BRILL
NIJHOFF

REVIEW OF CENTRAL AND EAST EUROPEAN LAW
45 (2020) 126-160

Review of Central and East European Law
brill.com/rela

Negligent Rape in Croatian Criminal Law: Was Legal Reform Necessary?

Marin Mrčela
Vice-President of the Supreme Court of Croatia
marin.mrcela@vsrh.hr

Igor Vuletić
Faculty of Law, University of Osijek, Osijek, Croatia
vuleticigor600@gmail.com

Goran Livazović
Faculty of Humanities and Social Sciences, University of Osijek, Osijek, Croatia
glivazovic@knjiga.ffos.hr

Abstract

This paper discusses the issue of negligent rape and liability for unreasonable belief in the victim`s consent in the context of Croatian criminal law. Modern rape law presents many challenges to both lawmakers and judges, with criminalizing negligence being only one of those challenges. This became more interesting in Croatia after amendments to the Criminal Code in 2011 (in effect since 2013), that criminalized unreasonable mistake of facts in the crime of rape. Croatian rape law has undergone significant changes related to these amendments. However, this paper focuses only on the aspect of unreasonable mistake of consent, this being both the most controversial and of great practical importance. The first section describes the elements of rape according to the Croatian Criminal Code along with an interpretation of those elements in the jurisprudence of the Croatian Supreme Court. Special attention is placed on the problem of *mens rea* and (un)reasonable belief in consent. The discussion also identifies the reasons for reform and the impact of the Sexual Offences Act of England and Wales (2003), which served as a model for Croatian legislators. The second section analyzes the results of research conducted by Croatian judges on the relevant status of the mistake of facts defense, as well as the importance of the victim`s resistance in terms of achieving a conviction, with special regard to the rate of rape convictions in Croatian

 | DOI:10.1163/15730352-BJA10002

law. The third section reviews comparative regional laws (Slovenia, Serbia, and Montenegro) with the goal of positioning the new Croatian rape law in a regional context. The last section discusses the necessity of criminalization of the negligent form of rape from the perspective of trends and standards created in Croatian theory and jurisprudence in the years prior to this amendment of the law.

Keywords

rape – mistake of facts – negligence – fault – consent – resistance – honest belief – unreasonable belief

1 Introduction[1]

Over the past two decades, Croatian criminal law has undergone significant reforms in the area of sex-crimes. A parallel development of two diametrically opposite trends is noticeable. On the one hand, there is an obvious trend of permanent liberalization in the sphere of criminal law protection of sexuality. This trend especially manifests itself by the decriminalization of certain behaviors, such as sodomy, through the introduction of sexual neutrality as one of the basic elements of sex-crimes, narrowing liability for incest, repealing marriage as a ground for excluding criminal liability, and so on.

On the other hand, there is a trend of continuous criminalization in this sensitive area of criminal law. Primarily, this trend is implemented by imposing stricter sentences and adding new offenses that enlarge the criminal zone. The last large reform of Croatian criminal law in 2011 (hereinafter: CC/11) was especially marked by this trend. The law took effect on 1 January 2013[2] and introduced many essential changes in the field of sex crimes. The legislator defined consent *expressis verbis* as a voluntary act by a person who is capable of making and expressing that choice (Article 152/3 CC/11). Moreover, the legislator enumerated several situations in which it would be assumed that there is

1 The research for this paper has partly been conducted within the "Croatian Violence Monitor: A Study of the Phenomenology, Etiology, and Prosecution of Delinquent Violence with Focus on Protecting Particularly Vulnerable Groups of Victims", a project co-funded by the Croatian Science Foundation (UIP-05-2017-8876) and the University of Zagreb's Faculty of Law. For more details, visit Violence Research Lab's homepage: www.violence-lab.eu.

2 Since being voted for in Parliament, the CC has already been amended four times. However, those amendments do not concern the issue of the negligent form of rape and therefore will not be discussed in this paper.

no consent (Article 152/3). A mistake of facts regarding honest belief in consent was criminalized (Articles 152/3 and 153/2), as will be described in detail below. The new law also raised the minimum age for the capacity to express legally valid consent: from 14 to 15 years of age (Article 158 CC/11). One might agree with the conclusion that, out of all offenses, sex crimes have probably undergone the most radical changes through this reform.[3] However, such an analysis of all the changes would be beyond the scope of this article. Instead, we discuss the one we think is the most controversial: the new concept of guilt regarding the crime of rape.

Until the reform, rape in Croatian criminal law was traditionally regulated as a crime that can be committed only with intent. The prosecution had to prove either that the accused knew that he/she was acting without the consent of the victim and wanted to do so (*dolus directus*), or that he/she was aware of such a possibility but decided to consciously disregard it and still continue with the planned activity (*dolus eventualis*). The first situation exists in cases where, for example, two defendants heavily beat the victim, after which one of them holds the victim`s hands and the other performs anal intercourse with the victim.[4] The second situation has a more theoretical meaning and is rarely encountered in practice. Since rape implies the use of force or a direct threat, the perpetrator allows the possibility of the absence of consent but still disregards it and continues with the planned activity, thus accepting the possibility of committing a crime. *Dolus eventualis* would exist when the perpetrator previously demonstrated aggressive behavior towards the victim and then later performed a sexual act, despite the fact that his prior aggression caused the victim too much fear to express non consent to the sexual act. As in the previous case of a defendant who had been constantly molesting and beating his wife for a period of two years, and who actually had nonconsensual intercourse with her: he did not need to threaten or force her as she was too afraid to resist. Therefore, it is justifiable to conclude that the defendant allowed the possibility of lack of victim consent and still went on with the sexual activity, which constitutes *dolus eventualis*.[5]

However, under the influence of some legal writers,[6] legislators decided to increase criminal responsibility by introducing liability for negligence: an accused who was not aware of the absence of consent but should have been

3 Ksenija Turković et al, *Komentar Kaznenog zakona* (Narodne novine, Zagreb, 2013), 205.

4 Supreme Court of Croatia, Kžm 44/12-7.

5 Supreme Court of Croatia, I Kž 259/14-4.

6 Ksenija Turković and Ivana Radačić, 'Rethinking Croatian rape laws. Force, consent and the contribution of the victim' in Clare McGlynn and Vanessa E. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge-Cavendish, London, 2011).

aware will be punished for the negligent form of rape. Hypothetically, a mistaken belief in consent exists if "A" thinks "B" wants to have sex with him, but fails to realize that she is just too afraid to oppose him since she knows he carries a hunting knife in his belt. Since such a legislative solution differs from all previous aspects of Croatian criminal law, it soon provoked debates and criticism in Croatian legal literature. Some authors argued that the new concept was inconsistent with the Croatian legal tradition and needed to be abandoned as soon as possible, as it would jeopardize the standard of legal certainty.[7] Others, however, claimed the new solution should be welcomed, and approached it as the first step in bringing Croatian criminal law closer to modern standards.[8] The aim of this paper is not to argue the pros and cons of negligent rape as a general concept,[9] nor is it to discuss whether negligence is an acceptable form of guilt in the crime of rape. These questions have already been analyzed by several authors in comparative literature and are not in the focus of this paper.[10]

The aim of this paper concerns only the following question: was such a change necessary, if one takes into consideration the long term legal practice based on standards developed by Croatian court jurisprudence, particularly the Supreme Court of Croatia? We find this to be an interesting and provocative subject, and one which has not been analyzed comprehensively in Croatian legal literature, especially on the basis of relevant court practice. We believe that the current state of Croatian jurisprudence in the field of sex crimes did not require implementation of negligent forms of rape. Therefore, our working hypothesis is that "jurisprudential progress in Croatia does not require criminalization of mistaken belief in consent".

The first section describes the elements of rape under Article 153 CC/11 and the reasons for the reform as given by the legislature in its official explanation. The second section presents the results of our research on Croatian

7 See, e.g., Dalida Rittossa and Igor Martinović, 'Spolni odnošaj bez pristanka i silovanje – teorijski i praktični problemi', 21(2) *Hrvatski ljetopis za kazneno pravo i praksu* (2014), 509–548, at 535.

8 Ivana Radačić, 'Kazneno djelo silovanja: pitanja definicije, (ne)odgovornosti za otklonjivu zabludu o pristanku i postojanje rodnih stereotipa u sudskom postupku na primjeru prakse Županijskog suda u Zagrebu', 19(1) *Hrvatski ljetopis za kazneno pravo i praksu* (2014), 105–125, at 122–123.

9 Nevertheless, it is noticeable that the Croatian legislator and jurisprudence over recent years have demonstrated a tendency towards introducing many controversial issues in the Croatian legal system. See, e.g., Jurij Toplak and Đorđe Gardašević, 'Concepts of National and Constitutional Identity in Croatian Constitutional Law', 42(4) *Review of Central and East European Law* (2017), 263–293, at 270.

10 For discussion on this issue see, e.g., McGlynn and Munro (eds.), *op.cit.* note 6.

jurisprudence, with a focus on the actual practical irrelevance of a mistake of facts defense before the Croatian Supreme Court, and the attitude of the Court regarding the issue of resistance as an element of rape, as well. The third section provides a brief analysis of comparative legislation in other similar regional law systems: Serbia, Slovenia, and Montenegro. Finally, we explain our standpoint that the criminalization of the negligent form of rape was not necessary if one considers the results of court practice.

2 Elements of rape under Article 153

The crime of rape in Article 153 CC/11, which is discussed in this paper, has been regulated separately from other forms of non-consensual sexual acts. It was designed as a qualified form of non-consensual sexual intercourse (*lex specialis*), whose main distinctive characteristic is the use of either force or immediate threat to the life or body of the victim or any other person. If the perpetrator threatened the victim that he would immediately kill her, this would be qualified as an offense under Article 153.

