THE THEORETICAL AND PRACTICAL QUESTIONS OF THE CRIME OF SEXUAL EXPLOITATION IN THE HUNGARIAN CRIMINAL LAW

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Introduction

Violent sexual offences always were and will be in the criminal law in consideration of the fact that these are very serious types of crimes. However, the rules of criminal law depend on the international and EU requirements and the current merits of the society, so they change constantly both in their content and in the language of the regulation.[1] The Hungarian Criminal Code which was in force until 30th June 2013 regulated two offenses among violent sexual crimes namely the rape (Section 197) and the sexual assault (Section 198). On the one hand the Act C of 2012 (hereinafter: the new Criminal Code), in order to adapt to the international requirements, overruns the dogmatic system[2] of Act IV of 1978 (hereinafter: the old Criminal Code), and in the frame of the crime of sexual exploitation (Section 196) protects specially the sexual liberty. On the other hand the earlier practical problems, which arised from the separated regulation of rape and sexual assault were eliminated by the legislator in such a way that the new Criminal Code regulates the aforementioned offences in the same statutory definition, called sexual violence (Section 197).

This study brings into focus the theoretical analysis, principally the problem of the ways of perpetration, and the practical application of the crime of sexual exploitation which is a *novum* compared to the former regulation. The author investigates the possible problems namely the interpretation, enforcement and constitutional law problems of the sexual exploitation.

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[1] Gál, István László: A szexuális bűncselekmények az új magyar büntetőjogban [The Sexual Offences in the New Hungarian Criminal Law]. 115-127. In: Elek, Balázs – Háger, Tamás – Tóth, Andrea Noémi (eds.)*: Igazság, ideál és valóság. Tanulmányok Kardos Sándor 65. születésnapja tiszteletére [Justice, Ideal and Reality. Studies in Honour of Sándor Kardos's 65th Birthday]*. Debrecen, 2014. p.115.

[2] Franczia, Barbara: A nemi önrendelkezési jog és a szexuális kényszerítés – Elemzés és javaslat *de lege ferenda* [The Right of Sexual Self-determination and the Sexual Exploitation – Analysis and Proposal *de lege ferenda*]. 165-174. *Jog, Állam, Politika,* Vol 6. (2014) No. 1, p. 165.

The Antecedents of the Constitution of Sexual Exploitation (Section 196)

According to the "old" Criminal Code (Criminal Code, Act 4 of 1978), the rape and sexual assault were punishable, when any person had forced another person to have sexual intercourse or sodomy by violence or imminent threat against life or bodily integrity. So the former practice qualified sexual act accomplished without the voluntary consent of the victim but without the effect of qualified duress as coercion, so we did not have a sexual crime which would have punished the so-called "non-consenting" sexual activities. The new Criminal Code brought significant changes because it punishes the sexual extortion as sexual exploitation more seriously than as a special case of coercion.

Although the crime of sexual exploitation is unprecedented in the Hungarian criminal law, it does not mean that the need for a special offense which would have penalized conducts punished now in the frame of sexual exploitation in the Criminal Code in force, had not appear in the earlier literature and among legislators. While preparing the "old" Criminal Code it occurred that the legislator would have had to create a new offense apart from the cases of sexual violence, highlighting it from the statutory definition of the crime of coercion, where the duress would not have achieved the rate required to rape or sexual assault. Those cases belong here, when the perpetrator enforces the sexual relationship by threatening for example with existential disadvantage or disadvantage related to family life.[3] The "old" Criminal Code, despite the plans, did not set out the sexual exploitation from the crime of coercion, but the new Criminal Code did it in order to suit for the international requirements.

According to the ministerial explanation of the new Criminal Code, the legislator shifted into the direction, which was required by the inland and foreign women right protecting organizations and the rulings of the Istanbul (CAHVIO) Convention[4] and Recommendation R (2002)5 of Committee of Ministers of the Council of Europe to member states on the protection of women against violence, when they enacted the crime of sexual exploitation; because the force of another person to perform or tolerate sexual activities incorporates all conducts when the passive subject does not give permission voluntarily and freely to the sexual activities, but under duress.[5] The cited international documents declare that parties shall take the necessary legislative or other measures to ensure all non-consensual sexual activities, if they are intentional conducts, are criminalised. They declare again, that consent must be given voluntarily as the result

[3] See Merényi, Kálmán: A nemi erkölcs elleni bűncselekmények pönalizálásának fejlődése a felszabadulástól a hatályos rendelkezésekig [The Progress of the Penalty of the Crimes against Sexual Morality from the Liberation to the Operative Provisions]. *Jogtudományi Közlöny,* Vol. 41 (1986) No. 1, 20-22.

