Amendments to the Criminal Offense of Rape in the Criminal Code of Serbia

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Abstract

After the introductory part, the paper points out to the essence of the criminal offence of rape that had been prescribed by the Criminal Code of the Republic of Serbia with amendments made before the entry into force of the Criminal Code from the year 2005. Following that, a criminal offence prescribed by this code with amendments made by the end of the year 2016 is discussed. Each of the prescribed forms is analyzed separately, with analysis of intention and negligence of this criminal offence. Requirements of the Istanbul Convention put in front of the countries that signed the convention with regard to this criminal offence are also discussed. Finally, concluding arguments are given.

***Key words**: rape, sexual intercourse, coercion, force, threat, consent.*

Introduction

Rape as one of the forms of violent criminality causes significant attention of criminologists because it raises a question of perpetrator and victim personalities in a specific way, their relation and symptoms of rape trauma as a serious and long-term consequence of victimization. At the same time, it considers the problem of false reporting, relation of formal social control bodies towards the victim and perpetrator, severity of the sentences, re-socialization of the perpetrator, the attitude of the environment towards the victim and perpetrator, etc.[2] In addition, the general and in particular the professional public within the field of criminal law is very interested in the criminal offence of rape which is a central criminal offence in the group of offences against sexual freedom. Due to all previously stated, a fierce debate is led in the scientific and professional circles which eventually leads to relatively frequent changes in the very essence of this criminal offence. The previous changes apart from introducing heavier punishments have been also aimed at wider protection of the victim in terms of criminal law as well as the expansion of the scope of acts representing the criminal offence. Unlike the previous solution when the passive entity could be only a woman with whom a perpetrator does not live in a marriage, today the victim can be both, a woman with whom a perpetrator does not live and also a woman with whom a perpetrator lives in a marriage as well as a male. As for the amendments to this criminal offence, particular attention is aroused by the requirements of the Istanbul Convention which imposes the obligation to significantly modify this criminal offence which requires a thorough and serious discussion so as not to achieve opposite effects from desired.

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1. Criminal offence of rape according to the Criminal code of the Republic of Serbia from 1977 with the amendments to the criminal code from 2005

Criminal Code from 1977[3] pursuant to Article 103 prescribed the criminal offence of rape which besides the basic type also implied the more severe types. The act within basic type was sexual intercourse while for the existence of criminal offence it was necessary that the act is undertaken by force implying the use of force or qualified threat that the life or the body of the passive entity or person close to them was going to be attacked. For the existence of the criminal offence, it was also necessary that the act was undertaken against a female followed by the additional requirement that the offender does not live in a marriage with the person in question. The sentence prescribed was imprisonment lasting from one to ten years.

More severe type of the criminal offence existed if in case of basic type the serious bodily injury or death of a female person occurred, or if the criminal offence was done by several persons or in the particularly cruel or humiliating way or in other particularly serious case. The sentence prescribed was imprisonment lasting for at least three years.[4]

According to this legal solution, only the sexual assault of a female person i.e. the penetration of the male sex organ into the female sex organ i.e. vaginal coitus was subsumed under the act of criminal offence of rape. Other sexual acts undertaken by the use of coercion were regarded as other criminal offences, therefore oral and anal sexual intercourse called sodomy between male and female or two males represented the criminal offence of sodomy prescribed by Article 110 of the same Law.

The perpetrator of criminal offence of rape could be only a male while a passive entity could be only a female who did not live with a perpetrator in the marriage. In other words, a legislator did not envisage the possibility of marital rape or the rape of a spouse.

The Law on Amendments to the Criminal Code of the Republic of Serbia[5] of 3 December, 1990 amended the qualified form of criminal offence of rape so that the words "in other particular case" were changed for "against an underage person". Accordingly, since then the qualified form of rape has existed if the basic type is committed against an underage person or if the passive entity is an underage female person. The underage person is considered to be the person below the age of eighteen.