To prove rape from Article 153/1 CC/11 the prosecution needs to offer evidence for objective and subjective elements of the crime. On the objective side (*actus reus*), the elements of the crime are: use of force or immediate threat to the life and body of the victim or any other person. On the subjective side (*mens rea*), similar to a non-consensual sexual act under Article 152 CC/11, the prosecution must prove the defendant's intent. Of course, the prosecutor must also demonstrate that there was intercourse or an act equivalent to sexual intercourse. Article 153/2 CC/11 (Rape) has the same provision regarding the consent of the victim as Article 153/2 CC/11 (Sexual intercourse without consent).[11] In other words, a perpetrator who was acting under unreasonable mistake of facts regarding the existence of victim consent would be punishable by a prison sentence from six months to five years. At the same time, a perpetrator who was acting under reasonable mistake of facts regarding the existence of victim's consent would be acquitted.

For the intentional form, the prescribed penalty is from one to ten years' imprisonment, and for the negligent form, the prescribed penalty is from six months to five years. According to official statistics, the crime of rape is rather rare in Croatia. Statistics for the period between 2001 and 2016 show that the conviction rate for rape varies between 0.18% (2013) and 0.42% (2009) out of the total number of convictions. This percentage is proportional to the low

11 The ambiguity of negligence related to rape is discussed in the next section.

level of reports of rape. Reports in the same period vary between 0.09% (2013) and 0.20% (2003) of all reported crimes.[12] One piece of research shows that Croatia has a relatively large "dark number"[13] in terms of the crime of rape, with only five reported rapes for every 100 000 people, which is below the European average.[14] The latest statistics demonstrate a continuation of these trends, indicating that amendments to the law are only a spoke in the complex wheel of social change,[15] which, as an issue of the potential impact of law on social changes and changes in behavior, will be addressed in Section 1. 2., below. But first, the *actus reus* and *mens rea* as interpreted in Croatian theory and jurisprudence, are examined.

2.1 *Actus Reus*

What makes rape different and more severe than other forms of non-consensual sexual crimes is that perpetrators use some form of physical force, such as slapping or beating the victim, or threats with such force that they directly endanger the life or body of the victim or another person (for example, threatening the victim with a knife held at the throat. In comparison to prior rape regulation, the new provision increases the criminal zone since it no longer requires the threat to be addressed to a person who is "close" to the victim (for example, brother, child, or spouse). Instead, it allows the threat to be addressed to any person, no matter what the nature of the relationship between that person and the victim, or indeed whether there is any relationship at all. Theoretically this means the perpetrator can threaten a person that he and the victim have never seen before.[16] For example, the perpetrator can threaten the victim, so that if the victim does not have sex with the perpetrator immediately, he would kill the first person he sees passing by. In the Official explanation to the Proposal for a New Criminal Code (hereinafter: Explanation),[17] issued by the Government in 2011, no explanation is given for this change. We can only assume it was intended to avoid potential difficulties in proving closeness between the victim and a third person, although no cases were presented before the Croatian courts.

12 *Statistical Yearbook of the Republic of Croatia*, 2010–2016. Yearbooks contain not only data for the year in which they are issued but also data for previous years.

13 The term refers to unreported crimes.

14 Davor Derenčinović and Anna Maria Getoš, *Uvod u kriminologiju s osnovama kaznenog prava* (Pravni fakultet, Zagreb, 2008), 62–65.

15 *Statistical Yearbook of the Republic of Croatia 2016.*

16 Ksenija Turković in Davor Derenčinović *et al* (eds.), *Posebni dio kaznenog prava* (Pravni fakultet, Zagreb, 2013), 164.

17 *Vlada Republike Hrvatske,* Prijedlog Kaznenog zakona, Zagreb, 2011, P.Z.E. 866, 185–186.

Force and/or threat are means the perpetrator uses to break the victim`s resistance. Therefore, it must be proven that the perpetrator used them for that purpose. Force can be absolute and irresistible (*vis absoluta*), or resistible (*vis compulsive*). Irresistible force exists if the perpetrator ties the victim up and rapes her. A case of resistible force exists if the perpetrator points a gun at the victim's knee and demands sexual intercourse. Force can also be physical or mental. Mental force exists when the perpetrator creates physical pressure on the victim, so that the victim is not able to resist at all and remains completely passive.[18] This kind of force is also recognized by Croatian jurisprudence. The Supreme Court has pointed out that physical force is not the only way to break the victim's resistance and that 'psychological pressure is just as effective'.[19] In such cases, the Supreme Court usually stipulates that, although the victim did not show any resistance, 'resistance could be expected, if one takes into account other circumstances and that there is sufficient evidence for the use of force'.[20]

Threat is understood as "every activity that indicates an immediate attack to the victim`s or another person`s life or body". As we have already explained, a perpetrator who threatens some other (milder) harm can be found guilty only based on Article 152. However, it is sufficient for rape that the threat be manifested by some type of conclusive action, which exists when the perpetrator is using an environment of fear and violence that he created earlier.[21] An example of this kind of threat would be if the defendant had made death threats to the victim two years before the rape actually occurred, so that at the time of the act she was too scared to show any resistance.[22] A threat of direct attack means that an attack may occur immediately. If a time gap occurs between the threat and the attack – for example, "A" threatens "B", who goes home and picks up a rifle and then comes back – this could be qualified only as a non-consensual sexual act (Article 152).[23]

Force or immediate threat is not sufficient. The prosecution must also prove that sexual intercourse (*immissio penis in vaginam*) or an act equivalent to sexual intercourse occurred, or at least an attempt at one of those actions. Rape, similar to other sex offenses, is sexually neutral so individuals of both

18 *Ibid.*

19 Supreme Court of Croatia, I Kž 571/13-4.

20 See, e.g., the following decisions of the Supreme Court of Croatia: I Kž 328/1999-3; I Kž 901/09-6; I Kž 502/16-4; I Kž 528/13-4; I Kž 286/14-4; I Kž 462/08-4; I Kž 375/1994-3; I Kž-349/1999-3; I Kž 571/13-4; I Kž 1070/06-3; I Kž 200/1992-3; I Kž 168/02-3; and many more.

21 Turković, *op.cit. note* 16, 164.

22 Supreme Court of Croatia, I Kž 259/14-4.

23 Turković, *op.cit. note* 16, 165.

sexes can be either perpetrators or victims. Of course, in the majority of cases, the perpetrator is male and the victim female, but cases where the victim is male do exist.[24] In addition to sexual intercourse, the law also includes another term, namely "an act equivalent to sexual intercourse", this being 'any act other than actual sexual intercourse' that is 'comparable with sexual intercourse by its (side)effects'.[25] These are all sexual acts that involve penetration of a sexual organ into the victim's body (other than *immisio penis in vaginam*) or penetration of the victim's sexual organs by the perpetrator's body parts (other than the *penis*). According to Supreme Court practice, acts comparable with sexual intercourse are, for example, *immisio in os, coitus per anum, fellatio, cunnilingus*, but also penetration of the victim's sexual organ by an object.[26] However, Croatian jurisprudence took one step further and interpreted some actions without penetration also as an act equivalent to sexual intercourse.[27]

According to earlier Court decisions, it was essential that such acts are performed with a specific goal – to 'satisfy the sexual urge of the perpetrator',[28] or to "replace sexual intercourse".[29] However, the approach which considers the perpetrator's sexual urge as legally relevant is now abandoned. According to the CC/11 the sexual urge is not an element of any sex crime. In one decision, the Supreme Court clearly emphasizes that '… rape occurs because the perpetrator attacks the sexual freedom of the victim, and this is not necessarily done "in order to satisfy the sexual urge", because such a goal or intent is not a component of the criminal offense of rape.'[30]

---

24 See, e.g., Supreme Court of Croatia, I Kž 8/16-4. The Supreme Court case database shows no cases where the perpetrator is female and the victim is male. There was one case where two males were convicted of aggravated rape and the victim was male. In that case the male victim was jointly beaten by the defendant, a juvenile: '[S]ubsequently, the juvenile removed the victim's sweatpants and pushed the handle of the broom into the victim's anal opening by moving the handle back and forth' (Supreme Court of Croatia, Kžm 44/12).

25 Turković, *op.cit.* note 16, 165.

26 Penetration of the vagina with a bottle (Supreme Court of Croatia, I Kž 920/07) or with the fingers (Supreme Court of Croatia, I Kž 103/07). Both cases are significant because they include so-called 'passive rape', e.g., when the victim is coerced into self-inflicting with objects as well. See further text below.

27 Supreme Court of Croatia, I Kž 726/03, where ejaculation into the victim`s mouth was considered as an act equivalent to sexual intercourse.

28 Supreme Court of Croatia, I Kž 294/01-7.

29 Supreme Court of Croatia, I Kž 496/03-3.

30 Supreme Court of Croatia, I Kž 922/11, 111 Kr 100/16. In the latter case, the Court emphasized that the "sexual urge" is not an element of the crime, explaining that '[O]therwise, the various forms of sexual abuse in which the perpetrator is not aiming at satisfying his

The CC/11 introduces a new legislative technique by closely defining that a perpetrator of rape is not only someone who performs sexual acts by himself, but also someone who:

– forces the victim to perform such activities with another (third) person or
– forces the victim to perform such activities on the perpetrator.

At this point, the law uses a rather casuistic approach, which is untypical of continental criminal law legal systems. Such an approach was justified by reference to "power over the act", a dominant concept in Croatian criminal law, which allows the court to qualify someone as the perpetrator of rape if he makes an "essential" contribution to the execution of a crime.[31] The legislature probably intended to end the obscure interpretation that perpetration of a sexual offense is possible only if one performs sexual acts by oneself, not if the perpetrator simply applies force and someone else performs the sexual acts (in which case, the one who applies only force can be no more than an aider or abettor).[32] It is questionable, though, whether this intervention was necessary since recent jurisprudence has taken a clear stand on that issue as seen in the following example:

> The defendant was accused as a perpetrator of rape because he forced the victim by beatings and knife threats to undress and have sex with another defendant (who just sat down and watched TV). After they were finished, he gave her a bottle and ordered her to masturbate in front of them. After that, he threw her out on the street naked. During the whole event, he did not directly participate in any of the acts of a sexual nature. However, the court found him guilty as a perpetrator of rape because he was an essential contributor to the execution of the crime.[33]

2.2 *Mens Rea and the Problem of Mistake of Facts*

Rape is by its character primarily an intentional crime. By raping a victim, the perpetrator usually, but not necessarily, satisfies a sexual urge and, more

sexual urge, but, for example, humiliation and verbal assaults against the victim, may remain unpunished'.

