

A Few Reflections on the Legal Provisions on Rape

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Rape is often considered (after murder) "*the most hurtful crime among adults*" (ČIRTKOVÁ 2008, pg. 61). Rape is also a crime that goes unreported extremely often. Both domestic and foreign experts¹ estimate that only 3 - 10 % cases of rape are reported to the police (this rate is much lower for rapes by an intimate partner or by a relative than for assault by a stranger). According to the police statistics, 530 rape offences were reported to the police in the Czech Republic in 2006.² For illustration, in Sweden, a country of approximately the same size, the number of reported cases of rape was about six times higher in 2005 (3,500). In addition to the problem of being severely underreported, the attrition rate of rape offenses is also very high - the criminal proceedings get laid aside, are discontinued, or are never even initiated. The statistics unfortunately tell us nothing about the reasons behind the attrition rate. Out of the 500 to 600 rapes reported annually in recent years, only approx. 150 perpetrators are convicted. The fact that a third of these prosecutions result in parole (i.e. the perpetrators had been found guilty but never served a day in prison) is appalling.

In her commentary on a similar situation in the USA, Catherine MacKinnon points out that: "Many victims of rape anticipate, with reason, that they will not be believed by the authorities or will lose in court – perhaps because they are not believed, but also perhaps because the triers of fact value their rapist over them, blame the woman for the rape, or do not care that they were raped, thinking the harm trivial or the law against rape repressive" (MACKINNON 2007, pg. 749).

The apprehensiveness of the victims about the criminal proceedings is rooted in stereotypes about victims and perpetrators as well as in the common myths about rape, its circumstances and the way it takes place. Another chapter discusses the myths and stereotypes that hinder effective punishment and prevention of rape.³ The following text focuses strictly on legal issues from the perspective of the victim. It examines the way the law deals with interpersonal violence and its adequacy, and outlines potential changes that might lead to improving the current state of affairs. With this goal in mind, this text first discusses substantive and procedural criminal law and then briefly refers to the developments in international law. The main theoretical positions analyzing the wrongs caused by sexual violence are presented in the conclusion.

¹ See e.g. WEISS – ZVĚŘINA 1997, or the overview of research to-date published by MACKINNON 2007.

² The Police of the Czech Republic crime statistics for 2006, 2007, 2008.

³ See Kristýna Ciprová's chapter in this publication or HAVELKOVÁ 2009.

Substantive law provisions

Until 2001, when a new amendment the Criminal Code⁴ was passed, the Czech law had defined rape as a crime committed only against women and carried out only by genital intercourse. Since 2001,⁵ by including intercourse of oral⁶, anal, or digital⁷ nature under the definition of "other comparable sexual intercourse", coercion to other than only the genital form of intercourse has been established as a criminal offense. Also, newly, anybody could be the victim. The aggravated offences (Subsections 2, 3 and 4) foresaw harsher sentences for a rape of a younger victim and for a rape that caused bodily harm or injury (i.e. results in grievous bodily harm or death of the victim).

The new Criminal Code,⁸ adopted in January 1, 2010, distinguishes four basic forms of sexual violence. Head III of the Criminal Code that lists "sexual crimes against human dignity" distinguishes the offence of rape by two types of sexual intercourse (Sec. 185 (1) and Sec. 185 (2a)) and two separate types of offence of sexual coercion (Sec. 186 (1) and Sec. 186 (2)):

Section 185 Rape

*(1) A person who through **violence**, the **threat of violence** or the **threat of any other serious harm** coerces another person to sexual intercourse, or takes advantage of another person's **defencelessness**, shall be liable to imprisonment for a term of six months to five years.*

(2) The offender shall be liable to imprisonment for a term of two to ten years if he commits the act defined in (1)

*a) **by genital or another comparable form of sexual intercourse***

b) with a child, or

c) with the use of a weapon.

(3) The offender shall be liable to imprisonment for a term of five to twelve years,

a) if he commits the act defined in (1) against a child of under fourteen years of age,

b) if he commits such an act against a person who is in detention, serving a prison sentence, under preventive treatment or in preventive custody, in a preventive or a foster care institution or in another institution where personal freedom is restricted,

c) or if he inflicts grievous bodily harm upon the victim by an act defined in (1).

⁴ Law No 144/2001 Coll.

⁵ Sec. 241, Law No. 140/1961 Coll., Criminal Code, as amended by Law No. 144/2001 Coll.