[4] Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11.V. 2011

[5] The ministerial explanation of the Act C of 2012 to the Chapter 19th p. 483

of the person's free will assessed in the context of the surrounding circumstances.[6] According to the ministerial explanation of the Act C of 2012, the crime of sexual exploitation is suitable to found the criminal liability only on the lack of consent, corresponding with the international requirements.[7] Some authors do not agree with that argument. They reference to that the statutory definition of sexual exploitation does not make it clear, whether the legislator would like to punish the lack of consent, so there is a risk that a narrower interpretation will be dominant in the practice.[8] This is supported by the report of the CEDAW Commission, which gives expression to that "While noting the new provisions on rape in the Criminal Code, the Committee remains concerned about the use of violence, threats and coercion, which continue to be elements of the statutory definition of rape rather than the lack of voluntary consent by the victim."[9] Further on, by the practical cases and by the summary, the author will expose her own opinion as well.

Moreover, the reason of the creation of the new offense was to satisfy the regulations of the Directive 2011/93/EU and the Lanzarote Convention, which provided increased protection for children against sexual activities. The Directive 2011/93/EU (the date of implementation was December 18th 2013) Article 3 paragraph 5 and paragraph 6, furthermore the Lanzarote Convention (which was signed by Hungary on November 29th 2010) Article 18 point b) of paragraph 1 penalize sexual activities with a child, where:

- abuse is made of a recognised position of trust, authority or influence over the child;
- abuse is made of a particularly vulnerable situation of the child, in particular because of a mental or physical disability or a situation of dependence;
- coercion, force or threats are used.

[6] See in more detail: Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11.V.2011, Article 36 – Sexual violence, including rape. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008482e (Date of download: 20 February 2016) and Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence (Adopted by the Committee of Ministers on 30 April 2002 at the 794th meeting of the Ministers' Deputies) Criminal law 34., 35. https://wcd.coe.int/ViewDoc.jsp?id=280915 (Date of download: 20 February 2016).

[7] The ministerial explanation of the Act C of 2012 to the Chapter 19th p. 484.

[8] See for example: Gilányi, Eszter: A szexuális kényszerítés tényállása az Isztambuli Egyezmény rendelkezéseinek fényében [The Crime of Sexual Exploitation in the Light of the Rulings of Istanbul Convention]. *Miskolci Jogi Szemle,* Vol. 10. (2016) No. 2, p. 126.

[9] CEDAW/C/HUN/CO/7-8 United. Nations. Committee on the Elimination of Discrimination against Women. Concluding observations on the combined seventh and eighth periodic reports of Hungary, adopted by the Committee at its fifty-fourth session (11 February – 1 March 2013) Article 20. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/HUN/CO/7-8&Lang=En (Date of download: 28 January 2016).

- Coercing, forcing or threatening a child into sexual activities with a third party shall be punishable, as well. [10]

The Theoretical Analysis of the Crime of Sexual Exploitation

The legal object of sexual exploitation is the sexual liberty, the sexual self-determination.[11] It can be considered the injury of the sexual self-determination in essence, when somebody takes another people into sexual activities against the will of that person. Although the sexual self-determination, as a part of personality rights, is not featured in the catalogue of the fundamental rights, but it is an elemental part of another fundamental right: the dignity of the human being. The sexual liberty, what is synonymous definition for the sexual self-determination, has three substantial partial rights, which are a) *the freedom of the development of sexual identity*, b) *the practice of sexual activities which are suitable for the sexual identity*, and c) *the liberty of choosing the situational elements of the sexual activities*. The latter involves the liberty of choosing partner, and the liberty of deciding that where, when, how and what kind of sexual activities to have with the partner.[12] Injury of any component means the injury of the legal object.

The perpetrator's conduct is to force another person to perform or tolerate sexual activities, and the relationship of the two conducts is a purpose-instrument relationship. The instrument-conduct is the force (which means duress, coercion, concussion or compel)[13]. This is an activity, due to which the passive subject acts according to the will

[10] See The ministerial explanation of the Act C of 2012 to the Chapter 19th p. 484, Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA and Council of Europe Convention Protection of Children against Sexual Exploitation and Sexual Abuse, the so-called: Lanzarote Convention.
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0093-20111217&from=HU) and
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046e1e1 (Date of download: 28 January 2016).