31 Vlada Republike Hrvatske, Prijedlog Kaznenog zakona, Zagreb, 2011, PZE 866, 186.

32 Such an interpretation was typical in the jurisprudence of the former Yugoslavia. See Bogdan Zlatarić, *Krivični zakonik u praktičnoj primjeni, I. svezak* (Narodne novine, Zagreb, 1956), at 107–109.

33 Supreme Court of Croatia, I Kž 920/07-6. For commentary on this decision, see Petar Novoselec, Supočiniteljstvo, posredno počiniteljstvo i jedinstvo radnje kod silovanja (sudska praksa), 15 (1) *Hrvatski ljetopis za kazneno pravo i praksu* (2008), 445–447, at 446.

importantly, also achieves some other important goals, such as an expression of aggression, or domination over the victim.[34] In the majority of cases the perpetrator acts with direct intent (*dolus directus*), which means an awareness of all the circumstances and intends to commit the crime.[35]

Croatian criminal law also predicts the possibility of indirect intent (*dolus eventualis*). This exists when the perpetrator is not completely sure of the elements of the crime but still performs the act. The possibility of rape with indirect intent is recognized in both Croatian theory of criminal law[36] and in jurisprudence. The Supreme Court articulates it very clearly when instructing the first instance court that 'rape is a typical intentional crime that can also be committed with *dolus eventualis*, which exists when the perpetrator is aware that he can commit the crime and he still commits further actions'.[37]

As emphasized, the CC/11 has introduced the negligent form of rape as well (Article 153/2). It has done so by criminalizing a situation in which the perpetrator was unclear about the consent of the victim. Such a perpetrator is unreasonably unaware that he is having non-consensual intercourse.[38] This is a special type of mistake of facts ("*zabluda o biću*") which in Croatian law has the effect of excluding intent, but perpetration can be punished for negligence if the law prescribes negligent form for a certain criminal offense (Article 30). The main assumption is that the perpetrator's mistake was avoidable (unreasonable). This means that, from the circumstances of the event, the perpetrator could easily realize the absence of consent. To evaluate whether a mistake was reasonable or unreasonable, the court must assess not only the (objective) standard of the average person in such circumstances, but also the (subjective) standard of the particular perpetrator. As the Supreme Court of Croatia points out, 'the critical event cannot be evaluated separately and independent of interpersonal circumstances'.[39]

Before the CC/11 was introduced, some situations were leading to exculpation of the perpetrator, since there was no negligent form of rape. However, after the reform, such a perpetrator will be criminally liable for a milder form

34 For detailed analyses of rapists' motives see, e.g., Diana Scully & Joseph Marolla, 'Riding the Bull at Gilley`s: Convicted Rapists Describe the Rewards of Rape', 32 (3) *Social Problems* (1985), 251–263.

35 Petar Novoselec, *Opći dio kaznenog prava* (Pravni fakultet, Osijek, 2016), 262.

36 *Ibid.*

37 *Supreme Court of Croatia, I Kž 26/05-3.*

38 Dini Rosenbaum, 'Strict Liability and Negligent Rape: Or How I Learned To Start Worrying And Question The Criminal Justice System', 14(3) *Cardozo Journal of Law & Gender* (2008), 731-792.

39 *Supreme Court of Croatia, I Kž 571/13-4.*

of rape, punishable by a prison sentence from six months to five years. This mistake of facts is *sui generis* because it refers to only one element of rape: the absence of consent. Mistakes of facts form the General part of the CC and fall into four types.[40] There are two reasons why the Articles of the CC/11 prescribe crimes of sexual intercourse without consent, and rape in particular prescribes mistake of facts (152/2 and 153/3). First, because mistake of facts *sui generis* has a narrower legal meaning than mistake of facts in the General part of the CC. Second, the articles emphasize the possibility of conviction for a negligent form of rape, which was necessary because rape was previously considered purely and simply as an intentional crime.

Mistake of facts and the problem of negligent rape are probably the most controversial current issues in rape law. There are many opponents, but even more supporters, especially among feminist writers. The main issue is about the purpose of rape law itself. Is the purpose to punish the perpetrator who intended to commit such a crime, or is the purpose to protect the victim from unwanted sexual activity? Those who argue that negligent rape should not be punishable rely upon the principle of moral blameworthiness. They claim that criminal liability should be imposed only if an actor is morally blameworthy, which is not the case in negligent rape. According to this point of view, negligent rape cannot pass the test of the appropriate standard for criminal liability. The legislator must positively answer three questions in this three-step test. The first question refers to the seriousness of the crime: is it serious enough (or dangerous enough) to justify the negligent form? The second question concerns whether criminalization of negligence has a reasonable chance of decreasing the incidence of the crime; while the third question focuses on the possibility of other (milder) alternatives.

Although rape certainly responds to the first question,[41] according to opponents of the negligent rape concept, it fails to adhere to the second and third question. They claim that the "negligent" concept is not likely to decrease the incidence of rape, and that a proper alternative could be found in adequate education which would help society overcome gender-related stereotypes. Some authors even claim that amendments to the law in general play a secondary

40 Marin Mrčela and Igor Vuletić, 'Mistake of Law and Mistake of Facts in Croatian Criminal Jurisprudence', 4(1) *Social Perspectives* (2017), 51–78, at 63.

41 Interestingly, though, how even an answer to this first question is sometimes not obvious if the social context is specific. E.g., in Soviet Russia, rape was considered to be not half as blameworthy as (even verbal) crimes against the state and was penalized more leniently. See Elspeth Reid, 'Defamation and Political Comment in Post-Soviet Russia', 38(1) *Review of Central and East European Law* (2013), 1–36, at 6.

instrumental role and do not lead to noticeable changes in case outcomes.[42] However, we could argue that, even though this might be true, it is not always possible to measure the level of impact that amendments to the law have on social movements. The new law, although perhaps not causing a radical change in case outcomes, could provoke public debate and therefore could eventually be a factor stimulating changes in social behavior. In other words: it is possible that such a drastic change as criminalization of negligent rape will over time encourage more community dialog about perceptions of consent, and indirectly create a friendlier environment for victims to report sexual victimization. In that sense, such a change could be seen as a step forward in enhancing awareness of the vulnerability of sex-crime victims. Therefore, we agree that the amendments to the law 'play an important indirect role in regard to social change by shaping various social institutions, which in turn have a direct impact on society'.[43]

On the other hand, those who plead for the negligent form of rape point out that the mistake should be both honest and reasonable, because it should otherwise have no legal effect. The contrary position leads to the truncated determination of culpability, which enables those found guilty to avoid criminal liability and conviction for rape. It is not sufficient that the defendant claims an honest belief in the consent of the victim if circumstances suggest differently. If the legal system does not recognize this fact, this in practice enables the defendant to claim non-awareness of consent and thus offers a way out or, as *Vandervort* claims, 'the exculpatory rhetorical power of the term "honest belief" continues to invite reliance on the bare credibility of belief in consent to determine culpability'.[44] Looking back historically, rape laws in many countries were under the influence of latent fear of false accusations and tendencies to 'conceive of female chastity in terms of financial and status value'.[45] These trends, along with the indisputable fact that the lawmakers were mostly men, resulted in traditional rape law relying (and still relying in much of today's world) on the use of physical force as a tool for overpowering the victim`s (physical) resistance.[46]

Other authors adopt a standpoint that falls somewhere in between. This is because they claim that the "mistaken belief" defense 'seems only fair given

42 Rosenbaum, *op.cit.* note 38, 748–757.

43 Yehezkel Dror, 'Law and Social Change', 33(4) *Tulane Law Review* (1958), 787–802, at 797.

44 See, e.g., Lucinda Vandervort, 'Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault', 42(4) *Osgoode Hall Law Journal* (2004), 625–660, at 626.

45 Munro, *op.cit.* note 10, 19.

46 *Ibid.*

the serious consequences attending conviction', but at the same time warn that such a defense would 'widen the opportunity for exploiting rape myths'.[47] However, if recognized by a specific, targeted law, the mistaken belief defense should be accepted only in cases where it meets both standards: that it is genuine and reasonable. If that is the case, this defense serves its purpose by adequately 'protecting the legitimate interest in educating sexual actors about acceptable norms of behavior without subverting fundamental principles of criminal law and procedure'.[48]

As already noted, this paper abstains from the effort of contributing to the debates presented above. Such discussions are not possible on a universal level, since every legal system has its own legal and social context, especially if one bears in mind the essential difference between substantive and procedural norms of the criminal law systems of common law and continental law. Herring and Madden Dempsey point out that, before deciding to criminalize certain behaviors, a responsible legislator has to establish not only that such behavior is *prima facie* wrong, but also that it is not typically justified in a certain society.[49] Therefore, in the next section we will try to explore the reasons that have motivated the legislator to introduce negligence into Croatian rape law and whether those reasons are supported by Croatian jurisprudence.

---

47 Donald A. Dripps, 'Rape, Law and American Society' in McGlynn and Munro (eds.), *op.cit.* note 6, 235. This author comments on the question of the mistaken belief defense in the context of the so-called Kobe Bryant case. NBA star Kobe Bryant was accused of raping a 19-year-old Caucasian hotel clerk in his hotel-room (*People v Bryant,* Co Eagle Cty Dist Ct case no. 03CR204 (2003)). Bryant did not deny having sex with her but claimed it was consensual. She, on the other hand, did not deny consenting to flirting and kissing and going to his hotel-room. The defense sought to prove that the physical evidence showed the accuser had had sexual intercourse with other men the day before she had intercourse with Bryant. The trial judge ruled this evidence as admissible, which caused the accuser to refuse to co-operate with the prosecution, causing case-dismissal.

