IMPACT OF ANTI-GENDER MOVEMENTS ON CRIMINAL LAW PROVISIONS ON SEXUAL VIOLENCE INCLUDING RAPE

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Outline

CHAPTER ONE: ´Sexual violence including rape´ law analysis

This chapter will examine the current criminal law provisions on sexual violence including rape in selected countries. It is an attempt to identify the main strengths but also to point out the weaknesses of the legislation and its application with regard to criminalizing sexual violence and rape. The foundation of the examination consists of requirements and principles presented in article 36 of the Convention.

In the first section of the chapter, the Austrian Criminal Code provisions on rape, sexual coercion, and violation of the right to sexual self-determination will be analyzed. Specifically in this section, special focused will be paid on conclusions drawn from the GREVIO monitoring procedure, since Austria is the only from the selected countries which have adopted the Convention and among the first of all also have gone through the full GREVIO monitoring cycle.

In the second section of this chapter, the current legal provisions on rape and sexual coercion of the Criminal Code of the Czech Republic will be surveyed. Important decisions and rulings of the Czech courts related to the interpretation of the crucial terms related to the crime of rape and crime of sexual coercion will be examined, and an attempt to identify their positive as well as negative elements will be made.

In the third section of this chapter, legal provisions on the crime of rape and the crime of sexual violence in the Slovak Criminal Code will be examined. Similarly to the previous sections, judgments of the courts on the engagement of interpretations of key legal elements of the selected provisions will be surveyed. Again, their beneficial, as well as their disadvantageous aspects, will be studied.

Which path to follow? Selected issues of examined legal provisions

In this chapter, an additional analysis of the selected elements and of the positive as well as the negative aspects of the criminal law provisions on the sexual violence including rape in Austria, Czech Republic and Slovakia will be carried out. A closer look will be given on possible effects of force-based definitions of sexual violence crimes, an elaborated part on consent-based law provisions will be presented. Briefly an issue of linguistics related to especially the crimes of rape will be examined and an analysis of very broad range of penalties for fairly similar crimes will be provided as well. In conclusion of the first chapter, a brief summary of (non)compliance of the criminal provisions related to sexual violence including rape with the requirements and principles of article 36 of the Convention will be offered.

CHAPTER TWO: Adoption of the Istanbul Convention in a socio-political context

This chapter focuses on surveying the socio-political context regarding the adoption of the Istanbul Convention in the selected countries. The chapter endeavors to identify the main actors on both sides of the discussions, the supporters as well as the opponents to the Convention´s adoption. Furthermore, it surveys the main arguments claimed especially by the opposition side of the debate.

The study of socio-political context is slightly different in the section analyzing the Austrian situation due to the fact that the Convention has been successfully ratified over five years ago. Therefore, in the Austrian section, the study focuses partly on the backlash against the Convention during the ratification period but focuses more on the current challenges in the field of protecting women and girls from violence and discrimination.

In the second section of this chapter which focuses on the Czech Republic, the socio-political context regarding signing and the current (counter) ratification efforts will be examined. The Czech Republic signed the Convention among the last, in 2016. Although, the Government has been reassuring its committed to ratify the Convention within a reasonable time-frame, nevertheless, several challenges occurred which caused the significant postponements of the ratification. Currently, heated debates are ongoing because the Czech Parliament should take a vote on ratification of the Convention in the near future.

The third section of the second chapter will focus on analyzing the socio-political context of the adoption of the Convention in Slovakia. The signing of the treaty happened without much of the public attention, among the first countries on the very first day of the Convention´s opening for signing. Soon after, but most visibly related to the organizing of the ´referendum on the family´ in 2015, the opposing voices calling to halt any progress in ratification of the Convention started gaining power. Seven years after the signature, Slovakia is experiencing a rather backward trend in the progress of protection of women against violence and discrimination symbolically represented by the unwillingness to ratify the Istanbul Convention.

Socio-political context and anti-gender movements

The final part of this thesis will focus on identifying and analyzing the main clusters of the opponents to the adoption of the Istanbul Convention, which, although often denied by the opposing actors themselves, echoes their general opposition to any progress in the field of prevention and elimination of violence against women and domestic violence. In this part, the national anti-gender initiatives will be framed in a broader European (or even global) context of anti-gender movements. Moreover, there will be an attempt to suggest possible rather short-term

prognosis mainly regarding to completion of the ratification processes of the Convention in the Czech Republic and Slovakia and regarding the general progress or regress in Austria.

Introduction

In December 2008, the Committee of Ministers of the Council of Europe established an Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO). It was composed of governmental representatives from the member states of the Council of Europe. The goal of the committee was to draft a text of a legally binding international instrument with an aim to "*prevent and combat domestic violence, including specific forms of violence against women, other forms of violence against women, and to protect and support the victims of such violence as well as prosecute the perpetrators.*" (Council of Europe 2011a, para. 19) Council of Europe was committed to developing a regional human rights mechanism similar to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (also known as the Convention of Belém do Pará, 1994) adopted by the Organization of American States, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (also known as the Maputo Protocol, 2003) adopted by the African Union. Within two years, the work of CAHVIO was completed and the text was submitted to the Committee of Ministers (Council of Europe, 2018c). The Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter ´the Istanbul Convention´ or 'the Convention') was adopted by the Committee of Ministers of the Council of Europe on 7 April 2011. The Convention opened for signature in Istanbul (therefore the abbreviated title of ´Istanbul Convention´) on the 11th of May 2011 and was instantly signed by 13 states, including Austria and Slovakia. Currently, at the time of writing, the Convention has

been ratified by 33 states. An additional 12 states have signed the treaty but (hopefully) are yet to ratify. Only two states have not yet signed, Russia and Azerbaijan (Council of Europe, 2018a). The proclaimed purpose of the Convention is to:

> "*a. protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;*
>
> *b. contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;*
>
> *c. design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;*
>
> *d. promote international co-operation with a view to eliminating violence against women and domestic violence;*
>
> *e. provide support and assistance to organizations and law-enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence*" (Council of Europe, 2011a).

The Convention has codified and further developed the current global standards in the field of elimination of violence against women and domestic violence. It was inspired by the application of the CEDAW Convention and General Recommendation No. 19 of the CEDAW Committee as well as by the jurisprudence of the European Court of Human Rights (Simonovic, 2014). The Convention is currently thought to be one of the most complex mechanisms in the field of prevention and elimination of violence against women and domestic violence, and rightly so. It combines three well-known principles of 3P - Prevention, Protection and Prosecution and where necessary also an additional ´P´ of integrated Policies (Council of Europe, 2011b, para.63).

Presently the most extensive survey on violence against women on the European continent, conducted in 2014 by the Fundamental Rights Agency of the EU shows that one in three women have experienced some form of physical and/or sexual violence since the age of fifteen, and at least eleven percent (over one in ten) of all girls and women have experienced some form of sexual violence and one in twenty has been raped since the age of fifteen (FRA, 2014). Based on the data from the survey, it is estimated that in the EU alone, 9 million women over the age of fifteen have been raped (FRA, 2014).

Naturally, a lay observer could easily expect a warm welcome from the international community and excitement and pride of countries to sign and ratify undeniably the most complex mechanisms of eliminating violence against women available in the Council of Europe region, without any delays. The reality sometimes suggests otherwise. For example, McQuigg (2012) feared that many states could be reluctant to sign and ratify the Convention mainly due to the fairly substantial obligations it places on states parties. The fear was partly well-founded because seven years after the adoption of the Convention by the Committee of Ministers, 14 countries have not yet ratified the treaty.[1] The remaining 14 countries combined have jurisdiction over more than 300 million people who are currently governed by states who are not willing or are simply taking unreasonably long to ratify the Convention.

Since the Convention is a legally binding instrument, GREVIO – the group of experts on action against violence against women and domestic violence – is responsible for monitoring of the Convention´s implementation by the parties to the treaty, if they wish to ratify. Its main monitoring mechanism is an evaluation based on reporting procedure almost identical to the one used by other UN human rights treaties, for instance, the CEDAW Committee except the possibility to bring an

[1] As of November 2018 – Armenia, Azerbaijan, Bulgaria, Czech Republic, Hungary, Ireland, Latvia, Liechtenstein, Lithuania, Republic of Moldova, Russia Federation, Slovak Republic, Ukraine, United Kingdom

individual complaint. An additional benefit of the reporting procedure and monitoring mechanism is the opportunity to provide elaborated explanations on terms and principles which might not have been sufficiently covered in the Explanatory Report. The Council of Europe with the cooperation of independent experts publish a ´Collection of papers addressing the topic of preventing violence against women´ which follows the themes of individual articles (Council of Europe, 2018b). Although this collection provides a valuable source of information related to selected issues the number of articles covered by this more in-depth analysis is still low.

From the very beginning, the development and adoption of the Istanbul Convention has been challenged by a number of influential groups who, to put it mildly, do not really aim at strengthening protection of human rights, especially the elimination of gender inequality, violence against women and gender discrimination. As Kuhar and Zobec (2017, p.31) put it:

> "*in the recent years – particularly since the mass protests by Manif pour tous in France against marriage equality in 2013 – an increasing number of groups and initiatives have been organised in resistance to what previously appeared to be an irreversible process of achievement of gender equality and sexual rights in the Western world (but also elsewhere). Their targets include anything from marriage and gender equality, abortion, reproductive rights, sex education, gender mainstreaming and transgender rights, to antidiscrimination policies and even the notion of gender itself."*

This organized resistance had its influence and in some countries is arguably the driving force of hindering the progress of protection of human rights *inter alia* symbolically (but not only) represented by the ratification of the Istanbul Convention. Arguably, these groups have already established themselves in the ´human rights´ mainstream and gained relevant public power which

suggests that reaching successful ratification by the remaining fourteen Council of Europe member states will be an uphill struggle.

The main point of the thesis is to analyze what (direct or indirect) impact anti-gender movements have on criminal law provisions on criminalizing crimes of sexual violence including rape. This will be done through an analysis of particular legal provisions related to selected sexual violence crimes including rape, with a focus on selected principles defined in article 36 of the Istanbul Convention and through an examination of the socio-political context in the selected countries in relation to adoption of the Istanbul Convention and an attempt to frame the local socio-political context into a broader trend of the anti-gender movement.

Jurisdictions

For this thesis, Austria, Czech Republic, and Slovakia were chosen as the main jurisdictions for the comparative analysis of selected matters. Despite having some significant historical and social differences, the selected jurisdictions have many commonalities, making them suitable analytical comparators. They all are civil law jurisdictions and politically are all parliamentary democracies. The most obvious difference is the democratic tradition since the second world war. While Austria was a part of the so-called western world, the Czech Republic and Slovakia, then still one country Czechoslovakia, was part of the eastern bloc. Another factor which influenced the selection of these jurisdictions was the factor of different phases of adoption of the Istanbul Convention. Austria signed the Convention as one of the first in 2011, ratified in 2013, Czech Republic, in contrast, signed among the last countries in 2016 and has not ratified yet, and Slovakia signed as one of the first together with Austria in 2011, but seven years later has not yet ratified.

In the first part, a legal comparative analysis will be presented. This analysis is focused on analyzing the national criminal legislation related to ´sexual violence including rape´. The main

comparator to the selected criminal law provisions is article 36 of the Convention. The ´sexual violence including rape´ article states:

> "*1. Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:*
>
> *a, engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;*
>
> *b, engaging in other non-consensual acts of a sexual nature with a person;*
>
> *c, causing another person to engage in non-consensual acts of a sexual nature with a third person.*
>
> *2. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.*
>
> *3. Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law*" (Council of Europe, 2011a, art. 36).

Article 36 of the Istanbul Convention was selected as the main comparator because "*[t]he Istanbul Convention is progressive and transformative in nature. It is a tool for systemic change, and for gender and social justice. It is intended to ensure governments guarantee the rights of all women and girls to a private and public life free from violence and it is intersectional in its design*" (Amnesty International, 2018, p.4). The principles enshrined in article 36 reflect and codify the progress in the area of establishing minimum standards for criminalizing sexual crimes, namely, but not exclusively to rape. It elaborates on the principles of international human rights law and standards on violence against women, the United Nations Convention on the Elimination of All

Forms of Discrimination against Women (CEDAW) and more importantly the CEDAW Committee general recommendations and decisions related to individual communications, the principles introduced and developed by the Belém do Pará Convention, the Maputo protocol, the practice of the International Criminal Court, as well as the practice of the European Court of Human Rights and others (Amnesty International, 2018).

The range of the national legal provisions examined in this thesis is limited to provisions engaging with the crimes of rape, crimes of sexual violence or sexual coercion and only in the case of Austria a recently adopted provision criminalizing the violation of sexual self-determination is also included. This thesis does not engage with other provisions related to issues such as sexual abuse, sexual abuse of minors, or similar provisions focused on more specific aspects of sexual violence or harassment. In the case of Slovakia and the Czech Republic, the analysis is limited to the crime of rape, and crime of sexual violence in the Slovak system and crime of sexual coercion in the Czech system. In the Austrian system, in total three distinct provisions will be examined; the crime of rape, the crime of sexual coercion and crime of violation of sexual self-determination. The limitation in terms of the variety of examined provisions is influenced by the limits of the total extent of the thesis.

Besides the comparison of ´law in the books´ in the form of legislative provisions related to the selected issue, the practice of the courts will be also examined. The selected decisions of the courts are used predominately with an aim to avoid pure black letter law comparison and to provide the most adequate understanding of the law. The scope of the analysis was reduced mainly because more articles of the Convention would dramatically reduce the possible extent and depth of the analysis of respective jurisdictions.

In the second part of the thesis, the possible factors influencing the different ratification phases will be examined. The current context in the selected jurisdiction will be put within a broader framework of ´anti-gender movements´ which is gaining power across many countries. Social and political context related to signing and ratifying the Convention will be presented. This part will be focused more on the socio-political analysis in the selected countries. One of the reasons is the fact, that all international law treaties, including the Istanbul Convention, must be adopted by the legislative branch of the countries, therefore it is crucial to capture the atmosphere, rhetoric, and context of socio-political discussion within the countries. Some arguments of both sides of the ratification debates will be presented but the focus will be on the arguments of the opposition to the adoption of the Convention. Especially with an emphasis of the ´opposing side´ of the debate, it is obvious that there is a significant shift from the relevant (qualified) discussion towards more blurry, ideological or emotional discussions shifting the focus away from the content and principles proposed in the Convention and more towards demagogic and populist politics of doubts, fear and emotions.

The overall methodology chosen for conducting this thesis was a desk research applying functional analytical research methods of primary and secondary sources.

Primary sources used in this thesis are the respective criminal codes and their provisions related mostly to sexual violence crimes. Additionally, decisions of courts of different instances from each of the jurisdiction represent an important source of information. Finally, the text of the Istanbul Convention and other international treaties were also used as primary sources of this thesis.