[11] Jacsó, Judit: XIX. Fejezet. A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények [Chapter XIX. Crimes against Sexual Freedom and Sexual Morality]. 169-203. In: Horváth, Tibor – Lévay, Miklós (eds.): *Magyar Büntetőjog. Különös Rész [Hungarian Criminal Law. Special Part]*. Complex, Budapest, 2013. p. 170.

[12] Szomora, Zsolt: *A nemi bűncselekmények egyes dogmatikai alapkérdéseiről.* [On Some Dogmatic Questions of the Crimes against Sexual Morality]. Ph.D. Thesis, SZTE Faculty of Law and Political Sciences. 2008. p. 123.

[13] The official English translation of the new Hungarian Criminal Code uses the definition "force" both by the force, which means duress, coercion, concussion or compel and by the force too, which means rape, violence. I would like to ascertain, when henceforward the force appear as way of perpetration, it means rape, violence. When the definition "force" shall be construed as one element of the perpetrator's conduct, it means duress, coercion, concussion or compel.

of the perpetrator and not his/her own will.[14] The purpose-conduct is the sexual activity. If the use of force is not aimed at the sexual activities, the crime of sexual exploitation cannot be determined. [15]

The question of the ways of perpetration is really problematic, because both the sexual exploitation and the sexual violence, which is the more serious crime, punish the force to perform or tolerate sexual activities[16]; but while the legislator declares that sexual violence can only be perpetrated by force[17] or threat against the life or bodily integrity of the victim,[18] it remains silent about the ways of perpetration in the case of sexual exploitation. At least this is said by some views. The viewpoint of the specialized literature is divided on the issue of whether the statutory definition of sexual exploitation contains ways of perpetration or not, and if not, what is/are the implicit ways of perpetration of sexual exploitation. The author summarizes the essence of the

[14] Sinku Pál: A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények – Btk. XIX. Fejezet [Crimes against Sexual Freedom and Sexual Morality – Criminal Code. Chapter XIX.] 189-221. In: Busch, Béla (ed.): *Büntetőjog II. Különös rész [Hungarian Criminal Law. Special Part]*. HVG-ORAC Lap- és Könyvkiadó Kft, Budapest, 2013, p. 192.

[15] Court Decision 1997. 108.

[16] Criminal Code Paragraph 196 (1) and paragraph a) point 197 (1).

[17] The *force* can aim at a person or a thing. But in case of the violent sexual offences the force suits to the frame of sexual exploitation only when the perpetrator realizes force, which aims at a person. In connection with the concept of force we must make a distinction between the will-breaking force, vis absoluta and the will-bending force, vis compulsiva. The vis absoluta is the expression of physical force, which has directly influence on someone and breaks resistance. A typical example is a strike with fist. In case of vis compulsiva the force is not compelling, but for the violent sexual offences force bending the will, vis compulsive, is sufficient. For example a slap in the face. I would like to highlight, that the force and the violent conduct are not synonym category. The violent conduct which trend towards a person can materialize with the simple touch of the body of the injured, when this conduct is aggressive. See 34/2007 and 71/2008. Criminal College Decision.

[18] The definition of the *threat* is defined by the point 7 of the paragraph 1 of Article 459. According to that "threat shall mean - save as otherwise provided - a declaration of intention to cause considerable harm (this is the objective side) so as to make the person who is the target of the threat fearful by such a declaration" (this is the subjective side) In accordance with the juridical practice we must regard the declaration of intention of such conducts as considerable harm, which can be evaluated as crime. The declaration of intention of legal behaviour can be evaluated as considerable harm, when someone would like to use this to enforce miscarriage. A declaration of intention to cause considerable harm must be suitable to make the person who is the target of the threat fearful by such a declaration. We can this investigate this on the basis of the concrete circumstances and the knowledge of the person of injured. The fear is serious when the person who is the target of it thinks that the supervention of the considerable harm declared by the perpetrator is real and because it is unfavourable for him/her, he/she would like to avoid it. The objective and subjective criteria must be investigated as complex and interference with each other, so collectively. We speak about qualified threat, when the threat is committed against the life or bodily integrity of the victim and it is direct.

possible approach modes and then the author focuses on what, in her opinion, may be the criticism of these approach modes.