⁶ See e.g. the decision of the Supreme Court of July 31, 2003, 6 Tdo 812/2003.

⁷ See e.g. the decision of the Supreme Court from December 15, 2005, 3 Tdo 1305/2005.

⁸ Law No. 40/2009 Coll.

(4) *The offender shall be liable to imprisonment for a term of ten to sixteen years if he commits the act defined in (1) and causes the death of the victim as a result.*

(5) *Preparation is a criminal offence.*

Section 186 Sexual Coercion

(1) *A person who through **violence**, the **threat of violence** or the **threat of any other serious harm** coerces another person to **sexual self-stimulation**, to **remove their clothes** or to **behave in a comparable manner**, shall be liable to imprisonment for a term of six months to four years or to a ban on any further activities.*

(2) *The same liability applies to an offender who coerces another person to **sexual intercourse**, **sexual self-stimulation**, to **remove their clothes** or to **behave in a comparable manner** abusing the person's **dependence**, **defencelessness** or one's own **position** of trust or influence.*

(3) *The offender shall be liable to a term of imprisonment of one to ten years if he commits the act defined in (1) or (2)*

a) against a child, or

b) with two or more other persons.

(4) *The offender shall be liable to imprisonment for a term of two to eight years,*

a) if he commits the act defined in (1) using a weapon,

b) if he commits an act defined in (1) or (2) against a person who is in detention, serving a prison sentence, under preventive treatment or in preventive custody, in a preventive or a foster care institution or in another institution where personal freedom is restricted, or

c) if he commits the act defined in (1) as a member of a organized group.

(5) *The offender shall be liable to imprisonment for a term of five to twelve years,*

a) if he commits the act defined in (1) against a child of under fourteen years of age,

b) or if he causes the victim a grievous bodily harm.

(6) *The offender shall be liable to imprisonment for a term of ten to fifteen years if he commits the act defined in (1) or (2) and causes the death of the victim.*

(7) *Preparation is a criminal offence.*

We can therefore distinguish four basic types of sexual violence with differentiated sentences. They can be ranked from the most serious (and the historically oldest) to the less serious forms as follows:

1) Rape by genital intercourse or another comparable form of sexual intercourse (Sec. 186 (2a)).

2) Rape by sexual intercourse (Sec. 186 (1)),

3) Sexual coercion to sexual self-stimulation, denudation or to a conduct of comparable nature (using violence, the threat of violence or the threat of any other grievous harm) (Sec. 186 (1)),

4) Sexual coercion abusing the dependent or defenceless state of another person or using one's own position of trust or influence to one's advantage (Sec. 186 (2)).

In contrast to the older provision, the new amendment distinguishes more forms of violent conduct and it includes a wider range of forms of wrongful coercion.

In regard to forms of conduct first of all, the new Criminal Code punishes genital intercourse,⁹ and sexual intercourse of a comparable form, such as oral, anal, or digital penetration - more or less¹⁰ as the provision of the old Criminal Code did. However, the term 'sexual intercourse' in Sec. 185 (1) and Sec. 186 (2) has never before been used independently in the Criminal Code. 'Another form of sexual abuse' was a term used in the offence of sexual abuse of persons under fifteen years of age. In the case of adults, other sexual intercourse was punishable as blackmail under the old Criminal Code. This construction, however, neglected its essence of sexual violence. The author believes that the interpretation of 'other form of sexual abuse' as developed in the case-law on the offence of sexual abuse of children should be used here. The interpretation covers conduct by which the perpetrator seeks to satisfy his or her sexual desires via another person's body (particularly by groping their breasts and genitals). The perpetrator's desire to find sexual self-gratification is important here, regardless of whether it is reached or not.¹¹ Finally, the criminal offense of sexual coercion now includes a category of act where the perpetrator coerced the victim to acts that satisfy the perpetrator's sexual desires (such as the victim's self-stimulation, denudation or other comparable conduct) while physical contact between the offender and the victim is no longer necessary.

Second, in respect to the forms of coercion, the legislation uses the terms "violence"¹² and "defencelessness"¹³. Having been used in the old provision, these terms are familiar. The inclusion of a threat of violence (not just of immediate violence) and a

⁹ „Genital intercourse is, according to established case-law, a connection of male and female genitalia, even if penetration into the vagina is only partial and without regard to whether the perpetrator achieved sexual gratification or not.“ (Sovák 1996). This definition after 2001, when gender neutralization of the provision occurred, has to be understood as a connection of any genitalia.