Secondary sources of this thesis consist mainly of various reports from NGOs, the Explanatory Report to the Istanbul Convention, reports by GREVIO, CEDAW Committee, and others. Another valuable source of information is the work of local legal scholars, especially the commentaries to

the criminal codes. Furthermore, works of other academic scholars, especially Paternotte, Kuhar, Krizsan, Havelkova, Korolczuk, Graff, Centes and Samal just to name a few. A number of press releases, news, and other media sources also contributed significantly to the presented thesis especially with regard to an attempt to capture the socio-political context related to adoption of the Istanbul Convention.[2]

CHAPTER ONE: ´Sexual violence including rape´ law analysis

Austrian "sexual violence including rape" law analysis

The current version of the Austrian Criminal Code – *Strafgesetzbuch (StGB)* – in its 10th section named as "*Criminal acts against sexual integrity and self-determination*" criminalizes various offences related to illegal sexual behavior. For this study the most relevant sections are §201 - Rape, §202 - Sexual coercion and recently adopted §205a - Violation of the right to sexual self-determination. Until 2016, the Austrian Criminal Code did not include any definite provision criminalizing non-consensual sexual acts.[3] Use of force, a threat of present danger to life or limb, or deprivation of liberty used to be the only acceptable criteria in assessing whether the act could be classified as rape. Since Austria was among the first to ratify the Convention, amendments to the Criminal Code provision were necessary to comply *inter alia* with the requirements and

[2] The language also played an important role throughout the whole thesis. The English language is neither native nor official language in any of the selected countries. A vast majority of translations were done by the author of the thesis from the original texts in the respective languages. Times, unofficial translations of texts were used either as an inspiration for the final translation used in the thesis or as a citation where indicated so. Naturally, this represents a potential issue especially in relation to translations of the legal provisions and crucial terms used in the legal documents. The best efforts were put into capturing the most accurate meaning of the provisions and the terms used in the legal systems of the selected countries. It might be that, while reading the thesis, the audience may find a term which is not translated in the most suitable manner. Therefore, an apology is expressed for any plausible linguistic inaccuracies.

[3] Current version of the Austrian Criminal Code including the history of amendments available at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296

principles of Article 36. The amendment to the Criminal Code which entered into force on the 1st of January 2016 introduced a new provision under §205a criminalizing offence of "violation of the right to sexual self-determination" (StGB, 2018). There is no available official English translation of the latest version of the Austrian Criminal Court therefore for this study, the criminal offence of "*Verletzung der sexuellen Selbstbestimmung"* is translated as "violation of the right to sexual self-determination" using the translations provided by the Austrian Government in an annex to their first Baseline report submitted to GREVIO for the Baseline Evaluation Report on Austria (Baseline Report, 2016 p.82-83). The translations provided by the Austrian Government in the mentioned annex were also used for the other criminal provisions of the Austrian Criminal Code.

Crime of rape

Section §201 of the Austrian Criminal Code (2018) defines rape as an act of:

> *"(1) Any person who by use of force, deprivation of liberty, or threat with a present danger for limb or life (§ 89) coerces another to engage in or acquiesce to sexual intercourse or conduct equivalent to sexual intercourse is liable to imprisonment for one to ten years.*
>
> *(2) The person is liable to imprisonment for five to fifteen years if the offence results in a serious assault (§ 84 para. 1) or pregnancy of the victim or if the victim is placed into a state of agony or is treated in a particularly humiliating way for a longer period of time; the person is liable to imprisonment for 10 to 20 years or imprisonment for life if the offence results in the death of the victim*" (Baseline Report, 2016 p.82-83).

In the baseline report submitted to GREVIO, the Austrian Government provided a brief description and its interpretation of the criminal offence of rape. The report states:

> "*Rape, § 201 of the StGB, is defined as taking place when someone has coerced a person by means of violence, threats with immediate danger to body and health, or false imprisonment to engage in sexual intercourse or other comparable sexual acts. The victim's volition is violated by the use of physical violence, menacing threats or false imprisonment... An offence committed within the family, including (ex-)partners, is considered an aggravating factor*" (Baseline Report, 2016, p.45).

In the wording of the provision, there are interesting terms which require further elaboration. According to the Supreme Court, the establishment of the ´conduct equivalent to sexual intercourse´ must be assessed strictly on a case-by-case basis. The comparative criteria are based on the intensity, the severity of the coercion, and the degree of humiliation. As an example of the rule the Court states that a brief and incomplete digital penetration into the vagina of an adult woman is not to be assessed as conduct equivalent to coitus [genital intercourse] (RIS 11Os70/02, 2002). A year later, the Supreme Court stated that the digital penetration is a ´sexual act comparable to sexual intercourse´ in the meaning of §201 regardless the duration and the depth of the penetration (RIS 14Os42/03, 2003). In 2013, the Supreme Court extended the understanding of ´conduct equivalent to sexual intercourse´ when in a case related to violation of §206 – serious sexual abuse of minors – provided a statement that a request of the offender via Skype to the victim to perform digital vaginal and anal penetration on the camera shall be considered a sexual act comparable to sexual intercourse (RIS 11Os134/13k, 2013).

In 2016, the Supreme Court pronounced a legal rule that a lack of consent of the victim is an implicit condition of the crime of rape and must be covered in the assessment of the intent of the offender (RIS 14Os87/16z, 2016). At the same time, the text of the decision did not provide a

sufficient elaboration on the notion of lack of consent therefore no more detailed analysis can be concluded.

Crime of sexual coercion

Section §202 of the Austrian Criminal Code (2018) defines sexual coercion as:

> "*(1) Any person who, except in cases under § 201, by use of force or dangerous threat coerces another to engage in or acquiesce to sexual conduct is liable to imprisonment for six months to five years.*
>
> *(2) The person is liable to imprisonment for five to 15 years if the offence results in a serious assault (§ 84 para. 1) or pregnancy of the victim or if the victim is placed into a state of agony or treated in a particularly humiliating way for a longer period of time; the person is liable to imprisonment for 10 to 20 years or imprisonment for life if the offence results in the death of the victim*" (Baseline Report, 2016 p.83).

What immediately strikes attention is listing pregnancy as an aggravating circumstance, although it remains unclear how could an act which would be considered under §202 result into pregnancy of the victim. Arguably any such act would necessarily need to be assessed under § 201 – the crime of rape.

Similarly to the criminal offence of rape, the Austrian Government shares its views on the crime of sexual coercion: "*Sexual assault, § 202 of the StGB, is defined as taking place when someone has coerced a person to engage in sexual acts by means of violence or menacing threats…*" (Baseline Report, 2016, p. 45).

An actual example of forced sexual conduct as stated in §202 is provided in a case when an offender coerced a victim by force to sit down on a couch and while holding the victim with one

hand, the offender masturbated with the other hand and then ejaculated on the victim´s face. By doing so, the Supreme Court ruled that the offender violated the §202 (RIS 13Os56/03, 2003). Based on the case law of the Supreme Court, a threat of publishing nude pictures without a permission of the victim (even if the pictures were taken with a consent of the victim) represents a dangerous threat within the meaning of §202 (RIS 12Os56/14y, 2014). This interpretation of the §202 has a substantial potential to increase protection of victims from new forms of sexual violence namely so-called cyber harassment and revenge porn incidents.

Crime of violating the right to sexual self-determination

The new provision of the criminal code criminalizes sexual acts that are conducted against the will of a person or while the person is in a coercive situation or after she/he has been intimidated by the perpetrator (AÖF & IST, 2016). While the new criminal provision "violating the right to sexual self-determination" is an important step and introduces the concept of non-consensual sexual acts (without force or threat) to Austrian criminal law for the first time. The section §205a of the Austrian Criminal Code (2018) defines the violation of the right to sexual self-determination as:

> "*(1) Any person who engages in sexual intercourse or conduct equivalent to sexual intercourse with another person by taking advantage of a predicament or after prior intimidation against that person's will is liable to imprisonment for up to two years unless the offence is punishable with a higher penalty under another provision.*
>
> *(2) The same penalty applies to any person who leads another in the manner set out in para. 1 to engage in or acquiesce to sexual intercourse or conduct equivalent to sexual intercourse with a third person or to perform an act equivalent to sexual intercourse involuntarily on himself or herself in order to*

sexually arouse or satisfy the perpetrator or a third person" (Baseline Report, 2016 p.84).

The Government provided its understanding of the offence in the following words:

"*Violation of sexual integrity, § 205a of the StGB, is understood to have taken place when someone has engaged in sexual intercourse with a person, or sexual acts equivalent to such, against that person's will or through coercion or as a result of intimidation... Ignoring a person's will is itself a form of sexual violence and does not require the use of (additional) violence, menacing threats or any other form of coercion*" (Baseline Report, 2016, p.46).

The state report provides us with some important definitions and explanations all under the supervision of the Government, therefore, it should be perceived as a relevant source of interpretations. For instance, the Government defines the term "against the victim's will" to also be the case when the victim implies the refusal of sexual acts, for example by crying (Baseline Report, 2016). *"Exploitation of exigencies on the part of the victim*" such as a financial emergency, homelessness or addiction may all constitute exigencies that seem to present the victim with no choice. Another example would be the threat of danger to loved ones (Baseline Report, 2016). The Government also provides their understanding of *"intimidation.*" Such action shall include various physical and/or psychological factors that are meant to provoke fear in the victim and may take place well before the time the criminal offence is committed (Baseline Report, 2016). "*Additional sexual acts without the use of violence, menacing threats or false imprisonment"* are punishable also for example when sexual activities are done in conjunction with the exploitation of a relationship in which a person exercises authority over the other person. The Government stated

that an act of deception may also lead to nonconsensual sexual intercourse, however, doesn't specify any details or reference to an actual case law (Baseline Report, 2016, p.46).

Another valuable source of information which is related to the fact that Austria has completed the GREVIO evaluation cycle is the Shadow Report. A coalition of NGOs led and coordinated by the Austrian Association of Autonomous Women´s Shelters (AÖF) and the Domestic Abuse Intervention Center Vienna (IST) together with 27 other organizations and associations[4] developed a report which was submitted to GREVIO for consideration (AOF & IST, 2016). The Shadow Report noted that the Austrian legislators originally argued in its Explanatory Remarks to the Istanbul Convention that there was no need for any adjustments to the Austrian Criminal Code. It was only after several NGOs started an awareness-raising campaign titled "*Ein Nein muss genügen*" [´No´ must be enough] that the Government was open to initiate amendment procedure to the Criminal Code (AÖF & IST, 2016, p.69). Overall, the report claims that while the provision §205a – the violation of the right to sexual self-determination - is in conformity with the minimum requirements of Article 36 of the Istanbul Convention, there would still be room for improvement regarding the criminalization of non-consensual acts and provides a few recommendations in regard to the implementation of Article 36. First of all, the report points out the possible unfortunate message that the newly introduced provision is not included in the section on rape. Such separation of the two offences could emphasize the notion that sexual acts committed against the (declared) will, are still not to be classified as rape, but only something less serious which cannot be called rape (AÖF & IST, 2016, p.70). The special stigma attached to the crime of rape is thus not assigned to those acts of non-consensual sexual acts which are comprised in §205a. The

[4] Full list of the organizations and associations available at http://www.aoef.at/images/04_news/news_2016/GREVIO-Schattenbericht_2016.pdf

(unspoken) hierarchy of the offence of rape and offence of violating sexual self-determination is further underlined by the statutory range of punishment. While the range of punishment for the offence of rape is one to ten years of imprisonment, the maximum sentence for the violating person´s sexual self-determination is two years of imprisonment with no minimum sentence. The authors of the Shadow Report argue that "*two years of imprisonment as the maximum punishment for acts that in practice can be of very similar gravity to the victim as those acts qualified as "rape" and that may further include a comparable level of malevolence of the perpetrator, generally seems to be a very limited range of punishment which does not reflect the seriousness of these forms of sexual violence*" (AÖF & IST, 2016, p.70).

An additional issue was identified in relation to the quite narrow wording in the newly introduced offence under § 205a of the StGB, as only sexual acts "against the will of a person" are classified as criminal offences. Phrasing "non-consensual" as used in the Convention covers cases in which sexual acts are carried out "without the consent" of the victim, not only "against their will" (AÖF & IST, 2016). The different wording, thus possible different interpretation, can introduce blurry classifications of possible criminal offences. For example a case when the victim does not have a chance to express his/her will for example as a result of traumatic shock or temporary paralysis caused by the assault. In the concluding section of this part of the shadow report, the authors of the report provided a list of recommendations which should be undertaken by the Government of Austria in order to improve the legislative aspect of preventing and combating violence against women. The NGO coalition calls upon the Government to:

> "*qualify all cases of non-consensual sexual acts as provided for in Article 36 of the Istanbul Convention as "rape" in order to avoid sending the message to victims as well as to society as a whole that some of those acts cannot be seen as*

> *rape and are therefore only minor offences. If the acts included in the offence of "violating a person's sexual self-determination" are not incorporated into the provision of rape, the former should at least provide for the same statutory range of punishment as the offence of rape.*
>
> *At the very least, the statutory range of punishment for "violating a person's sexual self-determination" should be raised and a minimum punishment should be introduced"* (AÖF & IST, 2016 p.70).

Although the shadow report stated that overall the new provision is in conformity with the minimum standards of the requirements of Article 36, if it lacks the crucial element of criminalizing all non-consensual sexual acts, it simply cannot be perceived as being in conformity with the Convention.

GREVIO (2017) in its report stated that Austria was one of the first parties, after the Convention came into force, to adapt its criminal law to the requirements of Article 36 by the criminalization of all non-consensual sexual acts. This statement is somehow inconsistent because there are several requirements of article 36 which GREVIO pointed out as ´insufficiently covered´ by the latest amended version of the Austrian Criminal Code.

GREVIO welcomed the effort of the Austrian authorities to meet the minimum standards of criminalizing all non-consensual sexual acts by introducing a completely new legal provision of violation the right to sexual self-determination. It noted that this "*is an important step towards holding perpetrators of rape accountable, notwithstanding that, for any number of reasons, they did not have to resort to violence or threat to make their victim compliant*." (GREVIO, 2017 p.39). One can hardly envisage the motivation of the authors to use the term "perpetrators of rape" since the legislators (as already stated) did not include the new provision under the provision on the

crime of rape but under a separated provision. Unlike the other two provisions (§201 rape and §202 sexual coercion) which are based on use of force, deprivation of liberty or a threat to life or limb, the new provision accommodates for instances of sexual intercourse or comparable conduct "against the will of a person", "under coercive circumstances" or "following an act of intimidation" (GREVIO, 2017 p.39). A negative aspect of the new provision under §205a as identified by GREVIO is that the provision requires a certain threshold, more specifically a penetration or a comparable conduct to be able to criminalize the act, therefore leaving out from the scope of the provision sexual acts of a "lesser nature" (GREVIO, 2017 p.39). Acts of the "lesser nature" as the GREVIO concluded are supposed to fall under the scope of section 218 – Sexual harassment of the Criminal code.[5] The provision §218 shall cover incidences which are "*capable of causing reasonable offence*" or "*violates the dignity of another by touching of a part of the body associated with sexual activity*" (Austrian Criminal Code, 2018). To prosecute an offender under this provision there is no necessity of use of force, prior intimidation or other thresholds necessary for the application of §201 or §202 or even §205a. This aspect is certainly a positive development of reaching the necessary level of criminalizing all non-consensual sexual acts.

