a World without Rape*. Eds. J. Friedman, J. Valenti. Berkeley, Cal. 2008.
- Muehlenhard C.L.: *Examining stereotypes about token resistance to sex*. "Psychology of Women Quarterly" 2011, 35(4), pp. 676–683.
- Muehlenhard C., Hollabaugh L.: *Do women sometimes say no when they mean yes?* "Journal of Personality and Social Psychology" 1998, 54 (5), pp. 872–879.
- Muehlenhard C., Humphreys T., Jozkowski K., Peterson Z.: *The Complexities of Sexual Consent Among College Students: A Conceptual and Empirical Review*. "The Journal of Sex Research" 2016, 53(4–5), pp. 457–487.
- Murphy E.: *No Means No: A Critical Examination of the Effectiveness of the "Yes Means Yes" Law*. "Thomas Jefferson Law Review" 2017, 39(2).
- Murphy G.H.: *Capacity to consent to sexual relationships in adults with learning disabilities*. "Journal of Family Planning and Reproductive Health Care" 2003, no. 29(3), pp. 148–149.
- Norris J., Stoner S., Hessler D., Zawacki T., George W., Morrison D., Davis K.: *Cognitive Mediation of Alcohol's Effects on Women's in-the-moment sexual decision making*. "Health Psychology" 2009, 20(26), pp. 20–28.
- Oberlauer J., Schmidhuber K.: *Die Verletzung der sexuellen Selbstbestimmung gemäß § 205a StGB*. "RZ – Österreichische Richterzeitung" 2015, 9, pp. 174–181.
- Paglia C.: *Free Women, Free Men: Sex, Gender, Feminism*. Pantheon, New York 2017.
- Perilloux C., Duntley J.D., Buss D.M.: *Blame attribution in sexual victimization*. "Personality and Individual Differences" 2014, 63, pp. 81–86.
- Pineau L.: *A Response to my Critics*. In: *Date Rape: Feminism, Philosophy and the Law*. Ed. L. Francis. The Pennsylvania University Press, Pennsylvania 2008, pp. 63–109.
- Plesničar M.M., Ambrož M.: *»Sila, objektivno sposobna streti odpor«: Empirična študija reprezentativnega vzorca pravosodne prakse v zvezi s kaznivim dejanjem posilstva, spolnega nasilja in spolne zlorabe slabotne osebe s pregledom možnih modelov novih zakonskih rešitev*. Inštitut za kriminologijo pri Pravni fakulteti Univerze v Ljubljani, Ljubljana 2019.
- Polizzi S.N.: *When No is Not Enough: Force in Rape Statutes and the Epidemic of Underreporting*. "Law School Student Scholarship Paper" 2015, 784, pp. 1–27.

- Quaedflieg C, Schwabe L: *Memory dynamics under stress*. “Memory” 2017, 26(3), pp. 364–376.
- Randall M.: *Sexual assault law, credibility and ‘ideal victims’*. “Canadian Journal of Women and the Law” 2010, 22, pp. 397–433.
- Reeves Sanday P.: *A Woman Scorned: Acquaintance Rape on Trial*. California 1997.
- Remick L.A.: *Read her lips: An argument for a verbal consent standard in rape*. “University of Pennsylvania Law Review” 1993, 141 (3), pp. 1103–1151.
- Roberts D.E.: *Rape, Violence, and Women’s Autonomy*. “Chicago-Kent Law Review” 1993, 69, pp. 359–388.
- Rodwell J.: *Problems with the Sexual offences Act 2003*, [2005], Crim LR 290.
- Roiphe K.: *The Morning After: Sex, Fear, And Feminism on Campus*. Boston 1993.
- Roxin C.: *Strafrecht – Allgemeiner Teil*. München: C.H. Beck’sche Verlagsbuchhandlung, 1992.
- Rumney P.N.S., Fenton R.A.: *Intoxicated Consent in Rape: Bree and Juror Decision-Making*. “The Modern Law Review” 2008, 71(2), pp. 279–290.
