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DIFFICULTIES IN THE CRIMINAL PROTECTION OF THE SEXUAL INTEGRITY OF WOMEN AND GIRLS WITH DISABILITIES

Abstract

Women and girls with disabilities are at a high risk of sexual violence, and there are numerous difficulties when it comes to their protection in the field of criminal law. The authors analyze the most important obstacles in the prosecuting and trial on the example of a court case. In addition to the need to protect and empower persons with disabilities (vulnerable victims) in criminal proceedings in Serbia, it is necessary to change the approach to prescribing criminal acts of sexual violence (rape and enforced intercourse of a helpless person). Thus, better protection of the sexual integrity of persons with disabilities would be achieved, and in accordance with relevant international standards, their possible discrimination would be further prevented. The paper examines the proposed solutions according to the provisions of the Istanbul Convention of the Council of Europe (CETS 210) and comparable examples in the legislation from Germany and Slovenia. The authors state that changes in criminal law can improve the protection of the sexual integrity of women with disabilities only if they are accompanied by an altered social approach to women with disabilities.

Key words: *Person with disability; Female victims; Sexual violence; Enforced intercourse of helpful person.*

I INTRODUCTION

The standardization of acts of perpetration in sexual crimes is particularly sensitive due to the intimate nature of sexual relations and the unclear boundaries of permissible and unacceptable (and punishable) sexual behavior. Therefore, criminal protection of sexual integrity and sexual freedom is reduced to a minimum. It is regularly consistent with the given, historically and culturally conditioned, concept of human sexuality. In the Western cultural milieu, from 1960 (the so-called "sexual revolution") until today, espe-

cially in the period from 1980 to 2010 (decriminalization of homosexuality, protection of women's rights, etc.), the concept of sexuality has changed significantly in the direction of increasing respect for sexual diversity with the aim of expanding the protection of the sexual rights of the individual under the influence of human rights.[1] Each stage of a 'conquest' of sexual freedoms has been accompanied by an increasing variety of situations that require criminal intervention, which in turn complicated the 'task' of criminal law to protect sexual freedoms and sexual integrity.[2] A new step towards the fuller protection of women's sexual freedom, sexual integrity and privacy marks the adoption of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence[3] (hereinafter: CETS 210). The member states of the Council of Europe are mostly the signatories of CETS 210, including all members of the European Union (hereinafter: the EU), since the EU, although not a state, signed the convention to demonstrate its adherence to its standards. In fact, EU bodies continue legislative activities in order to achieve uniform and efficient implementation of CETS 210.[4] The Republic of Serbia, as a candidate country for EU accession, has signed and ratified the convention,[5] although it has not fully implemented it.

Changes in the concept of sexual violence against women under CETS 210 could also be important for girls and women with disabilities,[6] who are more often than others at constant risk of being victimized by violence and sexual abuse. The particular vulnerability of women with disabilities and their greater exposure to violence is an obvious consequence of the accumulation of personal and social risk factors. People with disabilities are usually treated in society as passive users of the care and social care services, which affects their social exclusion. At the same time, women with disabilities are discriminated against on the basis of gender and disability (and persons with intellectual disabilities even on the basis of the type of disability in relation to women with sensory or physical impairments).

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1 Dagmar Herzog, *Sexuality in Europe, A Twentieth-Century History* (2011), 195-197.

2 Beatriz Corrêa Camargo and Joachim Renzikowski, 'The Concept of an "Act of a Sexual Nature", Criminal Law,' *German Law Journal,* Vol. 22, No. 5, 2021, 768.

3 Council of Europe, Convention on preventing and combating violence against women and domestic violence (adopted 7 May 2011, entry into force 1 August 2014), *CETS* 210 (Istanbul Convention), available at: *https://rm.coe.int/168008482e.*

4 European Commission, Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, Strasbourg, 8 March 2022 COM(2022) 105 final 2022/0066 (COD), available at: *https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/com_2022_105_1_en.pdf.*

5 Zakon o potvrđivanju konvencije Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici [Law on Ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence], *Official Gazette of RS – International Agreements*, No. 12/2013.

6 A person with congenital or acquired long-term physical, sensory or intellectual impairments that limit their life activities and, in unison with various obstacles, prevent them from participating in social life under equal conditions.

Discrimination against women in terms of health and maintenance of social gender inequalities through the operation of institutions of the social health system[7] has the consequence that society fails to recognize the need to provide more favorable living conditions and a better social inclusion of women with disabilities. In terms of their own sexuality, they are discriminated against both in relation to non-disabled women and in relation to disabled men.[8] The circumstance of occupying a marginal economic and social position is conducive to establishing and maintaining a power imbalance between women with disabilities and their environment, thus increasing their likelihood of becoming victims of violence and sexual abuse. [9] This is especially true for women with intellectual disabilities, who due to reduced cognitive abilities, communication barriers and lack of social skills are not able to perceive danger, defend themselves and exercise the right to access to justice as well as others. With these circumstances, the perpetrator calculates in order to sexually exploit them, and does so with impunity.

According to Joan Petersilia,[10] numerous criminological research conducted at the end of the 20th century in the United Kingdom, the United States, Canada and Australia confirm that disabled people are generally at a greater risk of victimization, and that sexual assaults on women with disabilities are particularly common against females with developmental disabilities. A study from 2021 for the Anglo-American region shows that the prevalence of sexual violence among adults with intellectual disabilities was 32.9%, i.e. that every third person with an intellectual disability suffered sexual abuse in adulthood, most often from another such person in conditions of collective accommodation.[11] Similar results on the prevalence of physical and sexual violence against women with health problems or disabilities compared to other women were obtained in the first European survey on violence against women, conducted in 2014 by Joanna Goodey under the auspices of the European Union Agency for Fundamental Rights (FRA).[12] It concluded that the prevalence of violence

7 Ellen Kuhlmann and Ellen Annandale, 'Gender and Healthcare Policy' in Ellen Kuhlmann, Robert H. Blank, Ivy Lynn Bourgeault, Claus Wendt (eds), *The Palgrave International Handbook of Healthcare Policy and Governance* (2015), 578-579.

8 S. J. Usprich, 'A New Crime in Old Battles: Definitional Problems with Sexual Assault,' *Criminal Law Quarterly*, Vol. 29, No. 2, 1987, 206.

9 Sussana Niehaus, Paula Krüger and Seraina C. Schmitz, 'Intellectually Disabled Victims of Sexual Abuse in the Criminal Justice System,' *Psychology*, Vol. 4, No. 3, 2013, 374.

10 Joan R. Petersilia, 'Crime Victims with Developmental Disabilities: A Review Essay,' *Criminal Justice and Behavior*, Vol. 28, No. 6, 2001, 656, 662.

11 Raluca Tomsa *et al.*, 'Prevalence of Sexual Abuse in Adults with Intellectual Disability: Systematic Review and Meta-Analysis,' *International Journal of Environmental Research and Public Health*, Vol. 18, No. 4, 2021, 12.

12 A victimization survey based on the interviews of 42,000 women from 28 countries concluded that 61% of respondents over the age of 15 who had health problems or were disabled had experienced sexual abuse (compared to 54% of non-disabled women). Weighing the results for the entire female population in the countries covered by the survey, according to the data that women with disabilities make up 16% of the population in the EU, it was concluded that women with disabilities are 3-5 times more likely to be victims of physical and sexual violence than other women (European Union Agency for Fundamental

against women in European countries requires the fastest possible adoption and harmonization of national legislation with CETS 210.c

The harmonization of national legislation with CETS 210 partly coincides with the obligations of the signatory states to the United Nations Convention on the Rights of Persons with Disabilities[13] (hereinafter: CRPD). This involves the fact that when it regulates the human rights of persons with disabilities, CRPD starts from the social model of disability. Therefore, among other things, CRPD stipulates the obligation of the contracting state to provide special protection for women and girls with disabilities from the multiple discrimination to which they are often exposed (Article 6). It is required to ensure equality before the law of persons with disabilities (Article 12) and effective access to justice in all court proceedings (Article 13, para. 1). State members undertake to take legal and other measures to prevent the exploitation, violence and abuse of persons with disabilities, including gender-related aspects (Article 16, para. 1). This includes the obligation to ensure effective laws and policies, including for women and children, to ensure that cases of exploitation, violence and abuse of persons with disabilities are identified, investigated and, if necessary, prosecuted (Article 16 (5) CRPD).

