DEÁK FERENC DOCTORAL SCHOOL
IN LAW AND POLITICAL SCIENCES
FACULTY OF LAW
UNIVERSITY OF MISKOLC

DR. ALEXANDRA NAGY

THE EVALUATION OF NON-CONSENSUAL SEXUAL ACTS IN THE CRIMINAL LAW

Theses of the PhD Dissertation

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I. The subject and the aim of the dissertation

The subject of my dissertation is the examination how non-consensual sexual acts are evaluated in criminal law. In the dissertation I make a distinction between the wider and the narrower notion of non-consensual sexual acts, which is the title and the subject of my dissertation. *In my opinion, the wider notion of the non-consensual criminal acts on the one hand includes* those coerced either by force or threat against the life or bodily integrity of the passive subject or by exploiting a person, who is incapable of self-defence or unable to express his will, for the purpose of sexual acts. On the other hand, it also includes sexual acts which fall outside the scope of the above mentioned acts since they do not qualify as sexual violence despite the fact that they are committed without the voluntary consent of the passive subject. In my view *the latter ones constitute the narrow notion of the non-consensual sexual acts.*

I made the above mentioned distinction since, the sexual acts committed by either force or aggravated threat clearly qualify as non-consensual having regarded the methods of conduct, the definition of non-consensual sexual acts as ruled by the international treaties – which require the legislator to criminalize any sexual act, which although are not qualified as sexual violence, and which are committed without the consent of the passive subject – coincides with the narrower notion of non-consensual sexual acts. That is to say, contrary to the facts of elements of the sexual violence – the core element of which is either the sexual act coerced by force or aggravated threat and the seriousness of the defence exerted by the offended party as elaborated in the judicial practice – the most important distinctive features of the non-consensual sexual acts are the lack of consent and the opposing will of the passive subject respectively.

The aim of writing the current dissertation was to examine and to analyse in detail the relevant elements of the statement of facts and the issues of interpretation in the relevant scientific literature of criminal acts which are conducted against the will of the passive subject, that is to say sexual exploitation[1] and sexual violence.[2] This aim is achieved by analysing the historic development in criminal law, the examination of the relevant international documents and the requirements laid down in them and examination of the legal frameworks of countries, where the legislation is in accordance with these requirements. In this regard I thoroughly

[1] Act C of 2012 on the Criminal Code (hereafter: CC) Section 196
[2] CC Section 197

analyse those acts committed upon and 'to the harm'[3] of a person under the age of twelve years with special regard to the legal issues related to these acts and to provide possible answers to these questions, while introducing my own point of view at the same time. In my view the analysis of the Hungarian judicial practice on the non-consensual sexual acts is of paramount importance for two reasons. I firmly believe that on the one hand theoretical questions can be best answered by analysing the judicial practice. I firmly believe that on the one hand theoretical questions can be best answered by analysing the judicial practice. Not only does a dissertation aimed at analysing the judicial practice related to the provisions of the Act C of 2012 on the Criminal Code (CC) on the non-consensual criminal acts enrich the scientific literature, but it may prove to be useful applying the law, I also believe.[4] In order to achieve the above mentioned objectives I carried out a thorough research and analysis of the judicial practice on the crimes of sexual exploitation and sexual violence. I studied 120 cases either at the Tribunal of Eger and Miskolc between March and December 2018 and between May and August of 2020, respectively. The core of dissertation, that is to say the introduction of the current Hungarian legal framework is mainly based on the analysation of the judicial practice done during my own research. Of course, relevant scientific literature and commentary literature also have been thoroughly considered.

II. The structure and the main hypotheses of the dissertation

The current dissertation is divided into three structural elements.

1. *The first structural element (Chapter III of the dissertation)* provides a brief introduction to the evolution of the historic development of the Hungarian regulation of non-consensual sexual offences, the changes in the regulation and the historic context of how the current regulation was shaped starting from the so called 'Csemegi Code.' (The first Hungarian CC dating back 1878.) [5] In doing so – wherever I found it necessary – I briefly introduce what causes made

[3] I used the quotation mark in order to indicate that regardless of passive subject's will any sexual act committed with a person under the age of twelve shall be qualified as sexual violence and punished accordingly, even if the passive subject gave his/her consent or the sexual act was initiated by him/her. In this case it is not the sexual self-determination, which sufferers the harm, but the healthy sexual development of the child. Thus, in this case the harm is different compared to the other non-consensual sexual offences in general.

[4] It is worth mentioning that in a related second instance criminal decision delivered at the end of January 2020, the court stated that there is no established judicial practice on the interpretation of the notion of sexual exploitation. (Tribunal of Eger Case, judgement of 21 January 2020 delivered in case No. 4.Bf.294/2019/18, pp 14-15)

[5] Act V of 1878 on the felonies and misdemeanours

these changes necessary. During the course of the examination of the legal history and the constitutional law – among other factors – I pay special attention to how the elements of the following list changed in the light of the then-current social and moral values:
- the determination of the legal subject;
- the regulation on the passive subjects, with regard to the issue of committing non-consensual sexual acts within an existing matrimonial cohabitation and the issue of extending the scope of passive subjects to men;
- the determination of the nature and the method of the conduct and related to them, the evaluation of sexual intercourse and the fornication by the society and the related issues from a constitutional and criminal law perspective;
- the evaluation and sanctioning of committing a sexual act upon a person under the age of twelve, that is to say on passive subjects, who have not reached the age of consent; furthermore
- the evaluation of the fact of forceful fornication against nature with special regard to the relevant decisions of the constitutional court.

2. In the second structural element (Chapter IV of the dissertation) on the one hand I examine the international obligations related to sanctioning of these crimes, which although do not qualify as sexual violence, but are committed without the voluntary consent of the passive subject. In relation to this, I examine the obligations of the states laid down in international documents related to the requirement of enhanced criminal protection of sexual self-determination. I also analyse the possibilities of how the non-consensual sexual offences may be codified and – based on a study relevant by its subject – I examine, which European states' criminal codes comply with the respective requirements of the relevant international standards.