- Schwabe L.: *Memory under stress: from single systems to network changes*. “European Journal of Neuroscience” 2017, 45, pp. 478–489.
- Schwartz S.: *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*. “Loyola of Los Angeles Law Review” 1982, 16(3), pp. 567–602.
- Schulhofer S.J.: *Consent: What It Means and Why It’s Time to Require It*. “The University of the Pacific Law Review” 2016, 47, pp. 665–681.
- Schulhofer S.J.: *Reforming the law of rape*. “Law & Inequality” 2016, 35, pp. 335–352.
- Schulhofer S.J.: *Taking Sexual Autonomy Seriously: Rape Law and Beyond*. “Law and Philosophy” 1992, 11(1/2), pp. 35–94.
- Schulhofer S.J.: *The Feminist Challenge in Criminal Law*. “University of Pennsylvania Law Review” 1995, 143, pp. 2151–2207.
- Schulhofer S.J.: *Unwanted Sex: The Culture of Intimidation and the Failure of Law*. Cambridge, Mass. 1998.
- Simester P., Spencer J.R., Stark F., Sullivan G.R., Virgo G.J.: *Simester and Sullivan’s Criminal Law: Theory and Doctrine*. 6th Edition. Oxford 2016.
- Šepec M.: *Načelo zakonitosti v kazenskem pravu (The Principle of Legality in Criminal Law – The Concept of Maximum Certainty and the Concept of Supremacy of the Teleological Interpretation of the Criminal Law Norm)*. “Pravnik: Revija za Pravno Teorijo in Prakso,” Ljubljana 2019, 74(7–8), pp. 479–502.
- Tuerkheimer D.: *Affirmative Consent*. “Ohio State Journal of Criminal Law” 2016, 13(2), pp. 41–469.
- Tuerkheimer D.: *Incredible women: Sexual violence and the credibility discount*. “University of Pennsylvania Law Review” 2017, 166, pp. 11–58.
- Tuerkheimer D.: *Rape on and off campus*. “Emory Law Journal” 2015, 65, pp. 1–45.
- Torenz R.: *The Politics of Affirmative Consent: Considerations from a Gender and Sexuality Studies Perspective*. “German Law Journal” 2021, 22, pp. 718–733.

- Vuletić Š., Šprem P.: *Materijalopravni aspekti kaznenog dijela silovanja u hrvatskoj sudskoj praksi*. "Policija i sigurnost" 2019, 28, pp. 130–155.
- Wegerstad L.: *Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden*. "German Law Journal" 2021, 22(5), pp. 734–752.
- Wiederman M.W.: *The gendered nature of sexual scripts*. "The Family Journal: Counseling and Therapy for Couples and Families" 2005, 13(4), pp. 496–502.
- Wirz L., Bogdanov M., Schwabe L.: *Habits under stress: mechanistic insight across different types of learning*. "Current Opinion in Behavioral Sciences" 2018, 20, pp. 9–16.
- Witmer-Rich J.: *Unpacking Affirmative Consent: Not as Great as You Hope, Not as Bad as You Fear*. "Texas Tech Law Review" 2016, 49(57), pp. 57–88.
- Wortley N.: *Reasonable Belief in Consent under the Sexual Offences Act 2003*. In: J. Clough: *The Role of Subjectivity in Determining 'Good Reason' to Possess a Bladed Article*. "The Journal of Criminal Law" 2013, 77, pp. 184–188.

Internet sources

- Altena-Davidsen J.: *Skating on thin ice: A misleading metaphor*. Leidenlawblog, available at: <https://www.leidenlawblog.nl/articles/skating-on-thin-ice-a-misleading-metaphor> [accessed 16 November 2021].
- Błuś A.: *Sex without consent is rape. So why do only eight European countries recognize this?* 4 January 2019, available at: <https://www.amnesty.org/en/latest/campaigns/2018/04/eu-sex-without-consent-is-rape/> [accessed 20.11.2021].
- Brown S.: *uConsent app helps partner consent to hooking up*. 30 April 2018, available at: <https://www.androidauthority.com/uconsent-hookup-app-860484> [accessed 20.11.2021].
