

VII

SIC MUR AD ASTRA

EDITORS
GERGELY GOSZTONYI
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DUNJA MILOTIĆ

Collection
of papers
on **Hungarian**
and **Croatian**
legal history 2024

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1. Violent sexual offences

The heightened danger to society posed by violent sexual offenses is reflected both in the associated penalties and in the fact that sexuality, as a phenomenon closely related to human and social existence, has always been subject to various strict regulations²³. Sexual violence refers to the act of engaging someone in any unwanted sexual activity through force, coercion, manipulation, or abuse, whether due to their age, disability, or any other reason, such as the influence of alcohol or other mind-altering substances, while the person is unable to give consent.

The definition of "decency" as a subject of criminal protection has been interpreted differently. According to older perspectives, not only legal but also moral and religious considerations expressed the criminality of satisfying sexual instincts, leading to the punishment of any extramarital sexual intercourse. The concept of decency receives criminal protection from two perspectives: (1) personal liberty and (2) societal interests related to decency. The latter aims to restrict citizens' sexual lives within certain boundaries and establish limits against "sexual instincts".

The Csemegi Code already recognized the vulnerable position of women and, although only concerning extramarital relations, began to sanction sexual violence, placing particular emphasis on the punishment for sexual violence committed against minors. The code dedicated a separate chapter to offenses related to sexual violence

²³ NAGY, Alexandra: *Az erőszakos szexuális bűncselekmények szabályozása / Ma és holnap? – birosag.hu [Regulation of Violent Sexual Crimes / Today and Tomorrow?]* https://birosag.hu/sites/default/files/2018-08/13_dok.pdf [Access on March 24, 2024].

(Chapter XIV). It detailed the sanctions associated with different sexual offenses. According to the early legal perspective, it was possible to punish offenders with violence based on the principle of retribution (Principle of Talio). The development of the law allowed for a shift in emphasis from physical violence to monetary penalties in the field of sanctions. Although domestic violence was not yet punishable, in my article, I will focus on the concept of “stuprum violentum,” namely the offense of violent sexual intercourse, and its sanctions according to the Csemegi Code. The analysis will incorporate the code’s commentary as well as subsequent court practices.

2. Historical aspects of regulating violent sexual offenses up to the Csemegi Code²⁴

The sanctioning and criminalization of violent sexual offenses have been part of the Hungarian legal system since the laws of the „Árpád era”. During this time, in addition to debauchery, adultery, and abduction, sexual violence began to be punished as well. During the reign of King István, there was no specific offense named sexual violence; it only appeared as a means of enforcing marriage. Its commission only required the payment of compensation.

Under the ruling of Ladislav I, the punishment for sexual violence became stricter, and the offense was punished by death penalty. At that time, the category of victims was limited to honourable women. The emergence of the „Buda City Law Book” and the legislation of certain free royal cities between 1244 and 1422 represented the next step. This legislation, also known as the “Tárnok Law”, sanctioned sexual violence with death penalty, similar to the previous regulation. Categorization appeared, separating sexual violence committed against virgins, virtuous and honourable women, and prostitutes.

²⁴ CZEBE, András: Az erőszakos nemi deliktumok hazai szabályozásának történeti aspektusai [Historical Aspects of Domestic Regulation of Violent Sexual Crime], *Diskurzus [Discourse]*, No. 2., 2013, pp. 3–12.

In the 47th article of King Ulászló II's decree of 1514, the regulations were tightened by also penalizing the relatives of sexual crime perpetrators. These individuals were deprived of the right to hold public office, thus falling into perpetual servitude. King Ulászló II was the first to emphasize the prevention of the offense. The Buda-decree of 1522 regulated that the lodging of military troops in churches was forbidden if it occurred against the will of the priests. This provision aimed to prevent sexual crimes committed by soldiers against nuns.

The *Praxis Criminalis*, as an independent criminal law proposal, first saw light of day in 1712. Section 13 of this proposal established the crime of violent defilement. The passive subjects of these acts were young girls, virgins, widows, and married women, and the offenders were punished by death by sword. The regulation also extended to acts against nature, including sexual contact between individuals of the same sex.

The *Constitutio Criminalis Theresiana* (1768) defined the most serious sexual offense as forcible sexual intercourse, punishable by decapitation. The crime was considered committed if the perpetrator forcibly or against the will deprived a maiden, woman, or widow of her maidenhood or womanly honour. The passive subject could only be a respectable woman.

The penal code of József II, the *Sanctio Criminalis Josephina*, enacted on January 13, 1787, was the first to sanction sexual violence not with death but with imprisonment or forced labour. It was also a novelty that the victim could claim compensation from the perpetrator, and the accomplice of the offender could be beaten without further consequences.