The possible approaches of the question of ways of perpetration:

Approach 'A'

"The force of another person to perform or tolerate sexual activities constitutes a crime, when the perpetrator commits this by the way of perpetration determined in the frame of the statutory definition of sexual exploitation, so by force or threat. The force can only bend the will of the subject (vis compulsiva)."[19]

The author thinks that the statutory definition does not contain explicit way of perpetration, because the text of the statute does not say *in concreto* that the crime can be committed by force or threat. It says only that any person who forces another person to perform or tolerate sexual activities is guilty of a felony. However, when we start up with the ministerial explanation, we can conclude that the general definition of sexual exploitation is the crime of duress (Section 195) and this contains ways of perpetration, which are not else then the force and the threat. When we approach from this direction, the force and the threat, as implicit ways of perpetration are possible. But in my view we must take account of that the statutory definition of sexual violence[20] evaluates ways of perpetration, and this includes the force.

When we start up from this, then we have the conclusion, that because the force is the way of perpetration of a more serious crime, of the sexual violence, when force happens the right qualification is sexual violence and not sexual exploitation in all cases. By the ascertainment of the sexual violence the force does not have to affect as *vis absoluta*. So in the viewpoint of the present study, if the perpetrator realizes compulsive force, the sexual violence is the right qualification and not the sexual exploitation.

Approach 'B'

The new Criminal Code does not evaluate ways of perpetration. However, when we start up from the statutory definition of the general crime of duress, then we can conclude that the sexual exploitation can be realized typically with force or threat, but we cannot exclude other ways of perpetration. In this viewpoint, the conduct of the perpetrator suits in the frame of sexual exploitation in all cases, when the perpetrator forces the injured to have sexual activities by such a way which do not realize sexual violence yet. Namely the sexual violence is the more serious crime, which expects the

[19] Sinku: *op. cit.* p. 193.

[20] Sexual Violence - Section 197 (1) Sexual violence is a felony punishable by imprisonment between two to eight years if committed: *a)* by force or threat against the life or bodily integrity of the victim; *b)* by exploiting a person who is incapable of self-defense or unable to express his will, for the purpose of sexual acts.

ascertainment of the sexual exploitation on the basis of the principles of specificity and consumption, if *quasi* technical cumulation occurs.
The crime can be perpetrated with the next typical ways of perpetration: (a) with threat, which is not direct; (b) with threat, which does not aim at the life or bodily integrity of the victim; (c) with force, which does not break the will, (not *vis absoluta*), but bends the will (vis compulsiva); (d) other modes, which are not qualified neither as force nor as threat." [21]

As opinion the author can confirm that what has been described: so the force is the way of perpetration of sexual violence. To support this, this paper refers to that the statutory definition of sexual violence came into being with the contraction of the crime of rape and sexual assault, and it requires henceforward the force or threat against the life or bodily integrity of the victim as ways of perpetration. By the rape and sexual assault, which is partial antecedents of the crime of sexual violence, the force had not got to effect to the passive subject as *vis absoluta*, the crime could materialize with compulsive force. [22] The author thinks that it is acceptable, that the crime can materialize other ways as well which are not qualified neither as force nor as threat, because when the perpetrator can materialize the crime only with "simple" threat, then the legislator presumably would have used the category of threat and not the force.

Approach 'C'

The statutory definition of sexual exploitation does not contain ways of perpetration, as against the duress, which is the general the statutory definition of sexual exploitation.

Therefore, the assignation is wrong, which says that the sexual exploitation can be perpetrated by force or threat, which are determined in the frame of the crime of sexual exploitation. When we set against the statutory definition of sexual exploitation and the sexual violence, we can establish *a contrario* the following conclusions: the way of perpetration of sexual exploitation is the "simple" threat, which cannot aim against the life or bodily integrity of the victim, or it can aim against the life or bodily integrity of the victim, but in that case it cannot be direct. But we cannot perpetrate the crime with force.

Considering that the threat is not a defined way of perpetration in the statutory definition, but only implicit, we might not use the legal definition of the threat by the sexual exploitation, particularly regarding to the comparatively restrictive components of the legal definition. Consequently, with regard to the sexual exploitation, the threat means a declaration of intention to cause harm so as to make the person who is the

[21] Gál: *op. cit.* 119-120. and Tóth, Mihály – Nagy, Zoltán: *Magyar Büntetőjog. Különös rész [Hungarian Criminal Law. Special Part.]* Osiris Kiadó, Budapest, 2014. p. 130-131. The chapter was written by Gál István László.

