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***How Act C of 2012 Transformed the Regulation of  
Violent Sexual Crimes in Hungary***

**1. INTRODUCTION**

After the change of regime, the rather differentiated Hungarian governments followed different criminal policies which significantly transformed the penal provisions established by Act IV of 1978. As a result, Act C of 2012 on Criminal Code was enacted on 1<sup>st</sup> July 2013. This transformation is also due to the accelerating scientific progress and the harmonization of law caused by the accession to the European Union.<sup>1</sup>

<b>How Act C of 2012 transformed the regulation of violent sexual crimes</b>		
<i>Act IV of 1978</i> <i>Chapter XIV:</i> Crimes against connubiality, family, youth and sexual morality	➔	<i>Act C of 2012</i> <i>Chapter XX:</i> Offenses against children and against family law <i>Chapter XIX:</i> Sexual freedom and sexual offenses
<i>197. § Rape</i>	➔	<i>197. § Sexual violence</i>
<i>198. § Sexual assault</i>	➔	<i>196. § Sexual exploitation</i>
<i>“sexual extortion”</i>	➔	

**1. table (edited by the author)**

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<sup>1</sup> Justification of Act C of 2012 on Criminal Code.

## **2. SEXUAL FREEDOM AND SEXUAL OFFENSES AS AN INDEPENDENT CHAPTER**

As it can clearly be seen from the table above, the previously effective Criminal Code disposed crimes against marriage, family, youth and sexual morality in chapter XIV, which was broken down into two independent chapters by Act C of 2012: chapter XX – offenses against children and family law – and chapter XIX – on sexual freedom and sexual offenses.

The new chapter more specifically expresses the defended legal matters because sexual integrity, sexual self-determination and sexual freedom appear besides sexual morality as previously dominating legal matters, therefore, it not only concentrates on public interest but on the private sector, too.<sup>2</sup> This can be positively interpreted regarding Hungarian legal literature formulated in the recent decades, which requires the creation of a new chapter, as sexual morality itself is inappropriate as the protected legal interest of sexual crimes.

The modified chapter above was also justified by international legislations like the annual Convention in New York in 1950, the 182 ILO Convention, the Optional Protocol to the Convention on the Rights of the Child, the Lanzarote Convention, the CAHVIO Convention and Directive 2011/93/EU of the European Parliament and the Council. These documents hold such social and international demands among these criminal offenses which emphasize the defense of persons under eighteen years of age. Therefore, significant changes took place in the structure and content of violent sexual crimes, listed under chapter XIX in the new Criminal Code. New concepts and new conclusions were formed, creating consistency with international terms; such as the factum of sexual violence which combines rape and sexual assault, the factum of sexual exploitation in order to fix the sanctioning of sexual extortion,

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<sup>2</sup> Ibid.

and the concept of sexual activity which attempts to resolve the conceptual problem caused by sexual intercourse and lewd act.

Criminal offenses under the effective chapter can be put into three categories based on their common legal matters:

1. crimes against sexual freedom, like sexual exploitation and sexual violence;
2. crimes against children's healthy sexual development like sexual abuse, exploitation of child prostitution, and child pornography;
3. and crimes against sexual relationship policies adopted by the society like incest, assisting prostitution, living from earnings from prostitution, and indecent exposure.<sup>3</sup>

### 3. SEXUAL EXPLOITATION AS NEW STATUTORY PROVISION

#### 3.1. *Legal reasons behind the modification*

Act IV of 1978 penalized rape and sexual assault if sexual intercourse or lewd act was realized by violence or imminent duress against life or bodily integrity. The legal practice of this period certified sexual act as duress if it was implemented by an unqualified threat without the voluntary consent of the injured party.<sup>4</sup> Legislators responded with a new statutory approach to it, called sexual exploitation, which punished the so-called sexual extortion more severely than before. Therefore, the regulation turned towards a different direction which is preferred by domestic and international legal aid organizations and associations.

The creation of sexual exploitation – as a new statutory provision – was justified by the Lanzarote Convention and Directive

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<sup>3</sup> BELOVICS, ERVIN – MOLNÁR, GÁBOR MIKLÓS – SINKU, PÁL: *Büntetőjog II. Különös rész. A 2012. évi C. törvény alapján* [Criminal Law II. – Specific Part. Based on Act C of 2012], 2012, HVG-ORAC, Budapest, 172.