The described modern approaches to regulating the sexual rights of women (including the position of women with disabilities) require rapid adjustments of criminal law. However, it is difficult to get rid of traditional concepts, even when they are contradictory.[14] It is reasonable to assume that the conservative paternalistic approach to marginalized groups (including women and girls with disabilities) that comes to the force in criminal law cannot be easily changed.

Rights – FRA, *Violence against women: an EU-wide survey* (2014), 186-188). The above data on the prevalence of sexual abuse among women with disabilities are taken from point 5.1.1. Opinions of the European Parliament raporteur (The situation of women with disabilities – exploratory opinion request by the European Parliament 11/7/2018 on the basis of which the resolution was passed (European Parliament resolution of 29 November 2018 on the situation of women with disabilities, 2018/2685(RSP)). The same data are stated in the act of the European Disability Forum (EDF), *Violence against women and girls with disabilities in the European Union,* Position Paper 2021, 7-8. It should be pointed out that the research defines sexual abuse more broadly – in addition to physical and sexual violence, it includes psychological violence, sexual harassment and persecution, as well as any sexual act undertaken without the consent of the woman. According to the same methodology, in 2018 the OSCE conducted a survey for the areas of the so-called Western Balkans (including Serbia), Albania, Kosovo*, Ukraine and Moldova.

13 UN Convention on the Rights of Persons with Disabilities, resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: *https://refworld.org/docid/45f973632.html*. Ratified in the RS by the Law on the Ratification of the Convention on the Rights of Persons with Disabilities [Zakon o potvrđivanju Konvencije o pravima osoba sa invaliditetom], (*Official Gazette of the RS – International Agreements*, No. 42/2009).

14 A good example is the legal status of persons with mental disabilities who cannot be held responsible for a crime committed but are subject to criminal sanctions on the basis of which they are isolated in prison psychiatric institutions (Nataša Mrvić Petrović, 'Krivičnopravni položaj osoba sa mentalnim poremećajima', *Temida*, Vol. 10, No. 3, 2007, 41-43. The same controversy was also noted by Penelope Weller, 'Reconsidering Legal Capacity: Radical Critiques, Governmentality and Dividing Practice,' *Griffith Law Review*, Vol. 23, No. 3, 2014, 499, 504).

The paper examines whether full harmonization of Serbian criminal legislation in accordance with CETS 210 would contribute to reducing obstacles to equal access to justice for women and girls with disabilities. It is to be noted that the Criminal Code of the Republic of Serbia[15] (hereinafter: CC) was amended in 2016 in order to be harmonized with CETS 210, but no solution was adopted according to which sexual violence (including rape) implies any sexual intercourse or sexual activity without a woman's consent. Paradoxically, according to CETS 210, other criminal acts were prescribed in 2016: female genital mutilation, persecution, sexual harassment and forced marriage. The aim of this paper is to examine whether there is a legal gap in the legislation of Serbia that is detrimental to the protection of the sexual integrity of persons with disabilities and affects their discrimination in practice. Based on these analyzes and sound foreign examples, the most acceptable model of legislation and changes in practice should be recommended. The topic is all the more important because Serbia lacks empirical research on violence and sexual violence against women with disabilities,[16] while the legal features of sexual crimes are relatively well researched. Therefore, it was necessary to point out the obstacles that make it difficult for people with disabilities to access justice.

II THE IMPORTANCE OF CHANGING THE MODEL OF CRIMINAL PROTECTION OF WOMEN'S SEXUAL INTEGRITY

Sexual crimes have historically been understood as violent crimes that, in terms of criminal protection, equate situations of abuse of power of the victim, who is unable to resist or cannot make independent decisions about their sexual life. Unlike the traditional approach to the protection of sexual freedom, CETS 210 insists on the distinction between voluntary sex, which is considered acceptable behavior, as opposed to sex without the consent of another person, which is prohibited and punishable. Such a concept is more in line with the modern cultural pattern of permissible sexual behavior, which requires that even in criminal law discourse, sexual intercourse or sexual activity is to be understood as a matter of choice and communication in a sexual situation.[17]

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15 [Krivični zakonik], *Official Gazette of the RS*, nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

16 We refer to two studies: Olivera Ilkić and Lepojka Čarević Mitanovski, *Žene sa invaliditetom nevidljive žrtve nasilja – studije slučajeva...*, IZ KRUGA, Belgrade, 2008 and Kosana Beker and Tijana Milošević, *Nasilje nad ženama sa invaliditetom u rezidencijalnim ustanovama*, Inicijativa za prava osoba sa mentalnim invaliditetom MDRI-S, Belgrade, 2017. In the *Wellbeing and Safety of Women* report, the OSCE-led *Survey on Violence against Women: Serbia – Results Report*, *2019* women with disabilities are not mentioned at all (except that it is stated on page 6 that they have a marginal social and economic position). In fact, they are not even recognized as a special group of women.

17 Linnea Wegerstad, 'Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden,' *German Law Journal*, Vol. 22, No. 5, 2021, 743.

Article 36 of CETS 210 stipulates that a state member should prescribe as a criminal offense of sexual violence – including rape – any sexual intercourse or other sexual activity to which a woman denies consent. Incitement of a woman to involuntarily participate in sexual activities with a third party should also be considered as punishable behavior. Marital or emotional relationship or previous marital relationship should not be a reason to exclude the punishment of sexual violence committed against a woman by her ex-husband or partner. Voluntary consent to sexual intercourse or sexual activity must be the result of the free will of the person, which is assessed in the context of the given circumstances.[18]

Is it justified to equate involuntary sexual intercourse with violence? It seems so. The fact is that every human action that is understood under certain circumstances as a sexual act, by the nature of things violates the psychological integrity and privacy of another person. The same act, for example, hugging, kissing, touching a certain part of another's body may or may not have sexual significance, depending on the person targeted, the circumstances and with what motive it was undertaken.[19] The meaning of the action must be interpreted objectively, according to the generally accepted cultural pattern and morals, but also subjectively, considering the intentions of the perpetrator and the perception of the victim. Hence, it should be understood that sexual crimes are regulated to include the most serious encroachments on the privacy and sexual integrity of another individual without their consent – and this means regular coercion, as it is contrary to their free will – and the crimes are classified according to the gravity of the psychological consequences, and not according to the physical injuries on the victim's body.[20]

18 It should be noted that "free will" as a philosophical construction is usually understood normatively – as a possibility of choice (i.e. not doing something under duress) or as control over the choice made for which the subject must bear moral responsibility. Therefore, as soon as someone cannot act of their own free will, it means that they are forced to do something. Roberts thinks similarly when he says that every sexual assault is a crime with an element of violence (Roberts Julian V. 'Sexual Assault is a Crime of Violence,' *Canadian Journal of Criminology*, Vol. 37, No. 1, January 1995, 91).