48 Rosanna Cavallaro, 'A Big Mistake: Eroding the Defence of Mistake of Fact about Consent in Rape', 86(3) *Journal of Criminal Law and Criminology* (1996), 815-860, at 859. This author describes the development of the mistaken belief defense in US law during a long period of thirty years. Among other important cases, she also describes the case of Mike Tyson (*Tyson v. Trigg*) and notices that rape law is very different from contract law: 'The law of rape is not a part of the law of contracts. If on Friday you manifest consent to have sex on Saturday, and on Saturday you change your mind but the man forces you to have sex with him anyway, he cannot use your Friday expression to interpose, to a charge of rape, a defense of consent or of reasonable mistake as to consent. You areprivileged to change your mind at the last moment.' (*Tyson v. Trigg*).

49 Jonathan Herring and Michelle Madden Dempsey, 'Rethinking the criminal law`s response to sexual penetration: On theory and context', in McGlynn and Munro (eds.), *op. cit.* note 6, 39.

3 Reasons for the Reform and Results of Research on Croatian Jurisprudence

The old Croatian rape law was under partial criticism for being too archaic and traditional in terms of accepting the concept that the central point of rape law is the absence of consent but not force (or absence of force).[50] Those opinions often quoted (older) jurisprudence of the Croatian Supreme Court, from the beginning of the 1990s, which mostly required proof of physical resistance by the victim.[51] In that context, critics have also advocated criminalization of negligence in order to avoid concern that the defense of mistaken belief of consent will have an exculpatory effect, no matter whether the belief was reasonable or not.[52] Empirical research, conducted prior to the amendment by the Croatian feminist organization "B.a.B.e.", has shown that, in 17 out of 27 cases, the Croatian courts required proof of resistance.[53] Other similar research, with a sample of 29 verdicts from the County Court in Zagreb rendered between 1 January 2008 and 29 February 2012, showed only four verdicts as arguable from the perspective of coercion and resistance, in the context as explained above.[54] However, this research was published after the Parliament had already voted for the new Code, so it could not be relevant for the amendment. In addition, both research results are limited since they covered only one court jurisdiction, and for a short period.[55]

The official explanation for the amendment is quite restrained on the mistake of facts issue. It was stated briefly that the reason was the same as for a non-consensual sexual act from Article 152. For a negligent non-consensual sexual act, the explanation states the following:

> Paragraph 2 introduces the liability for cases of unreasonable belief in victim`s consent. Since rape is an intentional crime, in such a situation, according to the general rules on mistakes, the perpetrator would not be liable. This provision introduces the possibility of punishment for the perpetrator whose belief in the victim`s consent was unreasonable,

50 Turković and Radačić, *op.cit.* note 6, 179.
51 *Ibid.*, 174.
52 *Ibid.*, 177–178.
53 *Ibid*, 174.
54 Radačić, *op.cit.* note 8, 110–114.
55 Even Radačić pointed out that her article 'does not intend to provide comprehensive analyses of Croatian jurisprudence, but to serve as a case-study of the County Court of Zagreb as the largest in Croatia in one recent period'. See *ibid.*, 106–107.

> despite the fact that this criminal offence is regulated only in intentional form.[56]

Such a solution is highly unusual for continental Europe[57] as it causes certain difficulties in interpretation, one of these being a possible contradictory formulation that rape is still regulated only as an intentional crime. It is not possible to claim that a certain offense only has an intentional form if, at the same time, there is liability for mistake of facts. The same illogical claim appears in part of the literature in Croatia, where some authors still claim that rape can be committed 'only by intent'.[58] Since mistake of facts excludes intent, and the law prescribes the possibility of such a mistake, it is clear that rape can be committed with negligence as a form of guilt and not only with intent. The provisions of a special part of criminal law cannot be opposed to the general principles of criminal law. Instead, they must be in accordance with and complementary to them. Therefore, a mistake of consent, as a type of mistake of facts, excludes intent and establishes liability for a negligent form of rape, too.

It is abundantly clear from the explanation that the new concept of rape (which includes the negligent form as well) was influenced by the British Sexual Offences Act of 2003 (hereinafter: SOA.).[59] The SOA applies in England and Wales. Over the last four decades, the criminal law system of England and Wales has undergone changes, gradually redefining the concept of rape. In *DPP v Morgan* (1975) it was declared that a man could not be found guilty of rape if he had an honest belief that the woman was consenting, even if that belief was unreasonable. This precedent, also known as the "rapist`s charter", set the grounds for a discriminatory policy against victims of rape that would influence the rape laws of England and Wales in the next couple of decades.[60] The Sexual Offences Act of 1976 achieved nothing revolutionary in this area, except that it limited the relevance of evidence referring to the earlier sexual behavior of the victim. In addition, the conviction rate for rape was unjustifiably low, which was most likely the main reason for the great reform made by the SOA in 2003. After an exhausting political struggle, the new act finally defined consent (according to the "consent plus" concept) and reformed the mistake of facts

56 *Vlada Republike Hrvatske, Prijedlog Kaznenog zakona, Zagreb, 2011., P.Z.E. 866*, 186.

57 Most countries of continental Europe regulate only intentional rape: e.g., Germany, Switzerland, Austria, Italy, Serbia, Slovenia, Hungary.

58 Turković in Derenčinović (ed.) et al, *op.cit.* note 16, 165.

59 *Vlada Republike Hrvatske, Prijedlog Kaznenog zakona, Zagreb, 2011., P.Z.E. 866*, 185.

60 For examples of discriminatory treatment of rape victims in England and Wales see Clare McGlynn, 'Feminist activism and rape law reform in England and Wales: A Sisyphean struggle?' in McGlynn and Munro (eds.), *op.cit.* note 6, 140.

defense, introducing the requirement that belief must be not only honest, but also reasonable in all the circumstances of the event (subjective criteria).[61] This change was marked as 'the most straightforward in its application'.[62] However, the SOA 2003 also became subject to increasing criticism over the years.[63]

It is evident that the Croatian legislature missed the opportunity to articulate clear and strong arguments for criminalizing negligence for the crime of rape. Based on prior analysis of the Croatian literature, as well as the explanation and background of the SOA 2003 as the role model for CC/11, we may conclude that the reasoning for the change is as follows:

a) Croatian rape legislation needed to be modernized in line with standards that emphasize consent instead of coercion and resistance;
b) criminalizing negligence is a part of that standard;
c) it is realistic to expect in Croatian jurisprudence that defendants could avoid liability if they claim an honest belief in victim consent, no matter whether that belief was reasonable or unreasonable, because
d) Croatian courts focus overly on the victim's resistance.

Below, we present the results of research on Croatian jurisprudence conducted during May, June and July of 2017. The research reviewed decisions of the Supreme Court in Croatia in rape cases that were selected through the online search engines "Supra Nova" and "e-Spis".[64] These decisions were marked as relevant by both engines, based on the following key words: rape, mistake of facts, honest belief, reasonable, unreasonable, coercion, resistance. They refer to a much longer period of 25 years, since the first verdict is from 1991 while the last is from 2016. Such a time range enables a closer look at whether a change in trends has occurred from the early 1990s until today. The results were analyzed using qualitative and quantitative methodology. Based upon a preliminary deep qualitative case-study method of available verdicts, SPSS descriptive and inferential statistics were implemented with a t-test for independent samples and ANOVA procedures.

3.1 *Status of the Defense of Mistaken Belief in Consent in Croatian Jurisprudence*

First, it is important to note that, according to our research, the defense of honest belief is not so widespread in Croatian jurisprudence. This is probably

61 *Ibid.*, 143.
62 Catarina Sjölin, 'Ten years on: Consent under the Sexual Offences Act 2003', 79(1) *The Journal of Criminal Law* (2015), 20–35, at 35.
63 *Ibid.* See also McGlynn, *op.cit.* note 60, 144.
64 Both are search engines for the Supreme Court database, which includes all decisions rendered by the Supreme Court as the appellate court for rape cases.

related to the fact that mistake of facts or mistake of law, not only in the crime of rape but in general, are not raised in Croatian courts, which in turn makes consequent acquittals based on this defense extremely rare. Therefore, defense lawyers in rape cases are not so enthusiastic to plead not guilty due to honest and reasonable belief in victim consent. Two types of argument confront most rape accusations. First, a lack of sufficient evidence that either a sexual act or coercion occurred – the defendant claims the victim is not telling the truth when stating that a sexual act occurred or that coercion was involved in the shape of use of force or threat. If defendants do not deny the fact of sexual intercourse, they claim it was consensual – not that they thought it was consensual but rather that it actually was consensual. The second argument is that procedural mistakes were committed during collection of evidential material or regarding the rights of the defendant. Conversely, the defense of honest and reasonable belief, as we have already explained above, means that the defendant does not argue that the victim has not consented, but does claim he believed the victim consented. This type of defense is rare. A thorough search by keywords: rape, mistake, mistake of facts, honest, unreasonable, belief, coercion, resistance in search engine systems resulted in 44 verdicts. In the period from 1991 until 2016, a total of 2817 individuals were reported for the criminal offense of rape, including 11 females.[65] Of the 2817 individuals reported, 1761 (62.51%) individuals, including 9 females, were indicted. A total of 1354 individuals, which represents 48.06% of reported and 76.88% of accused individuals, were convicted, including 7 females. On average, this represents a lower percentage of convictions in relation to the general average conviction rate, which is 85%, or the general organized crime conviction rate, which is 95%. The results show that out of 1761 accused individuals, 44 (2.49%) claimed they believed that the victim had consented, with only 10 out of 1761 defendants (0.56%) succeeding in that defense. Out of the 44 verdicts analyzed, 34 (77.3%) of the verdicts were convictions and 10 (22.7%) were acquittals. It appears that the mistaken belief defense is not likely to be successful for the defendant. This indicates that the Supreme Court is not easily convinced of an honest and reasonable belief in victim consent. Analysis of previous acquaintance with the victim shows that in 33 cases (75%) the victim was familiar with the rapist, while only 11 victims (25%) had no previous relationship with the perpetrator. This result indicates that a mistaken belief defense will be most likely in cases where the defendant and victim knew each other previously. Out of 44 cases

65 Official data from the Croatian Bureau of Statistics. The authors wish to thank Dubravka Rogić Hadžalić, the Director of the Social Statistics Directorate, Croatian Bureau of Statistics, for her invaluable assistance.

analyzed, our sample had 18 (40.9%) victims who were previously intimate with the rapist, and 26 victims (59.1%) who had no previous intimate relationship with the perpetrator.