The medieval and early modern laws described above did not satisfy the rather complex demands of criminal law.²⁵ It was necessary to wait until the end of the 18th

²⁵ BALOGH, Elemér: Az „első” magyar büntetőkódex-tervezet [The “First” Hungarian Penal Code Draft] In: KAJTÁR, István – SZEKERE, Róbert (eds.): *Jogtörténeti Tanulmányok [Legal Historical Studies] VII.* 2001, PTE ÁJK, pp. 45–48.

century for this step. In 1795, a criminal code draft emerged that included a comprehensive elaboration of the principles and provisions of criminal law. Regarding crimes related to sexual violence, a novelty was the expansion of the passive subjects of violent sexual acts, now allowing the commission of sexual violence against intoxicated, insane, feeble-minded, mentally ill, unconscious, and misguided respectable women, as well as men. For the first time in Hungarian criminal legal history, these acts could be prosecuted upon private complaint, which is still characteristic of sexual offenses to this day.

The proposal of 1827 represented a setback in the punishment of sexual violence by narrowing down the circle of passive subjects, as it stated that the offense could only be committed against respectable women.

The proposal of 1843, associated with Ferenc Deák, did not reach the level of legislation, but it is considered ground-breaking both in terms of substantive and procedural law, as it filled the gap in unified regulation. Chapters XVIII-XXII of the proposal dealt with the criminalization of sexual offenses, with the first chapter titled 'Regarding Forcible Sexual Intercourse.' According to this chapter, forcible sexual intercourse was committed by someone who forced sexual intercourse upon a woman outside of marriage by using physical violence or threats. The regulation also extended to cases where the offender administered a substance to the victim that rendered her defenceless, taking advantage of this to engage in sexual intercourse. The crime could only be committed against a woman with whom the perpetrator was not in a valid marriage. The general rule of the bill stipulated imprisonment as punishment, but the sanction was aggravated if the offense was committed against a person who had not yet reached the age of fourteen or if the offender had a sibling or parental relationship with the victim. The proposal reintroduced the institution of compensation, which the victim could demand from the offender, considering the seriousness of the consequences and the offender's financial situation. The bill considered sexual

intercourse completed when the 'reproductive organs had already united in reality'²⁶. The regulation also encompassed the attempted stage of the offense, sanctioning it up to the maximum punishment applicable for a completed act. In cases where the passive subject suffered severe bodily harm during the sexual offense or its attempt, the draft law allowed for cumulative punishment. If the act resulted in the death of the victim, the offender had to be held accountable as a murderer. With the exception of the most serious cases, the proposal made the prosecution of sexual intercourse dependent on private complaint.

3. Sexual Offenses in the Csemegi Code

The Csemegi Code is considered the first Hungarian Criminal Code and is attributed to Károly Csemegi, the State Secretary of Justice. The code consisted of two legislative provisions, the Act 5 of 1878 on misdemeanours and the Act 40 of 1879 on offenses. Similar to the current regulations, the Csemegi Code also categorized sexual offenses in a separate chapter titled 'Offenses against Modesty' in Chapter XIV. Examining the content of the first section (Section 232), we can conclude that the passive subject of the offense could only be a woman. There are two similarities with previous regulations. Firstly, it was a criterion that the perpetrator could not be the spouse of the victim, and secondly, the protection extended to victims who were unconscious, incapable of expressing their will, or unable to defend themselves.

The concept of threats is defined in Section 234 of the Csemegi Code. According to this, a threat can be defined as something that '*causes justified fear in the threatened person or their present relative about the immediate occurrence of a serious offense endangering their or their relative's life or physical integrity*'.²⁷ In the code, individuals

²⁶ Deák's legislative proposal from 1843.

²⁷ 1878. évi 5. törvénycikk a magyar büntetőtörvénykönyv a büntettekről és vétségekről [Act 5 of 1878 of the Hungarian Penal Code on Crimes and Misdemeanours], 234. §

under the age of twelve were deemed incapable of expressing their will. As a result, any sexual act committed against them was considered forcible sexual intercourse.