[22] Berkes, György – Julis, Mihály – Kiss, Zsigmond – Kónya, István – Rabóczki, Ede: *Magyar büntetőjog. Kommentár a gyakorlat számára [Hungarian Criminal Law. Commentary for the Practice].* HVG-ORAC, Budapest, 2002. 595.

target of the threat fear. Compared to the legal-definition of the threat, this approach mode broaden the scope of the conducts which can be evaluated in the frame of sexual exploitation, because by this definition we leave that the harm is considerable and the fear is serious. This wider interpretation of the threat harmonizes with the Council of Europe Convention on preventing and combating violence against women and domestic violence, so with the Istanbul Convention, which bases the criminal liability only on the miss of the consent."[23]

This approach meets the requirements which this paper has set out formerly, but the author thinks that it goes too far by the interpretation of the concept of threat since we can find the legal definition of threat in the Criminal Code. According to this, "threat shall mean - save as otherwise provided - a declaration of intention to cause considerable harm so as to make the person who is the target of the threat fearful by such a declaration." So, according to the definition, the threat has constitutive elements and this is that the harm is considerable and the threat is fearful. In my opinion, irrespectively of the fact that the threat is not a defined way of perpetration in the statutory definition of sexual exploitation, but it is an implicit way of perpetration, the legal definition of threat is applicable and the scope of the conducts, which we can evaluate in the statutory definition of the crime, cannot be extended with discretion.

Although this approach would like to adapt to the international requirements, the approach is not a most sufficient one, which wants to diverge from the legal definition of threat, because in accordance with the definition of Criminal Code the constitutive elements of the threat are the considerable harm and the fearful threat.

Approach 'D'

The definition of force with regard to the sexual exploitation incorporates all conducts under which the passive subject is disposed to have sexual activities without voluntarily consent. This may be will-bending force, namely *vis compulsiva* but cannot be will-breaking force, namely *vis absoluta*. This is also the case if the threat does not tend against the life or bodily integrity of the victim, but it foresees considerable harm, which affects other rights or interests, for example the loss of the workplace; or when the threat is not direct.

Compared to this in criminal law

- the crime of duress (Section 195) suppose the realization of force or threat, which does not tend against the life or bodily integrity of the victim, but it is direct, or threat, which tends against the life or bodily integrity of the victim, but it is not direct;

[23] Szomora, Zsolt: XIX. Fejezet. A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények [Chapter XIX. Crimes against Sexual Freedom and Sexual Morality]. 403-431. In: Karsai Krisztina (ed.): *Kommentár a Büntető Törvénykönyvhöz [Commentary to the Criminal Code]* Complex Kiadó, Budapest, 2013. 40.

- the crime of sexual exploitation (Section 196) misses the force, but supposes the threat, which does not tend against the life or bodily integrity of the victim, but it is direct; respectively it tends against the life or bodily integrity of the victim, but it is not direct;
- the crime of sexual violence (Section 197) supposes the force or the threat, which tends against the life or bodily integrity of the victim, but it is direct. Respectively the crime can be established failing of this, when the passive subject did not attain the age of 12 years."[24]

In this approach, the author notifies the conflict, because the sexual exploitation can be realized with compulsive force, thus the author maintains that the force is the way of perpetration of the sexual violence and is not of the sexual exploitation.

Approach 'E'

„In the light of the delimitation from the crime of sexual violence, the way of perpetration of the sexual exploitation can be only the "simple" threat. Therefore, the assignation is wrong which says that ways of perpetration determined in the statute are the force and the threat. On the one hand the statutory definition does not contain explicit way of perpetration, and on the other hand the implicit way of perpetration of the sexual exploitation is the threat. By the use of force we must establish sexual violence."[25]

With this approach the paper can identify that has been revealed by the other approach modes as criticism. The author would like to supplement it only with that in my opinion, next to the threat, other way of perpetration is thinkable, seeing that the legislator uses the concept of force, which means more than the threat anyway.

Approach 'F'

The sexual exploitation means conceptually only psychic influence, which has the consequent that the passive subject acts differently from his/her true will by being a participant of the sexual activity. According to the representative of this approach, it is problematic too, whether we can regard the sexual exploitation as the special case of the duress at all. Namely when we start up with the concept of force defined in the Criminal Code, then the way of perpetration, also by the force of another person to perform or tolerate sexual activities, is the force or the threat, because the statutory

[24] Márki, Zoltán: A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények [Chapter XIX. Crimes against Sexual Freedom and Sexual Morality]. 679-712. Kónya, István (ed.): *Magyar Büntetőjog: Kommentár a gyakorlat számára [Hungarian Criminal Law. Commentary for the Practice]*. 679-713. Third Print. HVG-ORAC Lap- és Könyvkiadó Kft, 2013. p. 682-683.