¹⁰ According to its explanatory memorandum, the new Criminal Code has defined the term "comparable sexual intercourse" more precisely as "sexual intercourse carried out in a comparable manner" because it does not concern similarity, but the comparable manner in which it is carried out.

¹¹ See e.g. earlier case-law of the Supreme Court of March 27, 1964, 5 Tz 8/64.

¹² Violence is understood as the use of physical force to overcome or prevent the victim's resistance. Bringing the victim into a state of defencelessness through the means of deception is also considered violence.

¹³ Defencelessness is interpreted in an absolute sense - the victim has to be fully incapable of comprehending the perpetrator's or her own actions and has to be unable to express her will or show resistance. Examples of defencelessness are unconsciousness, coma, deep sleep, illness, inebriation, or a similar state of incapacitation such as hypnosis, injury, being tied up, mental disability or low age.

threat of other forms of grievous harm is included anew, however. This broader understanding covers a greater scope of harmful types of conduct whereby the offender threatens not only the victim personally but also threatens third parties or other protected values.¹⁴ Furthermore, the crime of sexual coercion reflects an array of situations in which a) the victim is in a position of dependence or b) the offender abuses his position along with the trust or influence extended to him. These terms beg further clarification.

The abuse of power in situations involving a dependent victim formerly played a role only in crimes against children. According to Sec. 242 of the old Criminal Code, the crime of sexual abuse contained an aggravated offence of abuse of persons under fifteen years of age entrusted to the care of the perpetrator (or his supervision), or to situations in which the perpetrator abused the victim's dependence. According to Sec. 243, sexual abuse of a person under eighteen years of age was also a crime if the perpetrator abused her dependent status. This doctrine viewed dependence in the legal sense as a situation in which *"the aggrieved party relies on the perpetrator in some way and therefore the freedom of choice of the dependent person is more or less limited. The perpetrator abuses this lack of the victim's full freedom of choice in order to meet his sexually driven goals. Romantic relationships, therefore, would typically not demonstrate these above-mentioned characteristics of a situation of dependence"* (SOVÁK 1996). This construction can be used for interpreting coercion through dependence under the provision on sexual coercion among adults despite its original application in the prosecution of the sexual abuse of children.

The amended Criminal Code now also reflects the potential abuse of power in situations of hierarchy between perpetrators and their victims. This is unprecedented in the Czech criminal law context. The perpetrator's "abuse of position of trust or influence" constitutes coercion. For example graver instances of sexual harassment would fall under this definition, such as sexual harassment by superiors in a workplace or sexual harassment of students by teachers in educational institutions.

The three less serious forms of sexual violence (Sec. 185 (1), Sec. 186 (1) and (2)) are considered "misdemeanours"¹⁵ by the Criminal Code, which allows for speedier criminal proceedings, alternative sentencing and for utilizing the means of probation and mediation (such as refraining from punishment if certain conditions are met¹⁶). Rape by genital intercourse or by a comparable form of intercourse on the other hand is

¹⁴ The difference between a threat of immediate violence and a threat of violence is the scope of acts these definitions cover. The latter includes a threat of violence against other close persons or relatives, threat of violence in the future and violence against property. Threat of other grievous harm can be directed at property, honour and reputation such as a threat of breaking up a family or a marriage, or career opportunities, etc.

¹⁵ According to Sec. 14 (2) of the Criminal Code, misdemeanours are defined as "all crimes committed by negligence and intentional crimes punishable with imprisonment for a term of up to five years."

¹⁶ Sec. 46 and following of the Criminal Code.

a “very serious criminal offence”¹⁷ (the classification depends on the length of imprisonment – here maximum sentence is of up to ten years). The maximum sentence here was raised from eight to ten years, which is a positive development. However, a problem with parole sentencing persists.¹⁸ “Postponing imprisonment with a parole” is legally possible if the actual sentence does not exceed three years.¹⁹ The minimum sentence for rape is two years, so as long as the judge sentences the perpetrator to between two and three years in the individual case, parole is possible. Hence, the new Criminal Code doesn't address the high rates of parole awarded by the Czech courts.