19 Unlike sexual intercourse, whose sexual significance is obvious to everyone, the sexual connotation of acts of committing criminal acts of illicit sexual acts, sexual harassment or persecution does not have to be clearly expressed, as S. J. Usprich advises. We must not rule out the possibility that objectively neutral behavior, or what everyone else believes it to be, only motivates the perpetrator to take sexual action, as well as the fact that cultural differences affect the perception of permissible sexual behavior, and thus the perception of sexual assault (Usprich, *op. cit.*, 211). That is why in psychology, sexual assault is regularly associated with the wrong social communication between the perpetrator and the victim.

20 This involves the so-called formal criminal offenses whose features are realized as soon as the applicable illegal deed with a sexual connotation is undertaken. The perpetrator is to be severely penalized if there are serious consequences (injury or death of the victim). The deed is more regularly undertaken on the body of the victim, while the victim being forced to undertake sexual action on the body of the perpetrator is an exception. Prohibited behavior does not have to involve physical contact. This can occur, for example, when the victim is forced to watch other people's sexual acts or attend a sexual act committed by the perpetrator on himself.

How can criminal law adapt to new requirements? The change of the criteria according to which the limits of permitted sexual behavior are assessed requires the expansion of the zone of criminal intervention. Based on these changes, it will be possible to treat sexual violence as sexual situations that were in "the gray zone." In other words, when the perpetrator exploits a "vulnerable situation" in which the helpless victims find themselves, wherein, according to the circumstances of the case and their personal characteristics, they cannot be expected to offer resistance. Such an understanding is supported by the judgment of the European Court of Human Rights (ECHR) in the case of M. v. Bulgaria.[21] In para. 166 of the judgment, the court points out that there is a universal European trend towards recognizing the lack of consent of the victim as an essential element of rape and sexual abuse, even in European-continental legislation where traditional rape is associated with coercion, and that Bulgarian legislation was not harmonized with his trend, which is why there was no criminal prosecution of the perpetrators in this particular case.

It is clear that CETS 210 is the result of a different ideology that views sexual crimes in the broader social context of sexualized violence. It involves violence that is expressed in a sexual way, and is practiced by exploiting the imbalance of power that is established between the perpetrator and the victim on various grounds (gender, age, physical superiority, social status). Indeed, criminological research confirms that sexual crimes occur more regularly between acquaintances or even spouses and ex-partners, preceded by intimidation, psychological manipulation,[22] abuse of authority, power or position, and exploitation of the victim's powerlessness or subordinate position. Obviously, social circumstances have a affirmative effect on the perpetrators.

The question arises as to whether the changed concept of sexual violence under CETS 210 contributes to a better protection of the sexual integrity of girls and women with disabilities, especially those with intellectual disabilities, who are typical "vulnerable" victims of their environment.[23] The traditional

21 *M.C. v. Bulgaria*, application no. 39272/98, ECHR 621 of 4.12.2003, 3.

22 Coercion to sexual intercourse is applied as a last resort in a situation wherein the perpetrator has not previously gained sufficient trust from the victim. The manipulation strategy used by the perpetrator as a *modus operandi* to attract a woman to sexual intercourse determines the type of sexual crime committed by reducing the risk of coercion, as the perpetrator through the "seduction process" stops focusing on the woman as a victim and views her as a partner (Benoit Leclerc *et al.*, 'Offender-Victim Interaction and Crime Event Outcomes: *Modus Operandi* and Victim Effects on the Risk of Intrusive Sexual Offenses against Children,' *Criminology*, Vol. 47, No. 2, 2009, 607– 610). The perpetrator then applies coercion only when the woman's motivation to participate in sexual intercourse decreases (Benoit Leclerc *et al.*, *op. cit*., 613).

23 A 1994 study of sexual abuse of people with disabilities by the University of Alberta (Canada) found that 56.3% of perpetrators were members of the same social groups (neighbors, friends, family members, relatives) which is also valid in the case of abused non-disabled persons. The other 43.78% of perpetrators came into contact with the victim through the services they provided (psychological support, psychiatric services, health care, special transport, foster care), and it follows that the special ambience within which the disabled person resides increases the risk of sexual abuse. Dick Sobsey, 'Sexual abuse

approach to criminal protection, when it comes to women with disabilities, corresponds to the understanding that the subject matter are helpless, asexual persons who need to be protected from the possibility of leading a normal life within their means, and thus from sexual exploitation (even friendly), as this corresponds to the moral values of others.[24] It is reasonable to assume that the adoption of CETS 210, which entails a change in the traditional cultural pattern of (dis)allowed sexual behavior, must bring changes in that area as well. The question is, in which way? This remains to be seen based on the critical analysis that follows.

III THE LEGISLATION OF THE REPUBLIC OF SERBIA – BETWEEN THE MODEL OF COERCION AND THE MODEL OF CONSENT

The traditional approach towards crimes against women and sexual freedom which is based on coercion is shown in para. 269 (rape) and para. 270 (forced intercourse with a powerless person) of the Criminal Code of the Kingdom of Yugoslavia. The mentioned solutions, along with adjustments, were taken over in the later laws that were valid on the territory of Serbia. Rape was defined as forcing a woman to have sex (including having sex with a woman whom the perpetrator had incapacitated for defense), while according to para. 270, the accused was punished due to forcing intercourse on a woman not his wife and not capable of defense due to mental illness, dementia, impaired consciousness or for any other reason.[25] As can be seen, the state of powerlessness could have been caused by a physical or intellectual disability.

The exploitation of the victim's powerlessness in regards to sexual intercourse is now prescribed in Article 179 of the CC, under the same archaic name (forced intercourse with a powerless person) and with similar legal features as in the Criminal Code of the Kingdom of Yugoslavia. It differs in that the illegality does not exclude a marital relationship with the victim, marked as gender-neutral. Therefore, the act of execution is defined as any sexual intercourse, not just vaginal. Unlike rape, in the criminal offense under Article 179, the perpetrator exploits the state of incapacity of defense of a person who is considered incapable by law. As in the previous theory, it is not disputed that a helpless person is broadly recognized as a person with current or permanent disability, as well as other vulnerable people (due to illness,

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of individuals with intellectual disability' in Ann Craft (ed.), *Practice Issues in Sexuality and Learning Disabilities* (2004), 97.

24 Clare Graydon, Guy Hall and Angela O'Brien-Malone, 'The Concept of Sexual Exploitation in Legislation Relating to Persons with Intellectual Disability,' *eLaw Journal*, Vol. 13, No. 1, 2006, 166.

25 Mihail P. Čubinski, *Naučni i praktični komentar Krivičnog zakonika Kraljevine Jugoslavije od 27. januara 1929. godine, posebni deo* (1930), 209-210. There was legal discrimination – for the crime under para. 270 a sentence of up to 8 years in prison was stipulated, and up to 10 years for forced intercourse.

exhaustion from fatigue, consequences of childbirth, old age) who cannot put up any resistance, persons sound asleep, under the influence of alcohol or narcotics or disabled by the action of another person (not the perpetrator) – unconscious, tied up and the like.[26] The typical causes of incapacity are mental illness and mental retardation as forms of intellectual/mental disability, while incapacity or other conditions due to which a person is unable to resist may include physical disability or damage to the sensory organs. The general clause allows the state of powerlessness to be linked to other causes and situations, something which has been used amply by case or common law in the past and now, in order to among other things, achieve punishment in situations where the victim failed to resist even though they obviously did not consent to sexual intercourse. A more severe legal qualification can be applied in the case of a victim who is a minor or a child or if, incidentally, during sexual intercourse, the perpetrator negligently causes serious bodily injury or death to the victim.