[25] Szomora, Zsolt: Megjegyzések az új Büntető Törvénykönyv nemi bűncselekményekről szóló XIX. Fejezetéhez [Comments to the Chapter XIX about the Sexual Crimes of the New Criminal Code]. 649-657. *Magyar Jog*, Vol. 60 (2013) No. 11, 649-657.

definition of duress designates this ways of perpetration. The duress as way of perpetration, regulated in the Criminal Code under Section 196 suggests that the sexual exploitation can be realized with force or threat. But this is not correct, when we take into consideration the crime of sexual violence.[26]

This approach formulates it right, that the force cannot be the way of perpetration of the sexual exploitation, but the author thinks that the sexual exploitation, considering the conclusion, which we can *a contrario* deduct from the statutory definition of sexual violence, that when a more serious crime, in the case of question the criminal offense of sexual violence evaluates the force as way of perpetration, then if other statutory elements of sexual violence realizes too, that crime will be established, is evaluated as the special case of the duress, also in attention to the ministerial explanation of the new Criminal Code. With the creation of the crime of sexual exploitation the purpose of the legislator likely was to punish the cases of the so-called "sexual blackmail" (which were valued earlier in the frame of duress) as a more seriously qualified, independent crime in comparison with the statutory definition of duress.

To sum up the above-mentioned, the attitude of the paper is the next: reckon with that the crime of sexual violence, which has more serious judgment then the sexual exploitation, evaluates ways of perpetration, and these include the force, the right qualification is the sexual violence and not the sexual exploitation, when the perpetrator realizes force. However, the author thinks that the threat has a place among the ways of perpetration of the sexual exploitation, seeing that the sexual violence which is more seriously judged defines only the threat which tends against the life or bodily integrity of the victim, so the qualified threat as a way of perpetration. We must start up with the explanatory direction declared in the Criminal Code in relation to the definition of threat. This definition says: 'threat' shall mean - save as otherwise provided - a declaration of intention to cause considerable harm so as to make the person who is the target of the threat fearful by such a declaration. But, the sexual exploitation can be realized otherwise than threat too, because the approach adapts the best to the international requirements, which says, that the force by the statutory definition of sexual exploitation incorporates all conducts, under those the passive subject is disposed to have sexual activities without voluntarily consent.

As it marks out from the referred approaches, it is not obvious, that "since when", and "till when" the practitioner qualifies the given action as sexual exploitation and what is the line, when we already speak about sexual exploitation, and till when we can speak about sexual exploitation, and what is the line, when sexual violence already happens. And this raises the constitutional and practical problems of the not correct law-determination and of the overlap of the perpetrator's conducts. [27] To highlight the

[26] Franczia: *op. cit.* 169.
[27] Franczia, op. cit., p. 171.

constitutional law problems of the regulation (going to come to the practical problems by the explanation of the practical cases) first it is worth referring to that the principle of legal certainty, which is connected closely with the concept of the rule of law, requires that the complex legal system, the part-territories of the legal system, and all statutes of the law must be clear, unequivocal, calculable regarding to the effect and foreseeable for the recipients of the statutes. In the criminal law calculability and foreseeability requires both the sturdiness of the disposition describing the criminally prohibited conduct, and the clear declaration of the will of the legislator regarding the perpetrator's conduct. [28] The Constitutional Court dealt with the question of the legal certainty in many decisions, among others in the Constitutional Court Decision 37/2002. (IX. 4.), wherein it declares, that (...) „The recipients of the Criminal Code are usually everybody. But the recipients must know what the message of the legislator is, no matter what it is." (…) And in the Constitutional Court Decision 11/1992. (III. 5.) the judicial body takes sides as follows: "The legal certainty requires such clear and unequivocal formulation of rules, that everybody, who are touched, can be aware of her/his legal-situation, can regulate to it her/his verdicts and conducts, and can reckon with the legal-consequences." Evidently all these do not realize by the crime of sexual exploitation.

The new statutory definition is an intangible delict,[29] namely the exertion of perpetrator's conduct realizes for itself the crime, so the occurrence of any result is unnecessary. But in the literature we can meet with contrary viewpoint too, that says, the sexual exploitation is materialistic delict, and the result is the performance or toleration of sexual activities, which is contrary with the will of the passive subject.[30] The paper presents that that approach is more relevant, which assess the sexual exploitation as intangible delict, in regard to itself the crime does not evaluates result.