Procedural law provisions

From the perspective of criminal procedure, the Czech law is infamous for insufficient protection of the victim. As Langhansová and Kristková have noted, the Czech criminal procedure *“does not take into account...the psychological and moral harm suffered by the victims by the violation. The victim is viewed either as a witness, i.e. a source of evidence, or as the aggrieved person who can claim compensation for material or bodily harm”* (LANGHANSOVÁ – KRISTKOVÁ 2008). In line with this view, the Code of Criminal Procedure²⁰ only offers legal aid free-of-charge if the aggrieved person petitions the court for compensation and if she proves a lack of financial means to cover her own legal assistance, for instance.²¹ As a result, many victims of violent crimes participate in criminal proceedings with no legal support or aid. The fact that the Code of Criminal Procedure interprets the victim's damages²² only in terms of material or bodily harm represents a related problem. It provides no means of compensating immaterial - emotional or psychological – damage, rendering compensation for it impossible.

Despite the fact that the conceptual draft of the new Code of Criminal Procedure²³ declares “increased victim protection” and “strengthening the position of the injured party in the proceeding” among its goals, the necessity for provisions that will protect the victims, and particularly vulnerable victims, needs to continue to be emphasised in the process of drafting and adoption of the new Code. The category of particularly vulnerable victim should be established. This can either be determined by the type of crime (e.g. violent sex crimes), by the characteristics of the victim (young age, old age, lower mental capacity, repeated victimization²⁴) or possibly by the

¹⁷ According to the legal definition in Sec. 14 (3) of the Criminal Code, „all criminal offences not classified as misdemeanours by the criminal law” are considered crimes; and “very serious criminal offences are intentional crimes punishable with imprisonment with a term of ten years or more.”

¹⁸ Originally, Sec. 58 (1) of No. 140/1961 Coll.

¹⁹ Sec. 81 of the Criminal Code

²⁰ Law No. 141/1961 Coll., Code of Criminal Procedure.

²¹ Sec. 51a of the Code of the Criminal Procedure.

²² Sec. 43 (3) of the Code of the Criminal Procedure

²³ Ministry of Justice, CR, 'Re-Codification of the Criminal Law of Procedure (conceptual draft and explanatory memorandum)' (2009) <http://portal.justice.cz/ms/ms.aspx?j=33&o=23&k=4980&d=281460>

²⁴ When the victim has previously experienced a violent crime.

characteristics of the perpetrator (particularly in the case of public officials within the criminal justice system, such as the police).

Langhansová and Koláčková list a number of specific provisions that could better protect victims-at-risk:

- *"affording victims short of financial means the right to legal aid at a reduced charge or free-of-charge regardless of whether they petition the court for damages or not,*
- *reducing the number of repeated interrogations (and hearings),*
- *conducting interrogations in special interrogation rooms,*
- *utilizing audio and video recordings to prevent repeated interrogations,*
- *obtaining witness accounts with the help of video-links,*
- *making it possible to bar the perpetrator from the courtroom during the main hearing in order to protect the victim from secondary victimization (not only to protect truthful testimony)*
- *carrying out interrogations with the help of psychologists or psychiatrist,*
- *mandatory representation of the accused by an attorney at hearings and interrogations of the victim or*
- *enabling non-disclosure of personal information, especially of the victim's address, as long as it does not infringe upon the defendant's right of defense. "* (LANGHANSOVÁ – KOLÁČKOVÁ 2006)

The insufficient protection of the victim in criminal proceedings has an especially negative impact on victims of violent crimes. Another barrier to addressing interpersonal violence lies in the requirement of victim's consent with criminal proceedings.²⁵ If the perpetrator is the husband/wife, a domestic partner or another close relative, the prosecution of certain crimes cannot start or sometimes cannot continue without the consent of the victim. In the past, the victim's consent was necessary for the prosecution of rape per Sec. 241 (1) and (2). Today it is required in cases of sexual coercion according to Sec. 186 (1) and (2), but also for some offences of bodily harm and the offence of stalking. Even though at first sight this provision seems to afford autonomy to the victims and respect for their right to decide about the course of the prosecution, in reality it burdens the victims with the responsibility for prosecuting a close person and exposes them to pressure under which they often revoke their consent. (A consent once revoked cannot be granted again.) The legislators have tried to address this issue by adopting Section 163a that allows exceptions in situations where the victim gives or withdraws consent under obvious pressure or threat, or if she clearly acts from a subordinate or dependent position. How far this provision really protects the victims who are under the pressure of their abusers is questionable. The author believes that the provision of victim consent should be

²⁵ Sec 163 and 163a of the Criminal Code.

abolished for all interpersonal crimes, particularly crimes of violent and/or sexual nature (including sexual coercion and stalking).