As the main ground for their honest belief in the victim`s consent, defendants emphasized four types of circumstances: absence of the victim`s resistance, behavior of the victim prior to the event, the existence of an intimate relationship between the perpetrator and the victim, and the promiscuous lifestyle of the victim. Out of 44 cases analyzed, lack of physical resistance is present in 32 cases (72.7%), while the previous behavior of the victim (promiscuous, provocative physical appearance) is present in 12 cases (27.3%).

We wanted to analyze more thoroughly if any connection existed between any of these grounds and acquittal. The following tables represent the results.

The court's resistance intensity evaluation was not significant in relation to the type of verdict, $t(44) = -1{,}98$; $p>.05$, but the court had higher resistance evaluations of acquitted cases (M = 3.00).

The court's resistance intensity evaluation was not significant in relation to previous acquaintance with the victim $t(44) = -{,}33$; $p > .05$, but the court had higher resistance evaluations of victims with no previous knowledge of the offender (M = 3.09). This means that the Court did not consider previous acquaintance as a relevant factor in estimating the defendant`s honest belief. This finding is very important because it illustrates the difference in perception between professional judges (characteristic of the Croatian system) and jurors (common law system). Namely, in one study conducted in the common law system (USA) it turned out that 'juries and courts are likely to believe that a victim consented in cases where the victim and the defendant knew each other previously or where they were voluntary social companions'.[66]

TABLE 1 T-test on the court's resistance intensity evaluation in relation to verdict type

Variable	Verdict type	N	M	SD	t
Court's resistance intensity evaluation	Guilty	34	2.29	1.03	−1.98
	Acquitted	10	3.00	.81	

SOURCE: RESEARCH BY MRČELA, M., VULETIĆ, I., LIVAZOVIĆ, G. [OBTAINED FROM OFFICIAL AND COMMERCIAL DATABASES]
Note: $p < ,05^{*}$; $p < ,01^{**}$; $p < ,001^{***}$

66 Dana Berliner, 'Rethinking the Reasonable Belief Defense to Rape', 100(8) *The Yale Law Journal* (1991), 2687–2706, at 2687.

TABLE 2 T-test on the court's resistance intensity evaluation in relation to previous acquaintance with the victim

Variable	Previous cognizance with the victim	N	M	SD	t
Court's resistance intensity evaluation	Yes	33	2.42	1.09	–.33
	No	11	2.55	.82	

SOURCE: RESEARCH BY MRČELA, M., VULETIĆ, I., LIVAZOVIĆ, G. [OBTAINED FROM OFFICIAL AND COMMERCIAL DATABASES]
Note: p < ,05*; p < ,01**; p < ,001***

TABLE 3 T-test on the court's resistance intensity evaluation in relation to previous intimate relationship with the victim

Variable	Previous intimate relationship with the victim	N	M	SD	t
Court's resistance intensity evaluation	Yes	18	2.44	1.15	–.05
	No	26	2.46	.95	

SOURCE: RESEARCH BY MRČELA, M., VULETIĆ, I., LIVAZOVIĆ, G. [OBTAINED FROM OFFICIAL AND COMMERCIAL DATABASES]
Note: p < ,05*; p < ,01**; p < ,001***

The court's resistance intensity evaluation was not significant in relation to previous intimate relationship with the victim, $t(44) = –,05$; $p > .05$. This result only confirms the thesis presented for *Table* 2.

The court's resistance intensity evaluation was not significant in relation to the completion of the rape act, $t(44) = –,34$; $p > .05$, but the court had higher resistance evaluations in cases with attempted rape acts ($M = 2.60$).

The court's resistance intensity evaluation was significant in relation to the reason for honest belief $t(44) = –2,67$; $p < .05$, with prior victim behaviors having significantly higher resistance intensity evaluations ($M = 3.08$). This indicates the likelihood that the Court will look for proof of some sort of resistance in cases where the victim was acting provocatively or initiated intimacy. However, it still does not indicate that such proof will determine the verdict.

TABLE 4 T-test on the court's resistance intensity evaluation in relation to rape type

Variable	Rape type	N	M	SD	t
Court's resistance intensity evaluation	Completed	39	2.44	1.02	–.34
	Attempted	5	2.60	1.14	

SOURCE: RESEARCH BY MRČELA, M., VULETIĆ, I., LIVAZOVIĆ, G. [OBTAINED FROM OFFICIAL AND COMMERCIAL DATABASES]
Note: p < ,05*; p < ,01**; p < ,001***

TABLE 5 T-test on the court's resistance intensity evaluation in relation to the reason for honest belief

Variable	Reason for honest belief	N	M	SD	t
Court's resistance intensity evaluation	Lack of physical resistance	32	2.22	1.03	**2.67***
	Previous behavior of the victim (promiscuous, provocative, physical appearance)	12	3.08	.66	

SOURCE: RESEARCH BY MRČELA, M., VULETIĆ, I., LIVAZOVIĆ, G. [OBTAINED FROM OFFICIAL AND COMMERCIAL DATABASES]
Note: p < ,05*; p < ,01**; p < ,001***

After that, we wanted to find out which circumstance was decisive for the court accepting the "honest belief" defense. The following table illustrates which circumstance was the turning point in reasoning for acquittals.

The correlation analysis showed a significant positive correlation between the court's resistance intensity evaluation and the reason for honest belief ($p < .05$). This means that the court's resistance intensity evaluation significantly increased for victims who demonstrated previous promiscuous / provocative behavior and physical appearance. The verdict type was not significantly correlated to the court's resistance intensity evaluation or the reason for honest belief.

Finally, we examined the specific circumstances in which an honest belief defense turned out to be successful. We studied the decisions and determined that the Supreme Court`s decision on this type of defense was affirmative and mostly based on the circumstance that the victim did not manifest

TABLE 6 Correlation matrix on the court's resistance intensity evaluation, verdict type and reason for honest belief

Variable		Reason for honest belief	Verdict type	Court's resistance intensity evaluation
Reason for honest belief	**r**	–	–.210	**.381***
	N	44	44	44
Verdict type	**r**	–.210	–	.293
	N	44	44	44
Court's resistance intensity evaluation	**r**	**.381***	.293	–
	N	44	44	44

SOURCE: RESEARCH BY MRČELA, M., VULETIĆ, I., LIVAZOVIĆ, G. [OBTAINED FROM OFFICIAL AND COMMERCIAL DATABASES]
Note: p < ,05*; p < ,01**; p < ,001***

any resistance, or that manifested resistance was not sufficient. Eight of ten decisions are based on such circumstances.[67]

However, before we conclude whether this means that the criticism of Croatian jurisprudence, which is presented above, is justified, we have to examine it more carefully. In particular, the majority of these decisions are from the 1990s or early 2000s. Two of them are from the later period (2006 and 2008) and are cases where the defendant was a minor so the Court evaluated lack of life experience. Additionally, in both of those cases the perpetrator and the victim were intimately and sexually involved with each other.[68] In the two remaining decisions, the Court`s decision was based either on the fact that the defendant and the victim were in a stable intimate relationship and there was no evidence of coercion or resistance,[69] or the victim invited the defendant to a hidden place and gave him compliments and initiated sexual intercourse by

67 See the following decisions of the Supreme Court of Croatia: *I Kž 762/00-3; I-Kž-747/00-3; I Kž 115/1994-3; I Kž 266/1993-3; I Kž 810/1994-3; Kžm 26/08-3; Kžm 10/06-3; I Kž 47/01-3*.

68 Supreme Court of Croatia Kžm 26/08-3 and Kžm 10/06-3.

69 Supreme Court of Croatia I Kž 658/13-4.

kissing him, touching his penis and telling him that she wanted to be intimate with him.[70]

Based on this analysis, it is fair to conclude that the Croatian Supreme Court, even before the CC/11, developed an approach that properly differentiates situations in which the defendant had an honest and reasonable belief in the victim's consent from those in which the defendant had no such belief. It is important to emphasize that all acquittals that were based on the absence of "serious" or "physical" resistance, are from the 1990s or from the beginning of the 2000s.[71]

One of the key differences between the Croatian and common law systems is that in Croatia there are no jury trials. In common law systems one of the main objections against the honest belief defense concerns lack of experience by jurors, who could be easily deluded by skillful defense counsel.[72] In Croatia, however, as in most of continental Europe, professional trial judges make decisions on both the facts and the law. They have much more practical experience in adjudicating than lay jurors. Professional judges, while on the bench, will most certainly have more cases of rape, but nonprofessionals will have only one or maybe two opportunities to serve on a jury for a rape crime.

Although the question of resistance, as an element of rape, is not the topic of this paper *stricto sensu*, it is indisputable that this question is indirectly connected with the problem of mistake of facts and honest belief. Namely, the courts often base their decision on the nonexistence of certain forms and the seriousness of the victim`s resistance. Those who argue against, claim that such an approach is outdated and discriminatory.[73] We agree that the requirement for physical resistance by the victim, if understood as a *conditio sine qua non* of a rape conviction, is not acceptable in modern criminal law. On that basis, we agree with the conclusion that the Court should not insist on evidence of physical resistance. Instead, the emphasis should be on proof of coercion (either force or threat).