From 2005 to 2016, a more severe punishment was prescribed for the criminal offense of rape (Article 178 CC) than for the criminal offense under Article 179. With the CC amendments from 2016, the legal ranges for the mentioned criminal offenses were equalized, which shows that the offenses are equally socially dangerous. This also eliminated the complaints of women's rights groups about discrimination against women with disabilities as victims of sexual intercourse against the infirm in relation to rape victims.[27] The ranges of punishments prescribed by law remained the same in the latest amendments to the CC from 2019, with stricter punishments prescribed for both crimes for more serious forms of crime committed against children or when death was incurred to the victim during the crime.[28] Despite the proposal to envisage involuntary sexual intercourse as a basic form of rape or, more appropriately, as a separate crime subsidiary to rape,[29] a solution that

26 Čubinski, *op. cit*., 210-211; Milan Škulić, 'Krivično delo obljube nad nemoćnim licem – normativna konstrukcija, neka sporna pitanja i moguće buduće modifikacije', *Crimen*, Vol. IX, No. 1, 2018, 44-45.

27 There are no obstacles to applying the legal qualification of rape to girls and women with disabilities nor to any other criminal offense from Chapter XVIII of the CC but it is easier to convict the perpetrator by applying the legal qualification of forced intercourse. 2021 statistical data on the sentences imposed on perpetrators of criminal offenses fails to confirm the assumption that the penalties for forced intercourse against a powerless person are milder than for rape (Republic Bureau of Statistics – RBS, *Bilten br. 677: Punoletni učinioci krivičnih dela u Republici Srbiji, 2020 [Bulletin No. 677*: *Adult perpetrators of criminal offenses in the Republic of Serbia, 2020]* (2021), 67). That it is easier to prove the existence of a criminal offense under Article 179 is confirmed by the data on the outcome of the accusation: in all five cases those accused for forced intercourse against a powerless person were convicted, while 34 were accused of accused, 24 persons were convicted, one was acquitted, and in other cases the proceedings were suspended (RBS, *op. cit*., 40-41).

28 For the mentioned most serious forms of criminal offenses from Article 178 and Article 179 of the CC, the amendments to the CC (*Official Gazette of RS*, No. 35/2019) prescribe a sentence of at least 10 years or life imprisonment. Previously, a prison sentence of at least 10 years and a prison sentence of 30 to 40 years were prescribed.

29 Milan Škulić, 'Teorijska podela krivičnih dela protiv polne slobode i njihovo mesto u krivičnopravnom sistemu Srbije' in Đorđe Ignjatović (ed.), *Kaznena reakcija u Srbiji.* VIII

is not in line with CETS 210 was retained. It is probable that it was considered sufficient to even out the ranges of the prescribed jail punishment for the mentioned crimes, and that the disputable situations of non-consent to sexual intercourse that was not performed with the use of coercion could be encompassed, with a broader interpretation, by the criminal offense of sexual intercourse with a powerless person.[30]

In order to apply the existing legal qualification from Article 179 of the CC, it is sufficient to prove that the forced sexual intercourse was committed or equated with another sexual act, that the perpetrator used a powerless person and that the perpetrator was aware of the victim's incapability. The most important difference in relation to rape is the absence of coercion: moreover, a crime also exists when the initiative for sexual intercourse was provided by the powerless victim, as well as if the person had consented to sexual intercourse, provided that the person is mentally ill or severely mentally retarded, with the assumption that they cannot exercise their free will independently.[31] Thus, the perpetrator then fully exploits the victim's powerlessness. However, if the victim, despite being mentally ill or mentally retarded or in a state of temporary disorder due to alcohol or psychoactive substance abuse, had a sufficiently preserved mental ability to give relevant consent to sexual intercourse, there is no criminal offense from Article 179. With regard to the perpetrator's intent, it is sufficient to prove that the perpetrator sought sexual intercourse, being aware of the possibility of the victim being an incapacitated person and agreeing to use the victim's condition for sexual intercourse.

Despite the fact that the CC does not prescribe sexual violence (rape) as involuntary sexual intercourse, Article 179 is usually applied to the situ-

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(2018), 82; Škulić, *op. cit*., 67-68. Stojanović believes that the situation when sexual intercourse is not desired should not be equated with forced sexual intercourse, especially since rape by the degree of wrongdoing stands out in relation to other sexual crimes, except for forced intercourse over a powerless person – for exploiting the state of powerlessness (Zoran Stojanović, 'Silovanje bez prinude. Usklađivanje KZ Srbije sa članom 36 Istanbulske konvencije', *Nauka, bezbednost, policija*, Vol. 21, No. 1, 2016, 3, 9).

30 According to Stojanović, in all situations when coercion was not used but the deed was performed against the will of the victim, there is the possibility of applying Article 179 of the CC, as "the only criterion is that the state of powerlessness of the victim has been exploited and that, as a rule, there is no defensive will of the victim in the forced intercourse" and it should be considered (Stojanović, *op. cit*., 8). Škulić confirms that in a part of criminal law theory, as well as in court practice, the inability to defy the perpetrator is often equated with the situation in which a powerless person cannot express consent with sexual intercourse, and when it is considered that the victim failed to give consent for sexual intercourse (Škulić, *op. cit*., 68). However, the application of the *intra-legem* analogy which extends the application of the standard of "infirm person" to many categories of persons is not in accordance with the principle of legality (Maša Hribar, 'Criminal Protection of Helpless Persons in the Light of the Provisions of KZ-1', *Pravnik: Revija za Pravno Teorijo in Prakso,* Vol. 75, No. 1-2, 2020, 71). It is more effective to stipulate a new criminal offense than to allow an overly broad and uneven interpretation of the legal standard of a powerless person in court practice.

31 Nataša Mrvić Petrović, *Krivično pravo – posebni deo* (2019), 135. Škulić cites an example from the practice of a sexually exploited woman suffering from schizophrenia with an increased sexual urge (due to irrational ideations about sexual attraction) which she could not control and direct (Škulić, *op. cit.,* 60).

ation when the victim fails to consent to sexual intercourse, as they could not under the given circumstances resist the perpetrator. As for the criminal offenses from Articles 178 and 179 the envisaged prison sentences are in the same ranges, it cannot be concluded that the existing legal gap can cause a lack of protection of the sexual integrity and sexual freedoms of women with disabilities. Therefore, expanding the boundaries of sexual behavior does not necessarily mean improving the protection of the sexual integrity of women with disabilities. The question is, why then would any changes occur?

By changing the concept of sexual assault (rape) according to CETS 210, the sexual abuse of a person with no free will to consent to sexual intercourse due to the nature of their disability or because they are temporarily prevented by external factors to express their disapproval of sexual intercourse should certainly be equated with involuntary sexual intercourse as a form of sexual violence or rape. Thus, the new concept of sexual violence is based on the consent model, demanding that the focus of proof shifts from the fact that sexual intercourse took place and that the sexually exploited woman was instable to determining the existence and content of free will. In a situation whereupon the victim could actually express such free will, it is important to consider when she could have consented to sexual intercourse, as well as whether she could have expressed her free will in defiance. The concept popularly called "no means no," when a woman clearly states or demonstrates by implicit action (body signal, behavior) that she does not consent to sexual intercourse is not applicable to situations where she cannot freely express her will or when she cannot correctly interpret other people's sexual behavior due to life inexperience or reduced cognitive abilities. The more comprehensive protection of the sexual integrity of a person who would not be able to give relevant consent is then necessary, even when the victim expresses her free will to have sex. The assumption is that this primarily pertains to children, minors up to the age when they can make decisions on their own sexual life, and people with severe mental illness or severe mental retardation (often with combined disability). Insisting on the consent of such persons would entail enabling their sexual exploitation.[32]

IV EXAMPLES OF EFFECTIVE FOREIGN LEGISLATION

Sexual violence or abuse of a person with a disability as well as other infirm persons can be defined as sexual intercourse or any sexual act committed against or required of such a person against their will or to which they cannot

32 Alan W. Bryant, 'The Issue of Consent in the Crime of Sexual Assault,' *Canadian Bar Review*, Vol. 68, No. 1, 1989, 133-134. He therefore recommends that special statutory rules regulate the responsibilities of guardians or managers of collective institutions in order to prevent sexual abuse and exploitation of minors or protégés with intellectual disabilities (*Ibid.*). Hewitt is of a similar opinion: severely mentally disabled people are unable to give consent or have the wherewithal to consent to sexual intercourse. As they lack understanding of the consequences of their consent, they should be protected by the stipulating of a special crime and special punishment should be provided for sexual abuse committed by persons in charge of their care (Stanley E. K. Hewitt, 'The Sexual Abuse of Young Persons with a Mental Handicap,' *Medicine and Law*, Vol. 8, No. 4, 1989, 410).

willfully consent due to physical, psychological, cognitive, or linguistic inferiority (to paraphrase the definition of child sexual abuse in Bange and Deegner's monograph[33]). It is *ratio legis* to penalize persons who take advantage of a victim's specific position and circumstances well known to the perpetrator, doing so covertly and using control over the victim and authority.