<sup>4</sup> Act IV of 1978 on the Criminal Code, Art. 174., Art. 197. para. (1), Art. 198. para. (1).

2011/93/EU of the European Parliament and the Council, and declares the following crimes as punishable:

1. engaging in sexual activity with a person under eighteen years of age where coercion, force or threats is used; or
2. applying abuse based on a recognized position of trust, authority or influence over a child, including abuse within the family; or
3. applying abuse in a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.<sup>5</sup>

Directive 2011/93/EU also determines the lowest limit of the sentence's upper limit and places the crime committed to the injury of the parties – who do not reach the consent age limit – under severe judgment. Consequently, sexual exploitations committed to the injury of parties under eighteen and fourteen years of age appear as qualified cases in Act C of 2012. Furthermore, if sexual exploitation is committed by a family member or against a person who is in the care, custody or supervision of or receives medical treatment from such family member, or, if abuse is applied based on a recognized position of trust, authority or influence over the victim, it is considered as a qualified case, as well. The recognized position of authority or influence – between the perpetrator and the injured party – is a newly formulated constituent element which is beyond those previously described relationships but is capable of giving rise to other personal or appending relations like a cousin or a neighborly relation. Additionally, this factum is able to transpose the provisions of the CAHVIO Convention as it encompasses every coercive behavior that causes the injured party not to consent voluntarily.<sup>6</sup>

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<sup>5</sup> The 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 (hereinafter: Directive 2011/93/EU), Art. 3. para. (5) (III), and the Lanzarote Convention, Art. 18. para. (1) point (b).

<sup>6</sup> Justification of Act C of 2012 on the Criminal Code.

### ***3.2. Detailed examination of the relevant statutory provision***

The protected legal interest behind sexual exploitation is the social interest regarding freedom of sexual life of human beings. Sexual freedom behooves every living natural person on a basic legal level, therefore, the existence of total legal capacity is not a condition of passive subjectivity, namely, people over twelve or with diminished capacity can become passive subjects of sexual exploitation without further restriction. This raises the question: whether the complete absence of criminal capacity would impact passive subjectivity of sexual exploitation. The answer is no if the injured party is incapable of demonstrating consent in relation to sexual activities and sex practices.

Both expressions of criminal conduct are clearly visible from the factum of sexual exploitation, namely, the coercion to perform or tolerate sexual activities. Sexual act appeared as a new criminal concept in Act C of 2012, which means sexual intercourse and any gravely indecent and obscene act primarily for sexual purposes, intended to simulate or satisfy sexual desire. Besides sexual intercourse, it refers to sexual activities which correspond to lewd act in the common parlance.<sup>7</sup>

In my opinion, – with the creation of this definition – legislators solved the conceptual problem caused by sexual intercourse and lewd act,<sup>8</sup> as sexual intercourse – during the commitment of violent sexual crimes – can be interpreted as part of the lewd act and also concluded as a criminal conduct.

One actively cooperates as long as the injured party is forced to perform sexual activity. In the case of tolerance, cooperation turns into passive conduct.

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<sup>7</sup> Act C of 2012 on the Criminal Code, Art. 459. para. (1) point 27.

<sup>8</sup> NAGY, FERENC – SZOMORA, ZSOLT: A házasság, a család az ifjúság és a nemi erkölcs elleni bűncselekmények (Btk. XIV. fejezet) de lege ferenda [Crimes Against Connubiality, Family, Youth and Sexual Morality, Chapter XIV, De Lege Ferenda], in *Büntetőjogi Kodifikáció*, Vol. 2. No. 18. (2004) 18.

The factum of sexual exploitation can only be implemented with violence or threat. In this case, violence is only factual if it is directed against a person or its nature bends will. Threat is to be understood as a declaration of intention to cause considerable harm so as to make the person who is the target of the threat fearful by such declaration.<sup>9</sup> The first half of the definition is called the material side, while its second half is called the subjective side. As a result, the injured party acts contrary to his/her free will.<sup>10</sup>

Sexual exploitation is classified as a materialistic criminal offense which results in the sexual act itself or the toleration of sexual act against the passive subjects' free will. Perpetrators will be held accountable for attempting sexual exploitation if they begin the threat without totally performing it. Otherwise, offense is considered as consummated.