The subject as offender of the crime can be anybody, same-sex or opposite-sex person as the injured. The passive subject can also be anybody, independently of sex, physical condition and state of development, morality. The crime can be perpetuable only deliberately, namely regarding the orientation of the force, only with direct intention (*dolus directus*).

The qualified cases: by the creation of the crime of sexual exploitation the legislator took into consideration that international documents regard typically the age of 18 years as the upper bound of the childhood. That is why the statutory definition provides increased criminal defense to these persons, thereby that it threatens the perpetrator with more serious penalties, when the crime is committed against a person under the

[28] See Pócza, Róbert: Az erőszakos közösülés tényállása az „alkotmányos büntetőjog" tükrében [The Statutory Definition of Rape in the Mirror of the "Constitutional Criminal Law"]. *Magyar jog*, Vol. 52 (2005) No. 1, p. 16-17., and Constitutional Court Decision 37/2002. (IX. 4.) and Constitutional Court Decision 11/1992. (III. 5.)

[29] Gál: *op. cit.* 120., Jacsó: *op. cit.* 172.

[30] Sinku: *op. cit.* 193.

age of eighteen years. The passive subject of this qualified case can be the person ages between fourteenth-eighteen years. The intent of the perpetrator must comprehend the age of the passive subject. It is an even more seriously qualified case, if sexual exploitation is committed against a person under the age of fourteen years. It is also a qualified case, if the sexual exploitation is committed by a family member or against a person who is in the care, custody or supervision of the perpetrator, or receives medical treatment from him/her, or if abuse is made of a recognized position of trust, authority or influence over the victim.

The sexual exploitation is a special crime compared to duress regulated in the Section 195. The specialty comes about that the intent of the crime of duress is the sexual activity in the statutory definition of sexual exploitation. The cumulation of the sexual exploitation and the sexual violent is only quasi cumulation. We can distance the sexual exploitation from the sexual violence on the ground of way of perpetration; if it realizes force or threat against life or bodily integrity of the victim, we must to state sexual violence. The sexual exploitation can stand in real cumulation with battery (Section 164). The sexual exploitation assimilates the violation of personal freedom, which attends with the sexual exploitation. But when the violation of personal freedom separates from it in space and time, the cumulation of the two crimes is not *quasi*, but real.[31] In this case the violation of personal freedom is not qualified as committed by malice aforethought or malicious motive at the same time, in regard to the principle of *ne bis in idem*.[32]

The base case of sexual exploitation, which is sanctioned in Article (1) 196 is punishable only with the private motion of the injured. The legal policy cause of this direction is the protection of the injured.[33] But it should be highlighted that when an *ex officio* prosecuted crime is committed too in close substantive and temporal correlation with the base case, than the base case is punishable in default of private motion too. [34]

[31] Court Decision 2001. 448., Court Decision 2001.2., Court Decision 1991. 91.

[32] Court Decision 1991. 97.

[33] Constitutional Court Decision 37/2002. (IX.4) Justification III. 2.2. paragraph 2: "Requiring a private complaint for the punishment of forceful sexual acts serves the purpose of protecting the victim's privacy. It is within the scope of competence of the legislature to decide if it gives priority to punishing unconditionally those who commit sexual crimes over sparing victims the trauma of a trial. It is up to the legislature to select the criminal offences where substantive criminal law provides for exemptions from the criminal law principle of legality, and it has to specify the cases, among sexual crimes, where such exemptions apply - with consideration to sparing the victim - if it deems such exemptions justified. Therefore, the legislature is to decide on the basis of the mutually relative importance of public interest (the State's obligation to prosecute crime) and private interest (sparing the victim and respecting the victim's private sphere). It may decide that in specific cases of certain criminal offences, private interest shall prevail over public interest, i.e. punishment shall be conditional upon private complaint, or it may decide that the principle of legality in the classical sense shall have primacy."

[34] Court Decision 1998. 214.

The Practical Application of the Crime

Regarding to the novelty of the statutory definition, this crime has rather small practical use. But the author has found three practical cases.

According to the facts of the *first case*, the accused committed the sexual exploitation against his daughter. As stated in the accusation the man caressed, fingered his daughter, who loaded the age of fourteen years, and he had sexual intercourse with her several times. The injured told, that she was indicative for the accused more times, that "leave me alone!", but she did not defend in any way or forms against the action of her father. It happened only, that she tried to push the man away, but she could not. At another times she said nothing to her father, and she did nothing, because she dare not. The injured had told in her narration that her relationship with her father was not uncloudy, but she was not afraid of him, rather she was scared from the shame that what will be, if other people find out what happened to her.