3. In the third structural element (Chapter V of the dissertation) – focusing on the effective Hungarian legal framework –, I thoroughly examine the two statement of facts of the CC, which are aimed at sanctioning the non-consensual sexual acts and protecting right of the passive subject to sexual self-determination: namely sexual exploitation and sexual violence. My approach is dogmatic. Besides I pay attention to some of the relevant elements of the statement of fact of these crimes and their aggravated instances respectively. Furthermore, I pay special attention to the conceptual issues of the legal subject, sexual act and indecent and obscene act, consent, coercing, the methods of conduct, the seriousness of the defence exerted by the offended party and to the issues of distinction. I also pay attention to the issue of how the current Hungarian legal regulation on sexual exploitation provides the sanctioning of non-consensual

sexual crimes. Furthermore, I introduce the practical problems caused by the approach of the current legal framework, namely that it contains sexual violence and other non-consensual sexual offences under a different section.

Having regarded that the legislator reconsidered the system of qualification and the sanctioning of sexual acts committed against persons under the age of twelve, I devote a full section to the issues related to this crime and the new system of qualification effective from 1 January 2018. In doing so I introduce the problems of the judicial practice in the past with special regard to the criminal uniformity decision No. 2/2016 BJE of Curia – the Hungarian Supreme Court – and the decision of the Constitutional Court (No. 19/2017. (VII.18.) which stated that it was unconstitutional. Last, but not least I introduce the changes induced by the decision.

I answer the theoretical questions and the issues of interpretation and qualification in *the third structural part of the thesis (Chapter V of the dissertation)* by analysing practical cases. I pay special attention to the following questions:

- What natures of conduct may be sanctioned by recalling the indecent exposure?
- How indecent and obscene act and gravely indecent and obscene act may be distincted from each other?
- How requirements of international documents that is to say to sanction the non-consensual sexual acts are reflected in the Hungarian judicial practice?
- What is regarded as methods of conduct by the courts in relation to the sexual exploitation? What is the maximum and the minimum level of the crime? What are the typical methods of conduct in case of sexual exploitation?
- What are the criteria to qualify a certain act only as indecent exposure and what are the criteria to qualify as sexual exploitation? Furthermore, where is the threshold to be qualified as sexual violence?
- Is the German legal-framework of sexual exploitation – which, by its wording is in conformity with the Istanbul Convention[6] – more unambiguous than the statement of facts in the Hungarian CC? I am also questioning if it may raise issues of interpretation or the application of law?
- How did the judicial practice evolve and how does it evolve now on sanctioning the commitment of a sexual act upon a person under the age of twelve since the amendment of law, which entered into force on the 1 January 2018?

[6] Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, 11.V.2011. (Council of Europe Treaty Series – No. 210)

- How did the judicial practice evolve and how does it evolve on cases where the act was committed by more than one person, as an aggravated instance of sexual violence?

In the third and most important structural part of my thesis I would like to verify the following hypotheses:

- The indecent exposure's statement of facts guarantees the enhanced protection of sexual self-determination. *(Thesis No. 1)*
- The differentiation between the indecent and obscene act and the sexual act needs interpretation in the judicial practice. (*Thesis No. 2*)
- The current legal definition to be found in the effective Hungarian regulation of the sexual exploitation is not in full conformity with the requirements laid down in international documents. That is to say criminal liability – by the wording of the law – is not based expressly on the lack of consent. (*Thesis No. 3*)
- On the other hand, the regulation on sexual exploitation, which is based on coercing is suitable for sanctioning the non-consensual type sexual acts, provided that the notion of coercing is interpreted in the proper way. (*Thesis No. 4*)
- The judicial practice based on the legal definition of sexual exploitation may be suitable to sanction any external exertion of influence which – is suitable to bend the will of the offended party in any improper manner and – results in the willingness of the offended party to take part in the sexual act, though not through her/his own free will. ('*The question of the minimum threshold of the sexual exploitation*') *(Thesis No. 5)*
- Stating the maximum threshold – that is to stay making a distinction between the sexual exploitation which is to be sanctioned less strictly and the sexual violence which is to be sanctioned more strictly – and the methods of conduct of sexual exploitation needs interpretation which may lead to concurring points of view both in the legal practice and in the scientific literature. ('*The issue of the maximum level of sexual exploitation*' *and the determination of the methods of conduct of sexual exploitation*) *(Thesis No. 6)*
- The typical – but not the only exclusive – method of conduct of sexual exploitation is the simple threat. *(Thesis No. 7)*
- The requirement of the seriousness of the defence exerted by the offended party even if the defence exerted is low or even non-existent – based on the circumstances of the case – does not exclude the possibility of qualifying the act as sexual violence. *(Thesis No. 8)*
- Paragraph (2) Section 197, which sanctions sexual acts committed upon a person under the age of twelve with the consent of the subject of the offended party is to be considered as the

base case. Its aggravated cases are *de lege lata* clear since the amendment entered into force on 1 January 2018. *(Thesis No. 9)*

- In my opinion one should consider placing the two criminal offences in Paragraph (2) Section 197 and Section 198 – that is to say the sexual abuse and its aggravated cases – under one section, unlike done in the current regulation. *(Thesis No. 10)*
- The current wording of the CC – contrary to the rules of Act IV of 1978 by its current rules on rape and sexual assault – does not necessarily require more people to conduct the sexual act in order to qualify it as aggravated instance. *(Thesis No. 11)*
- Although the German regulation which sanctions the non-consensual criminal sexual acts in the narrow notion and in accordance with the requirements of international documents, that is to say, its core element is the 'recognisable will' of the passive subject – despite the above – may give rise to several problems during the application of law. *(Thesis No. 12)*

III. The method of the research

During the course of writing the thesis I studied the relevant Hungarian and foreign scientific literature (books, textbooks, commentaries, monographies, scientific articles and studies) and the Hungarian PhD dissertations. Furthermore I studied the relevant domestic judicial decisions and the Hungarian professional journal of criminal law (collection of criminal law related judgements) During the analysis of the current regulation in force and in some cases during the analysis of the historic part, I found it important to use the ministerial explanatory memorandum on the sexual acts as contained by the CC, since these show the intentions that lead the legislator during the recodification of the non-consensual criminal acts.[7] When examining legal history and the actual regulations I studied the relevant decisions of the constitutional court and the criminal uniformity decisions. For that, I applied the legal logics and the method of theoretical examination.

In the third structural part of the thesis I study and introduce the judicial decisions I collected myself or the ones which were assigned to me during my research, which I carried out at Hungarian courts. In doing so I analyse and introduce the issues of qualification, and draw my conclusions on these issues based on the judicial decisions.