Considering that the criminal legislation of the Republic of Serbia belongs to the German variant of the continental legal system, we find effective foreign examples in German and Slovenian law.

Amendments to the German CC made in 2016[34] helped to harmonize the legislation with Article 36 of CETS. The Code envisages every involuntary sexual act as punishable, while the consent of the victim is given as an expression of free will. The provisions of Article 177 unite the criminal acts of sexual assault, sexual coercion and rape, which has created a conglomeration of different forms of punishable sexual relations committed against the free will of the victim, coercion or abuse of their powerlessness. The theory was determined in support of the aforementioned solution, which envisages 'gray areas' of sexual behavior as punishable acts of the crime of sexual violence (rape). The 'gray area' includes all events when the perpetrator fails to use coercion but exploits the passivity of the victim who is in a specific "vulnerable situation" due to which they cannot resist the abuse.[35]

The advantage of this legal solution is that the legal-technical sexual assault of a helpless victim (even one with a disability) is equated with other punishable sexual coercion (rape). Therefore, the accusation that persons with disabilities are discriminated against are dropped, which is further contributed to by the deletion of the definition of "mental disorder or mental illness or disability" from the list of the typical examples of victim powerlessness. Simply put, sexual assault always exists if the perpetrator recognizes the situation of the victim's powerlessness and uses their dominance for committing sexual intercourse, regardless of the reason why the victim is absolutely incapable of expressing their free will. The most important difference in terms of proof is that there will no longer be any need, as in the case of Serbian legislation, to prove the inability of a powerless victim to resist the perpetrator but rather, whether or not there is a possibility of expressing free will regarding sexual relations. Thus, a more subtle difference has been established between powerless persons in the sense that for example, a quadriplegic woman cannot contest sexual intercourse, but she is intellectually capable of expressing her free will clearly.[36] It is up to the legal practice to decide which way this will be carried it is a *questio facti*.

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33 Dirk Bange and Günther Degner, *Sexualler Mißbrauch an Kindern, Ausmaß, Hintergründ, Folgen,* (1996), 95.

34 German Criminal Code [Strafgesetzbuch] in der Fassung der Bekanntmachung vom 13. November 1998 (*BGBl.* I S. 3322), das zuletzt durch Artikel 2 des Gesetzes vom 22. November 2021 geändert worden ist.

35 Jörg Eisele, 'Das neue Sexualstrafrecht,' *Rechtspsychologie,* Vol. 3, No. 1, 2017, 9-10.

36 Jeisele, *op. cit.*, 14.

Para. 177 subpara. 2 (2) stiupulates that a perpetrator is exploiting a person severely restricted in expressing their will due to their physical or mental condition, unless they are convinced consent was given. The same terms of mental disorder are used as with the state of sanity (as per medical-psychological criteria). The solution is a step towards the "yes means yes" model in regards to people with disabilities whose implicit consent is necessary to take advantage of their sexuality, in which case the sexual partner should not be prosecuted. However, the requirement of a positive consent is more rigorous than in the previous legal solution (the same as in the current legislature of the Republic of Serbia), as it insists on the need to build up the protection of the sexual integrity of such a person. Restrictions in the expression of free will do not affect the validity of the consent given, so it may happen that the decision of relatives or guardians of these persons is not crucial in assessing the personal sexual needs of these persons, and that they may explicitly or implicitly withdraw their consent in the future or restrict certain sexual acts. The free will of a woman who has limited mental abilities to express her free will must be proven according to the concept of "no means no." In other words, it must be proven that a woman with a disability had not consented to sexual intercourse, which can be difficult in the case of a person with intellectual disabilities who can be very susceptible to manipulation.

Pursuant to CETS 210, the amendments to the Criminal Code of Slovenia[37] dated 30 June 2021 as per the "yes means yes" model have changed the features of the criminal offense of rape under Article 170 and sexual violence from Article 171. It is distinctive of both criminal offenses that direct perpetration (sexual intercourse or another sexual act) is undertaken without the consent of the victim, while there is more severe punishment when these acts are committed under duress or blackmail. The protection of sexual integrity is supplemented by the criminal offense of sexual abuse of an incapacitated person (Article 172). A powerless person is one who, due to mental illness, temporary mental disorder or severe intellectual disability, cannot give relevant consent to sexual intercourse or other sexual activity. According to the prison sentences (from one to eight years), the criminal offense under Article 172 is more dangerous for society in general and more severe than the basic forms of rape and sexual violence, for which there is a sentence of six months to five years in prison. As can be seen, according to the Slovenian decision from Article 172, only a woman with a severe intellectual disability can have the status of a "powerless person," while Article 170 or Article 171 would be applied in relation to women with physical disabilities who cannot contest sexual violence but can express resistance, as well as persons with mild intellectual disabilities.

In both legislations, the definition of sexual assault (rape) has been changed in accordance with CETS 210. At the same time, the legal solution has been retained wherein sexual intercourse with a powerless person who cannot express their free will regarding their sexual life is a distinct form of criminal offense (as in the German Criminal Code), or a distinct crime (as in the Slovenian Criminal Code), in accordance with the criminal law model

37 Kazenski zakonik, *Uradni list Republike Slovenije*, št. 50/12, 6/16, 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21.

of coercion. The Slovenian solution has greater similarities with the existing CC of the Republic of Serbia and could be an acceptable model for making changes to the CC of the Republic of Serbia.

As the above examples show, a heterogeneous group of disabled persons (especially girls and women with intellectual disabilities) should be separated according to the criterion of whether they can understand the importance of sexual intercourse and make legally relevant decisions in this area of sexuality and express their free will. The first group are those who are physically unable to defy forced sexual intercourse but can form and express their defiance, usually verbally. The second group consists of those who have the possibility of physical defiance but are unable to understand the sexual situation and make a free decision. The changes require that women with disabilities are treated without the preconception that they are not *a priori* able to decide about their sexuality and that, being powerless, they should be protected from any sexual activity. The problem, however, is that a change of the concept does not necessarily enable a more effective criminal protection of persons with disabilities in practice.