Unlike some other systems, where the legal notion of rape includes all forms of non-consensual sexual activity (which also covers forms that do not include force or threat of force), Croatian criminal law has chosen a different approach.

70 Supreme Court of Croatia I Kž 47/01-3.

71 Even those Croatian authors who represent different opinions on this topic always quote mostly older decisions of the Supreme Court, from the beginning of the 90s. See, e.g., Ksenija Turković in Petar Novoselec (ed.), *Posebni dio kaznenog prava* (Pravni fakultet, Zagreb, 2007), at 153–154.

72 See, e.g. for Canada in Vandervort, *op.cit.* note 44; for the USA Berliner, *op.cit.* note 66, 2687–2706, at 2701.

73 *Ibid.*

As explained, other (milder) forms of non-consensual sexual actions are incriminated in Article 152, while rape (as the qualified form) was separated in Article 153. A constitutive element of rape in this concept is the use of either physical force or threat of such force. This means that these two circumstances are what differentiates rape (Article 153) from sexual intercourse without consent (Article 152). Force, by definition, means a physical act with the purpose of affecting the victim's behavior. As Stojanović claims, "while consent excludes the need for force, resistance confirms the need".[74] Therefore, if one wants to prove the use of force, then the existence of verbal or expected resistance must be proven. The latter term describes a situation in which the victim was too terrified to manifest resistance, but the circumstances were such that it is objectively justified to conclude that she did not consent.[75] Authors who argue differently claim that courts should focus only on the element of coercion, but they do not offer a solution as to how to prove coercion if it is not related to resistance.

In any case, the Court's attitude towards coercion and resistance is perhaps clearest in a recent case where an acquittal was reversed and remanded to first instance. Among other considerations, the Supreme Court of Croatia emphasized the following:

> Specifically, the Court at first instance states that "rape is a cruel and inconsiderate act of violence that occurs just because the victim resists and does not want the sexual act, and because he/she defends itself in all possible ways". It is true that rape is a cruel and inconsiderate act, but it is completely wrong to conclude that rape occurs "just because the victim resists and does not want the sexual act and because he/she defends itself in all possible ways". Rape does not occur because of the (lack of) activity of the victim, or because the victim resists and because he/she does not want sex. Such an approach would imply that the victim is "guilty" of rape. Rape occurs because the perpetrator attacks the sexual freedom of the victim, and in doing so, it is not necessary that it was done "in order to meet the sexual urge" – because such a goal or purpose is not a component of the offence of rape. It is also not necessary that the victim "defends him/herself in all possible ways", because it is contrary to the reason for prescribing the criminal offence of rape, which is specific,

74 Zoran Stojanović, 'Silovanje bez prinude, Usuglašavanje KZ Srbije sa članom 36 Istanbulske konvencije, 21(1) *NBP – Journal of Criminalistics and Law* (2016), 1–23, at 3.

75 Walter Perron and Jörg Eisele in Adolf Schönke and Horst Schröder (eds.), *Strafgesetzbuch. Kommentar* (C. H. Beck, München, 2010), at 1645.

> considering the sphere of sexuality as a complete protection of the freedom to decide with whom, when and how a person engages in sexual intercourse. In this sense, one clear and firm "no" is enough for a person to express their opposition to sexual intercourse, making it obsolete that the victim should "defend herself/himself in all possible ways". That is why the notion of rape in the first instance judgment is obviously based on the wrong gender prejudice, and therefore is not acceptable.[76]

Analysis of the verdicts that are form subject of our research shows that the Supreme Court abandoned discriminatory viewpoints many years ago. During the 1990s, the Court clearly stipulated, that the 'earlier sex life of the victim, as well as the way she was dressed, have no influence on the question of consent'.[77] In another verdict, the Court convicted the defendant of rape and explained that the victim 'had no real chance to show any resistance and…the fact that she did not demonstrate resistance is not relevant'.[78] The Court shows consistency in this attitude even in other decisions from that time, claiming that 'if the victim did not resist, the court has to decide whether that is because resistance could put her in a worse position…if that is the case, pure verbal resistance prior to the event is sufficient'.[79] The Court expresses a similar point of view when it emphasizes that 'courts must evaluate the fact that sometimes resistance could expose the victim to even greater danger'.[80] These concerns kept developing in recent jurisprudence. The Court remains insistent that the 'victim's opposition does not necessarily have to be manifested through physical resistance…it is sufficient if she demonstrated her will in a clear way'.[81] In addition, the Court is very clear that 'physical force is not the only possible… coercion and creating pressure and the atmosphere of fear are equally effective'.[82] Those and many other decisions show that the Croatian Supreme Court has over twenty years of consistency in interpreting rape according to modern principles and standards. It seems, however, that none of these decisions was taken into consideration prior to the amendments to Croatian rape

76 Supreme Court of Croatia I Kž 922/11.
77 Supreme Court of Croatia I Kž 639/97.
78 Supreme Court of Croatia I Kž 1048/93.
79 Supreme Court of Croatia I Kž 565/94-3.
80 Supreme Court of Croatia I Kž 632/93-4.
81 Supreme Court of Croatia I Kž 901/09-6. Same in I Kž 307/13-6, Kžm 13/13-6, I Kž 502/16-4, I Kž 658/13-4, I Kž 528/13-4, I Kž 700/00-5, I Kž 798/04-3 and so on.
82 Supreme Court of Croatia I Kž 571/13-4.

law.[83] Therefore, it remains difficult to conclude that criminalizing negligence will have any improving effect on Croatian jurisprudence that has not already been accomplished prior to the amendment.

3.2 *More Harm than Good: from Witness to Defendant?*

Based on the arguments presented, one may wonder if the new concept of rape will produce any significant effect. It is worth mentioning that up to mid-2017 not a single case dealt with possible negligence as a form of guilt in rape cases (Article 153/2).[84] On the other hand, there is a danger that spreading the criminal zone significantly could cause the opposite effect and, in some specific cases, open the door to criminal liability for those who had the status of witnesses. Croatian jurisprudence has registered two specific such cases that, as it appears, open this question.

In the first case – from 2004 – the defendant had been physically and sexually harassing his wife for several years (between 1993 and 2002). He was beating her almost every day, threatening her and by doing that, he totally broke her willpower. She was too afraid to confront him so she obediently followed his orders. He used to find other men through the newspaper and bring them to have sex with her, while he was in the other room recording it. This excited him sexually. He would then force her to have sex with him immediately after those men had left. He told visitors that "this is a sexual game he plays with his wife and that she enjoys it the same as he does". Since she showed no resistance, they had no reason to doubt his words He was convicted of several crimes, and the men he was inviting had the status of witnesses.[85]

The second case happened several years later, in 2014. The defendant had also been harassing his wife for several years and she was in constant fear. He forced her to have sex with unknown men he was bringing to the house. He even forced her to send them an SMS expressing the desire for sexual intercourse, which she did in fear of more violence. Since she showed no resistance, these men had no reason to doubt her consent. The defendant was convicted

83 It is fair to say that some decisions simply could not have been taken into consideration because they were reached after CC/11 came into force. However, before CC/11 was enacted there are ample decisions that clearly demonstrate the Court's positive attitude towards the modern concept of the criminal offense of rape.

84 There are some cases of negligence regarding the crime of sexual intercourse without consent (152/2), but not a single case related to negligence in rape (153/2).

85 Municipal Court in Pula, K-297/04; County Court in Pula, Kž 347/04. This case is commented on in Croatian literature, but in a different context from this paper (in the context of the demarcation between rape and milder forms of sex crime). See Petar Novoselec, 'Razgraničenje kaznenih djela prisile na spolni odnošaj i silovanja (sudska praksa)', 16(1) *Hrvatski ljetopis za kazneno pravo i praksu* (2009), 335–337, at 336.

of rape and the men he brought had the status of witnesses, similar to the first case.[86]

Such cases are rare but they open the question as to whether the men who performed actual sexual intercourse should be prosecuted for the negligent form of rape, under Article 153/2, or a negligent form of non-consensual sexual intercourse under Article 152/2 instead of being treated as witnesses. This question is made even more complicated if one considers that in Croatia mistake of facts is still a rare occurrence in jurisprudence, and that there are no clear and uniform criteria as to how to estimate whether a mistake was reasonable or not. It is a question of criminal prosecution policy because only the prosecutor is authorized to file an indictment. The Croatian court, as always, will find a proper way, as legal standards do deal with such cases if indictments are filed. Several factors will certainly be included in the court's analysis, including moral blameworthiness for such behavior and the purpose of imposing punishment. Of course, considering the '*ignorantia legis neminem excusat*' legal doctrine, one might speculate whether it is morally justifiable[87] to prosecute citizens. A court in such a case would be in a position to weigh whether unacceptable behavior is covered by rendering a guilty verdict against a perpetrator who coerced their victim into being "an object" of an obviously forced sexual act, or if there is a need for something more.

4 Comparative Overview of the Region: the laws of Slovenia, Serbia and Montenegro

In order to position Croatian rape law after recent reforms in the region,[88] we explored how the crime of rape is regulated in neighboring countries: Slovenia, Serbia, and Montenegro. These countries, along with Croatia, were former members of Yugoslavia and all have similar legal traditions and laws.[89]

86 Supreme Court of Croatia, I Kž 800/2013: the case was from the County Court in Varaždin.

87 See more on the moral legitimacy of decision-making in Carri Ginter and Raul Narits, 'The Perspective of a Small Member State to the Democratic Deficiency of the ESM', 38(1) *Review of Central and East European Law* (2013), 54–76, at 57.