Section 233 of the Code deals with offenses against modesty. It distinguishes sexual violence from attempted forcible intercourse by the absence of an intention to engage in intercourse. Depravity refers to severe acts that serve to arouse or satisfy sexual desire but exclude intercourse. Depravity encompasses all direct physical contact-related sexual abuses that do not fall under the definition of forcible sexual intercourse. The offense of sexual violence could only be established if no more serious offense was committed.²⁸

The Csemegi Code sanctioned forcible sexual intercourse with a longer duration (10-15 years) of penal servitude, while for sexual violence, a shorter duration (5-10 years) of imprisonment was imposed on the offenders, along with the possibility of dismissal from office.²⁹

Committing forcible sexual intercourse or sexual violence against a direct blood relative or sibling was considered an aggravating circumstance, as well as if the perpetrator committed the offense against a person entrusted to their guardianship, care, teaching, education, supervision, medical treatment, or custody. Additionally, it was considered an aggravating circumstance if the victim lost their life during the commission of these offenses, leading to life imprisonment according to Section 237.

Similar to Ferenc Deák's draft proposal, the Csemegi Code also made the prosecution dependent on private complaint, except in a few cases according to Section 239. These exceptions included situations where (1) another related offense subject to official prosecution was committed simultaneously, (2) a qualified case arose, or (3) the perpetrator caused the death of the victim. Once the private complaint was submitted, it could not be withdrawn.

²⁸ Act 5 of 1878, 235. §

²⁹ Act 5 of 1878, 235(2). §

The law did not punish the offender if they married the victim before the announcement of the verdict, which was made possible by Section 240 of the Csemegi Code. According to the justification, this provision was included in the Code based on the recommendation of judicial policy. The Code also penalized acts against nature. This offense could be committed by men against each other through violence or threats. The sanction for this offense was imprisonment. If the victim died as a result of the offense against nature, the perpetrator was sentenced to life imprisonment. The offense of seduction was also formulated in the Csemegi Code. Seduction was committed by a parent against their natural or legitimate child if they enticed their daughter to engage in intercourse with someone else or enticed their daughter or son to commit sexual acts, whether natural or against nature.³⁰

4. Separation of the concepts of sexual intercourse and depravity in the Csemegi Code

The Hungarian criminal legislation between 1878 and 2012 was based on the pair of concepts of sexual intercourse and depravity, so it is important to define the difference and boundary between the two terms. The Csemegi Code does not provide a precise definition for these two concepts, and they are still not encountered in today's criminal codes. The development of these concepts was left to judicial practice, which evolved over centuries.

The concept of sexual intercourse is used differently in judicial practice compared to its everyday meaning, placing the burden on the perpetrator, which raises questions about the application of the principle of *nullum crimen sine lege scripta*, which prohibits the application of customary law or judicial law against the accused. Opposing viewpoints have emerged regarding when we can speak of the occurrence of sexual intercourse. According to some theories, even external contact of the sexual organs can be classified as sexual intercourse, while others argue that at least partial

³⁰ The modern equivalent of seduction is pimping.

penetration is necessary to establish the occurrence. In his book from 1937, Pál Angyal expressed that *'The prevailing view in our domestic literature is that any act during which the male sexual organ comes into contact with the female sexual organ can be understood as sexual intercourse'*³¹.

Based on the above, within the concept of sexual intercourse, three distinctions need to be made:

1. Sexual intercourse in the physiological sense: This concept includes penetration as well as ejaculation.
2. Sexual intercourse in the everyday sense: Only the act of penetration.
3. Sexual intercourse in the criminal law sense: Contact between sexual organs with the intention of engaging in physiological or everyday sexual intercourse.

As a conclusion, we can infer that according to the criminal law concept of sexual intercourse, only heterosexual intercourse is possible, and any other act is considered depravity in criminal law. Depravity can also be present if the perpetrator's intention is not directed towards sexual intercourse in the physiological sense.

Depravity, as a central element of sexual violence, is addressed in criminal law. According to the formulation in the Csemegi Code, the difference between sexual violence and depravity is that *'the former is committed through stuprum, while the latter exists when no stuprum or its attempt has been committed'*³². Therefore, any severely offensive act against modesty, excluding sexual intercourse, that serves to arouse or satisfy sexual desire is considered depravity. The objective elements of depravity include the severely offensive nature of the act, while the subjective element involves motivation driven by sexual desire, meaning that the perpetrator aims to arouse,

³¹ ANGYAL, Pál: *A szemérem elleni bűntettek és vétségek [Crimes and Offenses Against Modesty]* Attila-Nyomda Rt., Budapest, 1937, p. 34.

³² 1878. évi 5. törvénycikk indoklása a magyar büntető törvénykönyv a bűntettekről és vétségekről [Justification of Act 5 of 1878 of the Hungarian Penal Code on Crimes and Misdemeanours].

intensify, or satisfy their own, the victim's, or a third party's sexual desire. Without a sexual motive, the elements of depravity are not fulfilled.³³

5. A legal case³⁴

The general part of the Csemegi Code remained in validity in Hungarian law until 1951, while the special part until 1962. Therefore, I will present a case and its judgment from the year 1890, which demonstrates the difference between attempted forcible sexual intercourse and the offense against depravity.