A short excursus into the German regulation – that is to say the research – is done first of all by the theoretical analysis, by the analysis of the wording of the German regulation, and by

[7] As an example, regarding the statement of fact of sexual exploitation, the ministerial explanatory memorandum of the CC determines the acts that are covered by the definition of the sexual exploitation.

studying the relevant judicial cases and drawing the conclusions. During the examination of the German regulation, I paid special attention to the relevant commentary, textbooks, and scientific literature, having regarded that during the comparative law analysis it is inevitable to introduce the dogmatic theory of the German criminal law instead of the mere introduction of the wording of the law.

IV. The summary of the results of the research

The results of my research – in the order of the chapters of my dissertation – may be summarized as follows:

Chapter III. – The history of the development of non-consensual sexual acts

Both the terminology and the structure of Criminal Code of 1978 – which was implemented from the Code Csemegi – was no longer sustainable in the light of the new challenges of criminal policy and the tendencies in international documents.

Chapter IV. – The relevant international expectations regarding the sanctioning of non-consensual sexual acts

The definition of rape in the Istanbul Convention is based on the lack of consent and the Convention calls on the states to take every necessary step to criminalize any sexual act which was done without consensus.[8] Recommendation Rec(2002)5 of the Committee of Ministers of the European Council 'on the protection of women against violence' echoes the basic principle of 'no means no' and places the burden on the member states to criminalize any sexual conduct with a person, who did not give his/her consent. Even if the passive subject did not give any sign of resistance.

The enhanced protection of sexual self-determination can be achieved by several models of regulation.

[8] BŁUŚ, Anna: Sex without consent is rape. So why do only nine European countries recognise this? 23 April 2018. https://www.amnesty.org/en/latest/campaigns/2018/04/eu-sex-without-consent-is-rape/ (Downloaded: 10 August 2019) (hereafter: BŁUŚ 2018)

- *The positive model of regulating the criminal acts* is based on the premise that the positive law of the domestic law shall expressly stipulate any conduct where the free consensus of the passive subject is missing to engage into the sexual act.
- *The model on regulating the sanctioning of any non-consensual sexual act suggests that – in order to fully comply with the requirements of the Istanbul Convention – the legislator should inaugurate a basic statement of facts into the criminal code that enables to sanction any non-consensual sexual act.*[9] There are further subtypes of sanctioning the non-consensual sexual acts based on this model:
  - *according to the basic principle of „Yes means yes" if one of the parties did not expressly consent to the conduct of sexual intercourse, that may serve as a basis to state the criminal liability of the other party*;
  - *according to the basic principle of „No means no": the criminal liability can be stated only if the passive subject expressly stated his/her opposing will regarding the sexual intercourse.* [10]

After some thorough examination of the above mentioned models, it can be stated that although each models have its advantages, on the other hand both of them display shortcomings from the aspect of legal dogmatic theory and techniques.

There are only a few countries in Europe – namely the United Kingdom (England, Wales, Scotland, Norther Ireland), Ireland, Belgium, Cyprus, Luxembourg, Iceland, Germany and Sweden – which expressly base the legal definition of sexual violence on the lack of consent, that is to say on the will of the passive subject.[11] However this does not necessarily mean that other states do not sanction those sexual act, which do not qualify as sexual violence coerced by either force or aggravated threat, although the consent of the passive subject is missing.

Chapter V. – The current and effective legal framework of non-consensual sexual acts in Hungary

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[9] EISELE, Jörg: Zur Umsetzung von Art. 36 der Istanbul-Konvention. In: Abschlussbericht der Reformkommission zum Sexualstrafrecht, dem Bundesminister der Justiz und für Verbraucherschutz, Heiko Maas, am 19. Juli 2017 vorgelegt. pp. 956-961. https://www.bmjv.de/SharedDocs/Downloads/DE/Service/StudienUntersuchungenFachbuecher/Abschlussbericht_Reformkommission_Sexualstrafrecht.pdf?__blob=publicationFile&v=1 (Downloaded on 19 May 2019)

[10] HÖRNLE, Tatjana: Menschenrechtliche Verpflichtungen aus der Istanbul-Konvention. Ein Gutachten zur Reform des § 177 StGB. Deutsches Institut für Menschenrechte. 2015. p. 7 https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Menschenrechtliche_Verpflichtungen_aus_der_Istanbul_Konvention_Ein_Gutachten_zur_Reform_des_Paragraf_177_StGB.pdf (Downloaded on: 19 May 2019)

[11] BŁUŚ 2018

The sexual self-determination is the liberty of the individual to freely decide whether they wish to conduct a sexual act or not and in case they wish to do so to freely decide on the partner, the place and the time.[12]

The following categorizations shall be made based on the severity of infringement of the protected legal interest, which is a basis for sanctioning:

1. *The indecent exposure is the most lenient form* of the sanctioning the infringement of the sexual self-determination as the protected legal interest.
2. *The sexual exploitation is a severe form* of the sanctioning the infringement of the sexual self-determination as the protected legal interest.
3. *The sexual violence is the most severe form* of the sanctioning the infringement of the sexual self-determination as the protected legal interest.

My findings regarding Thesis No. 1: According to Article 40 of the Istanbul Convention sexual harassment is a 'form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person […]' The Hungarian regulation in force provides the sanctioning of physical conducts of a sexual nature, which aims at the violating the dignity of the passive subject through the statement of facts of indecent exposure, especially by its third paragraph.[13] The latter one provides for sanctioning of touching any part of the offended party's body, except for his/her genitals. These conducts were classified as slander in the preceding Hungarian legal framework. On the other hand, placing them in the chapter called 'sexual freedom and sexual offences' was reasonable, since these acts infringe the right of the injured party to sexual self-determination. This solution emphasizes the special nature of the legal interest infringed by prescribing imprisonment not exceeding two years. The subsidiary nature of the statement of facts and the above mentioned sanction can be regarded as proportional within the chapter.[14]

In case we examine the statement of facts of indecent exposure in the Hungarian regulation throughout the 'spectacles' of the requirements laid down in international

[12] FISCHER, Thomas: Strafgesetzbuch mit Nebengesetzen. Beck'sche Kurz Kommentare. Band 10. 64. Auflage. C.H. BECK. München, 2017. p. 1180 (hereafter: FISCHER 2017), Deutscher Bundestag Drucksache 18/1969. 18. Wahlperiode 02.07.2014. p. 2 https://dejure.org/Drucksachen/Bundestag/BT-Drs._18/1969 (Downloaded on 5 May 2019)
[13] CC Section 205
[14] SZOMORA Zsolt: Megjegyzések az új Büntető Törvénykönyv nemi bűncselekményekről szóló XIX. Fejezetéhez. Magyar Jog. 2013. 11. szám p. 652 (hereafter: SZOMORA 2013b)

documents, it can be stated that while it does not fully coincide with the conducts of sexual harassment as determined by Article 40 of the Istanbul Convention – since the Hungarian statement of facts only covers the physical acts[15] – this does not mean that the Hungarian regulation on the statement of fact of indecent exposure is not in conformity with international standards. It follows from the fact that the Istanbul Convention – which was not ratified by Hungary –, in its Article 40, on the one hand does not require states to classify the conducts described in the said Article as sexual crimes, on the other, hand it does not require them to prosecute those acts – that is to say sexual harassment – by the tools of criminal law. It has to be emphasized that the statement of facts of indecent exposure is suitable for sanctioning conducts that violate human dignity irrespective of the perpetrator's intention regarding sexual nature of the conduct. This also provides the conformity with international standards and the enhanced protection of passive subjects.