In the report, GREVIO elaborates on an important issue of comprehension of criminalizing non-consensual sexual acts. In regard to Austrian legislative adaptation, it states that "*there is* –

[5] Sexual harassment and sexual acts done in public § 218 (Austrian Criminal Code, 2018).
"(1) Any person who harasses another by performing a sexual act 1. on the other person, or 2. in front of the other person in circumstances capable of causing reasonable offence is liable to imprisonment for up to six months or a fine not exceeding 360 penalty units, unless the offence is punishable with a higher penalty by another provision. (1a) A person is also liable under para. 1 if the person violates the dignity of another by intensive touching of a part of the body associated with sexual activity.
(2) The same penalty applies to any person who performs a sexual act publicly and in circumstances in which the direct perception of the person's conduct is capable of causing reasonable offence.
(3) In cases under paras. 1 and 1a, the perpetrator may only be prosecuted with the authorization of the victim" (Baseline Report, 2016, p.85)

however slight – a difference between sexual acts committed against the will of the victim [as is the case of Austrian legislation], and non-consensual sexual acts [as required by article 36 of the Convention]" (GREVIO, 2017 p.39). GREVIO argues that sexual acts committed against the will may not allow for criminal prosecution in cases where the victim remains passive but does not consent (2017 p.39). It adds that under the current Austrian legislation to criminalize non-consensual sexual activity, the victim must express her opposing will verbally or otherwise (GREVIO, 2017 p.39).

The Federal Ministry of Health and Women's Affairs (2017 p.23) in its response to the GREVIO report provides a counter-argument to the arrangements of criminalizing all non-consensual sexual acts as opposed to "only" criminalizing sexual activity against someone´s will. The Ministry (2017 p.23) stated that:

> *"[d]espite the fact that the Austrian Criminal Code refers to sexual acts against the will of a victim instead of a non-consensual act, no cases have been reported that would have been covered by the latter but not by § 205a StGB. Even if the law would require a non-consensual act, there would not be a difference in practice as the intent of the perpetrator has to comprise that fact as well. Therefore, if a victim remains passive, the perpetrator must be aware of the fact that this behaviour is not an implicit consent, and this must be covered by his intent. If the perpetrator is aware of the fact that the victim does not consent to the sexual act, the perpetrator is also aware of the fact that the sexual act is against the victim's will."*

It seems that in this contextual conflict it might be possible to partly or perhaps even fully agree with each of the sides of the argument. Does "*non-consensual*" mean "*against someone's will*" or

there are grey areas which might fall out of the scope of the provisions using the latter terminology? If a person prior, during and even after a sexual act remains passive, virtually no verbal or non-verbal expression of rejection, does it mean the act was carried out against the person´s will? It certainly means it was conducted without a freely given consent. But what about the will of a person? Can a non-expressed refusal be assessed by the principles of criminal justice as involuntary or more specifically against somebody´s will? Even more problematic case may be a hypothetical incident when a person (victim) acts along with the sexual act for any given reason, therefore does not remain (physically) passive, however in fact involuntarily "participated" in the sexual act without an expressed or freely given consent. It is feasible to assess somebody´s will through one of its many expressions – verbal, non-verbal or otherwise. A judicial assessment whether a certain act or behavior without any of the expressions/signs of human will should be considered as against the will may be very problematic. To focus rather on the common sense and simplified assessment, the Convention states that every sexual act without a freely given consent shall be criminalized. Arguably it is possible to retrospectively assess whether an act was carried out without a consent. The use of the terminology of "without a consent/non-consensual" is arguably easier to be proved beyond reasonable doubt than the terms "against a will of a person" therefore is the former is more suitable in terms of criminal justice principles. Certainly, it isn't absolutely possible, nor desirable to leave the complexity of assessments aside and in practice, there might be some scenarios when both assessments whether an act was committed against a will or without a given consent, nevertheless the attention may be pointed to paragraph 192 of the Explanatory Report which elaborates on the case by case and context sensitive assessments of evidence, which should recognize the whole spectrum of behavioral responses to sexual violence (Council of Europe, 2011b).

Experts from the Council of Europe (2011b, para.193) claim in the Explanatory Report that to meet the requirements of article 36 and its key principle of criminalizing all non-consensual sexual acts, the Parties to the Convention shall provide legislation which encompasses the notion of lack of freely given consent, however, it is left to the Parties to decide on the exact wording of the legislation and the factors that they consider to preclude freely given consent. An assessment of judicial practice related to the issue would be beneficial. The authors of the Baseline Report submitted by Austria in its annex indicated that there were two cases reported to the Public Prosecutor with an alleged violation of §205a between 2014-2015 (Baseline Report, 2016 p.68-70). Logically, it must be an error, due to the fact that section §205a only came into force on the 1st of January 2016. Based on other sources of Austrian courts case law, it is not yet possible to analyze a case law related to § 205a due to the fact that as of November 2018, there are only four available judgments related to the crime of violation of sexual self-determination (§205a StGB, 2018). None of the four judgments engaged in interpreting any of the main elements of section 205a, therefore it is not feasible to provide any conclusion related to the judicial interpretations of the relatively new legal provision. It is possible that with a higher number of judgments on §205a ruled by the Austrian courts such interpretations are just to be ruled and published.

Still, the conflict of understandings and different interpretations of "non-consensual" and "against will" creates an interesting debate which deserves an additional study.

Besides of the issue of (lack of) consent, GREVIO also noted that the requirement of criminalizing of intentional conducts as specified under Article 36 paragraph 1 c - causing another person to engage in non-consensual acts of a sexual nature with a third person – is not covered by the current Austrian law *(GREVIO, 2017 para. 142)*. The argument goes as follows:

> "*paragraph covers scenarios in which the perpetrator is not the person who performs the sexual act but who causes the victim to engage in sexual activity with a third person, for example as part of the control and abuse in intimate-partner violence. The scope of criminal intent is wider than that under the crime of aiding and abetting. It would not only cover the intent to help the commission of an offence, for example a rape, and the intent of the rape as such, but would also extend to the intent of causing both. In other words, the intentional conduct covered by Article 36, paragraph 1c aims at capturing more than the instigation or facilitating of a crime but the malevolent behaviour of abrogating a woman's sexual self-determination" (GREVIO, 2017 para. 142).*

On contrary, Austria rejected this part of the assessment by GREVIO and argued that the Austrian legislation fully covers the intentional conduct as defined in Article 36 1 c. (Federal Ministry of Health…, 2017). Austria claims that:

> *"[c]ausing another person to engage in non-consensual acts of sexual nature with a third person is – depending on the circumstances – covered by § 201 (rape), § 202 (sexual coercion), § 205a (violation of the right to sexual self-determination) or § 218 (sexual harassment) in combination with the general provision of § 12 (instigation or aiding and abetting) of the Austrian Criminal Code ...*" (Federal Ministry of Health…, 2017 p.23).

The argument of GREVIO might be found somehow hasty, especially focusing on the second paragraph of section 205a which arguably specifically focuses on meeting the requirements of the lit. c of article 36. On the other hand it is only related to limited number of actions so that may be the niche which GREVIO evaluated as not being covered by the current legislation. Despite the

length of the Explanatory Report or even the GREVIO Baseline evaluation report, the extent of clarifications to each and every unclear term or definition (non-consensual, principles of article 36, section 1 c…) are very limited and a lot of conflicting understandings are still to be resolved and clarified.

There is a need to emphasize the contributions of the GREVIO evaluation procedure which provides us with an interesting and valuable source of information since various stakeholders participate and share their understanding of the Convention as a whole or its individual provisions, reflecting a number of country or region-specific aspects including individual but also societal stereotypes and biases. Moreover, it is an important source of interpretations of certain provisions which might not have been clearly explained in the explanatory report. There are several more reports to be published in the near future (Council of Europe, 2018d). which can add to the mosaic of interpretations and clear many of unfinished definitions of key elements of the Convention such as the meaning of non-consensual or difference between aiding or abetting and – part C of article 36.

A paradox was spelled out in the NGO Shadow Report supplementing the 9th Austrian CEDAW Report which was published in June 2018. It noted that despite a relatively wide-spread provision of the psycho-social and legal assistance in proceedings, the rate of convictions in suspicion rape cases would increase, however they have been falling (UN HR Office, 2018). Partly a reason might be an inactiveness of some prosecutors which hesitate to go "an extra mile" for a just assessment of cases which do not provide crystal clear evidence, as stated attorney Steiner (DER STANDARD, 2016). Although, an already implemented project focusing on evaluation of the reasons for judgments to convict or to acquit suspects in regard to cases of suspicion of rape and sexual coercion, the report stated that an evaluation of the procedures of public prosecutors is

necessary (UN HR Office, 2018). Instead of considering increased penalties, the internal evaluation of the offense of violation of sexual self-determination and sexual harassment (StGB, §§ 205a, 218) which is to take place in 2019, should take a look at judicial sentencing and public prosecutorial procedures (UN HR Office, 2018). The civil society representatives demand the Government of Austria *inter alia* to accommodate for consistent recognition and adequate reflection of the principle of consent within the legal framework covering sexual offenses and conduct a comprehensive internal and external evaluations of judicial sentencing and public prosecutorial procedures in the area of sexual offences (UN HR Office, 2018).

Czech "sexual violence including rape" law analysis

The Ministry of Justice of the Czech Republic (2015) carried out an *analysis of preparedness* in which it identified various levels of necessary interventions in relations to legislative changes related to possible ratification of the Convention. The Ministry used three main categories distinguishing the levels of required interventions. The first category is represented by articles and paragraphs which require no legislative interventions based on the current legislation. The second category contains articles and paragraphs which require partial and/or minor legislative amendments or cases in which the Ministry was not certain about possible necessary legislative changes in the future. Under the second category, the Ministry listed around two dozen articles.[6] The third category contains articles and paragraphs which are not currently regulated by legislation, therefore require the adoption of necessary amendments to the current legislation (Ministry of Justice…, 2015). Under this category, there were only two identified articles - article 39, and article 59 which was classified as almost impossible to fulfill therefore suggested to be

[6] These are article 3, article 5, article 8, article 10, article 12 para. 1 and 4, article 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 31, 46, 49, 55, and article 58.

reserved from (Ministry of Justice…, 2015). A vast majority of articles and paragraphs were classified as requiring no legislative changes, including article 36 – sexual violence including rape. Regarding article 36, the Ministry argued that after its research it was concluded that the Czech Criminal Code criminalizes all acts pronounced in article 36 (Ministry of Justice…, 2015). In the conclusion of the analysis, it stated that the majority of all Ministries agreed upon a signature of the Convention and claimed that there aren't any significant legislative changes needed, besides a very few exceptions including the suggested reservation from article 59. The Ministries expressed their dedication in supporting and implementing equal treatment between men and women within their work (Ministry of Justice…, 2015).

Crime of rape

The current Criminal Code of the Czech Republic adopted in 2009, came into force from the 1st of January 2010, defines rape in the chapter – Criminal offences against human dignity in sexual sphere – section 185. It states:

> *"(1) Whoever forces another person to have sexual intercourse by violence or by a threat of violence, or a threat of other serious detriments, or whoever exploits the person's vulnerability[7] for such an act, shall be sentenced to imprisonment for six months to five years.*
>
> *(2) An offender shall be sentenced to imprisonment for two to ten years, if he/she commits the act referred to in Sub-section (1)*
>
> *a) by genital intercourse or other sexual intercourse performed in a manner comparable with intercourse,*

[7] Some texts translate the Czech term "*bezbrannost*" which is used in the original wording of the provision as ´defenselessness´ instead of the term ´vulnerability´

c) on a child, or

d) with a weapon..." (Czech Criminal Code 40/2009, 2009).

One of the most influential commentaries to the criminal law in the Czech legal system is arguably the Commentary to Criminal Code by Pavel Samal. Samal is a prominent legal figure, since 1993 the Supreme Court judge and since 2015 the chairperson of the Court. In the 2nd edition of the Commentary published in 2012, Samal (2012) describes the object of the crime of rape according to section 185 as the right of a person (woman or man) to have the power of free decision-making in relation to their sexual life. The subject of this criminal act is any person, not only a person of the female sex. It is a significant alteration since until 2001, when an amendment the Criminal Code was passed, the Czech law, similarly to the current Slovak law, had defined rape as a crime committed only against women and carried out only by genital intercourse (Havelkova, 2010). It is therefore necessary to look closer at the new meaning of the term sexual intercourse as adopted in the latest Criminal Code amendment. Samal (2012) states that the term "s*exual intercourse"* is defined as any way or method of satisfying a sexual instinct on the body of another person, of same or of different sex. It shall be perceived in a broad definition. It includes a genital intercourse – *coitus*, oral intercourse – *fellatio or cunnilinctus*, or anal intercourse, digital penetration but also other forms of sexual intercourse such as intercourse between breast – *coitus inter femora*, touching and groping of male or female genitals, or female breast, so-called erotic massages done by a perpetrator on the victim or forcing the victim to engage in such activity on the body of the offender. Another term with a broad meaning is the term *sexual intercourse or other sexual act performed in a manner comparable with [genital] intercourse.* In July 2010, the Supreme Court stated that *comparable genital intercourse* has generally a characteristic that the genitals of one involved party are replaced by other body part or an external object. It stated:

> "*On the one hand we distinguish cases when the male genitals instead of penetrating the female genital touch or penetrate other female body parts such as the mouth, the anus, armpits, or putting the male genitals into the victim's hand(s) in order to reach rubbing etc., on the other hand these cases when the female genitals instead of male genitals are being touched or penetrated by other body parts such as mouth, tongue, or inserting fingers or even various external objects"* (NS 7 Tdo 841/2010, 2010).

The Supreme Court (NS 7 Tdo 841/2010, 2010) provided a generalized rule that "*in case there is sexual intercourse involving genitals of one person, it shall be concluded that such intercourse is comparable to genital intercourse.*" Sexual intercourse done by a *genital penetration/intercourse or in another comparable manner to sexual intercourse* shall always be classified as fulfilment of the factual basis of a crime of rape with an aggravating circumstance as stated in the para. 2 lit. a (Samal, 2012). This means that committing rape by genital intercourse, previously widely considered to be the ´classic´ and the only recognized type of rape, the offender is committing a criminal offence of rape with aggravating nature, which ought to be penalized stricter than for other types of rape (sexual intercourse) as stated in para 1 section 185.

Logically, the assessment of a comparable nature of an act must be assessed very carefully on a case to case basis. As clearly shown in the case from April 2007, the intensity matters. In this case, the Supreme Court decided that:

> *"the term ´other sexual contact/intercourse performed in a manner comparable with intercourse´ within the ambit of section 185 para. 2, is only applicable in cases when the offender acts in such a way that the conduct and effect of severity is comparable to genital intercourse. Generally, it is oral or anal intercourse. The*

> *severity of such acts should be always assessed with respect to effects (psychological and physical) on the victim of the act. For example, had it been assessed that the offender while groping a victim also penetrated her vagina with fingers, [performing digital penetration] however this sexual activity within its intensity did not represent traumatic experience equal/comparable to violent intercourse, it cannot be assessed as ´other sexual contact/intercourse performed in a manner comparable with intercourse´ within the ambit of the para 2. Sec. 185"* (NS 8 Tdo 407/2007, 2007).

In contrast to the previous ruling, prior judgement delivered by the Supreme Court in 2005 in a case in which the offender performed digital penetration (repetitive penetration of fingers into the vagina), the Court ruled that such acts must be assessed as *´other sexual contact/intercourse performed in a manner comparable with intercourse´*. The Court stated that for the victim, it must have been undeniably psychologically and physically traumatic experience comparable to violent genital intercourse (NS 3 Tdo 1305/2005, 2005). The assessment of the severity of the psychological and/or physical trauma might be very dependent on the involved assisting professionals and the procedural settings of each case. For the sake of thevictim's protection and support but also the general justice, it is necessary to ensure that the assessment is carried out and that it is carried out by highly trained and experienced professionals. Whether this is the practice in reality, it would need to be examined in additional research.