- Colb S.F.: *Making Sense of "Yes Means Yes"*. Verdict Justia 2014, available at: <https://verdict.justia.com/2014/10/29/making-sense-yes-means-yes> [accessed 18 November 2021].
- Corinna H.: *Driver's ed for the sexual superhighway*. 18 November 2010, available at: http://www.scarleteen.com/article/abuse_assault/drivers_ed_for_the_sexual_superhighway_navigating_consent [accessed 20.11.2021].
- Ewen K.: *When "Yes" Really Means Yes: Have Great Sex with Affirmative Consent*. The Gottman Institute, available at: <https://www.gottman.com/blog/yes-really-means-yes-great-safe-sex-affirmative-consent/> [accessed 15 November 2021].
- Halley J.: *The Move to Affirmative Consent*. 10 November 2015, available at: <http://signsjournal.org/currents-affirmative-consent/halley/> [accessed 20.11.2021].
- Klein E.: *"Yes Means Yes" is a terrible law, and I completely support it*, available at: <https://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it> [accessed 22 November 2021].
- Lanz B.: *Der Erkennbare Wille – Zur »neuen Vergewaltigung nach § 177 Abs. 6 Nr. 1 StGB«*. 16 March 2017, available at: <https://www.benjamin-lanz.de/2017/03/16/der-erkennbare-wille-zur-neuen-vergewaltigung-nach-177-abs-6-nr-1-stgb/> [accessed 20.11.2021].

- Luckhurst P.: *We-Consent is the new app that lets you say ‘yes’ to sex... is it useful or just plain creepy?* 23 July 2015, available at: <https://www.standard.co.uk/lifestyle/london-life/we-consent-is-the-new-app-that-lets-you-say-yes-to-sex-is-it-useful-or-just-plain-creepy-10409525.html> [accessed 20.11.2021].
- Mantock R.: *Consent is not a commodity. Tech will never make it one.* THE FEMEDIC. May 2019, available at: <https://thefemic.com/news/consent-is-not-a-commodity/> [accessed 20.11.2021].
- McBride N.J.: *Rape and consent.* 2012, available at: [https://www.nytimes.com/1993/06/13/magazine/date-rape-s-other-victim.html](https://mcbridesguides.com/wp-content/uploads/2012/08/mcbride-rape-and-Roiphe K.: Date rape’s other victim. 13 June 1993, available at: <a href=) [accessed 20.11.2021].
- Schow A.: *Judge rule university can’t shift burden of proof onto the accused.* 10 August 2015, available at: <https://www.washingtonexaminer.com/judge-rules-university-cant-shift-burden-of-proof-onto-the-accused> [accessed 20.11.2021].
- Shibley R.: *Antioch’s Infamous Sexual Assault Policy*, 15 June 2007, available at: <https://www.thefire.org/antiochs-infamous-sexual-assault-policy/> [accessed 20.11.2021].
- Shulevitz J.: *Regulating Sex.* “The New York Times”, 2015, available at: <https://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html> [accessed 23 November 2021].
- Zadar A.: *Zašto seks bez pristanka u Hrvatskoj nije silovanje?*. 15 October 2019, available at: <https://www.antenazadar.hr/clanak/2019/10/zasto-seks-bez-pristanka-u-hrvatskoj-nije-silovanje/> [accessed 20.11.2021].
- The 8th March Institute campaign, available at: <https://www.samojapomenija.si/> and https://fotogalerija.dz-rs.si/datoteke/drugo/soj/razno/21_02_02_pobuda_-_Kazenski_zakonik.pdf [accessed 20.11.2021].
- The American Law Institute: *Model Penal Code: Sexual assault and related offences*, Tentative Draft No. 1. 30. April 2014, available at: <http://www.prosecutorintegrity.org/wp-content/uploads/2014/12/Model-Penal-Code-April-30-2014.pdf> [accessed 20.11.2021].
- Antioch College, *Sexual Offence Prevention Policy*, available at: <http://www.antiochcollege.edu/about/policies-and-procedures/student-policies>. [accessed 20.11.2021].