My findings regarding Thesis No. 2: The core element of sexual violence and sexual exploitation is the sexual act. Contrary to this, the core element of indecent exposure is indecent and obscene act. The indecent and obscene act has two distinctive features compared to the sexual act: on the one hand – as it was already stated above – the indecent and obscene act does not include any sexual motivation, on the other hand, indecent and obscene act is not so grave by its very nature.[16] During the course of my research I came to the conclusion that the distinction between indecent and obscene act and gravely indecent and obscene act is not always clear in the legal practice. However, by studying the judicial decisions it is possible to determine the typical natures of conduct of indecent exposure.[17] These are the following: stroking, hugging, kissing the offended party or giving a French kiss to the offended party (including putting the tongue into the offended party's mouth). Furthermore, giving a love bite to the offended party's skin surrounding his/her neck, or touching the bottom, the breast of the offended party, or putting hands between the legs of the offended party. Last, but not least stroking the mount of Venus of the offended party – except for the touching of the genitals –, or cuddling with the offended party or imitating sexual intercourse with the offended party. The above mentioned acts constitute a crime only if they were done against the will of the offended party. Contrary to the above mentioned, the gravely indecent and obscene act covers the

[15] GILÁNYI Eszter: A nők elleni erőszak és magyar büntetőjogi szabályozása a nemzetközi elvárások tükrében. PhD értekezés. Miskolc, 2017. pp. 202-203 (hereafter: GILÁNYI 2017)
[16] SZOMORA 2013b, p. 651, Tribunal of Eger, Case No. 2.Bf.1/2018/5, p. 8
[17] Paragraph (3) Section 205 of the CC

touching of the offended party's genitals, slipping the hands into the genitals – even through clothes or underwear – touching the offended party's genitals or bottom with the genitals of perpetrator and kissing the genitals of the offended party.

My findings regarding Thesis No. 3: There are two points of view in the scientific literature on the interpretation of nexus among coercion, force and the threat.[18] The first approach is that coercion – as umbrella definition – covers the use of force and threat as a predicate offense.[19] The other point of view – shared by many – is that coercion – as a nature of conduct – has two methods of conduct, namely use of force and threat.[20] Besides, several authors indicate that the typical – but not exclusive – method of conduct of coercion is the use of force and the threat.[21]

Several authors point out that coercion is 'an act that is suitable to break down the serious defence exerted by the offended party, which results in a situation, where the offended party cannot act according to his/her will.'[22] According to another approach, the coercion means the prevalence of the will of another person […] that is to say, the nexus between the one who exerts the coercion and the person who is the subject of this coercion. The core of this nexus is that the person, who is the subject of the coercion acts in accordance with the will of the person exerting the coercion.[23]

Based on the judicial practice '(…) it can be stated that substantial element of the coercion is

[18] See: GILÁNYI Eszter: A szexuális kényszerítés tényállása az Isztambuli Egyezmény rendelkezéseinek fényében. Miskolci Jogi Szemle. 2015. 2. szám. p. 122 (hereafter: GILÁNYI 2015)
[19] MÁRKI Zoltán: XIX. Fejezet. A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények. In: Magyar Büntetőjog: Kommentár a gyakorlat számára. (szerk.: KÓNYA István) Harmadik kiadás I. HVG-ORAC Lap- és Könyvkiadó Kft. 2013. p. 692 (hereafter: MÁRKI 2013)
[20] GÁL István László: A szexuális bűncselekmények az új magyar büntetőjogban. In: Igazság, ideál és valóság. Tanulmányok Kardos Sándor 65. születésnapja tiszteletére. (szerk.: ELEK Balázs – HÁGER Tamás – TÓTH Andrea Noémi) Debrecen, 2014. p. 120 (hereafter: GÁL 2014); SINKU Pál: XIX. Fejezet. A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények. In: Büntetőjog II. – Különös Rész. (szerk.: BUSCH Béla) HVG-ORAC Lap- és Könyvkiadó. Budapest, 2012., p. 196 (továbbiakban: SINKU 2012), SZOMORA Zsolt: XIX. Fejezet. A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények. In: Kommentár a Büntető Törvénykönyvhöz. (szerk.: KARSAI Krisztina) Complex Kiadó. Budapest, 2013. p. 407 (hereafter: SZOMORA 2013a)
[21] DEÁK Zoltán: A kényszer, az erőszak és a fenyegetés fogalma és jelentősége a magyar büntetőjogban. Doktori (PhD) értekezés. Szeged, 2017. p. 131 (hereafter: DEÁK 2017), JACSÓ Judit: XIX. Fejezet. A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények. In: Magyar Büntetőjog. Különös rész. (szerk.: HORVÁTH Tibor – LÉVAY Miklós) Complex Kiadó. Budapest, 2013, p. 171 (hereafter: JACSÓ 2013), JACSÓ Judit: XIX. Fejezet. A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények. In: Magyar Büntetőjog. Különös rész. (szerzők: GÖRGÉNYI Ilona – GULA József – HORVÁTH Tibor – JACSÓ Judit – LÉVAY Miklós – SÁNTHA Ferenc – VÁRADI Erika) Wolters Kluwer Hungary. Budapest, 2020, p. 218 (hereafter: JACSÓ 2020)
[22] JACSÓ 2013, p. 171, JACSÓ 2020, p. 218, MÁRKI 2013, p. 688, SINKU 2012, p. 192
[23] BALOGH Ágnes – TÓTH Mihály: Magyar büntetőjog. Általános rész. Digitális Tankönyvtár. 2010. https://regi.tankonyvtar.hu/hu/tartalom/tamop425/2011_0001_520_magyar_buntetojog/ch01.html (Downloaded: 11 November 2019)

that the offended party does not wish to conduct any act of sexual nature, but the perpetrator makes his/her will prevail (…).'[24] ' (…) the result of the coercion is that the conduct of the offended party was not determined by his/her own will, or even if his/her conduct was based on his/her own will, this will was shaped by the conduct of the person exerting the coercion (that is to say the defendant). '[25]