The following amendments relating to the criminal offence of rape are prescribed by the Law on Amendments to the Criminal Code[6] of 14 July, 1994, when along with the basic type which has remained unchanged, two qualified forms were prescribed. More severe type existed if the serious bodily injury of a female person occurred in case of basic type or if the offence was committed by several persons or in a particularly cruel and humiliating way. For this type, the sentence prescribed was the imprisonment of at least one year. The most severe form, for which the sentence prescribed was an imprisonment of at least three years, existed if the basic type is committed against an underage person or if the result of its execution was death of a female person.

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[3] "*Службени гласник Социјалистичке Републике Србије*", број 28 од 30. јуна 1977. године.

[4] General maximum stiplulated by Article 38 of the Criminal Code of SFRY was 15 years.

[5] "*Службени гласник Републике Србије*", број 16 од 3. децембра 1990. године.

[6] "*Службени гласник Републике Србије*", број 47 од 14. јула 1994. године.

More significant amendments to the criminal offence of rape were prescribed by the Law on Amendments to the Criminal Code[7] of 1 March, 2002. This law changed the basic type of the criminal offence by the omission of the words "with whom they do not live in a marriage", so that for the first time the possibility of raping the spouse has been envisaged. From that moment on, the passive entity of the criminal offence of rape can be a female person not only out of the wedlock but also in the wedlock. This law stipulated that the more severe type, besides the already prescribed situations, would also exist if the basic type resulted in the pregnancy or severe infectious disease. In addition, the sentences for all three types of criminal offence of rape became stricter so that the envisaged imprisonment sentence for the basic type was at least two years, for more severe type at least three years and for the most severe type at least five years.

2. Criminal code from 2005[8] with the amendments up to 1 december, 2016

Criminal Code from 2005 prescribes the criminal offence of rape by Article 178 in a fundamentally different way than it was previously. The basic type is committed by the one who compels other person to sexual intercourse or an equal act by force or threat to immediately attack the victim or a person close to them and it was punishable by the imprisonment lasting from two to ten years. The special type exists if the basic type is committed by threatening that something which could harm the honour or reputation of that person or the person close to them will be revealed or that other severe harm will be done and it was punishable by the imprisonment lasting from one to eight years. More severe type exists if in case of basic or special type occurred the serious bodily injury of the person against which the offence is committed or if the offence is committed by several persons or in a particularly cruel or humiliating way or against an underage person or if it resulted in pregnancy. This type was punishable by imprisonment sentence lasting from three to fifteen years. The most severe type exists if in case of basic or special type occurs the death of the person against whom the offence is committed or if the offence is committed against a child. The sentence prescribed for the most severe type is the imprisonment lasting from five to eighteen years.

The Law on Amendments to Criminal Code[9] of 3 September, 2009 increased the stipulated sentences so that the sentence prescribed for the basic type was from three to twelve years of imprisonment, for the specific type from two to ten years, for more severe type from five to fifteen years while the prescribed sentence for the most severe type was minimum ten years of imprisonment. Last Amendments from 2016 that enter into force on 1 June, 2017 prescribe the sentence of five to twelve years of imprisonment for the basic type.

3. Basic type of criminal offence of rape

The criminal offence of rape (Article178 Criminal Code) inculpates one less severe and two more severe types in addition to the basic type. The basic type of rape is

[7] "*Службени гласник Републике Србије*", број 10 од 1. марта 2002. године.
[8] "*Службени гласник Републике Србије*", број 85 од 6. октобра 2005. године.
[9] "*Службени гласник Републике Србије*", број 72 од 3. септембра 2009. године.

committed by the one who forces another person to sexual intercourse or equal act using force or threatening to immediately attack the life or body of that person or the person close to them. The term sexual intercourse implies the penetration of male sex organ into female sex organ, i.e. vaginal coitus, while the term equal to sexual intercourse implies anal and oral coitus.