A more psychologically adequate new concept of sexual violence from CETS 210 complicates the process of providing evidence for the existence of a crime. The problem is especially present in the continental legal systems in which the content of the standard of sexual intercourse and sexual activity are concretized by interpretation when applying the legal qualification. The intimacy and privacy of sexual relations makes it difficult to prove the commission and existence of a sexual crime. At the same time, the further we move away from actual or prevented violence, the more difficult it becomes to prove the facts according to which the existence of a crime is determined, as legal concepts and factual issues are intermingled when assessing whether or not a person has consented to sexual intercourse.[38] The accuracy of this assessment is documented by data from Sweden that the implementation of CETS 210 has affected the increase of reported rapes but that there was also an increase in acquittals, which indicates that the criterion by which consent is given (especially tacit) is unclear, and the court cannot easily assess whether participation in sexual intercourse was involuntary, especially if there were no clear signs of defiance and the victim's behavior was ambivalent.[39]

V OBSTACLES TO EFFECTIVE GAINING OF ACCESS TO JUSTICE FOR WOMEN WITH DISABILITIES

The experience of sexual abuse of all victims in general but especially girls and women with disabilities causes long-term psychological consequences (anxiety, depression, post-traumatic stress disorder, etc.) and an even larger withdrawal from society. As a rule, the consequences of a crime increase the functional limitations of a person with a disability or affect the

38 Bryant, *op. cit.*, 152.

39 Linnea Wegerstad, 'Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden,' *German Law Journal*, Vol. 22, No. 5, 2021, 741.

occurrence of a secondary disability. As sexual violence or abuse occurs in an isolated environment, the chances of the victim receiving help from others are slim. Because they are economically dependent on others and cannot take care of themselves, women with disabilities do not dare to report abusers if they are supported, cared for or assisted due to their disability, and thus the so-called dark figures of crime are high, especially if there is violence in the family or in a care institute.[40] Women with disabilities find it difficult to gain access to justice, both due to the limitations associated with disability and because of the reciprocal effects of their marginal social position. Therefore, CETS 210 emphasizes the mandate to help victims through cooperation with state bodies, as well as special support (Articles 20-22), the obligation to support victims of sexual violence (Article 25) and assistance in reporting violence (Article 27).

In the adversarial model of criminal procedure that dominates in modern legislation, the participation of the victim is most often reduced to the role of a witness. Thus the victim is obliged to participate in the stages of the procedure in which her character, reputation and propensity to lie are tested out. It is not enough for a witness to point out facts, but she must do so in an acceptable way, spontaneously and unprepared, in order to conclude from her behavior that she had testified credibly.[41] The position of the victim during the cross-examination is especially demanding, as she is exposed to questions and insinuations from the opposing party's lawyer and she may become confused, insecure and unconvincing and therefore leaves a bad impression on the jury, due to the fact that it appears that she was lying.[42]

The strongly contradictory character of the verbal inquiry and the importance of personal evidence for the outcome of the adversarial procedure complicates the position of sexual crime victims. There is a challenge to render proof in all sexual offenses, since the charge is based on the words of the victim against the words of the perpetrator and other evidence is rarely available. Even when it is possible to establish that there was sexual contact between the perpetrator and the victim on the basis of material evidence, the true nature of their relationship can only be ascertained from their conflicting statements. Therefore, the content or the quality of the given statements is crucial for proving the crime. An insufficiently convincing testimony of the victim, if there is no other evidence, may due to a lack of evidence affect the decision to suspend the criminal proceedings or even acquit.

The problem is exacerbated if a victim with a disability is unable to give a good quality statement, especially if, due to their limitations, they are unable to establish written or verbal communication. In that case, the help of an interpreter is necessary even in the pre-criminal procedure. In addition, people with intellectual disabilities find it difficult to understand the purpose

40 Filip Mirić and Aleksandra Nikolajević, 'Violence against Persons with Disabilities: the "Dark Number" of Crime,' *Facta Universitas – University of Niš,* 2021, Vol. 19, No. 2, 115-116.

41 Alan Cusack, 'Victims of Crime with Intellectual Disabilities and Ireland's Adversarial Trial: Some Ontological, Procedural and Attitudinal Concerns,' *Northern Ireland Legal Quarterly*, Vol. 68, No. 4, 2017, 440.

42 Nataša Mrvić Petrović, *Naknada štete žrtvi krivičnog dela* (2001), 78.

of the trial and the role they play in the proceedings and furthermore, they may be frightened by the courtroom setting and the presence of the public. In fact, they are often exposed to the risk of secondary victimization, i.e. mental suffering caused by frequent re-examination, inappropriate questions or an insensitive treatment by the authorities. Therefore, the state is obliged to protect the victim from secondary victimization and the discrediting of their identity during the cross-examination stage.[43] For example, due to the difficulty of obtaining credible testimony from rape victims, especially children, the US state of South Carolina has allowed a precedent in the form of excluding the public while questioning child victims, restricting the right to cross-examine, and prohibiting confrontation with the perpetrator.[44]

In the criminal proceedings in other countries, is is common that victims with intellectual disabilities have significant difficulties in communicating with state authorities during the reporting of criminal offenses and testifying in criminal proceedings.[45] If the questions asked in the proceedings are not adjusted to their level of cognitive abilities, the risks of secondary victimization increase, as the victim's statements may have to be repeated several times. On the other hand, deficiencies in the testimonies of victims with intellectual disabilities may affect the outcome of the evidentiary procedure and the possibility of procedural error.

The accuracy of these remarks is confirmed by an example from the practice of the Higher Court in Valjevo.[46] A 53-year-old accused man exploited his friendship with the mother of the plaintiff, then an under-aged girl (16 years old) with intellectual disabilities and forced intercourse on her while her mother slept in the same room, being under the influence of opi-

43 In the case of *Y. v. Slovenia* (Application No. 41107/10, judgment of 28 May 2015), the ECtHR held Slovenia responsible for violating Article 8 of the ECHR as during the cross-examination of the plaintiff in the course of a trial for sexual abuse, the court had failed to prevent the accused from making degrading and insulting remarks against the plaintiff. The court warned that cross-examination should not be used as a means of intimidating and humiliating witnesses (para. 108), as additional prohibitions would not unduly restrict the right to defend the plaintiffs who have been allowed detailed cross-examination but would certainly reduce the plaintiff's anxiety (para. 109).

44 Russell D. Ghent, 'Victim Testimony in Sex Crime Prosecutions: An Analysis of the Rape Shield Provision and the Use of Deposition Testimony under the Criminal Sexual Conduct Statute,' *South Carolina Law Review*, Vol. 34, No. 2, 1982, 589-590.

45 Researchers from Spain, Northern Ireland and Switzerland, independently of each other, agreed that people with intellectual disabilities have an unequal position in criminal proceedings compared to other participants. They have episodic memory and memory gaps, especially concerning details (time, place), they are suggestive and compliant, and as they fail to understand the legal terminology, they refute their earlier statements or arbitrarily leave the impression that they understood the question to avoid shame or embarrassment (Jacobo Cendra López *et al*., 'Victims with Intellectual Disabilities through the Spanish Criminal Justice System,' *New Journal of European Criminal Law*, Vol. 7, No. 1, 2016, 92-93, 96; Cusack, *op. cit.,* 435, 436, Niehaus *et al.*, *op. cit.,* 377).

46 Fully adjudicated case no. K 17/18, legal qualification: enforced intercourse with a vulnerable person from Article 179 para. 2 in connection with para. 1 CC, from the personal archives of Judge Dragan Obradović.

ates and alcohol. Due to combined disability, the victim was not able to offer adequate defiance. The defendant first touched the victim on the chest and body, and then had sex with her. The gynecological examination of the victim determined that she had had sexual intercourse during the previous 72 hours. What was crucial to the outcome of the proceedings was that the victim immediately informed her father, who filed a criminal complaint on her behalf, and a criminal proceeding was initiated relatively quickly and the necessary evidence was established.