Additional interesting development in regard to terminology is represented by the meaning of the "*threat of other serious detriment."* According to Samal (2012), the *threat of other serious detriment* shall be understood as a threat of material detriment but also as a threat of a serious injury to honor and good reputation, threat of a break-up of marriage or disturbance of family life.

The assessment of the threat of other serious detriment shall be assessed individually based on specific aspects and backgrounds.

An unclear argument was provided by Samal (2012) who claimed that it shall not be understood as coercion in cases when the victim resists at the beginning, but later voluntarily consents to sexual intercourse. Once again, how can anybody initiate a forced sexual intercourse (without a consent), therefore commit a crime of rape, and consequently receive "a permission" in the form of a freely given consent from the injured person and null the crime of rape remains unclear.

According to section 7 of the Code on criminal liability of legal persons, the crime of rape can be committed by a natural person but also by a legal person (418/2011 Sb. 2011). This is an interesting feature of the Czech criminal system; however I would argue that it can be fairly difficult to convict a legal person for such crimes as rape and further study would be necessary.

Crime of sexual coercion

Noteworthy developments in the Czech criminal system also occurred in criminalizing other forms of sexual violence. Section 186 - sexual coercion – offers classifications of criminal acts of sexual nature with a number of nuances. It states that:

> "(1) *Whoever by violence, threat of violence or threat of other serious detriment forces another person to masturbation, indecent exposure, or other comparable conduct or whoever exploit the vulnerability or dependence of another for such conduct, shall be sentenced to imprisonment for six months to four years or to prohibition of activity*.
>
> *(2) The same sentence shall be imposed to anyone who pressures/coerces another person to perform sexual intercourse, masturbation, indecent exposure, or other comparable conduct by exploiting his/her dependence or the offender's position*

and credibility or influence derived therefrom…" (Czech Criminal Code 40/2009, 2009).

Barbora Havelkova (2010), currently perhaps one of the most prominent Czech academic figures in the gender equality sphere, distinguishes four basic types of sexual violence with differentiated sentences. Havelkova (2010) sorts the types from the most serious (and the historically oldest) to the less serious forms as follows:

"1) Rape by genital intercourse or another comparable form of sexual intercourse (Sec. 18[5] (2a)).

2) Rape by sexual intercourse (Sec. 18[6] (1)),

3) Sexual coercion to sexual self-stimulation, denudation or to a conduct of comparable nature (using violence, the threat of violence or the threat of any other grievous harm) (Sec. 186 (1)),

4) Sexual coercion abusing the dependent or defenceless [vulnerability] state of another person or using one's own position of trust or influence to one's advantage (Sec. 186 (2))."

Unlike Havelkova, Pavel Samal (2012) argues that in section 186 – *sexual coercion* – there are three distinct types of sexual offences as follows:

1) *forcing another person to masturbation, indecent exposure, or other comparable conduct by a threat of violence or a threat of another serious detriment*
2) *pressures another by exploiting/abusing the vulnerability/defenseless of the another to engage in such conduct*
3) *coercing another person to perform sexual intercourse, masturbation, indecent exposure, or other comparable conduct by exploiting/abusing his/her dependence or the offender's position and credibility or influence derived therefrom.*

Although all three distinct types have a common denominator in form of involuntariness of masturbation, denuding, or comparable conduct caused by another person, there are differences in form and level of "coercion" as well as other nuances of the offences under section 186. The third type, unlike the first two types, also includes a conduct of sexual intercourse. Another difference is the level or rather a nature of the coercion. The first type defines a conduct of coercing in a meaning of forcing by a threat of violence or a threat of another serious detriment another person into masturbation/self-stimulation, indecent exposure, or other comparable conduct whereas the second type, its nature and level of coercion, is described more as a form of impelling another person by exploiting or abusing the vulnerability or defenseless of the person. An additional variance of these three types is the relation between the parties. While the first two types as enshrined in para. 1 of section 186, are criminalized regardless of the (power) relation between the offender and the victim, for the third type it is necessary to establish that the offender abused his/her position, credibility or influence derived from different hierarchical power relations (Samal, 2012).

Arguably, the general aim of this provision is to improve the overall protection of victims of sexual violence. Criminalizing such behavior of the offender which *forces another person to masturbation, indecent exposure, or other comparable conduct* but lacks physical contact/coercion between the offender and the victim fills in the gaps of legislation which requires physical engagement between the offender and the victim in an assessment of crime of sexual violence nature. According to Samal (2012), in cases of sexual coercion as defined in section 186, the offender does not physically engage with the victim, however, coerces the victim to perform various erotic or sexual activities which stimulates the offender´s sexual senses. The offender himself/herself does not engage in the erotic or sexual activities, but after coercing the victim, the

offender practically only observes the sexual activity of the other person in order to reach sexual excitement (Samal, 2012). The meaning of "*coercing another*" as applied in the second paragraph of 186 shall accommodate for such behavior which is not founded on violence or threats, neither contains any elements of aggression. The meaning shall be understood rather as one of the many various forms of pressuring someone to do something which they did not intent to do. Generally, there is a broad variety of non-violent forms through which the offender can coerce the victim to act as the offender desires (Samal, 2012). A part of the para. 2 is grounded with a term of abusing or exploiting dependence. "*Dependence exploitation"* shall be understood as an abuse of relation which provides with rights and obligations of one person over another, for example, a legal guardian over an irresponsible person, a prison guard over a detainee etc. (Samal, 2012). The other part of para. 2 is defined by the notion of power relations. The term *´abuse of offender's position and credibility or influence derived therefrom´* is a broader term compared to the above-mentioned term of dependency exploitation. It shall accommodate for all situation in which the offender´s position arouses credibility and authority over the victim. Samal (2012) lists examples such as superiors at a workplace, position of power or hierarchy in various artistic groups, well-known politician or any person with authority derived from his or her awards, successes or experience. Samal (2012) furthermore specifies that the crime of rape (as codified under section 185) may be committed also by someone, who by use of violence, threat of violence or other serious detriment coerces another person to have a sexual intercourse with another person, while the coercion may be directed towards both persons or just one of them (Samal, 2012).

Havelkova (2010) claims that in contrast to the previous provisions, the current criminal code distinguishes more forms of violent conduct and it includes a wider range of forms of wrongful coercion. Based on section 14, the current criminal code differentiates two types of criminal

offences – misdemeanors and felonies (Czech Criminal Code 40/2009, 2009). Misdemeanors have the upper limit of penalty up to five years and felonies with the upper limit of at least ten years (Czech Criminal Code 40/2009, 2009). Section 185 – rape and 186 – sexual coercion together provides for three "misdemeanors" based on the length of the possible sentencing. Specifically, section 185 para. (1), section 186 para. (1) and para. (2) are considered "misdemeanors". This allows for prompter proceedings, alternative penalties such as an application of the means of probation. Simultaneously Havelkova (2010 p.6) recaps that "[*p]ostponing imprisonment with a parole is legally possible if the actual sentence does not exceed three years. The minimum sentence for rape is two years, so as long as the judge sentences the perpetrator to between two and three years in the individual case, parole is possible. Hence, the new Criminal Code doesn't address the high rates of parole awarded by the Czech courts.*"

Equally to the crime of rape, based on the section 7 of the Code of criminal liability of legal persons, the crime of sexual coercion can be committed not only by a natural person but also by a legal person (418/2011 Sb. 2011).

To conclude, the Ministry of Justice (2015 p.18) offered their understanding of the article 36 of the Convention in the Analysis of preparedness. It stated "*The Criminal Code conditions criminalization of ´crimes of sexual nature´ with use of force or threat of violence or threat of another serious detriment or abuse of defenseless of the victim. Although the article [36] defines crimes of sexual nature with another person ´without a consent´ what it really means is, even with regard to the title of the article, that it is to happen precisely by violence or threat of violence (or abuse of defenseless.)* This provided understanding enormously misses the most important contribution of Article 36 which recommends criminalization of all non-consensual forms of sexual violence, even when no violence or threat of violence is present. It would be beneficial if

the Czech legislators examine the Explanatory Report with more critical reading or look into GREVIO reports which provide some elaborations on article 36 and its application in practice. While the last amendment of the Criminal Code introduced some modern understanding of sexual violence crimes, there are still areas which need to be addressed in order to overcome the gap between the current legal practice and the minimum standards introduced by the Istanbul Convention.

Slovak "sexual violence including rape" law analysis

The Slovak Ministry of Justice in collaboration with other Ministries and relevant stakeholders delivered a legal analysis of the Convention including a proposal for legislative and other measures necessary to secure compliance of the laws and policies with the Convention and the analysis was updated in February 2017 (Vlada SR, 2017). In the introductory part, the analysis draws attention to the findings of the FRA EU-wide survey and states that in Slovakia one in three women experiences physical or sexual violence since the age of fifteen, and one in five women experienced violence by her partner since the age of fifteen. It also mentions the findings of the Eurobarometer survey from 2009 in which 88% of Slovaks agreed that the issue of violence against women requires to be tackled in an urgent manner (Vlada SR, 2017). In the following paragraph named "*risks, problems*" the Ministry stated that simultaneously with the numerous activities of the NGOs dealing with issues of women´s rights and supporting ratification of the Convention, some conservative organization voice-up against the ratification and in 2016 a petition supported by over 12 600 citizens calling against the ratification of the Convention was delivered to the Ministry of Justice (Vlada SR, 2017).

Overall, the analysis was aiming at mapping the compliance of the current Slovak laws and policies with individual articles of the Convention. It identified that a great majority of requirements

introduced by the Convention are already in accordance with the current Slovak legislation. At the same time, it recognized that some need for harmonization of the Slovak legal and policy systems with parts of the Convention – ´partially in compliance with the Convention´ - definition of the gender-based violence, article 12 section 3, article 18, article 21, article 56, article 57 and article 58. For instance, the definition of gender-based violence in regard to a compliance of the Slovak legislation. The Criminal Code currently does not recognize sex/gender as one of the specific motives. The law recognized various specific motives and protected groups such as children, pregnant women, a dependent person, or specific motivation of revenge, racial or ethnic hatred or a sexually motivated criminal offence (Act 300/2005 Z.z., 2005). The Ministry of Justice admits that for instance relating to the case in Bratislava in which an offender was assaulting women (specifically targeting women) with excrements,[8] none of the specific motives would be applicable. Therefore the analysis concluded that "*in the future, it will be necessary to include sex/gender among the specific motives of criminal offences*" (Vlada SR, 2017). It remains unclear how this was classified as "partially in compliance" when the analysis literally stated that the Slovak legislation absolutely omits to recognize gender-based violence as a specific motive of criminal offences. The provided analysis classified as "not in compliance with the Convention" only two articles – article 25 and article 54. Regarding the article 36, the Ministry of Justice states that the current Criminal Code provisions are in compliance with the article (Vlada SR, 2017).

Crime of rape

The Slovak Criminal Code 300/2005, in the chapter of offenses against human dignity, in section 199 defines the crime of rape. The section 199 (1) provides that:

[8] More on the case in English available at https://spectator.sme.sk/c/20858972/fecal-phantom-gets-final-sentence.html

"*Any person who, by using violence or the threat of imminent violence, forces a woman to have sexual/genital intercourse with him, or takes advantage of a woman's helplessness for such act, shall be liable to a term of imprisonment of five to ten years*" (Act 300/2005 Z.z., 2005).

The article 36 of the Convention requires the parties to adopt such legislative or other measures, which enable the state to prosecute the perpetrators and offer protection from any act of sexual violence when conducted intentionally with other person(s) without her or his consent. To differentiate whether the act was prohibited and punishable the crucial element is the absence of free will and voluntarily given consent. To assess whether the consent was given, and if so, whether it was given voluntarily, the assessor shall take into account the context of all surrounding circumstances. The Convention does not specify whether the consent must be given verbally or non-verbally, it only mentions that it must be an act of a free will and on a voluntary basis. The paragraph 192 of the explanatory report specifies that the assessment whether the consent to any act of sexual nature was given voluntarily should be context-sensitive and should consider a wide spectrum of behavioral responses and reactions to sexual violence and rape which victims exhibit. Such an assessment should not be based on stereo-typical behavior in such situations (Council of Europe, 2011b para.192). This means that the assessor should not, for example, link the lack of physical resistance or no obvious fighting back as giving voluntarily consent. In support of this, the authors of the Explanatory Report drew attention to a milestone judgment delivered by the ECtHR in 2004. In the case of M.C. v. Bulgaria, the Court stated that it was persuaded:

"that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's

> *sexual autonomy. In accordance with contemporary standards and trends in that area, the member states' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim*" (M.C. v. Bulgaria, 2004 para.166). Additionally, the Court stated that: *"[r]egardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms ("coercion", "violence", "duress", "threat", "ruse", "surprise" or others) and through a context-sensitive assessment of the evidence*" (M.C. v. Bulgaria, 2004 para.161).

The Court acknowledges that in practice it might be difficult to prove the lack of consent without clear evidence such as bodily marks caused by physical violence or absence of eye-witnesses, nevertheless the state organs shall rule based on assessment of all surrounding circumstances and the prosecution shall be focused on the issue of the (lack of) given consent (Pirosikova, n.d.).

Similarly to the explanatory report to the Istanbul Convention, the Slovak Criminal Code has been interpreted and "explained" by local legal scholars. The most popular ´Extensive Commentary´ has been written by a number of scholars led, published, and regularly updated by Jozef Centes.[9] Based on the interpretation of the criminal code in the Extensive Commentary, the section 199 aims to protect the dignity of women and her right to free decisions about her sexual life. It literally states that the "*subject*" of this provision is a person of the female sex, regardless her age, mental

[9] J. Centes is a prominent legal figure, public prosecutor, university teacher, since 2014 inaugurated professor of Criminal Law, between 2011-2013 held the position of the General Prosecutor

or physical state, her reputation, lifestyle or whether or not the woman was sexually untouched (Centes et al., 2016).

The Commentary defines sexual intercourse as "*a contact between male and female reproductive organs in such a way, that there is at least partial penetration of man´s penis into woman´s vagina… If the victim is a virgin, it is not required to penetrate the hymen nor is relevant whether the perpetrator reaches satisfaction. When there is a [surface] touch of reproductive organs, it is classified only as an attempt to commit a crime of rape*" (Centes, et al., n.d.).

The drafters of the Explanatory Report to the Convention particularly call on states to ensure that the interpretation of rape legislation and consequently the prosecution of rape cases are not affected by gender stereotypes and myths about male and female sexuality (Council of Europe, 2011b para.192). This is supposed to prevent issues related to gender stereotypes such as those which say that social position of men is naturally dominant, and men are active seekers of sexual interaction while women are rather submissive and their sexuality is rather passive. The key elements in determining whether the act can be classified as rape or sexual violence can be drawn from the interpretation by J. Centes (et al. 2016); the violence or the threat of imminent violence shall be understood as the use of physical force by the perpetrator in order to overcome or eliminate "*seriously intended resistance of the woman*" to reach sexual/genital intercourse against her will. It elaborates further and similarly to the Extensive Commentary by Samal (2012), provides a very stereotypical guidelines for determining potential criminal act of rape by stating "*it cannot be considered a forced sexual intercourse when a woman at the beginning resists, but after a while willingly consents*" (Centes et al., 2016). How can anybody not commit a crime by starting with committing the crime but finishing with the victim of the crime consenting to the crime, therefore, nulling and voiding the crime, remains unclear.