For the existence of the criminal offence of rape, it is necessary that the sexual intercourse or an equal act has happened due to coercion in the form of force or threat. When it comes to threat, there is no dispute either in theory or in practice. Apart from the general characteristics a threat should fulfill in order to be relevant in the sense of criminal law, for the existence of this criminal offence it is also necessary to be qualified i.e. that the life or body of the passive entity or the person close to them is threatened to be immediately attacked. The term close person when it comes to this criminal offence, implies the persons who have the special, positive, emotional relation with the passive entity based on blood relation or close friendship such as children, parents, brother, sister, godparents, close friends and similar.

However, the term of force within this criminal offence is debatable as some theorists and practitioners require the existence of certain intensity of force for the existence of this criminal offence. It is deduced from existence or absence of resistance whether the sexual intercourse or equal act are the result of corresponding force. In fact, according to their standpoint, it is necessary for the existence of criminal offence of rape that the passive entity has provided the resistance.[10] If the resistance is missing, this criminal offence is not considered to have been committed and if the resistance is provided, its corresponding characteristics are required in order to accept the existence of criminal offence of rape. Thus, it is considered that the resistance should be real, serious and steady.[11] "In theory and court practice the prevailing view is that only the force able to overpower strong and steady resistance of the victim may be an element of the criminal offence of rape. Lack of resistance of certain intensity results in the conclusion on the absence of power."[12] It is also required that the resistance lasts throughout the whole sexual intercourse or an equal act whereas it is considered that subsequent consent or allowance of the passive entity excludes the existence of criminal offence.[13]

The acknowledgement of the fact that the criminal offence is completed in the moment of commencement of vaginal, anal or oral coitus and that for the completed criminal offence it is not necessary that the sexual intercourse or an equal act is also completed in physiological terms resulted in another view. This view suggests that the resistance should be provided up to the moment when the offence is completed. According to this view, the resistance should be continuous and it is such when provided from the moment of coercion commencement up to the moment when the criminal offence has been completed. [14] If the passive entity consents to sexual intercourse or an equal act after such an action started by the use of coercion and before such an action has been completed in physiological terms, it does not influence the existence of

[10] Tomković B., *Krivično pravo posebni dio*, Podgorica, 1998, p. 288.
[11] Lazarević Lj., *Krivično pravo Jugoslavije posebni deo*, Beograd, 1995, p. 448.
[12] Stojanović Z. - Perić O., *Krivično pravo posebni deo*, Beograd, 2003, p. 178.
[13] Bačić F. - Šeparović Z., *Krivično pravo posebni dio*, Zagreb, 1982, p. 154.
[14] Lazarević Lj., *Komentar Krivičnog zakonika*, Beograd, 2006, p. 508.

criminal offence of rape because it has already been completed. Such consent could be taken into account only during the sentencing.[15]

However, any standpoint which for the existence of criminal offence of rape requires the passive entity's resistance is not acceptable. The essence of the criminal offence of rape is completely clear and the will of legislator cannot be changed by the interpretation or application of this legal provision by tapering the incrimination. Namely, for the existence of criminal offence of rape, its essence requires that the sexual intercourse or an equal act occurred by the use of coercion. This implies that the legislator does not require from the passive entity to provide the resistance of a certain quality and lasting during the certain period of time. The essence of criminal offence of rape does not require serious, strong and steady resistance from the part of the passive entity. The resistance is not required to be overpowered by the use of coercion i.e. the perpetrator is not required to constantly and simultaneously overpower the resistance of the passive entity during sexual intercourse or an equal act. On the contrary, the legislator does not require any kind of resistance for the existence of this criminal offence.[16]

According to the current decision, the criminal offence of rape is completely completed when an action has been committed by the use of force or qualified threat regardless of the fact whether the passive entity has provided any resistance or not. It is important for the existence of the criminal offence that the sexual intercourse or an equal act occurs by the use of coercion, that the passive entity does not consent to that act but it is completely unnecessary for the existence of criminal offence that the passive entity expresses their disagreement by providing resistance. Resistance of the passive entity can be manifested in different ways ranging from implicit actions demonstrating the absence of desire or consent to sexual harassment or an equal act, by uttered words expressing that such an action is not desired or that there is no consent to such an action, via the most humiliating petitions, crying, up to the extremely strong physical resistance.[17]