The victim was born with cerebral palsy and hemiparesis of the right side, as a result of which she suffered an impairment of her psychomotor skills. She was diagnosed with mental retardation at the age of one and a half, needing psychiatric treatment since childhood. She attended a school for children with special needs. The victim was illegitimate, with a father living in Germany and visiting seldom. Due to the circumstances, as the father was in the country at that point in time, the victim related to her father what had happened to her and who the perpetrator was the day after the event. The mother was a chronic alcoholic, in good relations with the accused who was a neighbor, and with whom she drank together and occasionally had sexual relations. The relationship between the mother and the accused was the reason why he had access to their house both day and night and was able to remain alone with the victim. The mother's indifference towards the child was noted, even after she found out about the event. Due to the way she treated her daughter, and especially because she, as the only guardian, put herself in a situation where she could not render protection to her daughter from sexual abuse, she was convicted of neglect and abuse of a minor and received a long-term sentence.

The circumstances related to the committing of the crime were determined on the basis of the victim's testimony. She was questioned as a witness by a speech therapist or a court deaf interpreter and in the presence of an expert in the medical profession – a neuro-psychiatrist and a specialist of medical psychology. In the transcripts from the hearing of the victim at the main trial, the court council president stated that dialogue with the victim was very complicated, that questions were repeated several times, and that she gave incomprehensible or difficult to understand short answers. Only after questions were repeated several times by the deaf interpreter was it clear what the victim wished to say. Thus, the hearing had to be discontinued due to a difficult communication. The defense counsel and the court interpreter stated that the victim had better articulation three and a half years prior, when she had testified in the prosecutor's office, compared with the main trial.

The court claimed certain illogicalities in the victim's testimony and needed to expound on the reasons why it gave credence to her testimony, as opposed to the testimony of the accused. It referred to the results of the expertise of examining the victim's personality. A committee of experts stated that the victim was aware but communication with her was difficult due to her slurred speech, and that she was not able to give a timeframe for the

events that were the focus of the court trial, as well as that her knowledge was scarce. Also, she knew to recognize letters but could not read or count and she was not adept at abstract thinking, while her intellectual skills were at the level of moderate mental retardation. Thus, due to reduced intellectual skills, suggestibility and pliability were at an increased level. Decreased tolerance to frustration, frequent aggressive outbursts, a lack of critical thinking in social relationships, especially in heterosexual relationships, were observed. The mental retardation was manifested in underdeveloped cognitive abilities (underdeveloped abstract thinking, logical reasoning, understanding of cause-and-effect relationships) as well as in her personality traits (increased suggestibility, weakness of will, pronounced instinctive reactions whereupon instincts override the will, the inability to make decisions and reduced analytical thinking), which is why her ability to resist forced intercourse at the time of the event was significantly reduced. The expertise showed that her awareness was sustained quantitatively and qualitatively, that she had no tendency towards simulation but that her intellectual deficit affected her from distinguishing the essential from the irrelevant. Namely, she failed to understand the consequences but could reconstruct the event at the concrete level, with no precise timeframe.

During the main trial, the members of the expert committee conducted a diagnostic interview after the interruption of the hearing in the presence of the deaf interpreter and the victim's mother, who could understand her the best. It was concluded that she had no memory of past events and consequently, she responded to questions in an allusive manner, depending how they were posed. The expert witness also commented on the manner of record keeping during the hearing in the Public Prosecutor's Office, stating that the victim, according to her abilities and intellectual capacities, had no ability to speak as it was stated in the transcripts, or give such statement during the investigation, or understand them as they were presented to her but rather, she was directed towards a certain narration, i.e. the entire narrative in the transcripts was derived on the basis of what she had stated and the presumed meaning of what she had wished to say but had not ability to expand on it. The expert witness went on to explain that retardation is not only impaired intelligence as a mental function, but also an impairment of all cognitive and conative functions (psychological functions related to will and motives). Due to what the experts had determined, it was determined that at the time of the main trial the victim was not legally competent and failed to understand the real meaning of the trial. Thereby, her court examination was discontinued.

The data from the court case confirm the theory that factors from the immediate environment have a critical influence on the sexual victimization of a person with an intellectual disability.[47] In our example, these are the following: a broken family, the mother's alcoholism, the neglect of a child with disabilities, and the facilitated access of the accused to a disabled child, considering the accused was a family friend. Moreover, the accused was also fully apprised of the fact that the minor in question was mentally retarded and

47 Petersilia, *op. cit.*, 679.

suffered from cerebral palsy with hemiparesis on the right side, as her disabilities were evident.

In the mentioned case, the key problem was to establish contact with the victimized minor, as she was mentally retarded and deaf and dumb. This was why she was questioned during the investigation and at the main trial via a speech therapist – a court deaf interpreter. Her speech was more incomprehensible during the main trial phase and thereby, even the deaf interpreter and speech therapist failed to fully understand her, which was stated by the committee of medical experts who examined the victim party during the investigation and additional examination during the main trial in the presence of the deaf interpreter, which was also noted in the transcript during the main trial by the council president and later in the verdict's reasoning. Due to her physical condition, the victim also responded to some questions by using her hands, symbolically indicating how the critical event had occurred, which was noted in the transcript of the main trial. As regards informal communication with her, her mother, with whom the victim lived, provided the biggest support.

It seems that such victims would need to be provided with specialized services and comprehensive support at the first stage of reporting a crime. One of the important steps taken by the state to protect victims in criminal proceedings before regular courts is the establishment of the Service for Assistance and Support to Witnesses and Victims in Higher Courts, as well as in other courts designated by the High Judicial Council in 2016 by amendments to the Court Rulebook.[48] However, the establishment of the Service alone is not enough – it is necessary to keep in mind the experiences from other countries, as for example from the USA, that the centers for assistance to victims of rape or violence rarely have the conditions to provide support to mentally disabled persons.[49] In such cases, the victim's initiative cannot be awaited. Victim support organizations must act proactively in care institutions for persons with disabilities and together with the competent state authorities they must establish a system of structured support for victims in order to ensure timely detection and prevention of sexual abuse.[50]

48 Dragan Obradović, 'Respect for the right to human dignity of victims of criminal offenses during criminal proceedings in Serbia,' in Zoran Pavlović (ed), *Yearbook Human Rights Protection, the right to human dignity,* (2020), 228.

49 Petersilia, *op. cit.*, 688-689. Because communication with people with intellectual disabilities is a particular problem, it is suggested that support is given to people who have lived with persons with a disability (Weller, *op. cit.*, 506), which in turn may help reduce discrimination.

50 Cheryl Guidry Tuyska, 1998 Working with Victims of Crime with Disabilities, OVC Archive, NCJ 172838, *https://www.ncjrs.gov/ovc_archives/factsheets/disable.htm.* A good example is the Netherlands: sexual abuse in institutions for people with intellectual disabilities is prevented by the sexual education of the residents and educating staff on the psychological signs of abuse (Amelink Quirine *et al.*, 'Sexual abuse of people with intellectual disabilities in residential settings: a 3-year analysis of incidents reported to the Dutch Health and Youth Care Inspectorate, *BMJ Open* 2021, 7). On the other hand, the police, judicial and other bodies in pre-trial proceedings are mandated to cooperate with each other to protect the interests of the victim (Nataša Mrvić Petrović, 'Prava žrtava krivičnih dela u Holandiji,' *Strani pravni život*, No. 2, 2019, 20).