Those crimes, which nature of conduct is determined as coercion and contained by the specific part of the CC may be divided into three main categories: [26]
a) The first category covers those crimes, where the method of conduct of the coercion is force and the direct threat against the life or bodily integrity of the passive subject. Sexual violence is such a crime. [Section 197 of the CC]
b) The second category covers those statement of facts, where the method of conduct of the coercion is the force or threat. Duress is such a crime. [Section 195 of the CC]
c) The third category covers those crimes, where the nature of conduct is determined as coercion, but the method of conduct is not determined by the legislator. Sexual exploitation is such a crime. [Section 196 of the CC]

Based on the above mentioned, it can be stated that within the current Hungarian legal framework on non-consensual sexual act the legal definition of sexual exploitation is not in full conformity with the requirements laid down in international documents, namely that member states should expressly base criminal liability on the lack of consent. The reason of the above is that the Hungarian legislator defines the nature of conduct as '*coercing the passive subject to conduct sexual act'* instead of the '*lack of the passive subject's consent'* or '*against the will of the passive subject*.'

My findings regarding Thesis No. 4: The use of the notion of coercion does not raise any issue regarding the conformity with international documents, having regarded the fact that on the one hand the Explanatory Report to the Istanbul Convention states that the specific legal regulations – such as coercion, force, threat etc. – shall be interpreted in a way to make them eligible to

[24] District Court of Kazincbarcika, Decision No. 14.B.417/2017/30, p. 19
[25] Disctrict Court of Ózd, Case No. B.369/2017
[26] See in details: GILÁNYI 2015, pp. 127-131, NAGY Alexandra: A beleegyezés nélküli szexuális cselekmények szankcionálása a büntetőjogban. Magyar Jog. 2017. 2. szám p. 69 (hereafter: NAGY 2017)

sanction any non-consensual sexual acts, irrespective of the legal terminology.[27] On the other hand it does not raise any issue, since the coercion – as the lack of consent – is present in the case of any non-consensual sexual act.

My findings regarding Thesis No. 5: Regarding the determination of the *bottom threshold* of sexual exploitation, the ministerial explanatory memorandum (miniszteri indokolás) of the CC and the judicial practice provide guidance.

- The legislator's argument of the CC states that forcing another person to perform or tolerate sexual activities basically includes any behaviour, where the passive subject takes part in the sexual acts without his/her voluntary consent and not in a freely determined will. [28]
- The judicial cases analysed during my research support the above approach: the court stated the criminal liability of the perpetrator for sexual exploitation, when the offended party expressed his/her opposing will only by a back-turn.[29] The court also stated the criminal liability for sexual exploitation, when the offended party decided to tolerate the sexual approach of the defendant – her own father –, because her father was more lenient with her than with her siblings.[30] Last, but not least the court stated the criminal liability of the defendant for sexual exploitation, when the defendant's approach, which was sexually motivated in its nature, was rejected in a determined way only by one of the three offended parties and the other two expressed their rejection either orally or by implicit conduct, but only in a less determined way. The defendant however, could not reasonably interpret this as consent.[31]

Based on the above mentioned, the definition of coercion as nature of conduct – as a predicate offense – can be determined as follows: *within the framework of the statement of fact of sexual exploitation, the coercion covers any behaviour that make the passive subject to participate in the sexual act without his/her voluntary consent. On the contrary: the offended party engages into the sexual act only as a result of an external influence – bending his/her will in an inappropriate manner –, as a result of this is that the passive subject performs or tolerates a sexual act, against his/her original will.* This shall be judged based on the given circumstances of the case at hand.

[27] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, 11.V.2011. para. 191.
[28] The ministerial explanatory memorandum of Section 196 of the Act C of 2012
[29] Disctrict Court of Miskolc, Case No. B.0324/2017, Tribunal of Miskolc, Case No. Bf.193/2018
[30] Chief Prosecution Office of Heves County, Case No. B.611/2016/32-I, Tribunal of Eger, Case No. 13.B.12/2018/21
[31] The Military Council of the Tribunal of Debrecen, Case No. KB.II.23/2018/8

My findings regarding Thesis No. 6 and 7: In the case of the statement of facts of sexual exploitation, the issue of method or methods of conduct are problematic and the scientific literature is divided in a certain question: that is to say, whether the statement of facts says anything on the methods of conduct. In case of a negative answer, the question is the following: what are the implicit methods of conduct of sexual exploitation. The existence of the issue is highlighted by the fact that diverging approaches are to be found in the very same writing of the very same author.[32] In my PhD dissertation I introduced the diverging points of views in the scientific literature and summarized them in a chart. After introducing each approach, I identified their respective critical points and based on my research, which I carried out at the Hungarian courts I introduced my own point of view supported by the analysed legal cases. Of course, I do not miss to introduce the cases that probably do not support my point of view. My point of view can be summarized as follows:

Although the crime of duress can be regarded as the general statement of fact of sexual exploitation, the coercion as contained by the latter one is not identical with crime of duress. The statement of fact of sexual exploitation – compared to the statement of facts of duress – does not contain any explicit methods of conduct.[33]

When it comes to the determination of methods of conduct, it has to be considered that the statement of fact of sexual violence does evaluate methods of conduct, which includes the force and the aggravated threat. This leads to the conclusion that since the force and the aggravated threat are the methods of conduct of a more serious crime, namely of sexual violence, in case any force – either vis absoluta or vis compulsiva – was used or if there was an aggravated threat, the only proper evaluation is sexual violence.[34]

Based on the statement of facts of sexual violence it can be concluded a contrario that committing sexual exploitation is possible only through simple threat. Several judicial decisions

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[32] See: MÁRKI 2013, pp. 682-683

[33] *Likewise* BH 2018. 240. [24], SZOMORA 2013a, p. 404, SZOMORA 2013b, p. 653, SZOMORA Zsolt: XIX. Fejezet. A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények. In: Nagykommentár a Büntető Törvénykönyvhöz. (szerk.: KARSAI Krisztina) Wolters Kluwer Hungary. Budapest, 2019 p. 444 (hereafter: SZOMORA 2019), DEÁK 2017, pp. 128-131, GÁL 2014, p. 119, GÁL István László: A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények. In: Új Btk. kommentár. 4. kötet (szerk.: POLT Péter) Nemzeti Közszolgálati és Tankönyv Kiadó. Budapest, 2013. p. 12 (hereafter: GÁL 2013). *An opposing point of view* is articulated by: SINKU 2012, p. 193. o.