Accordingly, criminal offence also exists in those situations where resistance is missing due to any reason and the action is committed by the use of force. It is not disputable that the existence of resistance facilitates proving the existence of force. However, it was exactly this statement that led to mistaken views of theory and practice on the need of resistance. Namely, in the practice there is a problem to prove the use of force, i.e. it is noted that sometimes the passive entity submits the false report when a serious procedure problem occurs concerned with whom to believe- the accused that negates the use of force or passive entity stating the opposite. Due to that, the wrong standpoint stating the need of resistance from the part of passive entity certainly contributes to the wrong prejudice about the existence of significant number of false reports for the criminal offence of rape that is also considered to be a characteristic of this criminal offence. Sometimes, mainly in a very general sense, the information being operated is that about 30% and even up to 40% of the reports for raping are false. This

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[15] Delibašić V., *U kandžama prostitucije - krivičnopravni aspekt prostitucije*, Beograd, 2010, p. 110-111.

[16] Delibašić V., Krivično delo silovanje, *Arhiv za pravne i društvene nauke*, 2009, p. 72.

[17] Memedović N., *Krivično delo silovanja u jugoslovenskom pravu*, Beograd, 1988, p. 133.

cannot be accepted and much more real is the estimation that the percent of false reports for raping does not significantly differ in relation to false reports of other criminal offences.[18]

Due to these reasons it should be acknowledged as unacceptable to require from the part of the passive entity to provide the resistance as obligatory because "in the criminal law it has long been widely accepted that the problems in terms of proving shall neither condition the material and legal solutions nor cause the declination from certain basic principles."[19] It should be emphasized that the problem in terms of proving has not condition the material and legal solutions because the essence of criminal offence remained unchanged. This is something even less acceptable, the theory and practice find the solution for the problem of providing evidence of the used force in the unallowable change of criminal offence essence i.e. the change of legislator's will.

Accordingly, for the existence of criminal offence it is necessary that due to coercion in the form of force or qualified threat, the sexual intercourse or an equal act occurred i.e. that it is the result of coercion, not of a desire or voluntary consent of the passive entity. In relation to the previous, the use of force does not assume the existence of resistance which may or may not exist. For this criminal offence, the force should be undertaken in order to overpower the resistance of the passive entity who has provided it or in order to overpower the resistance which has not been provided but that is expected by the perpetrator i.e. it is presumed or thought that the resistance is going to be provided by passive entity.[20] It may occur that the perpetrator has used force precisely in order to avoid any kind of eventual resistance because they do not want it i.e. they have used the force in order to, helped by it, commit the sexual intercourse or an equal act without resistance. In this situation, the offender is fully aware that the passive entity has not given the consent and that the consent will not be given and therefore, the offender uses force precisely in order to prevent the provision of resistance.[21]

On the side of the passive entity, besides the absolute lack of consent to sexual intercourse or an equal act, the resistance could be missing although the force has been applied, due to several reasons. It is possible, as it is the case regarding other criminal offences[22], that the passive entity has become afraid because of applied force and due to that reason has not been at all capable of providing any resistance. It may also happen that the passive entity estimates, real or not, that in a particular situation resistance to the applied force may only make the already bad situation even worse and that sexual intercourse or an equal act is not possible to avoid. In that case the passive entity provides no resistance because they want to reduce the negative consequences of the criminal offence they are exposed to i.e. in order to minimize the evil which is happening to them for certain but not because they give the consent to the sexual intercourse or an equal act. Requirement from the passive entity to express the lack of consent to sexual intercourse or an equal act by providing the resistance would largely restrict the right of passive entity to sexual self-determination which is absolutely unacceptable.[23]

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[18] Aleksić Ž. - Škulić M., *Kriminalistika*, Beograd, 2004, p. 286.

[19] Stojanović Z., *Međunarodno krivično pravo*, Beograd, 2004, стр. 98.

[20] Atanacković D., *Krivično pravo posebni deo*, Beograd, 1985, p. 271.