Analysis of the annually updated versions of the Extensive Commentary by Centes and Others in the last 6 years suggest that they have been providing the exact same interpretations of the criminal acts of rape as well as sexual violence. There has been absolutely no change which suggests that there has been no reflection of the international trends in the consent-oriented rape law and in this field, Slovak legal system is stagnant.

Although the Ministry of Justice in its analyses requested by the government´s decision 297 stated that the current criminal code is in compliance with article 36, the reality might look slightly differently. The Ministry of Justice identified in the analysis that within the ambit of the article 36, the Slovak Criminal code lists criminal offences of rape, sexual violence and sexual abuse (§199-201). "*These criminal offences after the latest revision of the Criminal code deems "close person" also as ex-husband, spouse, ex-spouse, a parent of a mutual child and a person which is in relationship to their close person, but also a person, which lives or lived with the perpetrator in a shared household. Committing such criminal offences towards a close person/person under guardianship results in an imposition of higher penalty*" (Vlada SR, 2017). The Ministry in this analysis focused on a very particular and narrow requirement of article 36 and completely ignored the crucial aspects such as a criminalization of any sexual act based on non-consensual nature.

The Criminal Code in the §199 operates with a concept of violence which is further elaborated as a use of physical force. Undoubtedly, this concept is not in line with the key element of lack of consent for classifying a crime of sexual violence and/or rape as stated in article 36.

A brief analysis of final decisions of the Slovak courts suggests that the *Extensive Commentary* by Centes et al. has a significant influence also on the rulings of the courts. For example, in the case in which the district court of Vranov and Toplou ruled on an alleged rape crime committed against a physically disabled and blind woman by her fully-bodily-able friend. In several parts of the

reasoning the judge Monokova quoted sections from the Extensive Commentary by Centes. For instance, in the final ruling, the judge stated that *"the object of the criminal act of rape is the right of a woman to freely decide on her sexual life. The subject of the attack/assault is a person of the female sex, regardless of her lifestyle, her reputation or even whether the woman was a virgin, including cases when the woman had sex with the perpetrator in the past, including their relationship be it a partner, a spouse or a husband*" (10T/40/2014, 2017). The judge continued by citing that "*the violence shall be understood as use of physical force by the perpetrator in order to overcome or eliminate seriously intended resistance of the woman and attaining sexual intercourse against her will, while the sexual intercourse is defined as a contact/connection between male and female reproductive organs*" (10T/40/2014, 2017). The judgment also cites the precise wording of the definition on forcing a woman by stating that "*Forcing a woman to an intercourse shall be understood as overcoming of seriously intended resistance of the woman or giving up of resistance the woman due to realization of helplessness, taking into consideration that the perpetrator by a use of violence or a threat of imminent violence gave no choice to express resistance*" (10T/40/2014, 2017). The outcome of the judgment was that it was not proved that the crime was committed by the defendant.

The first instance district court in Prievidza also quoted the Extensive Commentary by stating that "*intercourse shall be understood as a contact of the male and female reproductive organs in such a way, that there is at least a partial penetration of a male penis into woman´s vagina*" (2T/43/2016, 2016). Almost identically, the district court in Cadca in support of the finding quoted the Extensive Commentary by stating that "*the defendant overcame by a use of violence a seriously intended resistance of the injured party thereby committed a crime of a rape*" and absolutely identically restated that "*Intercourse shall be understood as a contact of the male and female*

reproductive organs in such a way, that there is at least a partial penetration of a male penis into woman´s vagina" (2T/144/2013, 2013).

Crime of sexual violence

The section 200 of the Criminal Code defines the crime of sexual violence by stating that:

> **"***Any person who, by using violence or the threat of imminent violence, forces another to engage in oral sex, anal sex, or any other sexual acts, or takes advantage of another's helplessness for such act, shall be liable to a term of imprisonment of five to ten years*" (Act 300/2005 Z.z., 2005).

The Extensive Commentary by Centes does not provide an extensive commentary in regards to the crime of sexual violence. Basically, it is referring to the very same terminology and etymology as in the previous provision on the crime of rape. However, it does provide a unique feature and that is stating that the subject of the attack as well as the offender may be a woman but also a man (Centes et al., 2016). This is a crucial difference between section 199 and section 200, since section 199 – rape can only be committed against a woman. The Commentary elaborates on the meaning of sexual acts and it states that the sexual acts of oral or anal sex which are listed directly in the text of section 200 are only listed in a demonstrative manner and the provision shall be understood as any acts or activities aiming and satisfying sexual needs and intervening into bodily integrity of the victim (Centes et al. 2016). The difference between the section 199 and section 200 is that the latter does not require (at least) a partial penetration of the penis into vagina, otherwise, the act would be understood as rape as stated in section 199. Cases which for obvious reasons would not be classified as rapes and there is a provable use of force or a threat of imminent use of force resulting into any activity aiming at satisfying sexual needs against the other person´s will, these cases are covered by the section 200 – sexual violence.

As a part of the analysis of the judgments by the Slovak courts, it was found that several judges ruled in cases in which the defendants were charged simultaneously with both crimes of rape and sexual violence. Judge Chmelan in 2012, found an offender guilty of committing a crime of rape §199 and a crime of sexual violence §200 and the offender was sentenced to 8 years and 4 months imprisonment. The judgment was appealed by the offender, however, the second instance court in Trencin rejected the appeal and upheld the first instance court judgment (1T/138/2012, 2012). In the justification part, the judge noted that the fact that the offender committed two crime was perceived as an aggravating circumstance (1T/138/2012, 2012). Similarly to the previous case, the district court in Liptovsky Mikulas convicted an offender of a crime of rape and crime of sexual violence and ruled a concurrent sentence to the offender of eight years and four months of imprisonment (2To/103/2013, 2014). The defendant appealed to the county court in Zilina which annulled the judgment of the first instance court, modified the reasoning, found the offender guilty of a crime of rape and crime of sexual violence and sentenced the defendant to eight years and four months of imprisonment (2To/103/2013, 2014). The defendant appealed to the Supreme Court arguing a wrongful legal examination and incorrect application of the §41 of the Criminal Code – concurrent sentencing. The Supreme Court accepted the appeal and ruled that "*if the offender, by use of force or by a threat of imminent use of force, forces a woman to an intercourse and also to other sexual acts or if the offender takes advantage of her helplessness for such act, and these sexual acts (including the intercourse) are alternated, cumulated or committed in an immediate sequence, it shall be considered as a single act (concurrence) of the crimes of rape §199 and sexual violence §200*," essentially ruling that nobody can be found guilty of committing both crimes at the same time (Tdo 49/2013, 2013 p.5). Besides delivering this ruling, the Supreme Court canceled the judgment of the County Court of Zilina and order the court to deliver a new judgment.

The County Court in the subsequent judgment found the defendant guilty of the crime of rape with a concurrent sentence of five years and six months (2To/103/2013, 2014).

Andrea Mesochoritisova in her *Analysis of the Istanbul Convention in the light of the public policies of the Slovak Republic* argues that the current Slovak legislation does not reflect the substance of the lit. C of paragraph 1 of Article 36 which requires to criminalize cases of "*causing another person to engage in non-consensual acts of a sexual nature with a third person*" (2016 p.216). The Extensive Commentary suggests that in cases when for example a woman forces a man into an intercourse/coitus with another woman, she shall be liable as an indirect offender (Centes et al. 2016). This can be classified based on the provisions in the second division of the Slovak Criminal Code 2005 which lists the definitions of an offender, accomplice and an abettor of a criminal offence (Act 300/2005 Z.z., 2005). Based on the explanation provided in GREVIO (2017 para.142) report on Austria, the conclusion reached by Mesochoritosova (2016) stating that the current Slovak legislation does not meet the requirement in the lit. C, paragraph 1, article 36 of the Convention, is correct.

Which path to follow? Selected issues of examined legal provisions

Force-based criminal law provisions

Each of the selected jurisdictions criminalizes a crime of rape. Wording and a content of the provisions are quite similar, with some small but very important differences. An apparent common denominator for each of the selected jurisdictions is in the assessment of an alleged crime of rape, the fact that there must be a recognizable application of violence, physical force or a threat of force/injury. The specific wording varies, nevertheless, the requirement is present in each of them. In regard to the provisions on sexual violence or sexual coercion, and in the case of Austria, the provision on violation of sexual self-determination the differences are greater. The most noteworthy differences are examined below.

Slovakia further restricted the assessment by a stricter wording of the criminal code provisions. It requires a threat of "*imminent*" violence. Centes (et al., 2016) states that if the violence under threat is not imminent and at the initial phases it is not possible to clearly prove that it was leading to satisfaction of sexual need of the offender, it shall be assessed only as a crime of extortion as stated in provision §189. In cases of threat of imminent violence, it must be obvious that the violence will be used immediately if the victim would not surrender to the will of the offender (Centes et al., 2016). Additionally, the wording of "*seriously intended resistance*" undoubtedly puts more burden on the assessment procedure to prove that the resistance was "seriously intended". Seems like "any" resistance is not enough, it must be "seriously intended." This wording is not present in the legal provisions but "only" in the extensive commentary, however it must be restated that it has been repetitively shown that the Commentary is a frequent source of definitions and literal citations in final judgments delivered by the Slovak courts.

The same interpretations apply to the second examined criminal act legal provision – sexual violence. In Slovakia, rape is a crime only against a woman and it must include genital penetration, and sexual violence is a crime against either, man or a woman, and requires a penetrative conduct other than genital intercourse. Based on a representative survey conducted in 2017, only 27,9 % of cases of sexual violence included use of force by the perpetrator, 14,4 % included threat of imminent use of force, 22% of victims consented to sexual act due to fear, in 11,9 % of cases the offender threatened the victim to spread slurs and scandals about the victim, and in 11,4 % of cases of sexual violence followed by a long-term psychological coercion by the offender (Ocenasova, Michalik, 2017 p.25). Based on this data, just over 40% of all cases of sexual violence, namely rape §199 and sexual violence §200, are currently covered by the Slovak Criminal Code. Zuzana Ocenasova (2018), one of the authors of the survey, noted that it is safe to presuppose that around a half of all cases of sexual violence could be prosecuted only with serious difficulties based on the current criminal legislation. She added that based on the survey, in cases of force-based definitions of sexual violence, it is implicitly expected form the victim to defend herself and in cases when the woman who experienced sexual assault does not show marks of violence it is common for this woman to experience distrust and skepticism and therefore might not seek assistance from the police (Ocenasova, 2018).

The Czech judicial system also requires a presence of physical violence or a threat of imminent violence by the perpetrator. Unlike the Slovak system, the Commentary by Samal, states that threat of violence shall be understood as a threat of imminent violence but also as a threat of violence which is not to be used immediately but possibly only later in the future (2012, p. 1837). To differentiate between a threat of violence related to crimes of sexual nature and crime of extortion,

the first scenario requires an eventual personal/physical contact of the perpetrator and the victim. As an example, Samal detailed a scenario when "*the offender via a phone threatens the victim to break his/her arm unless the victim arrives in a proposed location in order to reach a sexual intercourse with the offender. The victim, knowing the aggressive character of the offender arrives in the location and without any further/more current threat of violence undergoes a sexual intercourse with the perpetrator"* (2012, p.1837). Furthermore, the threat does not need to be targeted directly towards the victim but also for instance towards the victim´s child, relative, etc. (Samal, 2012). Additionally, according to Samal (2012), the *threat of other serious detriments* shall be understood as a threat of material detriment but also as a threat of a serious injury to honor and good reputation, threat of a break-up of marriage or disturbance of family life. These aspects of the criminal provision for rape certainly positively broaden the scope of protection of victims and a society as a whole.

The second examined legal provision of sexual coercion partly follows the requirement of the provision related to rape. However, in the second paragraph, it omits the requirement of presence of physical violence, threat of violence or threat of other serious detriment and criminalizes all acts of sexual nature which are coerced on another person by other means than physical violence or a threat of such violence. It focuses on "softer" ways of coercion characterized by exploitation of dependence or hierarchical power relations signified in the offender´s position, credibility or influence. This is an enormous progress in terms of criminalizing all non-consensual sexual acts as required by the Istanbul Convention.

In the Austrian legal system, assessment of crime of rape and crime of sexual coercion also require the presence of use of force, deprivation of liberty or threat with a present (in other words imminent) danger for limb or life. In the provision referring to the crime of sexual violence the

threshold of ´an imminent danger for limb or life´ is omitted. For a better understanding of crucial terms of these provisions, the Supreme Court engaged in a fairly high number of cases which provide us with a substantial source of interpretations.

The most obvious divergence from the threshold of use of force, etc. is the newly adopted legislation of §205a which aimed at ensuring a full compliance with article 36 of the Convention by criminalizing all non-consensual sexual acts. Under this provision, no determination of use of force is required, rather the threshold is set at acting against person´s will, or an act after a prior intimidation which is in direct contrast with the provision for the crime of rape with requires a threat of immediate violence. As already discussed in the previous part of the thesis, there is still a lot that needs to be examined to determine whether ´against person´s will´ equals to the threshold of all non-consensual sexual acts. Meanwhile, the Austrian Criminal Code is the only one from the selected jurisdiction which specifically states the threshold "against person´s will" in the legal provision. Neither in the Czech Republic nor in Slovakia the criminal codes recognize a breach of person´s will as a threshold for criminalizing a sexual act. In both countries, the legal scholars engaged in using the term against a person´s will, however, only as a part of de facto non-binding commentaries to the criminal codes.

Consent-based criminal law provisions

As a possible recent source of inspiration for non-consensual sexual legislation, for example, Sweden can be examined. The latest amendment to the Criminal Code from 2018, related to section six named ´sexual offenses´ introduced two new crimes - negligent rape and negligent sexual assault. The Criminal Code states that all cases when a person engages in sexual acts with another person and is grossly negligent to the fact that another person does not participate voluntarily, the person shall be liable to imprisonment for a maximum of four years (Swedish Penal Code, 2018).

Principally, when it should be obvious to the offender that the other person did not give a consent to the sexual act, the act shall be criminalized. The term gross negligence has been described as "conscious negligence or more serious forms of unconscious negligence" as E. Hofverberg (2018) argued and added that the test is whether the offender could and did do all the things necessary to determine whether consent was actually received. The Swedish Minister of Justice, M. Johansson claimed that "*this is a modern legislation based on modern relationships*" and noted that "*It should sit in the spines of every boy and man in Sweden that this is how it is. That you have to make sure that the one that you intend to have sex with is a voluntary participant*" (Anderson, 2018). Elin Sundin, a vocal advocate for passing of the consent-based legislation, welcomed the new legal provision and stated that "*We need men to understand that if he is unsure, he should either ask or just not go there. We have a saying in Sweden: 'If she is lying still, it is not her will*' (Anderson, 2018). The amendment also received some criticism. The Swedish Bar Association Secretary General Anne Ramberg stated that "*The new legislation has not lowered the burden of proof, since the prosecutor has to prove that a crime was committed, and they have to prove intent…We have been very critical because it's not going to lead to more convictions*" (Anderson, 2018). An overall negative aspect of these provisions is, similarly to the Austrian section 205a, not setting a minimum penalty which can send a signal that a rape without consent is something less serious as rape conducted with use of force. Whether these formulations of the criminal code fulfill the requirement of article 36 of the Convention should be known soon. Sweden is currently in the evaluation procedure by GREVIO. The evaluation report on Sweden by GREVIO (2018) is scheduled to be published by the end of 2018.