[34] *Likewise:* SZOMORA 2013a, p. 404, SZOMORA 2013b, p. 653, SZOMORA 2019, p. 444, DEÁK 2017, p. 131, JACSÓ 2020, pp. 218-219, Partly similar opinion: MÁRKI 2013, pp. 682-683, BENEDEK Tibor: Jogértelmezés és bírói gyakorlat a szexuális kényszerítés, a szexuális erőszak és a szexuális visszaélés miatti büntetőeljárásokban. 2017. október 16. http://www.mabie.hu/index.php/cikkek-tanulmanyok/139-dr-benedek-tibor-jogertelmezes-es-biroi-gyakorlat-a-szexualis-kenyszerites-a-szexualis-eroszak-es-a-szexualis-visszaeles-miatti-buntetoeljarasokban (Downloaded: 23 November 2019) (hereafter: BENEDEK 2017). *Contrary to this* GÁL and SINKU argues that sexual exploitation may be done through vis compulsiva. GÁL 2013, p. 12, GÁL 2014, p. 119 o., SINKU 2012, p. 193

analysed by me expressly state that the typical method of conduct of sexual exploitation is simple threat, such as threatening with losing the workplace, or publishing a compromising footage on the internet immediately. Since threat is not defined in the statement of facts as a method of conduct, but it is only some implicit method of conduct, instead of the legal term of threat, threat here means envisaging some harm which can make the threatened one feel fear.[35] This wider notion of threat is in accordance with those international documents that base the criminal liability on the mere lack of consent. Besides – having regarded the fact that there are two conjunctive conditions to qualify the threat as sexual violence – if only one of the conditions are met, the correct evaluation is sexual exploitation. Based on this, the statement of fact of sexual exploitation is fulfilled if the threat is against the life of bodily integrity of the offended party, but not directly or the threat isn't against the life or the bodily integrity of the offended party but direct in its nature.[36]

Other methods of conduct may be called into question except for force, [37] since, the legislator picked the term of 'coercing', which necessarily means more than threat. As a result the perpetration through violent conduct[38] – that does not qualify as force – may belong to this category provided that the above mentioned behaviour of the perpetrator results in a kind of necessity, or which facilitates the perpetration of the sexual act through an exposed situation. On the other hand, the wide-notion of violent conduct elaborated by the legal practice is not applicable, when it comes to the statement of facts of sexual exploitation. The definition of violent conduct is to be interpreted in a restrictive way within the framework of sexual exploitation. *That is to say it may only include those offensive acts that are aimed at touching the body of the offended party but not suitable to cause any damages in the body. Furthermore, it can only include those acts that are eligible to restrict the offended party in his/her free movement or to harass him/her in an offensive or restrictive way, without being eligible to cause any bodily harm.* Any behaviour that is exerted through behaviour assaulting the body of the

[35] *Likewise:* SZOMORA 2013a, p. 404, SZOMORA 2013b, p. 653, SZOMORA 2019, p. 444, BENEDEK 2017, District Court of Kazincbarcika, Case No.14.B.417/2017/30. *Contradicting point of view* to be found in: BH 2019. 96., JACSÓ 2020, p. 219. For a definition of threat that diverges from the definition in the CC see: BARTKÓ Róbert: A terrorizmus elleni küzdelem kriminálpolitikai kérdései. UNIVERSITAS-GYŐR Nonprofit Kft. Győr, 2011. pp. 225-229

[36] *Likewise:* SZOMORA 2013a, p. 404, SZOMORA 2019, p. 444, DEÁK 2017, p. 132, MÁRKI 2013, p. 683, *Opposed to this:* GÁL argues that the threat cannot be aimed against the life or the bodily integrity. GÁL 2013, p. 12, GÁL 2014, p. 119

[37] *Likewise:* GÁL 2013, p. 12, GÁL 2014, p. 120, JACSÓ 2013, p. 171, JACSÓ 2020, p. 219, *Likewise in its substance*: DEÁK 2017, p. 131, MÁRKI 2013, p. 682, NAGY 2017, p. 71

[38] *Likewise:* BH 2018. 240. [28], *Likewise in its substance:* JACSÓ 2020, pp. 219-220, *Opposed to this:* SZOMORA 2019, p. 445

offended party through exerting real physical force – such as tugging, beating or hitting the face – may not be evaluated within the frameworks of sexual exploitation.

Summarizing the issue of the upper threshold: in case of the use of force – either vis absoluta or vis compulsiva – and aggravated threat the proper qualification is sexual violence. Contrary to this, when the threat is against the life of bodily integrity of the offended party, but not directly or the threat is not against the life or the bodily integrity of the offended party but direct in its nature the proper qualification is sexual exploitation.

My findings regarding Thesis No. 8: The Hungarian judicial practice – except for a few individual decisions[39] – interprets the seriousness of the defence exerted by the offended party in an 'elastic' way and it makes the requirement of serious defence exerted by the offended party relative that is to say its central role weightless in case of sexual violence.[40] Contrary to the central role of the seriousness of the defence exerted by the offended party, the following arguments provide to make its role relative in the judicial practice:

1. First of all it is not required from the offended party to exert the defence until the end,[41] the crime of sexual violence can be stated even if the passive subject stood the sexual act as a result of the force.[42]
2. Secondly, if the offended party did not exert defence or the offended party stopped exerting defence because he/she thought that his/her efforts was in vain, it does not preclude the possibility of stating that the passive subject exerted serious defence.[43]
3. Thirdly, even a minor level of force may prove enough to realize the coercion,[44] similarly, in case of a minor passive subject even a minor level of force or threat is eligible to fit the statement of facts since the minor passive subject is dependent on his/her guardian.[45]
4. Fourthly, besides the above mentioned arguments, others too, support my thesis that the requirement on the seriousness of the defence exerted by the offended party is rendered relative by the judicial practice. As an example, even 'vis compulsiva' – that is to say a force that bends the will of the passive subject – is enough to evaluate the act as sexual violence, exerting *vis*