All the abovementioned issues should be considered in the course of actual drafting and adoption of the new Code of Criminal Procedure.

The context of international law

From the perspective of international law, there are three important lines of development: 1) the conceptualization of gender violence as discrimination against women, 2) the development of the human rights obligation of due diligence that mandates States to prevent and investigate violent crimes including rape, and 3) the definition of rape in international criminal law.

Gender-based violence was conceptualized as discrimination against women in 1992 by the Committee on Elimination of Discrimination against Women in its General Recommendation No. 19.²⁶ Even though we have been discussing rape as a gender-neutral phenomenon so far in this text, the great majority of rape crimes and other sexual violence are in fact perpetrated by men upon women. The General Recommendation No. 19 brings attention to the consequences gender-based violence has on women's abilities to enjoy their rights and freedoms fully and equally with men. To mitigate this negative effect, it establishes the positive obligations of States to fight against different forms of gender-based violence (including sexual harassment in the workplace, for example). States are required to exercise all due diligence to prevent gender-based violence, and if it occurs, they must investigate and prosecute it as well as to compensate the aggrieved person for damages.

The understanding of rape as a human rights issue arose from two lines of development of case-law of the European Court of Human Rights (ECtHR). First, rape got subsumed under torture, inhuman or degrading treatment or punishment (Article 3 of the European Convention on Human Rights²⁷). The ECtHR held so in two cases where sexual violence had been perpetrated by Turkish armed forces upon the Kurdish population. In the case of *Aydin*,²⁸ a seventeen years old Kurdish girl was arrested by the Turkish armed troops and taken into custody where she was abused and raped. The court established that this treatment had constituted torture and held that the State had breached its duty defined in Article 3 of the Convention. In the case of *Akkoç*²⁹, an

²⁶ "The definition of discrimination includes gender-based violence that is violence which is directed against a woman **because she is a woman** or **which affects women disproportionately**. It includes acts which inflict physical, mental or sexual harm or suffering, threats such as acts, coercion, and other deprivation of liberty. Gender-based violence may breach specific provisions of the Convention, regardless whether those provisions expressly mention violence." Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 (6), U.N. Doc. A/47/38 (Jan. 29, 1992).

²⁷ The Convention for the Protection of Human Rights and Fundamental Freedoms. Federal Ministry of Foreign Affairs release No. 209/1992.

²⁸ ECtHR ruling of September 27, 1997, *Aydin v. Turkey*, ECHR 1997-VI (No. 25660/94).

²⁹ ECtHR ruling of October 10, 2000, *Akkoç v. Turkey*, 34 Eur.H.R.Rep. 51 (2000) (Nos. 22947 & 8/93).

adult Kurdish teacher was arrested in connection with her husband's political activities. In prison, she was sexually and psychologically tortured, but she was never raped. The Court ruled that this treatment had also constituted torture.

Another important development in respect to the needs of victims of violence committed by private individuals has been the advancement of the international doctrines of *due diligence*³⁰ and *positive obligation*³¹. These concepts establish that "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation"³². The Court applied this doctrine to rape in *M.C. v. Bulgaria*³³, in which the Bulgarian criminal justice system had essentially ignored multiple rapes of a fourteen years old girl and the relevant notice to the police made by the victim. The court reiterated that the States do not only have the negative obligation not to commit rape and torture themselves, but that they also have the positive obligation to prevent rape and to take adequate measures if it is committed. This interpretation of the obligations of States means that the States are not responsible only in the relatively unusual situations in which they are directly accountable for violent acts (especially when they are perpetrated by the State's armed forces as in the Turkish cases) but they also carry responsibility for the actions of private individuals (when husbands, partners, etc. are the abusers). The States must take all due care to provide effective legal protection against rape and to investigate cases of rape and punish the perpetrators. The victims must be compensated.

As a signatory country of the European Convention, the Czech Republic is also required to observe its due diligence obligations. The abovementioned statistics on the attrition rate of rape cases in criminal proceedings, the high rate of parole sentencing and the fact that victims are unable to receive compensation for immaterial damages raises the question whether the Czech Republic fulfils these obligations.