88 The relevance of the comparative approach has been emphasized by many authors. See, e.g., Balász Fekete, 'The Revival of Comparative Law in a Socialist Country: The Impact of Imbre Szabó and Gyula Eörsi on the Development of Hungarian Comparative Law', 38(1) *Review of Central and East European Law* (*2013*), 37–52, at 39–40.

89 See *op.cit.* note 2. A similar legal tradition is also present in other Balkan countries, e.g., Bulgaria. See Gergana Marinova, 'Bulgarian Criminal Procedure: The New Philosophy and Issues of Approximation', 31(1) *Review of Central and East European Law* (2006), 45–79, at 52.

Moreover, the social and cultural context as well as the mentality in all of these countries is similar. We present a brief description of the approach to the criminalization of rape after Slovenia and Croatia joined the European Union, while Serbia and Montenegro are currently in the negotiating process.

4.1 *Slovenia*

Slovenia was the first of the former Yugoslavian republics to join the European Union. In that sense, Slovenia was also the first to adopt the *acquis communautaire* in all areas of law, including criminal law. However, certain criminal offenses which protect women and children against sexual and domestic violence were introduced in Slovenian criminal law only after they were introduced in Croatian criminal law. For example, Slovenia introduced stalking and forced marriage as criminal offenses only in 2015, while Croatia implemented them in 2013.

Slovenian literature suggests that many cases of rape are qualified as sexual violence because of the lower minimum sentence. Moreover, it is difficult to prosecute marital rape without the victim's cooperation and victims are usually reluctant to cooperate. Victims complain about the court proceedings, they are still asked about their sexual preferences, sexual history, abortions, as well as drug and alcohol use.[90] Some criminological studies indicate that the majority of rape cases in Slovenia occur in closed private spaces (such as apartments, houses, and cars) during weekends.[91]

Article 170 of the Slovenian Criminal Code regulates the crime of rape (SLO: *posilstvo*). Similar to many other systems, rape has undergone a long process from a traditional to a modern concept.[92] Nowadays, it is regulated as a sexually neutral crime. Recently, one criminological study disclosed several cases of male victims of rape and other sex crimes in Slovenia, and that sexual victimization can be experienced quite differently by male and female victims in terms of the characteristics of the offense, the offender, and police procedure.[93] Rape can be committed in marriage, as well. Unlike Croatian law, in

90 Katja Zbukovec Kerin, 'National Analysis of Legislation – Slovenia, European Women`s Lobby', (5 January 2019) available at https://www.womenlobby.org/IMG/pdf/2714_slovenia_lr.pdf.

91 Aljaž Viraj & Sara Korpič, 'Analiza posilstven v Sloveniji od leta 2008 do leta 2012 z uporabo geografskih informacijskih sistemov', (5 January 2019), available at https://www.fvv.um.si/dv2014/zbornik/Viraj.pdf.

92 For details on the historical development of Slovenian rape law see Damjan Korošec, *Spolnost in kazensko pravo, Od prazgodovine do t. i. modernega spolnega kazenskega prava* (Uradni list Republike Slovenije, Ljubljana 2008), at 43–85.

93 Irma Kovčo Vukadin, Vedran Žgela, Jadranko Mesić, 'Gender Differences in Sexual Victimization', 67 (4) *Revija za kriminalistiko in kriminologijo* (2016), 389–403, at 392.

Slovenia rape can be committed only as an intentional criminal offense. The defense of honest belief, reasonable or unreasonable, if successful, would lead to acquittal of the defendant. Statistics show that the number of prisoners serving sentences for rape in Slovenia is increasing.[94]

The *actus reus* of the crime, similarly to Croatian law, has two main components: the use of coercion or threat of direct attack on the life and body of the victim; and sexual intercourse or another act equivalent to sexual intercourse. Slovenian literature and jurisprudence have not built clear standards on the scope of activities that can be qualified as acts equivalent to sexual intercourse. In the official explanation to amendments to the law this term was interpreted narrowly, so that it included only anal sex, while other forms of sexual act (including penetration) can be qualified only as the milder criminal offense of sexual violence.[95] Such standpoints differ from those in Croatia but similar to those in Serbia (described below in Section 4.2.). However, Slovenian authors are making an effort to fill this gap. Korošec has analyzed both Slovenian and comparative law and literature, advocating for a wider interpretation of acts equivalent to sexual intercourse. The author claims that, just as Croatian law, equivalent acts should include all acts involving penetration and even certain acts without penetration if comparable with sexual intercourse.[96]

The main legislative difference between the CC/11 and the Slovenian Criminal Code is that Slovenian law does not list the type of sexual activities as precisely as Croatian law, but instead uses a more general formulation. Another very important difference is that Slovenian law does not regulate the possibility of the perpetrator using force or threats against a third person. Article 170/1 regulates only force or threats against the victim, which means that the court is not allowed to extend this definition to a third person. That would be against the *nullum crime sine lege stricta* principle. Therefore, the criminal zone of rape seems to be significantly narrower than in Croatia.

A qualified form of rape is regulated in Article 170/2, and it exists if a perpetrator acts in a cruel or extremely humiliating manner, or if the crime is committed successively by several perpetrators or against offenders serving a sentence or other persons whose personal freedom was taken away. On the other hand, a privileged form exists if the perpetrator threatens a large loss of property to the victim or their relatives, or with disclosure of any matter

94 Marcelo F. Aebi, Christine Burkhardt, Rok Hacin, M. M. Tiago, 'A Comparative Perspective of Imprisonment Trends in Slovenia and Europe from 2005 to 2014', 67(4) *Revija za kriminalistiko in kriminologijo* (2016), 430–442, at 437.

95 Matjaž Ambrož, 'Novi slovenski Kazneni zakonik', 15(1) *Hrvatski ljetopis za kazneno pravo i praksu* (2008), 323–341, at 339; Korošec, *op.cit.* note 92, 143.

96 Korošec, *op.cit.* note 92, 206–215.

concerning the victim or their relatives which is capable of damaging the honor and reputation of the victim or their relatives (Article 170/3). It is interesting that in this case the law also recognizes the possibility of a threat towards another (third) person, but limits the scope only to a relative, which is also a narrower concept than the Croatian model. It is noticeable that, unlike Croatian law, Slovenian law does not differentiate rape (as a separate crime) from non-consensual sexual acts (as a milder crime). Instead, it adopts a wider definition of the term "rape" and regulates all forms in the same provision. This means that in each case of involuntary sexual intercourse or equivalent act, the qualification remains the same and the only practical difference lies in the prescribed penalty.

The literature emphasizes that the victim's actual resistance is not a necessary element for rape. It is sufficient if resistance was to be expected in the given circumstances and the perpetrator's actions were directed to repressing that resistance from the very beginning.[97] This means that Slovenian law, similar to Croatian law, recognizes the category of expected resistance.

4.2 *Serbia*

The modernization of Serbian rape legislation started in 2005, when this criminal offense was regulated as gender-neutral. Rape in marriage and the extramarital community were criminalized, as the legislator expanded the *actus reus* by introducing the term of sexual acts equal in kind to sexual intercourse. Recently, Serbia joined the Istanbul Convention, which triggered several additional significant changes in Serbian sex-related law. Serbian legislators also implemented some new criminal offenses, such as sexual harassment, forced marriage, and mutilation of female sex organs.

At the moment, there is a serious debate in Serbian literature on how to (re) define rape.[98] Serbian legislators did not implement solutions similar to the Croatian Article 152, according to which milder forms of rape would also include any sexual intercourse without consent, independently of whether force or direct threat are used. Although such an amendment was proposed to the Serbian Parliament in 2017, the public prosecutor`s office strongly opposed the amendment, claiming that such a change, considering the existing jurisprudence in Serbia, would eventually lead to the alleviation of criminal policy towards rape, since courts would choose to apply milder forms of rape each time

97 *Ibid.*, 150.

98 See Stojanović, *op.cit.* note 74, 3–23; Veljko Delibašić, 'Usklađivanje krivičnog zakonodavstva sa Istanbulskom konvencijom', in *Evropske integracije i kazneno zakonodavstvo* (Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor, 2016), 181–192.

the situation is doubtful.[99] Under such heavy criticism, the legislator decided to postpone the amendment.

The current Criminal Code of the Republic of Serbia regulates rape in Article 178 (SRB: *silovanje*). This provision states three forms of rape: basic, qualified, and privileged (milder). All forms can be committed only by intent, which means that mistake of facts, if proved, would lead to acquittal of the defendant. For conviction, the prosecutor must prove that the perpetrator acted with awareness of lack of consent. Unlike Croatia, however, Serbian literature is definitive that rape can be committed only with *dolus directus*.[100]

The basic form exists when the perpetrator forces another person (the victim) to have sexual intercourse or sexual activity of the same kind. There is still no consensus as to which acts are included in the term "sexual activity of the same kind". Part of the literature and jurisprudence claims this involves only anal sex, while another part argues this involves all other acts that include some kind of penetration of the victim`s body committed with sexual connotations.[101] Those who claim the latter also stipulate that those "other acts" are not possible between two female persons.[102] This standpoint is different than that accepted in Croatian literature and jurisprudence, as described earlier.

Sexual activity must be a result of the use of either physical force, or by threat that the perpetrator will directly attack the life or body of the victim or another person who is in close relation to the victim. This standard includes not only the victim`s relatives, but other individuals emotionally connected to the victim, as well.[103] In that aspect, Serbian law is narrower than Croatian, since it does not recognize rape if force and threat are not directed to a closely related person. The main issue of Serbian jurisprudence is how to determine the sufficient level and intensity of force required for rape, since this is a distinctive element from other (milder) forms of sexual offenses. Both theory and jurisprudence agree that force can be either *vis absoluta* or *vis compulsive*. In either case, however, it has to be sufficient to break the victim`s resistance.[104] Force will also exist if the perpetrator uses alcohol, drugs or other substances,

99 Milan Škulić, 'Krivično delo silovanja u krivičnom pravu Srbije – aktuelne izmene, neka sporna pitanja i moguće buduće modifikacije', 8(3) *VIII CRIMEN* (2017), 339–441, at 395–396.