[39] As an example see: BJD 3074.
[40] SZOMORA Zsolt: Az erőszakos nemi bűncselekmények kényszerítési eleméről. Büntetőjogi Kodifikáció. 2008. 2. szám., pp. 28-32 (hereafter: SZOMORA 2008). See: BJD 3076., BH 1997. 568., EBH 2004. 1105.
[41] BH 2007. 107., BH 2011. 30., BH 2013. 295., BH 2014. 6., BH 2014. 201. [61]
[42] BH 2011. 30.
[43] BJD 1251., BH 1997. 568., BH 2007. 107., BH 2013. 295., BH 2014. 6., BH 2014. 201. [61], The Decision of the Kúria in Case No. Bfv.28/2014/6, Budapest Court of Appeal Case No. Bf.294/2008/8, JACSÓ 2013, p. 175, JACSÓ 2020, p. 225
[44] BJD 8191.
[45] BH 2014. 201. See: BÉRCES Viktor: A sértett magatartásának büntetőjogi relevanciájáról: beleegyezés, közrehatás, utólagos hozzájárulás. Büntetőjogi Szemle. 2017. 2. szám, p. 52

absoluta is not required.[46] In case of sexual violence, the sexual act – as a target act –, presupposes a predicate act, namely the use of force. The latter one is generally a sort of physical coercion aimed at breaking down serious defence, on the other hand it does not necessarily mean invincible force (vis absoluta): even a smaller amount of physical influence, which is – having regarded the age and the personal characteristics of the offended party – suitable to break down his/her resistance, may provide a ground to state that the crime was committed."[47]

My findings regarding Thesis No. 9: The authors in the scientific literature mostly agree that based on the new CC, the crime of sexual violence has three base cases, that is to say: 1) those, which may be committed by either force or aggravated threat (sexual violence in the strict sense) as contained by point 'a' Paragraph (1) Section 197. 2) Sexual violence committed by exploiting a person who is incapable of self-defence or unable to express his/her will, for the purpose of sexual acts, as contained by 'b' Paragraph (1) Section 197. 3) Committing a sexual act upon a person under the age of twelve years as contained by Paragraph (2) Section 197, which – according to this – is a base case as well.[48] The reason beyond this can be described as follows: having regarded the fact that the aggravated case stems from the base case, its dogmatic theory has to fit into the dogmatic theory of the base case, since the aggravated case contains such plus elements that enhance the crime's harmfulness to society and therefore enhance the extent of punishment.[49] On the other hand, Section (2) does not fit into Section (1),[50] since the passive subject and the nature of conduct is different, that is to say the subject of the crime and the determinant material element do not coincide in case of the two statement of facts.[51]

Until the adoption of the amendment done by the Act CLXXVII of 2017 to increase criminal legislation against sexual violence affecting children under age of twelve, both the scientific literature and the judicial practice was divided, when it came to the question whether any aggravated statement of facts are built on the base case as contained by Paragraph (2)

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[46] SZOMORA 2008, p. 29, SZOMORA 2013a, p. 407, DEÁK 2017, p. 77
[47] BH 1997. 568.
[48] Lásd ehhez: GÁL 2013, pp. 17-18, GÁL 2014, p. 125, JACSÓ 2013, p. 174, JACSÓ 2020, p. 224, MÁRKI 2013, p. 688, SINKU 2012, p. 198, SZOMORA 2013a, p. 409, SZOMORA Zsolt: A tizenkét éven aluli sérelmére elkövetett szexuális erőszak újabb minősítési kérdései, avagy a bírói gyakorlat menthetetlennek látszó vergődése a kétszeres értékelés és más alapelvek hálójában. In: Ad valorem. Ünnepi tanulmányok Vida Mihály 80. születésnapjára. (szerk.: GÁL Andor – KARSAI Krisztina) Iurisperitus Kiadó. Szeged, 2016. pp. 350-351, SZOMORA 2013b, p. 654
[49] BALOGH Ágnes: Az életkor jelentősége a szexuális erőszak tényállásának értelmezésénél. Magyar Jog. 2017. 5. szám. p. 283
[50] SZOMORA Zsolt: „Amicus Curiae" – Dr. Hegedűs István, a Szegedi Ítélőtábla kollégiumvezetője részére II. 1) és SZOMORA Zsolt: „Amicus Curiae" – Dr. Sulyok Tamás az Alkotmánybíróság elnöke részére. p. 3
[51] MÁRKI 2013, p. 688

Section 197 of the CC or not. Based on the proper grammatical interpretation of the statement of facts however, it can be stated that according to the system of qualification of Section 197 of the CC in its pre 1 January 2018 form qualified the narrower sense of sexual violation – as contained by the first sentence of point a) Paragraph (4) Section 197 – as a more aggravate crime. At the same time, the second sentence referred back to Paragraph (3) of Section 197, which referred further back to points 'a' and 'b' of Paragraph (1) Section 197, but was not built on Paragraph (2) at all. In the current form of the law, the issue of evaluation is clear. The aggravated instances of sexual violence committed against persons under the age of twelve are defined by points aa-ac of Point 'a' of Paragraph (4) and (4a) of Section 197 as follows: by exploiting a person who is incapable of self-defence or unable to express his will, for the purpose of sexual acts; by a family member or by a person who is responsible for the care, custody or supervision of the passive subject, or by multiple perpetrators. These three are to be evaluated as aggravated instances in spite of the fact that the sexual act was conducted as a result of consent.