The offender of sexual exploitation can be anyone. Complicity occurs if the offender, knowingly and voluntarily, helps another person to commit the crime. The basic case of sexual exploitation may relate to abetting or aiding. This criminal activity can only be implemented with the offender's straight intent.<sup>11</sup>

#### **4. SEXUAL VIOLENCE AS NEW STATUTORY PROVISION**

##### ***4.1. Legal reasons behind modification***

The re-regulation of rape and sexual assault was necessary because Hungary signed the Lanzarote Convention on 29<sup>th</sup> November 2010, and EU Member States accepted Directive 2011/93/EU in December 2011, which declare the following crimes as punishable:

1. engaging in sexual activities with a person under eighteen years of age where coercion, force or threat is used; or

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<sup>9</sup> Act C of 2012 Art. 459. para. (1) point 7.

<sup>10</sup> SZOMORA, ZSOLT: Az erőszakos nemi bűncselekmények kényszerítési eleméről [Coercion during violent sexual crimes], in *Büntetőjogi Kodifikáció*, Vol. 8. No. 2. (2008) 30.

<sup>11</sup> BELOVICS – MOLNÁR – SINKU: *op. cit.* 174.

2. applying abuse based on a recognized position of trust, authority or influence over a child, including abuse within the family; or
3. applying abuse in a particularly vulnerable situation of a child, notably because of a mental or physical disability, or a situation of dependence.<sup>12</sup>

Both legislations use the word child on persons under eighteen years of age. Directive 2011/93/EU also determines the lowest limit of the sentence's upper limit and it places the crime committed to the injury of parties – who do not reach the consent age limit – under severe judgment, which is also normative for the Hungarian legislation.

Act IV of 1978 penalized rape and sexual assault if sexual intercourse or lewd act was realized by violence or imminent duress against life or bodily integrity.<sup>13</sup> Over the years this case-law has become clearer, which made the interpretation and application of duress and qualified threat unified. Therefore, Act C of 2012 continued to apply it. Accordingly, the basic case of sexual violence is committed when the perpetrator uses force or threat against the life or bodily integrity of the victim to perform or tolerate sexual act.

Consequently, sexual exploitations committed to the injury of the parties under fourteen and twelve years of age appear as qualified cases having regard to Directive 2011/93/EU. Furthermore, a qualified case can be realized more than once at the same time.<sup>14</sup>

In the case of the previous legislation, sexual relationship established with a person under twelve years of age entailed the fact of rape or sexual assault. Furthermore, criminal liability was established on the fact of seducement in case of victims between twelve and fourteen years of age. With the creation of Act C of 2012, legislators repealed the presumption, which deemed persons under

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<sup>12</sup> Directive 2011/93/EU, Art. 3. para. (5) (III), and the Lanzarote Convention, Art. 18. para. (1) point b).

<sup>13</sup> Act IV of 1978 on the Criminal Code, Art. 174., Art. 197. para. (1), Art. 198. para. (1).

<sup>14</sup> Directive 2011/93/EU Art. 3., Art. 5. para. (2)-(3), Art. 6.

twelve as incapable of defense. This can be explained by the fact that the new Criminal Code explicitly refers to the age of victims. Therefore, Act C of 2012 assigns a higher range of punishment to sexual violence.<sup>15</sup> Namely, legislators solved the dogmatic problem<sup>16</sup> which stemmed from the commitment against victims under twelve.

In addition, the new Criminal Code punishes the assurance of necessary or facilitating conditions of sexual violence regarding its seriousness. This primarily involves the preparation of the scene and the guaranteeing of narcotics.<sup>17</sup>

#### **4.2. Detailed examination of the relevant statutory provision**

The protected legal interest behind sexual violence – similarly to sexual exploitation – is the social interest regarding freedom of sexual life of human beings. Its passive subject can be anyone regardless of age and gender.

The criminal conduct of sexual violence has two expressions: sexual exploitation and consumption for sexual act. Sexual act appears as a common element in both expressions. The concept of sexual intercourse in criminal context is worth to consider. According to previous legislations, sexual intercourse was consummated if genital contact occurred with sexual intent.<sup>18</sup> This approach is no longer maintained. According to the special provisions of the new Criminal Code, sexual intercourse can be interpreted as part of lewd act and also concluded as a criminal conduct.

Sexual exploitation – as the first expression of the criminal offence – can be committed with two interdependent acts, namely, with sexual act and coercion. There is an objective and instrumental relation between these conducts in which sexual intercourse appears as an objective action while coercion appears as an instrumental

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<sup>15</sup> Act C of 2012 on the Criminal Code, Art. 197.