100 Škulić, *op.cit.* note 99, 415.

101 Zoran Stojanović, *Komentar Krivičnog zakonika* (Službeni glasnik, Beograd, 2017), at 436; Škulić, *op.cit.* note 99, 414.

102 Škulić, *op.cit.* note 99, 415.

103 *Ibid.*, 405.

104 *Ibid.*, 401; see also Stojanović, *op.cit.* note 101, 567.

or hypnosis to stun the victim or cause unconsciousness. If the victim is a minor, force of less intensity is required than if the victim is an adult.[105]

Similar to Croatia, rape is sexually neutral (although in the majority of cases, the perpetrator is male and the victim is female) and can be committed in marriage. In addition, the crime is not limited only to sexual intercourse, but also involves other forms of sexual activity that have the same meaning and gravity as sexual intercourse.[106] However, the description of these actions is less precise than in Croatian law.

The privileged form is regulated in Article 178/2 and exists if the perpetrator did not threaten with force, but with revealing information that could hurt the reputation of the victim or a closely related person. This solution is wider than that in Slovenia, but still narrower than the Croatian model. In the Croatian system, this kind of behavior would be qualified as the milder criminal offense of non-consensual sexual act (Article 152 of CC/11). The qualified form exists if a victim was severely injured, or became pregnant, or if the victim was a minor, or if the crime was committed by more than one perpetrator, or in a humiliating or cruel way (Article 178/3).

Serbian literature and jurisprudence present the standpoint that conviction of rape requires proof of the victim's resistance. While some authors claim there should always be proof of serious, firm and permanent resistance, other authors represent the more liberal attitude that in some cases rape is possible even if there was no resistance *tempore criminis* (because the perpetrator broke the victim's resistance earlier and the victim was in fear).[107] The latter definition means that recognition of the category of expected resistance is identical to Croatian and Slovenian law. Part of the literature emphasizes one decision of the Supreme Court of Serbia as a very good example of the standard of proof required for rape. This was a case of a victim who claimed she was raped by the use of force. Yet there were no physical injuries or other marks on her body and clothes. The Court concluded that lack of physical injuries and other traces (such as semen) does not necessarily lead to the conclusion that the sexual act was violent. Instead, courts should always consider all the circumstances of the event.[108]

105 Škulić, *op.cit. note* 99, 404.

106 For examples see Ljubiša Lazarević, *Komentar Krivičnog zakonika Republike Srbije* (Savremena administracija, Beograd, 2006), at 311.

107 Stojanović, *op.cit.* note 74, 6–7.

108 Decision no. Kž 415/90. For commentary see Škulić, *op.cit.* note 99, 404.

4.3 *Montenegro*

Similar to other systems in the region, Montenegro's rape law has undergone a long process of gradual adjustment to modern standards, especially after joining the Istanbul Convention. The latest amendments to the law entered into force in 2018 and introduced several significant changes regarding the crime of rape. The purpose of these changes was to harmonize this area of criminal law with the Istanbul Convention.[109] Therefore, Montenegro's legislators changed the basic concept of rape and regulated the offense more closely to Croatian law. However, despite recent changes in legislation, Montenegro's justice system continues to face public criticism due to a lenient criminal policy towards rape.[110]

The crime of rape is regulated in amendment Article 204 of the Criminal Code (MNE: *silovanje*) as a sexually neutral criminal offense, which can also be committed in marriage. Article 204 regulates the basic and qualified forms of this crime. All can be committed only by intent. Unlike Croatian law, the negligent form of rape is still not criminalized in the law of Montenegro.

The basic form of rape (Article 204/1) is committed if the perpetrator commits sexual intercourse or some other equivalent act without the victim`s consent. This is a new concept of rape, which, just as in Croatia, emphasizes lack of consent as a constitutive element. The *ratio legis* of this amendment was to provide protection against all forms of non-consensual sexual acts and to harmonize the law with standards required in the Istanbul Convention.[111] The basic offense exists if the perpetrator did not use force or threats, and it is punishable by one to eight years of imprisonment. If the perpetrator used force or a direct threat, this constitutes a qualified form, punishable by imprisonment from two to ten years.

In literature, there is still some debate on the scope of "other equivalent acts". Authors who argue for a narrower interpretation claim that this term only implies penetration by the penis into the victim`s anus or mouth, independently of the victim`s sex and gender.[112] This concept leads to the logical conclusion that this kind of act can be committed only by a male perpetrator, which is similar to the Serbian standpoint, but different from the Croatian one.

109 See GREVIO Report regarding Montenegro from 25 October 2018 (at 49), (5 January 2019) available at www.gov.me/ResourceManager/FileDownload.aspx?rld.

110 (5 January 2019) available at https://www.in4s.net/skandalozne-sudske-odluke-crnoj-gori-vece-kazne-lopove-nego-silovatelje/?lang=lat.

111 See GREVIO Report (*op.cit.* note 108).

112 Miodrag Jović, *Krivično pravo – posebni deo – skripta I* (Univerzitet u Novom Pazaru, Novi Pazar, 2011), at 108.

Other authors believe that jurisprudence should adopt a broader concept and qualify every penetration of the victim`s vagina or anus as an act equivalent to sexual intercourse. This concept also includes penetration with hands or fingers, objects, and so on and can be committed by female perpetrators as well.[113]

As in Croatian law, but differently from Slovenian and Serbian law, a third person no longer has to be in close physical proximity to the victim. This means that the legislator decided to extend the criminal zone. Other forms of rape exist if the perpetrator threatens to reveal something which could compromise the victim`s reputation or threatens some other grave harm (Article 204/3); if the severity of the rape caused bodily injury, or was committed by several perpetrators, or against a minor, or with the consequence of pregnancy, or in a humiliating or perfidious way (Article 204/4); if rape caused the death of the victim or if the victim is a child (Article 204/5). This last is the most serious case of rape, punishable by imprisonment from ten to forty years.

Studies emphasize the absence of victim consent as an element of rape.[114] In that aspect, the majority opinion requires proof of both coercion and resistance. Resistance can be passive, verbal, physical and a combination. In any case, resistance has to be serious, real and consistent.[115] It appears that this standpoint, unlike previously analyzed systems, does not recognize the category of expected resistance, which makes the rape law of Montenegro more rigid and conservative than the laws of Croatia, Serbia, and Slovenia.[116]

5 Conclusion

During more than 25 years of independence, many significant changes have taken place in the Croatian legal system. One of those changes was in the field of criminal law, particularly in respect of the criminal offense of rape. The Supreme Court of Croatia has embraced and developed clear and nondiscriminatory standards regarding victim resistance. Many decisions clearly show the Court's position that the victim's resistance is not an element of the criminal

113 Aleksandar R. Ivanović & Aleksandar B. Ivanović, 'Krivično djelo silovanja u krivičnom zakonodavstvu Crne Gore', 2(3) *Pravne teme* (2014), 92–110, at 94–95.

114 *Ibid.*, 93.

115 *Ibid.*, 93–94.

116 For more details on legal and social occasions in Montenegro see Vladimir Savković, 'The Alleged Case of Golden Shares in Montenegro: A Candidate Country's Experience as an Incentive for Including *Acta Jure Gestionis* within the Range of Restrictions on Free Movement of Capital', 41(2) *Review of Central and East European Law* (2016), 117–156, at 120–135.

offense of rape, and therefore no need arises to prove it. The same situation exists regarding "satisfying the sexual urge" of the defendant since this is also not an element of the criminal offense of rape (and for that matter nor is the criminal offense of sexual intercourse without consent).

Mistake of facts as a defense in court practice is of minor occurrence. Our analysis shows that this is the case regarding the criminal offense of rape as well. This type of defense has even more sporadic success and in practice is used only in cases when, in fact, there is not enough evidentiary material that rape has even been committed.

The rare acceptance of such a defense may be related to the fact that in Croatia, as in many countries with continental law systems, adjudicators are professional judges; they decide based on the facts and the law. One may expect that professional judges, with rape case experience, would exercise careful scrutiny when assessing this type of defense. Indeed, analysis of Supreme Court decisions clearly shows not only acceptance and development of a modern approach regarding the criminal offense of rape, but careful consideration of all elements of the crime, along with elements that are no longer essential for the criminal offense of rape as well.

It is therefore clear that the Supreme Court in practice had chosen a modern approach even before the changes of CC/11 were adopted and enacted. Statistical data shows the same adjudication pattern; the proportion and number of rape reports and rape convictions are the same in the period before CC/11 as after its enactment, and there is no conviction of the negligent form of rape despite the fact that CC/11 has been in force for more than four years. Of course, statistical data should not be the only basis for any credible systematic conclusion, even in this case. Therefore, further empirical research on the particular characteristics of the Croatian criminal legal system, together with analysis of Supreme Court decisions, may serve as a basis for a more valid conclusion.

Another factor that should be taken into consideration is that negligent rape is not part of the legal tradition in many continental law countries. A short comparative analysis clearly shows this is valid for the legal systems in the region, as well. In fact, the negligent form of rape is specified in common law countries, where rape usually includes other forms of sexual crime, which are separate offenses in continental law systems.

The analysis that served as an argument for introducing the negligent form of rape was not comprehensive, as a small number of outdated cases was used.

There is a logical obstacle when considering negligence and rape. The essential elements of rape are use of force or threats. It is difficult to imagine a case in which the perpetrator uses force or threats and then claims that they had reasonable ground to believe that the victim consented. Cases of sexual

intercourse without consent due to force or threats are not elements of this criminal offense, but sexual intercourse without consent represents a different criminal offense other than rape.

Therefore, introducing the negligent form of sex crimes is the right approach for other aspects of nonconsensual sexual intercourse, but its necessity is quite doubtful regarding rape. It remains dubious whether the concept of negligent rape will bring any significant improvements to Croatian jurisprudence and victim protection.