[21] Delibašić V., *U kandžama prostitucije - krivičnopravni aspekt prostitucije*, Beograd, 2010, p. 113.

[22] Opposed to rape, with robbery neither theory nor practice recquire the passive entity to provide resistance, especially not resistance of certain quality and duration, but only recquire used force, so there is no reason to act diferrently when it comes to rape.

[23] Delibašić V., Krivično delo silovanje, *Arhiv za pravne i društvene nauke*, 2009, p. 74-75.

4. Less and more serious criminal offence of rape

Less serious type of criminal offence prescribed by paragraph 2 differs from the basic type only in terms of coercion form used in this type of criminal offence due to a threat to a passive entity that something which could harm their honour and reputation will be revealed about them or a person close to them or by other severe evil. In the first case it is a special kind of blackmail while in the second case it is a threat of evil that should be severe enough to force the passive entity to sexual intercourse or an equal act. It can be a threat that the life or body of the passive entity or a person close to them are going to be attacked providing that they are not threatened by an imminent attack but the attack after a certain period of time. When it comes to this type of criminal offence of rape, a threat of attack may also refer to other resources of the passive entity such as the property of great value, for example that the offender is going to set fire to the house of the passive entity, blow up their car or the like.

More serious type of criminal offence of rape, prescribed by paragraph 3, shall exist if in the course of any of the types from the first two paragraphs, occurred a serious bodily injury of the person against whom the offense was committed or if the offense is committed by several persons or if it is committed in a particularly cruel or humiliating way or against an underage person or if it resulted in pregnancy. The term of serious bodily injury should be interpreted as it is envisaged by criminal offense of serious bodily injury from Article 121 of the Criminal Code. A term of several persons implies two or more persons. "Thereby, the co-offenders have to be in question. For this qualified type of rape, it is enough that every offender applies only a part of the enforcement action."[24] Every rape implies cruel and humiliating treatment of the passive entity. However, for the existence of this type of criminal offence of rape, it has to be an especially cruel or especially humiliating manner. These are the cases when much greater physical and psychological suffering is inflicted upon the passive entity than it is necessary for the criminal offence of rape to be committed i.e. when the passive entity is additionally humiliated. The term of an underage person, pursuant to Article112, paragraph 9 of the Criminal Code, implies the person who has attained the age of fourteen and has not attained the age of eighteen.

It is absolutely undisputable that there will be a qualified type of criminal offence of rape from paragraph 3 if the criminal offense has as a consequence the pregnancy of the passive entity. However, with regard to the fact that the female person can also commit the criminal offence of rape against a male, the question which may arise is whether there is a qualified type of criminal offence of rape if it resulted in the pregnancy of the perpetrator of this criminal offence. In the response to this question, it should be taken into account that the legislator requires that the criminal offence results in the pregnancy without specifying whose pregnancy- pregnancy of the perpetrator or pregnancy of the passive entity. Accordingly, in the moment of the conception i.e. in the moment of pregnancy occurrence, certain family or inheritance rights and duties are exercised. The passive entity does not absolutely consent to them since they have not consented to the sexual intercourse as well. Due to given reasons, it should be realized that there is also going to exist a qualified type of criminal offence of rape in the case when the pregnancy of perpetrator is a consequence of the offence.[25]

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[24] Stojanović Z., *Komentar Krivičnog zakonika*, Beograd, 2006, p. 442.

[25] Delibašić V., *op. cit.*, стр. 80.

The most severe form of this criminal offence prescribed by the paragraph four exists in case of death of the passive entity in the course of the offence from the paragraph one and two or if the offence is committed against a child. Pursuant to Article 112, paragraph 8 of the Criminal Code, it is considered that a child is a person who has not attained the age of fourteen.