As it is clear from the practical case, the defendant performed sexual activities with her daughter several times. The defendant did not use neither force, neither will-breaking (*vis absoluta*) nor will-bending (*vis compulsive*), nor threat tending against the life or integrity of the victim (qualified threat) was not occurred, but the sexual activities were against the will of the injured, because she asked her father to stop it and she wanted to push the man from herself, so the passive subject did not give the permission voluntarily and freely to the sexual activities. On the strength of the statutory definition the right qualification is the sexual exploitation.

In *another case* the Public Prosecutor's Office accused the defendant for the crime of sexual exploitation against a person under the age of eighteen years who, according to relevant historical facts, slept in the bed being naked next to the injured in the bedroom of the X. number's house, the defendant wreathed his right hand round the girl and pressed her down, while he was stroking her and pushing his sex organ to her bottom. The injured woked up her mother, sleeping in the same bed, who called the defendant to go back to the couch. The correct classification of the act is sexual exploitation, because according to the view of the Public Prosecutor's Office, the act of the defendant did not go to the frame of the crime of sexual violence, which can be committed with force or qualified threat. [35]

In the *third case* the Public Prosecutor's Office accused the defendant for the crime of sexual exploitation and other crimes, which were committed against a person who was in the care of the defendant and under the age of fourteen years. As per the relevant facts the defendant pushed his foster daughter off several times; he pulled off

[35] The author think it is an interesting question that how we can evaluate the act of the defendant that he pressed down the injured. In that case we cannot speak about force yet, but a sort of violent conduct was realized either way. And this raises the problem, "till when" we can speak about sexual exploitation and what is the demarcation, when the conduct of the defendant is appraisable as sexual violence, which has a more serious valuation.

her clothes and had sexual activities with her. The injured tried to push the defendant from herself, but the defendant spread the victim's legs. The defendant stopped the act, because the injured shouted and cried louder and louder. The Court qualified the action as sexual violence, differently from the qualification declared in the accusation, referring on the one hand to that the force: the push-off of the injured, the split of her legs etc., is not the way of perpetration of the sexual exploitation, but the sexual violence; and on the other hand to that the force does not have to be compelling to state sexual violence. Will-bending force (*vis complusiva*) is enough in cases of violent sexual offences affecting sexual freedom.

This case attests that the theoretical problem of the question of ways of perpetration, which the author suggested in the theoretical analysis of the statutory definition of sexual exploitation, is an existent practical problem, and it is not clear, that "till when" the practitioner can qualify the given action as sexual exploitation, and what is the line, when we have to analyze the criminal relevance of sexual violence.

Summary

The legislator, by constituting the statutory definition of sexual exploitation, complies with the requirements of international documents and women-protecting organizations, which found the responsibility on the missing of the consent. In case of appropriate legal practice, as it appears from the first case, the statutory definition is suitable to realize this. As reported in the cited case, the passive subject sometimes expressed orally, that she did not want to have sexual activities with the perpetrator, but in other times this verbally expressed "no" was missing, too. The action qualified as crime anyway, namely sexual exploitation, which shows that the statutory definition of sexual exploitation is capable to fulfill the requirements of international documents, which declares the respect of verbally expressed will of the injured in relation with sexual activities. This progress is definitely commendable.

But the author thinks that the „indeterminacy" of the regulation in force, as it marks out from the case, which has been reviewed in connection with sexual violent, can raise on the one hand dogmatic and on the other hand practical problems. So it is not fortunate, that the legislator did not define specifically the way of perpetration in the frame of the statutory definition of sexual exploitation or did not refer by any unequivocally mode to what is expected to realize the crime. In my opinion definitions incorporated to the Criminal Code or at least a decision ensuring uniformity that declares in concreto what to mean by force in the apropos of sexual exploitation would be a solution to the problem. It would ease the work of law enforcement bodies and ensure that with the same crime the same qualifications shall be born. So we can live down on the requirements of legal certainty too.

The following definition may be a solution, it is the de lege ferenda suggestion of the author: Criminal Code Paragraph 4 Section 196: „In the apropos of sexual

exploitation force is meant by threatening (Criminal Code Point 7. Paragraph 1 Section 459) and such a conduct - except for force (meaning rape and violence) - when the victim does not give his or her approval to the sexual act freely but under duress providing that sexual violence is not realised."