In general, the Istanbul Convection does not include a definition of consent. To obtain some guidelines or an inspiration on defying consent in relation to sexual violence crimes, a small

number of European national legislations can be examined. As the latest report on rape law from the EU countries conducted by Amnesty International states, only eight countries[10] in the EU have adopted legislation in line with the international human rights standards requiring criminalizing all non-consensual sexual acts (Amnesty International, 2018).

A noteworthy example is from 2015 when the Director of Public Prosecution presented guidance and toolkits for the law enforcement agents in England and Wales where consent-based legislation was adopted in 2003. The goal of the guidance was to provide further clarification of the law and restate that based on the 2003 legislation, the prosecutors are obliged to require the defendants to provide an explanation on how the consent was obtained. The guidance also put emphasis on the necessity for assessing person´s ability to consent in specific circumstances, for example, if there is a likelihood of mental health problems, if the person was asleep, unconscious or incapacitated due to consumption of alcohol or drugs, or if there was financial or other dependencies in the context of domestic violence or another relationship of power (Amnesty International, 2018). These requirements shift the burden of proof from the victim to the defendant which is a significant human rights-oriented development.

From the international perspective, one of the most renowned decisions delivered by the CEDAW Committee, the case *Vertido v The Philippines* decided in 2010, recommended the state party to:

> *"(i) Review of the definition of rape in the legislation so as to place the lack of consent at its centre;*
>
> *(ii) Remove any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the*

[10] Belgium, Cyprus, Germany, Iceland, Sweden, Luxembourg, Ireland and the United Kingdom.

complainant/survivor in proceedings by enacting a definition of sexual assault that either:

requires the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting;

or

requires that the act takes place in "coercive circumstances" and includes a broad range of coercive circumstances" (CEDAW Committee, 2010).

A kind reminder is that all three countries selected as the comparative jurisdictions for this thesis are parties to the CEDAW. Arguably the recent trend is more favorable to shifting towards the *´unequivocal and voluntary agreement´* as contrary to *´coercive circumstances´* with a long list of possible coercive circumstances which keeps the burden away from the defendant to prove that the ´agreement´ was sought, received and voluntarily given.

Additionally to national legislations and recommendations cited by the CEDAW Committee in 2010, the International Criminal Court in its Rule 70 of the Rules of Procedure and Evidence suggests the Court to use in sexual violence cases the following principles on how to define consent or rather how to assess lack it. It states:

"(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;

(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

(d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness" (ICC, 2013).

Generally, it would be highly beneficial if GREVIO provides more detailed definitions of the requirements of consent-based sexual violence including rape law. At the same time, perhaps it was a strategic step to provide a wide margin of appreciation and not to limit the definitions in the main text of the Convention or the Explanatory report, but rather progressively engage in definitions and interpretations of criminalizing all non-consensual sexual acts.

Language of the laws

Yet another outdated aspect of the Slovak Criminal Code is the chosen linguistic adaptation of the crime of rape a crime of sexual violence. In short, rape can be only committed by a genital penetration by a male offender on a female victim, other acts such as oral or anal penetration are to be assessed as "only" sexual violence. Following the comprehensive argument proposed by Sandra Fredman (2013) and her team that the epithet "rape" poses a unique linguistic and cultural connotation, the Slovak criminal act ignores this paradigm and significantly limits the range of involuntary sexual act which can be legally categorized as rape. On contrary, Austria and the Czech Republic broadened the range of involuntary act by criminalizing also ´comparable act to sexual/genital penetration´ which mitigates the issue of identifying the crime differently than a crime of rape.

Criminal sanctions

From listing the range of basic sentences by imprisonment only a limited number of conclusions can be drawn. What can be concluded is a reflection of the drafters' intentions. It certainly has a different sense, to set the sentencing range from five to ten years compared to six months to five years or not to even set any minimum penalty by imprisonment.

In this aspect, Slovakia set the highest range from five years to ten, as a basic range, which can be extended under aggravating circumstances such as acting in a more serious manner §138, when the crime is against a protected person §139, by reason of specific motivation §140, or against a woman in custody or in prison. Under these circumstances, the range of sentences increases to seven to fifteen years of imprisonment. The range of penalty by imprisonment between fifteen to twenty years shall be applied if the offender commits the crime of rape or sexual violence and through its commission causes grievous bodily harm to the victim. In cases when the offense is committed and causes death, or it is committed under a crisis situation §134-2, the sentence shall range between twenty and twenty-five years of imprisonment (Act 300/2005 Z.z., 2005). Generally, it is thought that the crime of sexual violence is targeted to other forced sexual acts than heterosexual genital penetration by a male offender, and all homosexual forced sexual acts. Peculiarly, under aggravating circumstances of the crime of sexual violence, the legislators adopted a formulation of aggravating circumstance which is only targeted to women (not to men) in custody or in prison. It was not able to research whether it was a mistake or there was a justification for such formulation, however, it certainly limits the scope of application of higher sentences if the crime of sexual violence is committed against a male victim in custody or serving his term of imprisonment.

The current Czech Criminal Code recognizes different aggravating circumstances and set slightly different penalties compared to the Slovak system. The basic range of penalty by imprisonment related to a crime of rape is set between six months to five years. It might seem much lower compared to Slovakia, however, the interpretation of the crime of rape is significantly different as discussed in the previous chapters. The ´classic´ type of rape – forced genital penetration – and comparable conduct is classified as an aggravating circumstance which increases the penalty range to between two and ten years. The same penalty should be applied if the crime of rape is conducted against a child or with a weapon. Increased penalty between five and fifteen years shall be applied in cases when the crime is committed against a child under fifteen years of age, if the crime is committed against a person in custody, serving term of imprisonment, during a preventive treatment/rehabilitation, preventive detention, foster care institution, or other places where the person's freedoms are restricted, or if the victim suffers a grievous bodily harm. Imprisonment between ten and sixteen years shall be applied if the offender causes the death of the victim as a result of his actions (Czech Criminal Code 40/2009, 2009).

In relation to the crime of sexual coercion, the Czech legislator adopted slightly lower ranges of penalties. The basic penalty is set between six months and four years or a prohibition of any further activities. If the offense is committed against a child or against two or more other persons, the offender shall be liable for imprisonment between one and ten years. Imprisonment between two and eight years shall be applied in cases if the offender for commission of the offense uses a weapon, or commits the offense against a person who is in custody, serving term of imprisonment, during a preventive treatment/rehabilitation, preventive detention, foster care institution, or other places where the personal freedom is restricted, or if the offender commits the crime as a member of an organized group. The range of sentence by imprisonment between five and twelve years shall

be applied if the crime is committed against a child under fifteen years of age, or the offender causes the victim a grievous bodily harm. In case the offender causes a death of the victim he/she shall be liable to imprisonment of ten to fifteen years (Czech Criminal Code 40/2009, 2009).

The Austrian Criminal Code sets arguably the lowest basic sentences for the crime of rape. The legislators set the range between one to ten years of imprisonment for convicted offenders of rape. List of aggravating circumstances related to the crime of rape within the provision specifically states five aggravating scenarios. Additional general aggravating circumstances are provided under the §33 which *inter alia* states that committing several crimes of the same or different act is an aggravating circumstance, but also committing a crime against a "close person" such as a relative, former spouse, present partner etc. (Austrian Criminal Code, 2018). Five to fifteen years of imprisonment shall be applied for cases when the offense results in a serious assault as defined by §84, if the offense leads to pregnancy of the victim or if the victim is placed into a state of agony or is treated in a particularly humiliating/degrading way for a longer period of time, the offender shall be liable to imprisonment for five to fifteen years. It might have a very positive impact to specifically recognize pregnancy as an aggravating circumstance. Undoubtedly, pregnancy as a result of rape impacts the victim in different ways with possible significant traumas related to such state. In cases when the offender as a result of the offense causes the death of the victim, the imprisonment for ten to twenty years should be ruled (Austrian Criminal Code, 2018). The provision for the crime of sexual coercion sets the basic penalty range between six months and five years. Aggravating circumstances and range of increased penalties are identical those listed under the provision for the crime of rape (Austrian Criminal Code, 2018).

As already criticized, the latest provision of violation of the right to sexual self-determination does not set any minimum penalty and only sets the maximum possible sentence for up to two years.

This provision also does not list any possible aggravating circumstances and only mentions that if the offense is punishable under another provision, the penalty of imprisonment could be higher based on the range under the other applicable provision (Austrian Criminal Code, 2018). Aside of well-founded criticism as stated in the NGO shadow report in the previous chapter, not setting any minimum penalty for a crime which can be comparable to ´classic rape´ might be assessed as violation of article 45 of the Convention which states that sexual violence crimes "*shall be punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness*" (Council of Europe, 2011a). At the same time, if the main point of the penalty of imprisonment is to punish but also to prevent a conduct of crimes in the future, a shorter time in prison with elaborated rehabilitation and educational program is more beneficial and impactful than a long time in prison with no proactive additional efforts to prevent the perpetrators repeating their crimes.

To assess the accurate rates of convictions, and more specifically, types and lengths of penalties another research would need to be carried out. We get some hints from the sources used in this thesis, which overall suggested that there is a high percentage of parole sentencing in the Czech Republic (Havelkova, 2010), a surprising decrease of convictions of rape cases despite the increased legal support for victims in Austria (UN HR Office, 2018). A study judicial practice related to criminal offenses of rape and sexual violence in Slovakia is currently being conducted by the Institute for labor and family research. The results of the study are estimated to be published in the first quarter of 2019 (Zastavme nasilie, 2018).

Based on the provided analysis in this and the previous part of the thesis, Slovakia is arguably a long way from ensuring compliance with article 36 of the Convention. It has a very limited scope of involuntary sexual acts which are criminalized under the current criminal law provisions. It

requires a rigid interpretation of the use of violence which limits the scope of protection. There are no signs of reflecting the notion of criminalizing all non-consensual sexual acts. The Czech legal system, as well as the Austrian system, adopted important amendments to their criminal codes which significantly broaden the scope of criminalizing involuntary sexual acts. Based on the jurisprudence of the selected countries, as well as the conclusions of the assessments of criminal codes by the GREVIO, neither of the chosen countries fully meet the criteria and principles introduced in article 36 of the Istanbul Convention.

> *"Human rights standards-compliant legislation itself is not the solution to addressing and preventing the ever-present prevalence of rape, rather a starting point*" (Amnesty International, 2018).

CHAPTER TWO: Adoption of the Istanbul Convention in socio-political context

Adoption of the Convention in the Austrian socio-political context

Austria, among the very first, signed the Convention on its first day, the 11th of May 2011. Austria has been rightly generally considered to be of high standards in the field of tackling violence against women and especially domestic violence. In 2013, the efforts were recognized by the CEDAW Committee (2013, para.24) which commended Austria for its leading role in combating violence against women including its position in the drafting of the Convention on preventing and combating violence against women and domestic violence. It welcomed the enactment of the Second Act on Protection against Violence of 2009 and notes the ongoing discussions to ratify the Convention.

Despite the strong record and commitment to protect victim of sexual violence, violence against women and domestic violence, Austria is no exception to experiencing opposition to the adoption of the Convention, and general resistance from oppositionist "anti-gender" groups. In June 2013, the magazine ´Katholisches´ (Catholic) published an article spreading disinformation about the Convention´s aim to introduce gender ideology. It aimed to inform the reader about the ratification of the Convention by Italy and asking a rhetorical question whether Austria and Germany would follow and contribute to the pool of countries that ratified thus contribute to the Convention coming into force. It stated that:

> "*In 81 articles, the Convention uses the language of gender ideology. An ideology that uses familiar words but means something completely different. Their goal is the eradication of the natural sex of man and woman. To invalidate the two*

> *natural sexes, many "sexes" are constructed. A natural gender is rejected. A human being is not a male or a female by nature, but only because of his will. The individual decides what he is right now. A self-allocation, which can also change arbitrarily and which the legislator and the society have to accept without contradiction. Otherwise, there would be discrimination…Women become a kind of protected category that requires special ad hoc provisions to ensure their "equality", but above all to overcome the natural gender order of men and women"* (Nardi, 2013)

As the time showed, the oppositionist groups were not successful in their goal of preventing Austria from ratifying the Convention and Austria became the 7th country to ratify the Convention. The ratification process was completed on the 14th of November 2013 without any reservations to the Convention. The Vice-Chancellor Michael Spindelegger on the date of ratification completion noted that "*We can be proud that Austria is one of the first countries to have ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence. With our ratification, we have contributed to making the Convention enter into force soon*" (Außenministerium, 2013). Spindelegger added a strong statement and called upon other CoE parties that have not ratified the Convention to do so in a near future. He specified that:

> *"[t]his Convention has established a common international standard of protection for women. I hope the ten ratifications that are needed for it to enter into force will soon be made. Austria is going to use its chairmanship of the Committee of Ministers to promote this highly important agreement in Europe and beyond. We owe it to the many victims of domestic violence to do everything*

in our power to prevent such human rights violations in the future" (Außenministerium, 2013).

The Convention came into force in Austria on the 1st of August 2014, among the first ten entries into force what was a condition for the Convention to become a binding instrument (Council of Europe, 2018a). In November 2014, the current Chancellor, at that time the Minister of Foreign affairs, Sebastian Kurz declared that *"[v]iolence against women has severe consequences for society as a whole and thus concerns us all. The fight on violence against women and girls is, therefore, one of the declared priorities of the Austrian foreign policy*" (Außenministerium, 2014). Notwithstanding the general high-level political support, there are numerous concerns currently disturbing the commitment and actual quality of mechanisms of protection and prevention of violence against women. Some issues were pointed out by the Council of Europe's GREVIO Monitoring Mechanism on Violence against Women and Domestic Violence. Austria is one of the first countries to have been reviewed by GREVIO Baseline Evaluation Report. The report on Austria was published in September 2017. The evaluation process was initiated by the submission of the state report by the Austrian Government, promptly followed by a shadow report by an NGOs coalition, just as we are used to from the CEDAW procedures. Next step was up to the GREVIO to deliver the evaluation report which was followed by the government´s comments to the GREVIO report. Lastly, the cycle was finalized by publishing recommendation adopted by the Committee of the Parties (Council of Europe, 2018d). Overall, the report restated the recognition of Austria for its "*strong leadership*" in the areas of combating domestic violence but also expressed some general worrisome. Among the persistent problems, as the GREVIO Committee pointed out, is that the focus has strongly been on the issue of domestic violence, while "*less*

attention, financial resources and political support" was dedicated to other forms of violence against women (GREVIO, 2017 p. 15-16).

The federal system for promotion and protection of gender equality has gone through numerous significant structural changes from its establishment. The Division for Women was founded in 1997 within the Federal Chancellery. In 2000, it was incorporated into the operational area of the Federal Ministry for Social Security and Generations. In 2003, the Division for Women was moved to the newly founded Federal Ministry for Health and Women. In 2007 the Women's Division operated in the Federal Chancellery. From March 2014 to June 2016 it was part of the Federal Ministry of Education and Women's Affairs, and from July 2016 to January 2018 of the Federal Ministry for Health and Women's Affairs. Taking effect on 8 January 2018, this structure changed again, and the task was taken back by the Federal Chancellery (Women & Equality, 2018). As rightly pointed out: "*such frequent changes by themselves are worrying from the perspective of sustainability and stability*" (Juhasz, Pap, 2018 p.19).