5. Intent to commit rape and negligent rape

The criminal offence of rape can only be committed with intent which in the basic type, among other things, must include the awareness that sexual intercourse or an equal act has been committed by force or qualified threat and against the will of the passive entity. For less serious type of criminal offence referred to in paragraph two, the intent includes an awareness that an action is undertaken under threat that something that could harm the honor or reputation of the passive entity or a person close to them will be revealed or under threat that other severe harm against the will of the passive entity. As for the more serious forms of this criminal offence, the existence of negligence is necessary in relation to more severe consequence, while in relation to the aggravating circumstances that do not have the character of a serious consequence the action of the perpetrator has to be intended.

As for the more serious type of this criminal act prescribed by paragraph three, the occurrence of the serious bodily injury of the person against whom the criminal offence is committed has to be covered by the negligence of the perpetrator. If the serious bodily injury were covered by the intent of the perpetrator, then it would be the concurrence of criminal offence of rape and criminal offence of serious bodily injury. Otherwise, there must be the casual relation between the sexual intercourse or an equal act and the occurrence of serious bodily injury. Such situation would include the situation in which the passive entity jumps out of the window of the apartment or a moving vehicle in order to avoid rape and on that occasion gets serious bodily injury or the like. Court practice has taken a unique stand that this qualified type is also in question in those situations when the basic type of criminal offence remained only an attempt and the serious consequence appeared. The standpoint also present in the court practice is that this type of criminal offence may also exist in case when a passive entity in suicide attempt due to a rape inflicts upon themselves serious bodily injuries. In these cases, it is justifiable to consider more serious consequences to be in a casual relation to a rape.[26] As for the most serious type of rape prescribed by paragraph 4, the circumstance that death of the passive entity occurred due to committed or attempted criminal offence of rape must be covered by the negligence of the perpetrator. Otherwise, if the death of the passive entity was covered by the intent of the perpetrator, the concurrence of the criminal offence of rape and criminal offence of murder or first degree murder would be in question.

More serious consequence of criminal offence of rape consisting of the pregnancy occurrence given that the pregnancy does not generate the characteristics of other criminal offence may be covered not only by negligence but also with the intent of the perpetrator.

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[26] Lazarević Lj., *op. cit.*, стр. 511.

As for the aggravating circumstance referred to in paragraph three, that the offense has been committed by several persons, or that the offense has been committed in a particularly cruel or humiliating way, or against an underage person, or in the worst type referred to in paragraph four that the offense has been committed against a child, these circumstances have to be regarded as the intent of the perpetrator. In determining whether the fact that the underage person or a child is in question is a qualifying circumstance covered by an intent or negligence of the offender, it should be noted that sometimes it is difficult to determine how old the passive entity is. It is known that persons from 12 to 13 years old may be developed with visible sexual signs corresponding to persons from 16 to 17 years old. In such cases, the perpetrator may be mistaken regarding the age of passive entity as the aggravating circumstance i.e. it may happen that the age of passive entity is not covered by the intent of the perpetrator when the more serious type of this criminal offence is not in question.

6. Amendments for the purpose of compliance with the Istanbul Convention

The wrong standpoint of the theory and practice requiring from the passive entity to provide the resistance in the criminal offence of rape has led to a new mistake i.e. wrong view that the sexual intercourse or any other sexual act involving a lack of consent equal to sexual intercourse or other sexual act done by the use of coercion. This significant mistake represents the base of the Istanbul Convention[27] and the base for requiring the incrimination of every non-consensual sexual act even in those situations when no type of coercion is used. In relation to that, the question arising is whether the criminal offence of rape from Article 178 of the Criminal Code meets the requirements of the Istanbul Convention. It is immediately notable that under the convention all sexual acts done without the consent of the passive entity are subsumed as a rape without additional requirements i.e. the lack of consent when undertaking the sexual act is put in the first place instead of coercion. The difference is evident and contained in the fact that according to the Criminal Code, the existence of refusal and coercion is necessary and the convention requires that the essence of the criminal offence comprises the consent *i.e.* criminal offence shall exist whenever there is no consent regardless of the fact whether the coercion is used or not.[28]

Istanbul Convention imposes the obligation to adjust the Serbian criminal legislation to the requirements largely guided by feminist views concerning the issues related to the crimes against sexual freedom, as well as in relation to certain offenses against the rights and freedoms of man and citizen i.e. against marriage and family whereby the views of criminal and legal theory and practice have not been sufficiently taken into account. Primarily, it has been ignored that the criminal law is the last means (ultima ratio) as well as its fragmentary nature i.e. that neither can it provide a comprehensive protection nor is it advisable to enter into some sort of interpersonal relationships. Therefore, it is necessary to approach the amendments to the criminal

[27] The Council of Europe Convention on preventing and combating violence against women and domestic violence.