According to the facts of the case, the perpetrator approached the victim on a road leading through the forest, urging her to engage in sexual intercourse. As the victim did not comply with the demand, the defendant threw her to the ground, lifted her clothes, and attempted to engage in sexual intercourse with her. However, another woman forcibly pulled him away from the victim. The victim had the opportunity to escape and run away, but the perpetrator followed her and again threw her to the ground. He was unable to complete the sexual intercourse because the victim kept struggling and moving. Seeing that he could not achieve his goal, the defendant left. As the perpetrator did not prepare himself for the commission of the crime other than using force, his actions can be classified as preparatory acts based on the facts of the case. However, during this time, he forcefully threw the victim to the ground, lifted her clothes, and touched her private parts, thus committing an offense of assault under Section 233 of the Csemegi Code (hereinafter referred to as the Criminal Code).

When determining the punishment, the court took into account the defendant's lack of criminal record, his confession, and his intoxicated state as mitigating circumstances. However, the court considered it an aggravating circumstance that the

³³ SZOMORA, Zsolt: A fajtalanság és a nemi cselekmény [Bestiality and Sexual Acts]. *Acta Universitatis Szegediensis: Acta Juridica et Politica*, No. 17, 2007, pp. 1–56.

³⁴

https://adt.arcanum.com/hu/view/BuntetoJogTara_25/?query=szemérem%20elleni%20erőszak%20jog eset&pg=117&layout=s [Access on March 24, 2024].

offense was committed in the forest and was repeated. As a result, the sentence was set at 9 months of imprisonment and a 3-year deprivation of office.

However, the Royal Court of Kassa partially modified the judgment of the royal court. Instead of convicting the defendant of the offense of indecent assault, it found him guilty on the offense of forcible sexual intercourse as defined in Section 232 (1) of the Criminal Code. Based on Sections 96, 232, and 66 of the Criminal Code, the court modified the sentence to two years of penitentiary. The appellate court's reasoning was that although forceful sexual intercourse did not occur in either case, it could not be completed due to the intervention of an external party and the resistance of the victim. The defendant acted independently and separately in each case, initiating two instances of forcible sexual intercourse. Considering that both actions of the defendant went beyond preparatory acts, his guilt can be established as an attempt to commit the offense of forcible sexual intercourse under Section 232 (1) of the Criminal Code, based on Section 65.

The Royal Curia also modified the judgment, this time sentencing the defendant to two years of imprisonment. According to the Curia's reasoning, although the defendant attacked and threw the victim down twice in a continuous sequence, he was unable to complete the offense due to an unforeseeable obstacle beyond his control. Based on this, the Curia concluded that only one act was involved, albeit committed separately but in a continuous sequence. Therefore, there is no cumulative criminal offense. Thus, the court found the perpetrator guilty of attempted forcible sexual intercourse as defined in Section 232 (1) of the Criminal Code, based on Section 65.

Based on this case law, it is evident that early courts faced difficulties in distinguishing between attempted forcible sexual intercourse and the offense of indecent assault. In addition to criminal law, moral considerations played an important role in the assessment of the facts.

6. Conclusion

The expansion and narrowing of criminal law regulations regarding violent sexual offenses have always been influenced by prevailing public opinion, as well as the general situation and ideology of society.

The sanctioning of such acts has been present in Hungary since the time of its foundation, gradually accompanied by increasingly severe punishments for the offenses. Notably, the death penalty was one of the most prominent, which could be imposed on perpetrators of violent sexual crimes until the 18th century. Monarchs sometimes broadened, sometimes narrowed the scope of passive subjects, and neither in the Middle Ages nor at the beginning of the modern era did a law emerge that would have been lasting and satisfied the complex needs of criminal law.

The Csemegi Code, known as the first Hungarian criminal code, gained legal force in the late 19th century. Alongside violent sexual intercourse, the Code also sanctioned indecent assault, which, in addition to more serious punishable cases, already contained significant conceptual elements such as obscenity or threats.

Distinguishing between depravity and sexual violence is an important doctrinal question, and a perfect demarcation does not exist to this day. The differentiation of the two offenses is based on judicial discretion, so it is through judicial practice that the two sets of circumstances can be distinguished from each other. The case presented in the article highlights how a specific set of circumstances was interpreted in early law and the mitigating and aggravating circumstances taken into account in sentencing. In conclusion, it can be stated that the regulation of violent sexual offenses in the current Criminal Code is based on the factual situations and concepts defined in the Csemegi Code.