Austria is no exception to a tangible shift of politics to the right or even far-right political spectrum as is the case in many countries across Europe (Clarke, Halasz…, 2017., Klormann, Kohrs…, 2017). Current coalition has been formed with a strong participation of the FPÖ, the right-wing populist-national-conservatives (Nordsieck, 2017). As pointed out "*[i]ncreased funding of women's political interests is just as unlikely in the near future as improving the situation of asylum-seeking women*" (McKenzie, 2018). According to Paternotte and Kuhar (2018), the findings show that anti-gender campaigns resonate with right-wing populism in various different ways among which, right-wing populists are among the main drivers of anti-gender campaigns as is the case in Germany and Austria.

Some of the past changes to the federal system designated to promotion and protection of gender equality were no coincidence. It was the FPÖ and ÖVP who in 2000 formed a coalition government on the national level, which, among other things, dissolved the Women's Ministry, degraded it to a ministerial section and established a "men's section" in the Ministry for Social Affairs, Family and Generations (Mayer, Sauer. 2017). As Mayer and Sauer (2017 p.25) argue "*the FPÖ's positions in Government advanced conservative discourses on gender*." Now, the Government is formed of the very same parties.

Alarming tendency of deteriorating position of gender equality was also noted by Angelika Mlinar, an Austrian politician and a member of the European Parliament. She stated that "*the position of women in Europe has deteriorated, which is a trend we generally observe. The term "gender" causes protests in some countries, especially men are often afraid of a supposed threat*" (Der Standard, 2018).

As a possible mitigation strategy to this alarming trend, the alliance "*Gewalt FREI Leben*" (Violence FREE life) was founded in fall 2017. It is an association of victim protection institutions and civil society organizations, which goal is to improve the protection from violence in Austria. The Alliance's mission is to support the implementation of the recommendations of the GREVIO and to improve the implementation of the Istanbul Convention (AOF, 2018).

On contrary, the Austrian Society for the Protection of Tradition, Family and Private Property (TFP) is an umbrella organization of various associations with the aim of protecting the foundation of Christian civilization. Organizing number of lectures, summer schools, public talks, publication and flyers and campaign such as "*No to gender ideology - Yes to the traditional family"* or the *"European Crusade for the Family*" (Tradition…, 2018).

One of the most pressing issue that the system of protection of women against violence experiences in Austria is its insufficient funding. Currently, the overall annual budget is around 10 million euros (around 1 euro a year per citizen of Austria), which means the Government actually decreased the budget compared to the previous years. Such irresponsible budgeting directly effects the women who are looking for protection services (Gucanin, 2018).

Adoption of the Convention in the Czech socio-political context

Between 2014 and 2016, the Czech Women´s Union (CWU)[11] implemented a project called *"Equal Opportunities of women and men: awareness raising activities targeted to the regions of the Czech Republic.*" During the project period, the CWU together with other project partners carried out a number of activities including 35 debates, informative and educational events, in which over a thousand people participated, published series of Informative letters to the Istanbul Convention and a collection of expert articles #ForIstanbul: Domestic violence and selected topics around gender-based violence. Furthermore, the CWU published four extended volumes of their magazine "*Woman of the third millennium*" and dedicated significant attention to their renewed blog in which they mainly focus on the Istanbul Convention (CWU, 2016). The CWU (2016) delivered to the office of the Minister of Human Rights and Equal Opportunities[12] a petition presenting almost ten thousand signatures demanding adoption of the Istanbul Convention.

The government´s decision n. 930 adopted in November 2014 assigned the Ministry of Justice to prepare documents for signing and ratifying the Convention by the 30th of June 2015 (Vlada CR,

[11] CWU is a women's non-governmental, non-profit association with large membership covering the whole of the Czech Republic (over 10.000 members in 400 grassroots units - as of 2018). Its main program /mission of the CWU is to pursue equal opportunities for women and men and tackling other aspects of gender discrimination. (https://www.csz.cz/index.php)

[12] The Ministry of Human Rights and Equal Opportunities does not exist anymore. Its operation was terminated under the government of Andrej Babis in 2017.

2014). This assignment was specified in February 2015 by the decision n. 126 on the Action plan for prevention of domestic and gender-based violence 2015-2018, in which the Government *inter alia* assigned the Ministry of Justice to deliver documents for ratification of the Convention for an inter-ministerial commenting procedure, also by the 30th of June 2015 (Vlada CR, 2016c p.8).

Based on these government´s decisions, the Ministry of Justice prepared the document "*The analysis of the Czech Republic´s preparedness to accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence*" which was presented to and accepted by the Government´s decision in October 2015 (Vlada CR, 2015). This decision also assigned the Ministry of Justice in cooperation with the Ministry of Foreign Affairs to present the Government with materials in regard of signing the Convention by the end of 2015 (Vlada CR, 2015).

The decision n. 114 adopted on the 8th of February 2016 expressed the Government´s agreement with a ratification of the Convention and recommended the president to initiate the signing process with the reservation of the article 44, paragraph 1, section e). Moreover, the decision assigned the Ministry of Justice to provide a list of necessary legislative measures with regard to ratification of the Convention (Vlada CR, 2016b). Being among the last eight-member states of the Council of Europe who had not signed the Convention, on the 8th of February 2016, the Government agreed to sign the Convention. The official signature of the treaty was issued on the 2nd of May 2016 reserving to article 44 (Treaty Office, 2018). Then, the Minister of Human Rights, Jiri Dienstbier, welcomed the completion of the signing phase and stated that the ratification process is expected to be completed in 2018 (Vlada CR, 2016).

Significant delays in signing of the Convention were caused by several (mostly political) factors. One of the most vocal political figures opposing signature and consequent ratification of the

Convention has been the former vice-prime minister and a chairperson of the KDU – ČSL (Christian-Democratic Union – Czechoslovakian People´s Party) Pavel Belobradek.[13] In 2016, Belobradek claimed "*the Convention brings zero novelties in the field of protection of women against violence. We do not beat our wives*" (Kopecky, 2016). He further argued that "*the female genital mutilation does not exist in our country and the only novelty it [the Convention] brings is elements of gender ideology*" (Kopecky, 2016). Belobradek also expressed his opinion on the other issue – marriage: "*Marriage is a relationship between a man and a woman, parents are the father and the mother and there is no third sex...*" (Kopecky, 2016). Although the Convention does not deal with marriage legislation, oppositionists enjoy mixing the agenda of ´protection of marriage´ with Istanbul Convention. In May 2018, KDU – ČSL published a press release stating the Party´s stand on the possible ratification of the Convention. Among other concerns, it expressed serious doubts that:

> "*nobody is in a position to provide political guarantees that the Istanbul Convention will not be interpreted against a family unit structure consisting of a relationship of one man and one woman. Furthermore, there are no guarantees that the Convention will not be used as an excuse nor as a legislative pillar (1) towards a diminishment of the authentic differences between male and female sex or towards an elimination of the terms of father and mother from the official pro-family oriented governmental politics, (2) towards implementation of an early and forced sexualization of children in schools through obligatory education…"* (KDU-CSL, 2018).

[13] Pavel Belobradek held the office of the Vice Prime Minister for science, research, and innovation between January 2014 and December 2017.

The core ideas of the press release have been restated on several occasions by Belodradek, but also Marian Jurecka (a former Minister of Agriculture and a vocal oppositionist to the Convention) and number of other MPs from the KDU-CSL party (Jurecka, 2018., KDU-CSL, 2018c., Poslanecka snemovna, 2018).

In June 2018, an alliance of seven Christian churches published an official statement calling upon the MPs not to ratify the Convention as long as it includes "*degradation of relationships between men and women to antagonistic power relations, categorizing societies of equal human being into artificial categories, and programmatic relativization of the common values of the European culture and it´s passing down to next generations*" (Cirkev, 2018). The statement also argues that "*the Istanbul Convention is neither necessary nor beneficial for the countries of the European Union*" (Cirkev, 2018). The alliance organized a petition "*We want to preserve traditional family, we reject ratification of the Istanbul Convention and the Dublin IV*" which calls upon the Prime Minister and the Government of the Czech Republic to prevent the ratification of the Convention because "*it only leads towards a spread of gender ideology and severe impact on establishment of traditional – hence heterosexual – families*" (Brada, 2018). As of November 2018, the petition has been signed by over 6 600 signatories (Brada, 2018). According to the petitioners, the Convention has a direct effect on educational curriculums and education of the youth. The petitioners claim that based on the Convention the children will have to be educated on "non-stereotypical gender roles" which is aiming at indoctrination of children towards gender-neutrality and establishment of sort of the third gender. The petitioners state that "*The practice of the western countries clearly shows that the children in their early childhood development ´can choose´ their own sex, which is absolutely socially, morally, culturally and historically unacceptable*" (Brada, 2018).

In the last four years, the Czech Government has been through some major political crisis (minority government and government in demission.) In 2017, the Government under the current Prime Minister Andrej Babis, despite noteworthy criticism from across various sectors, decided to terminate the existence of the Ministry for Human Rights, Equal Opportunities and Legislation. The Prime Minister claimed that the agenda will be sufficiently covered by the Ministry of Justice (Ceska Televize, 2017). Arguably, frequent resignations and naming of new Ministers of Justice is not particularly helpful for upholding the agenda of ratification of the Convention. Currently there is already a fourth Minister of Justice in the office, just in the last 4 years (Vlada CR, 2018a).

The Ministry of Justice, the coordinating body of the ratification process, argues that it is necessary to finalize the amendment procedure of the criminal code. The analysis which was requested by the Government and its realization assigned to the Ministry of Justice identified three areas which require a legislative modification. These are the necessity of provision of a sufficient limitation period in relations to crimes of sexual violence, the necessity of criminalizing intentional sterilization of women without prior and informed consent and the necessity of criminalization of an act of luring a person to the territory of a state other than the one she or he resides in order to force this person to enter into a marriage (Ministry of Justice…, 2015). "*First of all, it is necessary to complete adoption of the domestic amendment, only after that, the Convention will be ratified*" stated currently already a former Minister of Justice (Psenicka, 2018).

"*It probably isn´t a huge tragedy if the ratification process of the Istanbul Convention will be prolonged by a couple of months, however, I think it would be possible to ratify the Convention even before the amendment procedure of the Criminal Code*" was noted by senator and the former Minister for Human Rights Jiri Dienstbier (Psenicka, 2018). Generally, the tradition in parliamentary democracies such as also Czech Republic suggests that the head of the state supports

and only formally approves the acts of the Parliament, however, this case might be different. The President´s spokesperson admitted that the Head of the State might hesitate with his signature needed for the completion of the ratification process. He added that the president would hesitate if he believes that "*the Convention significantly prefers unreasonable gender ideology*" (Psenicka, 2018).

The postponement of the ratification, caused besides others also by the official position of the Ministry of Justice, was welcomed by many critics of the Convention including Nina Novakova, a former MP for the TOP 09 Party. Novakova stated that she currently works closely with Czech and Moravian Catholic bishops, who in May 2018 disseminated letters to all parishes decisively warning against the dangerous impact of ratification on the life of the nation, institutions, especially schools, but also dangerous impact on the life of families and individuals (Fatym, 2018a). Novakova also stated that thanks to the postponement "*we will now have more time to persuade the public about the harmfulness of this Convention*" and she also believes that at the end, Czech Republic will follow the path of neighboring Slovakia which openly rejected ratification of the Convention at the beginning of 2018 (Psenicka, 2018).

The Czech MPs at the Parliament of the EU noticeably follow the rhetoric of their home national parties. Some MPs are vocally in favor of ratification with constructive critiques. Miroslav Poche (CSSD) generally supports the Convention, however, emphasizes the pity of not including parts on cyber violence, especially cases of so-called revenge porn (Bilek, Sojkova, 2017). Contrary to the supportive stands of some MPs there is also a vocal opposition to the ratification of the Convention. According to Tomas Zdechovsky, an MP at the Parliament of the EU representing the KDU-CSL party, the Convention is very controversial because in practice it mainly supports the gender indoctrination and he is of an opinion that the Convention is not needed since the current

legislation related to the whole issue is at the sufficient level in the Czech system. On the contrary, he claims that the attention of the EU and the public should be channeled towards countries where the level of protection of women is very low, and as an example he states Turkey (Bilek, Sojkova, 2017). Zdechovsky also takes a firm public stand against the ratification and requires rejection of the ratification just as Slovakia did (Popelkova, 2018).

The current Czech Prime Minister Andrej Babis several times stated that his Government is in favor of the ratification. He reassured his intention to ratify also just a few days after then the Slovak Prime Minister Fico firmly rejected ratification of the Convention in Slovakia. In February 2018, Andrej Babis stated that he "*doesn´t see any reasons why the Government should not ratify*" (Pravda, 2018). On the 18th of June 2018, Andrej Babis published a personal blog in which he was responding to clearly fabricated accusations that he has already ratified the Convention and that he is in favor of letting children to choose ´the third gender´. According to Babis´ statements, it is a clear case of fake news. He states that it is "*a nonsense that the Istanbul Convention ´restricts gender´ or that the Convention allows taking children away from their parents. This Convention is fact aims at developing countries with weak protection of women and in our case, those fighting against the Convention are mostly pro-Russian conservative websites*" (Babis, 2018).

In September 2018, The Government´s Office published a brochure "*The Convention of the Council of Europe on preventing and combating violence against women and domestic violence: myths and facts*" listing the most common misinterpretations of and disinformation about the Convention (Vlada, 2018b). The brochure was initiated by a recommendation of the Government´s Committee for prevention of domestic violence and violence against women, which has been aiming at responding to increasingly frequent media disinformation and campaigns of some politicians and platforms against the ratification of the Convention (Vlada CR, 2018b). The very

same recommendation of the committee also recommended to carry out an awareness raising seminar on the Convention for both chambers of the Parliament (Vlada CR, 2018c).

Probably at the time of the committee work on completion of the brochure, nobody expected to be challanged with a new source of hoaxes and myths from some of the highest ranked Catholic church officials. On the 28th of September 2018, "*monsignor*" Petr Pitha, former Minister of Education and a Roman Catholic priest, delivered (read from a paper) a sermon in the main Prague's Cathedral of the Saint Vit, mystifying and misinterpreting the Istanbul Convention and spreading false characteristics of the Convention. The video of the sermon was published on YouTube under a profile named "Istanbul Convention" (YouTube, 2018a). Among other statements, he stated that the Istanbul Convention and its protagonists adopted ideologies of Marxism and Nazism (YouTube, 2018a). He further stated that:

> "*Your families will be ripped and chased apart. All is needed, is to you say to your children, that men and women are not the same…*"; "*Sex determination of the newborns by looking into their crotches will be abolished*"; "*Children will decide what is their sex, and therefore you will be obliged to raise them sexlessly and furthermore you will not be allowed to give them any name*"; "*for every disagreement you will be deported to correctional/reformative labor camps with extermination features"*; "*Your children will be taken away and it will be concealed where they are kept, where they have been sold, where there are being imprisoned. To reach this, a false accusation is enough*."; "*Homosexual will be proclaimed a superior ruling class, you will be a part of an inferior helping class and work according to the commends of the powerful elites, who will be dictating what can and cannot be said*" (YouTube, 2018a).[14]

[14] A shortened version of the video available at https://zpravy.idnes.cz/kazani-arcibiskupstvi-katedrala-svateho-vita-svaty-vaclav-petr-pitha-istanbulska-umluva-gsf-/domaci.aspx?c=A181009_100435_domaci_lre)

The Prague's archbishopric through its spokesperson announced that the sermon was not a representation of its stand: "*these are his [Pitha´s] words, not of the archbishopric*" (Horak, 2018). The spokesperson added that according to him, the church top leadership cannot in any way influence opinions which the priests present during their sermons (Reznakova, 2018). On the contrary, the top church representatives did express their opinions on the "incident". The Prague´s archbishop Dominik Duka publicly announced that "[*a]s a chairperson of the Czech Bishops´ Conference, I express support to Mons. Petr Pitha in relation to the sermon delivered on the Saint Wenceslas day*" (Horak, 2018).