[28] Delibašić V., Usklađivanje krivičnog zakonodavstva sa Istanbulskom konvencijom, *Evropske integracije i kazneno zakonodavstvo (poglavlje 23 - norma, praksa i mere harmonizacije)*, Zlatibor, 2016, p. 186-188.

legislation for the purpose of compliance to the Istanbul Convention in a particularly cautious manner and to carry out previously a serious and thorough scientific discussion concerning this significant issue.[29]

It should be taken into account accordingly, that there is a danger that the consistent application of the Istanbul Convention could lead to absurd situation which would not have any criminal and political justification which is the best illustrated by the following example. If a husband wants to watch the finals of the World Cup and therefore does not want to have a sexual intercourse and does not consent to it while his wife wants a sexual intercourse exactly at that moment and starts a sexual act even if she does not use coercion according to Istanbul Convention, she would commit a criminal offence because there is no consent of her husband!? For example, if she on that occasion performs oral coitus even if the husband did not have an erection, according to Istanbul Convention it would be a completed criminal offence of rape.[30] Since according to this Convention Article 186 of the Criminal Code shall be abolished, in that case the proposal of the spouse is not necessary for the prosecution so the wife from the given example would be prosecuted. The possibility that the husband may exercise his right not to testify in the proceedings conducted against his wife does not diminish the absurdity of the situation because there is always a possibility that the wife recognizes the completion of these actions i.e. a criminal offense which means that she would be sentenced. Therefore, the changes in the Criminal Code should be done in an extremely cautious way in order to avoid the opposite effect from the desired one.[31]

In order to harmonize the criminal legislation of Serbia with Istanbul Convention particularly important are the obligations concerned with psychological violence, stalking, physical violence, forced marriage, female genital mutilation, forced abortion, forced sterilization and sexual harassment. However, the most important and the most significant change relates to criminal offence of rape as Istanbul Convention requires that all the acts undertaken without consent even in those situations when any coercion has not been used at all shall be prescribed as a criminal offence of rape.[32] This implies that the compulsory element of lack of consent shall enter in the essence of that new criminal offence of "rape". In other words, each partner in a sexual intercourse from now on shall be obliged to give their consent because otherwise their male or female partner shall be within the criminal zone.[33]

Considering that the provision 36 of the Istanbul Convention does not result in the obligation to amend the existing law description of the criminal offence of rape as well as that it does not require the incrimination of all involuntary sexual acts not merely those undertaken by the application of coercion, while retaining Article 178 of the Criminal Code, it is necessary to prescribe a new criminal offence which, considering that the coercion has not been applied, would be less serious than the criminal offence of rape. This new criminal offence would have to include not only sexual intercourse and

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[29] *Ibid.*, стр. 190-191.

[30] Feminists, under whose influence the Istanbul Convention was and whose attitudes prevail in it, definitely did not have in mind this possibility.

[31] Delibašić V., *op. cit.*, стр. 191.

[32] If the principle was applied in other criminal offences as well, then any theft would become a robbery.

[33] Delibašić V., *op. cit.*, стр. 191.

an equal act but also other sexual acts undertaken against a person without their consent.[34]

In relation to the previous, also acceptable seems to be the solution that the existing less serious type (paragraph 2) shall be changed by a new less serious type regarding the non-consensual sexual intercourse when there are no characteristics of the basic type from paragraph 1 which would also cover the criminal zone of the current less serious type.[35]

Finally, it should be noted that the Proposed Law on Amendments of the Criminal Code which entered the parliamentary procedure on 15 November, 2016 contains only one change regarding the criminal offence of rape and that is the increase of the specific minimum sentence of imprisonment for the basic type of the criminal offence of rape from three to five years.