<sup>16</sup> TÓTH: *op. cit.* 298.

<sup>17</sup> Justification of Act C of 2012 on the Criminal Code.

<sup>18</sup> BELOVICS – MOLNÁR – SINKU: *op. cit.* 177.

action. Sexual violence's second expression is realized by the sexual act itself.

The method of perpetration needs to be evaluated in both expressions. Sexual violence is punishable if committed by force or threat against life or bodily integrity of the victim or a person is exploited who is incapable of self-defense or unable to express his/her will for the purpose of sexual act:

1. Violent conduct shall mean any act of aggression and undue influence exerted on a person by the application of physical force, even if it does not result in bodily injury.
2. The concept of threat sets dual barriers in the case of sexual violence. It marks those values which threat should be directed against and also refers to its direct nature. Namely, threat should be directed against the life or bodily integrity of the victim and it should be suitable to break victims' own will. By the latter we mean the implication of psychological impact which results in the detriment of the victim.
3. When injured parties are incapable of defense, they are unable to perform physical resistance against the attacks launched against them. Persons who are temporarily or permanently unable to express their resistance fall into this category, as well.<sup>19</sup>
4. When victims are incapable of exercising free will, they are unable to perform resistance physically, which can be transitional – for example sleep, faint, intoxication or narcosis – and permanent nature – in case of mental incapacity. The latter nature can be remedied differentially because the victim is capable of exercising free will during his/her diminished capacity. Therefore, criminal offence is not implemented in case of agreement. In the case of lacking criminal capacity the subject under examination is the extent of incapability of exercising free will. If injured parties prove

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<sup>19</sup> Act C of 2012 on the Criminal Code, Art. 459. para. (1) point 29.

to be capable of exercising free will in respect of sexual activity, their consents are legally relevant.<sup>20</sup>

Sexual violence should be judged if perpetrators commit a sexual act with a person under the age of twelve or force such person to perform sexual act. With the creation of Act C of 2012, legislators repealed the indisputable presumption which deemed persons under twelve as incapable of defense.<sup>21</sup>

Sexual violence is classified as a materialistic criminal offense which results in sexual activity. Perpetrators can be hold accountable for attempting sexual violence if they begin the coercion without totally performing it. Art. 197. para. 5 records the preparation of the criminal conduct, namely, any person who provides the means necessary for or facilitating the commission of sexual violence is guilty. This primarily involves the preparation of the scene or the guaranteeing of narcotics.<sup>22</sup>

The perpetrator of sexual violence can be anyone irrespective of gender or sexual capacity. Complicity occurs if the person performing the periodic behavior is different from the person performing the sexual act. If sexual act is committed by two or more people jointly – knowing each other’s activity – they become independent perpetrators of sexual violence, namely, it will be judged as an aggravating circumstance.<sup>23</sup> Sexual violence – similarly to sexual exploitation – can only be implemented with the perpetrator’s straight intent.

The aggravating circumstances of sexual violence can be found under Art. 197. para. 3 and 4. The penalty is more severe if sexual violence is committed:

1. against a person under the age of eighteen; or
2. by a family member or against a person who is in the care, custody or supervision of or receives medical treatment from

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<sup>20</sup> BELOVICS – MOLNÁR – SINKU: *op. cit.* 178.

<sup>21</sup> Act C of 2012 on the Criminal Code, Art. 197. para. (2).

<sup>22</sup> Act C of 2012 on the Criminal Code, Art. 197. para. (5).

<sup>23</sup> Act C of 2012 on the Criminal Code, Art. 197. para. (3) point c).

- such family member, or if abuse is based on a recognized position of trust, authority or influence over the victim, or
3. by more than one person on the same occasion,<sup>24</sup> in full knowledge of each other's acts;<sup>25</sup> or
  4. by a family member or against a person who is in the care, custody or supervision of or receives medical treatment from such family member, or if abuse is based on a recognized position of trust, authority or influence over the victim, or by more than one person on the same occasion, in full knowledge of each other's acts against a person under the age of twelve; or<sup>26</sup>
  5. by a family member or against a person who is in the care, custody or supervision of or receives medical treatment from such family member, or if abuse is based on a recognized position of trust, authority or influence over the victim, or by more than one person on the same occasion, in full knowledge of each other's acts against a person who has reached the age of fourteen.<sup>27</sup>

The counting of sexual violence adjusts to the number of victims. In other words, multiple sexual activities performed by the same perpetrator at the same time against the same victim forms a natural union, while a sexual act performed with unified determination in different times against the same victim eventuates cumulateness.