In the case from Serbia under analysis, there were no indications that any of the state bodies had treated the victim with any prejudice, although there may be stereotypes about women and prejudices about rape and women with (intellectual) disabilities in the police and judicial bodies, and even in the work of social services, and even among women with disabilities themselves. The ECHR judgment in the case of I. C. v. Romania corroborates this statement.[51] In fact, instructing the competent authorities about persons with disabilities and the ways in which credible and high-quality testimony of persons with intellectual disabilities could be achieved could reduce prejudices.[52]

From the aspect of the general prevention of sexual crimes committed against minors, it is important that in the Republic of Serbia the Law on Special Measures to Prevent Crimes against Sexual Freedom against Minors (hereinafter: the Law) was adopted in 2013. Article 3 of this Law applies to perpetrators who have committed one of the ten criminal offenses from the group against sexual freedom against minors, among which are rape and forced intercourse with a disabled person.[53]

It is important to note that criminal protection of the sexual integrity of migrant women and girls or asylum seekers is provided under the same conditions as for the local citizens. Given that Serbia is a transit country for migrants/asylum seekers, they are provided with the right to health care, which is guaranteed as one of the basic human rights of Article 48 item 4 of the Law on Asylum and Temporary Protection.[54] Upon admission to an asylum center or other accommodation facility, all applicants are medically examined, while appropriate health care is a priority for seriously ill applicants, applicants who are victims of torture, rape and other severe forms of psychological, physical or sexual violence, as well as a persons with mental disabilities.[55]

51 *I. C. v. Romania* (No. 36934/08; Judgment of 24 May 2016). The applicant, who was 14 years old at the time of the alleged rape, complained that Romania's criminal justice system was more inclined to trust male perpetrators than her, and that the authorities had not protected her or shown concern for the juvenile victim. The court found that there was a violation of Article 3 of ECHR, that the national courts failed to take into account the victim's youth and mild intellectual retardation when assessing her defiance. In addition, the psychological characteristics of the victim were not examined in order for her reaction to the sexual event to be understood, nor was extensive documentation of psychiatric treatment taken after the incident, which could testify to the trauma she had suffered (para. 58).

52 Cusack, *op. cit*., 443; Niehaus *et al., op. cit.,* 377.

53 [Zakon o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima], *Official Gazette of the RS*, No. 32/2013, Article 3. There is a ban on mitigation of punishment and conditional release of the perpetrators, non-statute of limitations for criminal prosecution and execution of sentences, and legal consequences of convictions, some of which last 20 years, as well as a ban on acquiring public office and a ban on employment, i.e. calling or occupation related to work with minors. Also, special measures are implemented regarding the perpetrators of these crimes after serving a prison sentence that can last up to 20 years, and aim at special prevention – the protection of minors from persons convicted of sexual crimes against minors.

54 [Zakon o azilu i privremenoj zaštiti], *Official Gazette of the RS*, No. 24/18.

55 Dragan Obradović, Branka Antić and Marko Ognjenović, "Migranti – nova kategorija pacijenata u zdravstvenom sistemu Srbije i pojedini problemi', *Zbornik Instituta za kriminološka i sociološka istraživanja*, Vol. XXXVIII, No. 2, 2019, 192.

VI CONCLUSION

In Europe, due to the efforts of regional organizations, "victim reform" has been encouraged, primarily in the aim of preventing violence against women and children. When it comes to preventing sexual violence, the normative dimension of sexuality, although hidden, stems from a given cultural pattern of permissible sexual behavior. The adoption of CETS 210 implies a change in this pattern in the area of the sexual freedoms already acquired. As the boundaries of criminal law intervention expand, the task of criminal law becomes more complicated due to the fact that the model of coercion is being transferred to the model of consent. As it primarily serves to determine the free will of the victim, the new concept unquestionably complicates the burden of proving rape or other types of sexual assault. In theory, as well as in foreign practice, the problems caused by the comprehensive interpreting when there is involuntary participation in sexual intercourse and whether the perpetrator could have misunderstood the will of the victim according to the circumstances have already been pointed out.

Considering that the conceptual change at the level of the Council of Europe has already taken place, the legislation of the Republic of Serbia must adjust completely to it. It will be necessary to change the definition of the crime of rape (Article 178) and to adjust the features of the crime of sexual assault on a powerless person (Article 179). Supporting the new concept, the current legal solution from Article 179 of the RS Criminal Code enables a discriminatory outcome insofar as voluntary sex with a person who is considered "powerless" (and persons with intellectual disabilities are considered as such) can be illegal and punishable behavior. When a person is to be considered powerless depends on who is applying the standard. As can be seen, jurisprudence tends towards a broad interpretation of the "powerless state" of a person in order to gather all situations of sexual intercourse under the existing standard without the consent of that person.

By using examples from foreign legislation, we endeavored to assess whether the amended criminal law regulations would facilitate access to justice for women and girls with disabilities who are victims of sexual crimes. However, the formal relinquishment of the paternalistic attitude towards persons with disabilities in the area of the protection of their sexual integrity and sexual freedoms is more of an ideological goal to be pursued, and it does not necessarily mean the improvement of that protection in practice. Moreover, it can set it back if case law does not uniformly interpret the changed features of these crimes.

Given that there is a high "dark figure" of sexual crimes to the detriment of women with disabilities, it seems that the priority is to create conditions for them to enable the recognition of the sources of danger and resist sexual abuse, as well as to report it. It would, thereby, be necessary to provide systematic and comprehensive support and assistance to such victims through the proactive engagement of the NGO sector and social services. It is important to increase the sensitivity of state bodies and courts to the needs of victims with disabilities, especially when it comes to women with intellectual

disabilities in order to prevent the secondary victimization of such witnesses. It is necessary, then, to organize training for members of the police and judiciary in order to increase awareness about the causes and consequences of disability and combat the possible harmful effects of prejudices and stereotypes about women with (intellectual) disabilities as victims of sexual crimes. Interdisciplinary teams of experts (social workers, psychiatrists, psychologists, speech therapists) should be available to prosecutors and judges who, through joint efforts, can provide appropriate services to the victims in time, gain their trust, facilitate communication with competent state bodies and carry out high quality psychological expertise on women.

The changes in the depiction of crimes against sexual freedoms must be understood as an integral part of the broader efforts to prevent social discrimination against women, including those with disabilities. This includes activities regarding their education and empowerment (employment and raising functional autonomy), with a positive attitude towards the sexuality of women with disabilities and continuous sexual education in order that they can recognize the danger in time and learn from experience how to express their free will. Instead of denied sexuality and constant social exclusion that, paradoxically, contributes to a higher risk of violence and sexual abuse, we should strive for independence and the social inclusion of people with disabilities. It is slightly idealistic to advocate for greater financial support from the state in order to encourage changes in the direction of greater autonomy and independence, better education and increased employment of people with disabilities. However, it is up to the authorities to find ways to equate these persons, especially women, with others, both in their ability to lead a normal life and in gaining access to justice.

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TEŠKOĆE KRIVIČNOPRAVNE ZAŠTITE SEKSUALNOG INTEGRITETA ŽENA I DEVOJAKA SA INVALIDITETOM

Apstrakt

Žene i devojčice sa invaliditetom su u visokom riziku od seksualnog nasilja, a brojne su poteškoće kada je u pitanju njihova zaštita u oblasti krivičnog prava. Autori analiziraju najvažnije prepreke u krivičnom gonjenju i suđenju na primeru sudskog postupka. Pored potrebe zaštite i osnaživanja osoba sa invaliditetom u krivičnom postupku u Srbiji, neophodno je promeniti pristup propisivanju krivičnih dela seksualnog nasilja (silovanje i prinudni snošaj bespomoćne osobe). Time bi se postigla bolja zaštita seksualnog integriteta osoba sa invaliditetom, a u skladu sa relevantnim međunarodnim standardima, i, dalje, sprečena njihova eventualna diskriminacija. U radu se razmatraju predložena rešenja prema odredbama Istanbulske konvencije Saveta Evrope i uporedivi primeri u zakonodavstvu Nemačke i Slovenije. Autori navode da promene u krivičnom zakonodavstvu mogu unaprediti zaštitu seksualnog integriteta žena sa invaliditetom samo ako su praćene izmenjenim društvenim pristupom ženama sa invaliditetom.

Ključne reči: *Osoba sa invaliditetom; Ženske žrtve; Seksualno nasilje; Obljuba nad nemoćnim licem.*