
Redefining the Criminal Act of Rape and Sexual Violence according to the Only-yes-means-yes Model

di

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Abstract: This post aims at presenting the redefinition of the criminal act of rape that happened in Slovenia in 2022, and discusses the legal, societal and political debate surrounding this major legal change.

Introduction

The #MeToo movement, in which women revealed their experiences of everyday systematic misogyny, was the reason why the Slovenian non-governmental organisation [The 8th of March Institute](#), which is focused on highlighting injustices, inequalities and the importance of human rights, launched a Slovenian campaign in 2018 to collect anonymous stories that testify the everydayness and ubiquity of one form of violence, namely sexual harassment. The NGO received testimonies from women and men of all ages and socioeconomic backgrounds, and all stories pointed to relationships of subordination. By analysing the testimonies, the NGO was able to identify some systemic problems faced by victims of sexual violence, and envisage possible solutions. One of the systemic solutions was to redefine the [crime of rape and sexual violence](#), which is a [step](#) toward a society that does not tolerate sexual assault, respects the physical integrity of individuals, respects human dignity, and recognises a person's will and personal boundaries.

The police deals with approximately 70 rapes a year, and it is noted that still many are not reported, because victims remain silent out of shame, fear of being condemned in their social environment, fear that they will not be believed, and fear of lengthy and painful procedures in courts. Therefore, they must be helped to raise their voices, because rape must always be condemned. [Amnesty International Slovenia](#) states: "Sex without consent is rape. It is as simple as that - there are no gray areas here. It is also rape if the victim is under the influence of alcohol or intoxicating substances. And also if the victim goes home alone with someone or wears clothing that exposes the body." The [testimonies](#) of victims of sexual violence from the #MeToo campaign show that perpetrators are well aware of their acts and discourage victims from reporting them.

The problematic nature of the previous legislation was also pointed out by a 2019 judgment, in which the perpetrator was acquitted of the crime of rape because the victim was asleep when the rape began, and he used force only when the victim woke up. Although the victim began to push him away with her hands, and he covered her

mouth with his hand and held her under him with his physical strength until the end of the sexual intercourse, the court held that this was not rape. Such a ruling was made possible by the [criminal law](#), which defines rape as an act in which the perpetrator “forces” the victim to have sexual intercourse in one of two ways: he/she forces her/him by using force or by threatening a direct attack on her/his life or body; or he/she forces her/him by threatening that he/she will find out something about her/him or her/his loved ones that will harm her/him or their honour or reputation, or that he/she will cause great financial harm to her/him or her/his dependents.

Previous Law

The previous criminal definition in the Slovenian Criminal Code defined rape and sexual violence on the basis of the use of physical or psychological coercion, which could also involve the use of drugs or hypnosis. The threat must be serious and directly aimed at the life or body of the victim. Therefore, both the force and the threat used by the perpetrator to obtain sexual intercourse or equivalent sexual act must be such that they are objectively likely to break the victim’s resistance. In practice, this has led to bizarre situations in which victims (mostly women) are asked to actively defend themselves while exposing themselves to possible more severe violence, even though in many cases they are not even capable of resisting. This model left out all situations in which the perpetrator did not need to use force to achieve sexual act because, for example, the victim was numb with fear or surprise, or was not conscious, could not say “no”, or was asleep. Such a model told victims that they themselves were to blame for the violence, because they had not resisted (enough). This is undoubtedly not true, because the perpetrator is always to [blame for sexual violence](#).

Slovenia legalised a model of coercion that assumed that the perpetrator had to use force and that the victim resisted. In non-governmental organisations dealing with victims of violence, it has been pointed out for years that in many cases the victims are unable to fight back, because they are paralysed by fear or shock, for example. One of the main criticisms of this model has been that it asks the victim to resist the perpetrator, which in practise can also mean exposing the victim to even more danger. “Expecting the victim to do the latter is not only inappropriate, but also unreasonable,” said the authors of the [analysis](#) published in 2018 by the Faculty of Law at the University of Ljubljana.

In this respect, the implementation of the veto model or the no-means-no model would be a small step forward, as it no longer imposes the condition that the perpetrator must use force or threaten to use it, nor does it require that the victim physically resists the aggressor. At the same time, in this model, consent to a sexual act is conceptualised in such a way that there is no consent to a sexual act the moment a person says “no” to a sexual initiative. The victim must clearly express his/her refusal by saying “no” or in some other comparable verbal way; otherwise, under this model, the law assumes that the victim has consented to the sexual relation. However, the model does not take into account that the victim of violence often does not say “no”, but [remains silent](#) or completely passive out of shock or fear.

[Amnesty International Slovenia](#) also pointed out the inadequacy of this model: “Because we should not be interested in whether the person said 'no', but whether

they said 'yes!.' This is achieved by implementing the affirmative model or the only-yes-means-yes model, which means that each person decides for themselves whether they are ready for and want sexual intercourse.