Sexual violence can be judged in a conglomeration with sexual exploitation if the perpetrator continues to perform sexual activities with the victim who became twelve years of age. Formal deficiency forms if the perpetrator violates the victim's personal freedom during sexual violence but if it is separated in time and space, accumulation should be judged. Simple factor merges into the basic factum every

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<sup>24</sup> Bkv. 27.

<sup>25</sup> Act C of 2012 on the Criminal Code, Art. 197. para. (3).

<sup>26</sup> BELOVICS – MOLNÁR – SINKU: *op. cit.* 180.

<sup>27</sup> Act C of 2012 on the Criminal Code, Art. 197. para. (4).

time, if it was committed as the result of sexual violence.<sup>28</sup> Aggravated factor is recognized as an exception, which accumulates with sexual violence. Homicide committed with malice aforethought or with malicious motive should be judged if homicide takes place in the course of sexual violence. Mortality caused by factor should be judged in accumulation with sexual violence, if the result occurs by the negligence of the perpetrator.

## 5. THE PROBLEM OF THE OPERATIVE REGULATION

The previous legislation penalized rape and sexual assault within the context of violent sexual crimes to which Hungarian legal literature responded with strong criticism. This criticism included the unsuitable legal matter of violent sexual crimes, the statutory indeterminacy of sexual intercourse, incorrect formulation of lewd act, passive subjectivity of persons under twelve years of age, concentration of factums, and modification of the chapter.<sup>29</sup>

In my opinion, Act C of 2012 can be positively interpreted based on the critics mentioned above. Namely, the operative Criminal Code penalizes violent sexual crimes under a new and independent chapter. The new Chapter more specifically expresses the defended legal interests because sexual integrity, sexual self-determination and sexual freedom appear besides sexual morality as the previously dominating legal interest.<sup>30</sup> New concepts and new conclusion of facts were formed, creating consistency with international terms such as the fact of sexual violence which combines rape and sexual assault, the fact of sexual exploitation in order to fix the sanctioning of sexual extortion, and the concept of

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<sup>28</sup> Bkv. 34.

<sup>29</sup> TÓTH, ÁRON LÁSZLÓ: A nemi erkölcs ellen erőszakos bűncselekmények hatályos szabályozásával kapcsolatos néhány problémáról [A few problems connected to the current legal regulation of violent crimes against sexual morals], in *Iustum, Aequum, Salutare*, Vol. 3. No. 4. (2007) 235.

<sup>30</sup> Justification of Act C of 2012 on the Criminal Code.

sexual activity, which resolves the conceptual problem caused by sexual intercourse and lewd act. During the detailed examination of violent sexual crimes I noticed the following problem.

The perpetrator of sexual exploitation uses violence or threat – under the statutory definition of duress<sup>31</sup> –, which causes the victim to perform or tolerate sexual act.<sup>32</sup> This factum also appears in the first expression of the criminal conduct of sexual violence as legislators bound the mode of perpetration to violence and limited threat.<sup>33</sup>

Therefore, the problem of operative regulation is the duplication of violence as the mode of perpetration. In my opinion, this will be a key problem of judicial discretion in the future because legal separation of the examined criminal conducts raises further questions.

<i>Proposal to solve the existing problem of the operative regulation</i>	
<i>Sexual exploitation</i>	
196. § (1) Any person who <i>forces</i> another person to perform or tolerate sexual activities	➔ 196. § (1) Any person who <i>threatens</i> another person to perform or tolerate sexual activities is guilty of felony.

## 2. table (edited by the author)

By making the statutory definition of sexual exploitation more specific, it can solve the dogmatic problem shown above. Namely, emphasizing threat on which sexual extortion is based and neglecting violence. My train of thought is based on the fact that perpetrators psychologically – instead of physically – influence victims during sexual extortion.

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<sup>31</sup> Act C of 2012 on the Criminal Code, Art. 195.

<sup>32</sup> Act C of 2012 on the Criminal Code, Art. 196. para. (1).

<sup>33</sup> Act C of 2012 on the Criminal Code, Art. 197. para. (1) point a).

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- [6] Bkv. 27.
- [7] Bkv. 34.