- BBC: Gina-Lisa Lohfink: *German model fined for false rape claim.* 22 August 2016, available at: <https://www.bbc.com/news/world-europe-37158471> [accessed 20.11.2021].
- The Cut: *Why Germans Are So Angry About This Rape Case.* 21 June 2016, available at: <https://www.thecut.com/2016/06/gina-lisa-lohfink-rape-case.html> [accessed 20.11.2021].
- DW: *German court throws out model’s appeal over false rape claims.* 10 February 2017, available at: <https://www.dw.com/en/german-court-throws-out-models-appeal-over-false-rape-claims/a-37497521> [accessed 20.11.2021].
- Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO): *Baseline Evaluation Report Sweden.* 21 January 2019,

- available at: <https://rm.coe.int/grevio-inf-2018-15-eng-final/168091e686> [accessed 20.11.2021].
- Hofverberg: *Sweden E: Parliament Makes Lack of Consent the Basis for Rape Charges*. 3 July 2018, available at: <http://www.loc.gov/law/foreign-news/article/sweden-parliament-makes-lack-of-consent-the-basis-for-rape-charges-introduces-criminal-liability-for-negligent-sexual-assault/> [accessed 20.11.2021].
- Independent: *Man acquitted of raping female colleague because she did not scream*. 24 March 2017, available at: <https://www.independent.co.uk/news/world/europe/man-acquitted-rape-woman-not-scream-female-colleague-turin-court-diamante-minucci-a7648451.html> [accessed 20.11.2021].
- Jutrani list: *Nezapamćen zločin u okolici Zadra: sedam mladića u godini dana više puta grupno silovali 15-godišnjakinju. Jutranji list*, 14 October 2019, available at: <https://www.jutarnji.hr/vijesti/crna-kronika/nezapamcen-zlocin-u-okolici-zadra-sedam-mladica-u-godini-dana-vise-puta-grupno-silovali-15-godisnjakinju-sudac-ih-pustio-da-se-brane-sa-slobode-9480887> [accessed 20.11.2021].
- Law Reform Commission: *Report Sexual Offences and Capacity to Consent 2013*, available at: https://www.lawreform.ie/_fileupload/Reports/r109.pdf [accessed 18 November 2021].
- LegalFling, available at: <https://legalfling.io/> [accessed 20.11.2021].
- New York Times: *'Ask First' at Antioch*. 11 October 1993, available at: <https://www.nytimes.com/1993/10/11/opinion/ask-first-at-antioch.html> [accessed 20.11.2021].
- Pursuit (University of Melbourne): *More than Yes or No Question*. 23 March 2016, available at: <https://pursuit.unimelb.edu.au/articles/more-than-a-yes-or-no-question> [accessed 20.11.2021].
- Slovenska tiskovna agencija (Slovenian Press Agency): *Sodba v primeru spolnega napada odmeva v javnosti*. 9. January 2019, available at: <https://www.iusinfo.si/medijsko-sredisce/dnevne-novice/234524> [accessed 20.11.2021].
- The Washington Post: *The school that's put sex to the test*. 3 December 1993, available at: https://www.washingtonpost.com/archive/lifestyle/1993/12/03/the-school-thats-put-sex-to-the-test/e5034ee3-fb89-42ab-bb5a-75d33558d0a2/?utm_term=.d66fb71adb5d [accessed 20.11.2021].
- Verdict: *Making Sense of "Yes Means Yes"*. 29 October 2014, available at: <https://verdict.justia.com/2014/10/29/making-sense-yes-means-yes> [accessed 20.11.2021].
- Washington Post-Kaiser Family Foundation, Poll: *One in 5 women say they have been sexually assaulted in college 2015*, available at: <https://www.washingtonpost.com/graphics/local/sexual-assault-poll> [accessed 16 November 2021].
- Wiener Interventionsstelle: *Nein heißt nein! Zur Reform des Strafgesetzbuches*. 2016, available at: <https://www.interventionsstelle-wien.at/taetigkeitsbericht-2015-download> [accessed 20.11.2021].