New Law

In the affirmative consent model or the only-yes-means-yes model, the core of the offence is the lack of free consent to sexual intercourse. This allows for more effective prosecution of sexual violence and [more effective protection](#) of the fundamental right to bodily integrity. The criminal justice apparatus will no longer question whether sufficient force was used in a particular case. However, the use of force will be an [aggravating circumstance](#). Consent may be given as free active participation or as freely given consent, i.e., it may be given by words or actions as long as those words and actions clearly express permission and a desire to participate in sexual intercourse. The existence of consent should not be considered automatically given just because the person does not express any objection. Thus, if someone remains silent or does not say “no”, there is no consent. With this model, [Slovenia joins countries](#) such as Belgium, Croatia, Cyprus, Denmark, Iceland, Luxembourg, Sweden, the United Kingdom and others.

In [The 8th of March Institute](#), they emphasised that this model relieves the victim of guilt, as the previous system required victims to prove that they resisted or whether they resisted enough. The introduction of this model sends a clear signal that everyone’s body is absolutely inviolable without free consent.

When the redefinition of the offence of rape and sexual violence was announced, there were some objections and questions about whether it meant that a contract or agreement had to be signed in advance for intimate relations, which would destroy romance. During the campaign, the Institute sought clear explanations that free consent must be given in a clear, externally recognisable and understandable way, but that the person does not have to explicitly say “yes”. If someone is not sure whether he/she has given consent, he/she must make sure that there is consent, which is perfectly normal. The integrity of every person’s body and protection from unwanted interventions is a fundamental human and a constitutional right. Therefore, interference with one’s sexuality must always be consensual, because interventions in the body of another against his/her will can have very serious consequences, as one of the anonymous victims wrote in the #MeToo statements: “The victims are the ones who have to live their whole lives in a body that has been raped.” The progress is mainly thanks to non-governmental organisations and more than a hundred volunteers who mobilised the public to create a real [social movement](#).

Some also expressed concern that more “innocent” people would be charged, as someone might unknowingly misunderstand consent given freely and voluntarily or revoke it “in the midst of sexual intercourse” without their knowledge. The [Institute](#) responded that rape and sexual violence are among the least reported crimes in society; even at the EU level, only 14 percent of all rapes are reported. As a [study](#) by The Institute of Criminology at the Faculty of Law in Ljubljana shows, inadequate legislation in the past is also responsible for this, as this is societal silence and stigmatisation of victims after speaking out. The underreporting of sexual crimes is also related to the fear of secondary victimisation that the victim may experience at the

police station or in court, as well as the low level of trust in the justice system, as victims do not believe that it can truly protect them. There is also no empirical analysis to support the claim that the introduction of the only-yes-means-yes model has an impact on the increase in unjustified accusations. Changing the definition of a crime does not change the basic principles of the legal system, such as the presumption of innocence for the accused and the fact that the prosecution must prove guilt beyond a reasonable doubt, i.e., that the sexual intercourse was not consensual. During the investigation and evidentiary proceedings in court, the defendant is also questioned about the steps he/she took to ensure that he/she had obtained voluntary consent, but this does not imply a presumption of guilt. In criminal proceedings, the circumstances of the individual case must always be assessed.

The 8th of March Institute submitted the initiative to amend the Slovenian Criminal Code to Parliament, whereupon the 60-day period began in which they had to collect the required 5,000 certified signatures. They managed to do so in just eight days, and the proposal also received unanimous support from all political parties. Subsequently, the [proposal was approved](#) by a decisive majority and Articles 170 - 172 of the [Criminal Code](#) were amended.

Conclusion

The redefinition of the crime of rape is an important societal shift toward better protecting victims and society more broadly, and breaking the silence that accompanies sexual violence. This is a clear signal of total intolerance of violence, as the change in the law states that consent is required for any sexual relationship. However, it is important to realise that the approved change in the law will not miraculously heal society, but it is rather expression of a strong political will to change the mentality, empower victims, and enable more effective prosecution of perpetrators. Victims will be encouraged to report such crimes, because there will no longer be a risk that perpetrators go unpunished. The change in criminal legislation is also a [major step](#) toward formal gender equality, which will lead to a new understanding of interpersonal relationships, new conversations between young people, and new forms of intimacy between adults.

The amendment was also welcomed by the Association SOS Help (Hotline for Women and Children - Victims of Violence), which believes that the amendment, which states that consent is required for any sexual relationship, will further support victims in their decisions to report rape. But less than a year after the amendment went into effect, police and prosecutors have yet to see any changes in practice. Moreover, [experts warn](#) that additional attention must be paid to the stigmatisation and secondary victimisation of victims, who continue to experience the violence and must defend themselves against discredit.

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