In regard to the definitions of rape in the international criminal law, the need for their establishment became apparent in connection with raising the visibility of sexual and reproductive violence in the armed conflicts and genocide in Rwanda and in former Yugoslavia. The Statutes of both Tribunals ruled that rape perpetrated upon civilians in a situation of armed conflict constituted a crime against humanity.³⁴ The International Criminal Tribunal for Rwanda first defined rape as follows in the case of *Akayesu* in 1998:

³⁰ First in the case of *Velásquez Rodríguez*, 1988 Inter-American Commission on Human Rights (ser. C) No. 4 (July 29, 1988).

³¹ Particularly in ECtHR case-law, e.g. ECtHR ruling of December 4, 2003, *M.C. vs. Bulgaria*, ECHR 2003-XII (No. 39272/98).

³² Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19, U.N. Doc. A/47/38 (Jan. 29, 1992).

³³ ECtHR ruling of December 4, 2003, *M.C. vs. Bulgaria*, ECHR 2003-XII (No. 39272/98).

³⁴ UN Security Council resolution 827 (1993) on the International Criminal Tribunal for the Former Yugoslavia (ICTY), Article 5 (g); UN Security Council Resolution 955 (1994) on the International Criminal Tribunal for Rwanda, Article 3 (g)

*“a [1.] physical invasion of a [2.] sexual nature, committed on a person [3.] under circumstances which are coercive.”*³⁵

Sexual violence which includes rape, is considered to be:

*“any act of sexual nature which is committed on a person under circumstances which are coercive.”*³⁶

These definitions are clearly concerned with the position of victim of sexual violence. Infringements of sexual nature under coercive circumstances, i.e. situations in which the victim is under pressure, constitute a crime. Compared to the Czech legislation, this definition, first, includes coercive circumstances external to the perpetrator's actions and out of his control. Second, "circumstances that are oppressive for the victim" include a wider range of situations than those that fall under the terms "violence", "defencelessness", "dependence", or the "the perpetrator's position".

Rape is now included in the Rome Statute of the International Criminal Court³⁷ as a crime against humanity:

Article 7 (1) For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...]

c) Enslavement, [...]

*g) **Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,***

h) Persecution against any identifiable group or collectivity on [...] gender [...] grounds...

We can expect that the definition established in the case of *Akayesu* will also be used by the International Criminal Court. And even though the developments in the area of international criminal law do not directly affect the position of women in the Czech Republic, the fact that the definition used in the case of *Akayesu* takes into account "coercive circumstances" is an important signal for the potential development of definitions in the Czech criminal law in the future.

Theoretical Discussion

Sexual violence as a serious social problem has been at the centre of attention for legal theorists and feminist lawyers (especially its gender dimension) for several decades now. There has been a debate among legal scholars about what wrong do

³⁵ International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu* ICTR-96-4-T (1998); par. 598.

³⁶ *Ibid.* It needs to be added that the Court uses this definition when the following conditions are met: „[4.] This act must be committed : (a) as part of a wide spread or systematic attack; (b) on a civilian population; (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.“

³⁷ The official translation of the Rome Statute was published in No. 84/2009 Collection of Intl. Agreements

sexual violence and rape constitute. Jonathan Herring³⁸ distinguishes five types of wrongs identified in the academic literature:

1) Rape as violence. This position makes a distinction between forced sex (seen as a serious offense) and unwanted sex (less serious).³⁹ This view basically corresponds with the construction of rape in the Czech criminal law.

2) Rape as a violation of autonomy. The notion of consent is central for this perspective (consent is usually an essential element in definitions of rape in the Anglo-American context). Here, sexual intercourse without the victim's consent is considered a fundamental attack on another person's sexual autonomy.⁴⁰ In keeping with this interpretation, rape constitutes harm even if direct violence has not been used and/or the victim has not been injured nor exposed to sexually transmitted disease or to the possibility of being impregnated.⁴¹ In the Czech criminal law, this view is reflected in the criminalization of abuse of a defenceless person. Even though the explanatory memorandum for the new Criminal Code emphasizes the principle of "protecting free choice in sexual relations", it must be noted that the Czech criminal law does not prosecute many situations in which sexual intercourse takes place without the consent of the victim and when the sexual autonomy of the victim is infringed.