Conclusion

Starting from the Criminal Code from 1977 up to now the criminal offence of rape has undergone several changes in a way that the scope of actions subsumed under the essence of this criminal offence has been expanded and therefore the scope of persons who may be passive entities also expanded and prescribed sentences significantly increased. Bearing in mind that the rape is a central criminal offence in the group of criminal offences against sexual liberties as well as indisputably harmful consequences which are long-lasting and difficult to remedy, such tendency of the legislator can be accepted and defended by valid arguments.

In the past, the theory and practice took a completely wrong standpoint that for the existence of criminal offence of rape when the force is used, it was necessary that the resistance was provided from the part of a victim. The resistance should have been of certain quality and intensity and there was a requirement that the resistance had certain duration. In that way, theory and practice roughly and unreasonably changed the will of legislator who in the essence of the criminal offence of rape had never required (as indeed in the case of other criminal offences committed by coercion, such as robbery) from the victim to provide resistance. The criticism of such a standpoint of theory and practice has led to the right standpoint that for the existence of criminal offence of rape it is enough that offence is committed by coercion (threat or force) regardless of the fact whether the victim provided the resistance or not. Current legal solution as well as the standpoint of the major part of theory and practice is completely correct.

However, the criticism of the standpoints requiring from the victim to provide resistance resulted in the fact that some theorists have gone to other extremes and therefore have made a mistake arguing that every non-consensual sexual intercourse represents the criminal offence of rape. This standpoint constitutes the basis of the Istanbul Convention which Serbia has signed and therefore committed itself to incorporate its provisions into domestic legislation. Bearing in mind that this is a very sensitive issue, it is necessary to proceed with an extreme caution during fulfillment of the obligations arising from this Convention so as not to achieve the opposite effect from desired.

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[34] *Ibid.*

[35] Stojanović Z., Usaglašavanje KZ Srbije sa Istanbulskom konvencijom, *Dominantni pravci razvoja krivičnog zakonodavstva i druga aktuelna pitanja u pravnom sistemu Srbije*, Kopaonik, 2016, p. 26.

Literature

1. Aleksić Ž. - Škulić M., *Kriminalistika*, Beograd, 2004.
2. Atanacković D., *Krivično pravo posebni deo*, Beograd, 1985.
3. Bačić F. - Šeparović Z., *Krivično pravo posebni dio*, Zagreb, 1982.
4. Delibašić V., Krivično delo silovanje, *Arhiv za pravne i društvene nauke*, 2009.
5. Delibašić V., *U kandžama prostitucije - krivičnopravni aspekt prostitucije*, Beograd, 2010.
6. Delibašić V., Usklađivanje krivičnog zakonodavstva sa Istanbulskom konvencijom, *Evropske integracije i kazneno zakonodavstvo (poglavlje 23 - norma, praksa i mere harmonizacije)*, Zlatibor, 2016.
7. Ignjatović Đ., *Kriminologija*, Beograd, 2000.
8. Lazarević Lj., *Komentar Krivičnog zakonika*, Beograd, 2006.
9. Lazarević Lj., *Krivično pravo Jugoslavije posebni deo*, Beograd, 1995.
10. Memedović N., *Krivično delo silovanja u jugoslovenskom pravu*, Beograd, 1988.
11. Stojanović Z. - Perić O., *Krivično pravo posebni deo*, Beograd, 2003.
12. Stojanović Z., *Komentar Krivičnog zakonika*, Beograd, 2006.
13. Stojanović Z., *Međunarodno krivično pravo*, Beograd, 2004.
14. Stojanović Z., Usaglašavanje KZ Srbije sa Istanbulskom konvencijom, *Dominantni pravci razvoja krivičnog zakonodavstva i druga aktuelna pitanja u pravnom sistemu Srbije*, Kopaonik, 2016.
15. Tomković B., *Krivično pravo posebni dio*, Podgorica, 1998.