My findings regarding Thesis No. 10: The amendment, which entered into force on 1 January 2018, sustained the tradition of criminal law that even if the sexual act was based on consensus, any sexual act upon a person under the age of twelve shall be classified as sexual violence. Having regarded that the legal subject of Paragraph (2) of sexual violence and the sexual abuse (Section 198 of the CC) is the same – that is to say both protect the undisturbed sexual development of the child –, furthermore – contrary to the statement of facts of sexual exploitation and sexual violence – both statement of facts lack the coercion as an element, I agree with the authors,[52] who suggest that the legislator should have placed Paragraph (2) of Section 197 into the Section on sexual abuse. Furthermore, the legislator should have defined the perpetration by a family member or by a person who is responsible for the care, custody or supervision of the passive subject as an aggravated instance. Had the legislator done so, the perpetration against a person under the age of twelve could have been placed in Paragraph (3) Section 198 with its current wording and sentence thresholds, except for the term 'sexual violence shall also include.' The aggravated cases – committed by a family member or by a

[52] HOLLÁN Miklós: A 12 év alatti gyermekek nemi fejlődésének büntetőjogi védelme. Egy törvénymódosítás margójára. Collega. 1998. évi 3. szám. p. 19, NAGY Ferenc – SZOMORA Zsolt: A házasság, a család, az ifjúság és a nemi erkölcs elleni bűncselekmények (Btk. XIV. Fejezet) de lege ferenda – II. rész. Büntetőjogi Kodifikáció. 2004/2. szám p. 24; SZOMORA argues that a possible separation of the sexual crimes committed against children and grown-ups regardless of they were committed with or without coercion would serve both practical aspects – by making the regulation more clear and better understandable – and the purpose of clearing the profile of the legal subject. See: SZOMORA 2013b, p. 657

person who is responsible for the care, custody or supervision of the passive subject, or by multiple perpetrators – maybe placed in Paragraph (4) with a sentence of imprisonment from 5 to 15 years.

My findings regarding Thesis No. 11: Based on point 'c' Paragraph (2) Section 197 and point 'c' Paragraph (2) Section 198 of the Act IV of 1978, that is to say the 'old CC' the aggravated instance of rape and the sexual assault – namely the perpetration by more than one person on the same occasion – was realised only, if several persons raped or sodomized the victim on the same occasion, knowing about each other's act. In a case from the legal practice the court of second instance came to the conclusion that the act of the three defendants, namely that they coerced the two offended parties to conduct mutual oral treat – in order to satisfy the sexual desires of the offenders – based on the above mentioned old regulations did not constitute the aggravated instance in case of the crime in question. On the other hand, the council expressed that the current version of the CC does not necessarily require the perpetration of sexual act by more than one person on the same occasion in order to state the aggravated case. Thus the aggravated form can be stated in case the offended party is coerced by more than one person to conduct sexual act with another person, who is also coerced to conduct sexual act by force or aggravated threat.[53]

In connection with perpetration by more than one person on the same occasion, as aggravated case, the commentary literature states that in order to state that the act was finished, at least two offenders shall conduct the sexual act. If two perpetrators started to exert the coercion with the aim of conducting a sexual act, or only one perpetrator conducts the sexual act it can only be evaluated as an attempt.[54] This proper analysis does not preclude the possibility of evaluation as committing the sexual act by more than one person and that such an evaluation is correct, since the commentary literature examines the case, when the intention of the perpetrators is to conduct a sexual act with the passive subject personally by the multiple perpetrators. The commentary literature examines the conditions in this regard and the issues from the point of stadium theory. The above introduced case from the practice namely when the perpetrators coerced the two offended parties to conduct mutual oral treat in order to satisfy the sexual desires of the offenders on the other hand can be regarded as an atypical case of perpetration by more than one person. Having regarded the aim of the offenders, and based on the fact that the effective wording of the CC does not require that all of the offenders shall

[53] Disctrict Court of Miskolc, Case No. B.3033/2014

[54] See: MÁRKI 2013, pp. 702-703, SINKU 2012, p. 199, SZOMORA 2013a, p. 410, SZOMORA 2019, p. 451

conduct sexual act with the passive subject – besides that the commentary literature is right – the above mentioned statement of facts constitute perpetration by more than one person on the same occasion. If all three offenders had conducted sexual act on the passive subjects, it should have been evaluated as an aggravated instance as well. Contrary to this if only one perpetrator's intention was aimed at conducting sexual act, while the other two only wanted to participate in the coercion in order to facilitate the sexual act of the third offender, that would mean that they were only co-perpetrators of the basic instance of the crime. When it comes to distinction between the basic and the aggravated instance, one should examine the intention of the perpetrator, namely whether it was aimed at conducting a sexual act or not:[55] if at least two of them had the intention to conduct sexual act – or to coerce someone to conduct such act – the act has to be evaluated as aggravated instance.

It has to be emphasized that in case of aggravated instance of perpetration – namely the perpetration by more than one person –, the offenders shall not be regarded as connives at crime, but as individual perpetrators.[56]

<u>*My findings regarding Thesis No. 12:*</u> The recodification of the sexual crimes in Germany was aimed at correcting the loopholes of the preceding version of the law and enhancing the protection of sexual self-determination. The German legislator tailored the new statement of facts of the non-consensual sexual acts to conform the requirements of the Istanbul Convention. In accordance with it, *the core element of the statement of facts of sexual assault*[57] *was determined as the recognisable will of the passive subject and the conduct of the sexual act against the recognisable will of the passive subject.*

Despite the conformity of the law's wording it is unclear how the offender of the sexual assault shall persuade the passive subject of the sexual assault to conduct sexual act without using any coercing measure and in a way that avoids evaluation of the offender's act as another Paragraph of the crime or as a totally different crime. This is particularly problematic, *when it is the passive subject who conducts sexual act on the offender without any coercing from the side of the offender, however the passive subject does not wish to do so.* In this case it is really hard to interpret the condition of 'against the recognisable will' [of the passive subject].[58]

[55] See: SZOMORA 2019, p. 451
[56] See: BH 1994. 9., BH 2000. 279., BH 2003. 271.
[57] Deutsches Strafgesetzbuch, Paragraph (1) Section 177
[58] FISCHER 2017b, pp. 1224-1225

It is unclear what recognisability means, and similarly, the law does not tell who shall recognise the opposing will of the passive subject.

The current Hungarian regulation has seen some critical comments, i.e. the sexual exploitation, which is aimed at enhancing the protection of sexual self-determination – contrary to the German regulation – *'is still based on the use of coercion […], instead of the lack of the passive subject's consent.'*[59] As a result the effective Hungarian regulation does not sanction any non-consensual sexual act.

As a result of my researches I have come to the conclusion that although the Hungarian regulation does not contain any statement of facts that would – based on the terminology of the law – expressly sanction the conduct of sexual act against the will or the lack of consent of the passive subject, referring to the judicial practice analysed in this very PhD dissertation, the effective Hungarian statement of facts – that is to say those of sexual exploitation – can be matched with the effective German regulation. Besides the enhanced protection of sexual self-determination the notion of sexual exploitation in the Hungarian regulation ex lege – contrary to the German regulation – does not raise issues like how the offender of the sexual assault *'shall'* persuade the passive subject of the sexual assault to conduct sexual act without using any coercing measure.

[59] CEDAW/C/HUN/CO/7-8. 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), para. 20

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