3) Rape as an invasion of integrity. By taking into account both the physical harm suffered by the victim and the infringement upon her autonomy, this understanding is more complex than others. It regards rape to be „*an invasion of the embodied person*“⁴². This position emphasizes the harmful consequences of rape such as shame, loss of self-esteem, objectification and dehumanization.⁴³ This conceptualization is unfamiliar in the Czech context and the narrow notion of compensation in the criminal law, that interprets harm as strictly material, essentially ignores any other types of harm.

4) Rape as moral harm. According to this definition, rape is "*an expression of disrespect for the value of the victim... Failure to secure consent is an injury to the acknowledgment of the victim's value as a fully fledged person worth of respect.*"⁴⁴ It puts forward that rape is an act that is capable of expressing social meaning.⁴⁵ Rape is an expression of contempt for all women. Through his actions, the aggressor demonstrates that all women are objects he can use for his own pleasure.⁴⁶ All women in our society hear the message that is sent by rape. Susan Brownmiller articulated this opinion thus: "*The rapist performs a myrmidon function for all men by keeping all women in a thrall of anxiety and fear. Rape is to women as lynching was to blacks: the ultimate physical threat by which all men keep all women in a state of psychological*

³⁸ HERRING 2009 pg. 90 and cont.

³⁹ DRIPPS 1992, pg. 1792; as quoted in Herring.

⁴⁰ GARDNER – SHUTE 2000, pg. 205; as quoted in Herring.

⁴¹ Its critics point out that this definition ignores the physical aspect of rape.

⁴² LACEY 1998, pg. 47; as quoted in Herring.

⁴³ Ibid, pg. 64.

⁴⁴ MCGREGOR 2005, pg. 227; as quoted in Herring.

⁴⁵ HERRING 2009, pg. 92.

⁴⁶ MCGREGOR 2005, pg. 229; as quoted in Herring.

intimidation."⁴⁷ This interpretation is extremely useful in making the argument against the requirement to obtain the victim's consent for the prosecution of a close person - as the victim, in keeping with this understanding, is not one woman but all women.

5) Finally, there is the radical feminist approach that asserts that true consent is impossible in the conditions of patriarchy. Catharine MacKinnon argues that "*rape law takes women's usual response to coercion – acquiescence, the despairing response to hopelessness to unequal odds – and calls that consent.*"⁴⁸ Robin Morgan writes that "*Rape exists any time sexual intercourse occurs when it has not been initiated by the woman out of her own genuine affection and desire... Because the pressure is there, and it need not be a knife blade against the throat; it's in his body language, his threat of sulking, his clenched or trembling hand, his self-deprecating humour or angry put-down or silent self-pity at being rejected. How many millions of times have women had sex "willingly" with men they did not want to have sex with.*"⁴⁹ The proponents of this position say that rape crimes are no extraordinary departures from the norm nor isolated excesses but rather, they are merely extreme expressions of male dominance over women. In the light of this knowledge, Michelle Madden Dempsey and Jonathan Herring argue that sexual penetration constitutes a *prima facie* wrong that requires justification.⁵⁰

The last two analyses in particular – rape as moral harm and the radical feminist argument that many acts in a patriarchal system (even when not covered by criminal law) are, in fact, forms of rape - are either unfamiliar or rejected in the Czech context *a priori*. This is a great challenge because both of these approaches emphasize a fundamental aspect of rape – that it both reflects and reinforces inequities between men and women and existing gender roles. It means that statements by offenders, such as "she incited me", do not pardon their crime. On the contrary, such statements make the crime of rape all the more serious because the perpetrators seek to justify their actions using their privilege to determine what is suitable for women to do and not to do, and to consequently punish their transgressions.

We can only hope that a serious and well-informed debate on "sexual ethics" will emerge in the Czech Republic both in respect of rape and sexual coercion in criminal law as well as with regard to harassment and sexual harassment in the workplace and in educational institutions. That we will begin to understand that sexualized advertising, prostitution, pornography, sexual harassment and rape are interconnected and that these phenomena represent a continuum of different forms of objectification of women, all of which conflict with women's rights, women's dignity and the equality of sexes.

⁴⁷ BROWNMILLER 1975, pg. 254.

⁴⁸ MACKINNON 1987, pg. 100, as quoted in Herring.

⁴⁹ MORGAN 1980 in Lederer, L (ed). *Take back the night: Women on pornography* (Morrow, New York 1980), pgs. 134–5, as quoted in Herring.

⁵⁰ MADDEN DEMPSEY – HERRING 2008.

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