As a prompt response to this sermon, the Czech Women´s Lobby (CWL)[15] brought an accusation against the Roman Catholic priest Pitha, for spreading of alarming news as stated in section 357 of the Czech Criminal Code.[16] In the published press release, CWL claimed that "*[n]ot a single of the Pitha´s mentioned statement is true*" (CWL, 2018b). At the time of writing, there is no follow-up information on a progress of the law-suit.

Adoption of the Convention in the Slovak socio-political context

Based on the government´s decision n. 297 from the 4th of May 2011, Slovakia signed the Istanbul Convention as one of the first signatory countries, on the very first day of the Convention opening for signing, on the 11th of May 2011. The Slovak Government by this decision declared its consent to sign the Convention and assigned the Minister of Justice two main tasks. Firstly, by the 30th of June 2013, in cooperation with other ministries, the General Prosecutor, the chairperson of the Statistical Office and with the representatives of the selected NGOs working in the field of the

[15] The Czech Women's Lobby (CWL) is an umbrella organization that defends the rights of women in the Czech Republic. More information on CWL available at https://czlobby.cz/en/who-we-are

[16] Section 357 – Spreading of Alarming News states "*Whoever intentionally causes a threat of serious concernment of at least a portion of population of a certain area by spreading alarming news that is untrue, shall be sentenced to imprisonment for up to two years or to prohibition of activity*" (Czech Criminal Code 40/2009, 2009).

prevention and combating of violence against women and domestic violence, to carry out legal analysis of the Convention and in case of necessity to propose legislative changes needed to comply with the Convention for further review by the Government. Secondly, by the 31st of December 2013, after the conduct of the legal analysis and after the adoption of the necessary legislative acts ensuring the compliance with the Convention, to present a proposal for the ratification of the Convention for further governmental negotiations (Vlada SR, 2011).

In the following period, Slovakia reclaimed its stand to ratify the Convention domestically but also on the international level. In 2012, during the 67th UN General Assembly high-level meeting in New York, Slovakia proposed its national "voluntary pledges" related to rule of law. The Ministry of Foreign Affairs and European Affairs after consulting the Ministry of Justice, declared on behalf of the Slovak Republic *inter alia* the following pledges:

- *"to ratify the Istanbul Convention by the end of 2013,*
- *to strengthen the legal and institutional framework to recognize the rights of women against all form of violence against them, which is in line with the international law understood as violation of human rights and a form of discrimination of women,*
- *to abstain any form of violence against women and ensure that the state organs, including judicial organs working on behalf of the state, act in compliance with this pledge of protecting women´s human rights,*
- *to adopt all necessary legislative and other measures to ensure due diligence in prevention, investigation, punishment and provision of reparation for acts of violence against women perpetrated by the non-state actors*" (Slovak Republic, 2012).

Although, the national and the international position of Slovakia was clearly in favor of the ratification, during the preparatory phases and especially in the second half of 2013 representatives against ratification have started being very publicly active. Among the most active actors requesting to immediately halt all preparation on the ratification of the Convention were the number of religious organizations, NGOs and several MPs representing those institutions in the Parliament. The civic association "Forum for the Public Questions" (FPQ) supported by additional 105 NGOs, religious organizations, churches, and even private enterprises (FVO, 2013c) requested in its letter, to which they attached their own analysis (FVO, 2013b) of the Convention, the top national officials, to actively engage in termination of the ratification processes of the Convention. The FPQ claimed that it supports the overall goal of the Convention and that is to mitigate the violence against women, however they also claimed that the fundamental problem is that the Convention in number of its articles supports various aspects of gender ideology, therefore the FPQ called for a public discussion on the potential impact of the adoption of the Convention (Mesochoritisova, 2016).

In December 2013 the Government adopted *The National Action Plan for Elimination and Prevention of the violence against women 2014-2019* which included the task to prepare and present the proposal for ratification of the Convention by 2014. On the very same day as the Government adopted the Action Plan, the Minister of Justice requested the Prime Minister to prolong the task to present a proposal for the ratification of the Convention from 2013 to 2016 (Mesochoritisova, 2016). Although there is no way to be certain, one can easily argue it was based on the letter delivered to the office of the Minister of Justice from the representative of the Forum for the Public Questions requesting termination of the ratification processes (FVO, 2013a). As a

response to the request made by the Minister of Justice to prolong the deadline for the presentation of the ratification proposal, representatives of the Government´s Council representing the civic society delivered a letter to the Minister of Justice expressing major concerns about potential delay of the ratification and also underlined that the letter from the FPQ is based on numerous misinterpretations of the Convention and is in direct conflict with other already adopted obligations of the Slovak Republic in the field of elimination of the violence against women, for example the United Nations Convention on the Elimination of All Forms of Discrimination against Women (Mesochoritisova, 2016).

The slow ratification process of the Istanbul Convention in Slovakia was also noticed at the international level. In 2014, Slovakia submitted its combined 5th and 6th periodic reports for the period of 2008-2013 to the CEDAW Committee which inter alia declared that preparation of the ratification of the Istanbul Convention belongs among the priorities of Slovakia. In 2015, the CEDAW Committee (2015, para. 18) assessed the Slovak combined periodic report and "*noted with concern*" that "*there have been vigorous campaigns by non-State actors, including religious and civic organizations, the media and politicians, advocating traditional family values, overemphasizing the roles of women as mothers and caretakers and criticizing gender equality as "gender ideology."* Furthermore, the CEDAW Committee (2015, para.20) also noted with concern *"[t]he long delays in adopting comprehensive legislation on violence against women, including domestic violence, and in ratifying the Istanbul Convention.*" The Committee issued number of recommendations in which the Committee urges Slovakia

> "*to strengthen its efforts to take effective and proactive measures, such as awareness-raising campaigns and public statements by high-level government authorities, to promote the understanding of gender equality in line with*

> *international human rights standards, and counter efforts made by any actors to downplay or degrade the pursuit of gender equality by labelling such measures as ideology*" and to "*expedite the enactment of the law on the prevention and elimination of violence against women and domestic violence, in line with the Istanbul Convention, and ratify that instrument"* (CEDAW Committee, 2015 para. 18-21).

In 2017, sociologist and director of the Institute for Labor and Family Research, Silvia Porubanova, who participated in number of discussions between the pro-ratification representatives including the new Minister of Justice and the representatives of the conservative and religious organizations demanding termination of the ratification process, stated that "*during the discussions about the Convention we always almost immediately get to the trans people. The opponents of the ratification fear the most that the Istanbul Convention disputes or relativize men´s and women´s identity and, literally, that it would not be clear who is a man and who is a woman, and [according to them] that is a fundamental risk for a traditional family. I cannot agree with this*" (Gehrerova, 2017). Silvia added that it was the last time she participated in such discussion because she stated that "*at this point, this type of discussion does not seem to be meaningful nor legitimate*" (Gehrerova, 2017). This seems to be one of the tactics of the oppositionists to shift the factual debate away from the facts towards underlining fears and misinterpretations of the Convention or even other human rights documents.

Since the late 2017, a new alliance of predominantly Catholic church figures and organizations related to the Catholic church, called the "Slovak Convention for Family" (SCF) has been organizing a series of public talks called "*Zastavme zlo z Istanbulu*" in translation [Let´s Stop the

Evil from Istanbul] (SDR, 2017). The name itself is based on a common misconception that the Convention comes from Istanbul and is often related to rhetoric of bringing Turkish/Muslim elements into the Slovak thus the Catholic culture. The series includes frequently church-organized lectures usually taking place at churches across Slovakia, various petitions, many demagogic articles published on various portals, even YouTube videos – some of them as of November 2018 reaching around 260 000 views (Kuffa, 2018). The civil society sector organized a number of public talks, even a nationwide media campaign advocating for ratification of the Convention with placement in various media including the national television, radio and the online sector (info.sk, 2015). To illustrate the difference of social media popularity the ´anti-convention´ videos currently reach over a quarter of million views, while the YouTube channel of the pro-convention campaign has around 40 000 views (YouTube, 2018b). The public lectures against the Convention have been organized since the late 2017 and are still being organized biweekly across Slovakia. The activities of the SCF received significant support by all major Christian churches in Slovakia who agreed on a joint declaration against the ratification of the Istanbul Convention. This joint declaration was read virtually in all Christian churches across Slovakia as a part of the main Saturday/Sunday services sermon (KBS, 2018).

In spring 2018, then the Prime Minister Robert Fico delivered a public speech on the 22nd of February 2018. In this speech, on behalf of himself and the government coalition partners, he firmly stated that although 98 or 99% of the content of the Convention is useful, as the prime minister he would never permit ratification of the Convention (Gehrerova, 2018). During his speech, Fico misinterpreted several articles and goals of the Convention and repeatedly accused migrant communities of bringing their harmful cultural traditions to catholic Europe (Gehrerova,

2018). According to Fico, the problematic aspect is that the Convention would be in violation of the constitutional provision which defines marriage as a union of one man with one woman (SITA, 2018).

An assassination of the young Slovak couple, journalist Jan Kuciak and archeologist Martina Kusnirova, led to the resignation of Robert Fico, who however remains the chairperson of the strongest coalition party, therefore one can hardly expect any change in a position of the strongest governmental party on the potential ratification of the Convention. Instead of a potential improvement in the ratification process of the Convention, the Slovak National Party, which is a coalition partner in the current Government took a step further and requests not only termination of any ratification processes but also a complete withdrawal of the signature from the May 2011 (Gehrerova, 2018). The complete withdrawal of the signature is also strongly advocated by the already mentioned Slovak Convention for Family, who claims that they welcome the decision of the former prime minister not to ever ratify the Convention, however if still officially signed it is like "*a loaded gun at one´s head*" therefore only an absolute rejection of the Convention including the withdrawal of the signature will ensure that ´the loaded gun´ will stop aiming at the Slovak Constitution (Zbinovsky, 2018).

In March 2018, the European Parliament called on 11 EU member states, including Slovakia, to ratify the Istanbul Convention (European Parliament, 2018). Two weeks earlier, when it was already on the agenda of the EP to discuss the issue of a rather slow ratification pace in many countries of the EU, Miroslav Mikolašik, Slovak member of the EP, proclaimed that if the EP calls on the EU member states to ratify the Convention, it would be a serious step over the powers of the EP and intervention into the internal state affairs of the member states (Teraz, 2018). He added

that the Convention brings practice of gender ideology which is in conflict with the existing legislation (Teraz, 2018).

The Convention opposition uses the term "gender ideology" whenever they refer to the Convention and blame the Convention for introducing terms, principles and definitions that would harm the Slovak legal system (Daniska, 2017). Although the Slovak legal system does not have a tradition in using the term "gender" the colloquial language uses and understand the term very well. There is a minor linguistic issue, since a translation of "gender" in Slovak is "rod." The issue is that although the term "*rod*" is stated in the anti-discriminatory clause in the Slovak Constitution, it refers to a term "*birth, descent or family line*" not to "*gender*". These synonyms might cause a bit of confusion, nevertheless, the term "gender" is not so new to the Slovak legal system. In fact, all "questioned" terms are already known and applicable within the Slovak legal system for several years. For example, the Act No. 365/2004 of 20 May 2004 on equal treatment in certain areas and protection against discrimination, amending and supplementing certain other laws, commonly known as Anti-discrimination Act of 2004 prohibits discrimination based on sex which as explained in the article 2a – shall be also deemed as discrimination based on pregnancy or maternity, but also as discrimination based on sex or gender identification (Act 365/2004 Z. z., 2004). Furthermore, a number of binding legal sources adopted by the European Union elaborate on the terms and duties which are often stated as "dangerous if adopted" although they are already adopted and enforced. For example the *Directive 2006/54/EC of the European parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation* (recast) from 2006 requires all member states to apply "gender mainstreaming" by taking into account the objective of equality between men and women in formulation and implementation of legal and administrative provisions. The

Directive 2012/29/EU of the European parliament and of the council establishing minimum standards on the rights, support and protection of victims of crime defines in the article 17 what types of crimes shall be understood as gender-based violence. In article 9 the Directive (2012/29/EU) lists protected grounds from discrimination inter alia gender, gender expression and gender identity. Additionally, a number of terms and principles such as gender-based violence, gender mainstreaming which are vehemently being rejected by the opposition of the ratification, have been voluntarily adopted (*a quarter of century ago*) by the Slovak Republic through the ratification of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). For instance the article 5 of the original document, or a number of general recommendations inter alia general recommendation n.19 which was updated by the n.35, n.23, n.28 and n. 31 just to name a few.

Since the appointment of the new Prime Minister, Peter Pellegrini, there has been absolutely no public media statements from the Prime Minister or his office related to the Istanbul Convention.[17] On the contrary, at the end of March 2018, the new Minister of Justice has publicly responded to the question of the journalists related the matters of ratification of the Istanbul Convention by stating "for now, it's *passé*" (Dennik N, 2018).

As of November 2018, series of public talks by the opposing SCF has been organized in over 10 different major Slovak cities. The organizers claim that during these talks they were able to collect nearly 40 000 handwritten signatures to their petition demanding the state representatives to withdraw the signature of the Convention and publicly denounce possible ratification of the Convention in the future (Zbinovsky, 2018). The public talks as well as the petition against

[17] Pellegrini have taken office in March 2018

ratification are still ongoing (SDR, 2018). Currently, there are no major public initiatives held in support of the ratification of the Convention.

Socio-political context and anti-gender movements

The situation related to the ratification of the Convention in the selected countries is not a unique phenomenon, rather contrary, it is a reflection of a broader trend of a fight against progress achieved by the feminist and generally the human rights sector and movements over the last three decades. One does not need to be an expert to notice an increasing polarization in the so-called western societies. It would be incorrect to unlink the phenomenon of radicalization and anti-democratic and anti-liberal voices with the struggle to sustain the progress achieved in the field of women´s rights promotion and protection. This new ´anti-gender´ phenomenon is characterized by an increasing polarization in politics, liberal democracy backsliding and an increased politicization of gender and sexuality which leads to new forms of opposition and changing alliances between oppositional actors (Verloo, Paternotte, 2018). Strong disinformation campaigns and radical opposition campaigns against "gender ideology" but also against any guarantees of rights for women are seen across many European countries.

According to a number of contemporary scholars, Verloo, Paternotte (2018), Korolczuk (2016), Graff (2014), or Kuhar, Zobec (2017) the current counter-efforts to progress of protection of women´s rights has been initiated and essentially directed by the Catholic Church especially as a reaction to the UN women platforms from Vienna, Cairo and Beijing in the 1990s. The efforts gained more radical and wide-spread contours rather recently, especially after decisive encounters with right-wing populism in several European countries (Patternote, Kuhar, 2018). Graff (2014, p.434) argues that "*the recent wave of attacks was initiated by Pope Benedict in December 2012 in an address that quotes Simone de Beauvoir as the source of 'a new philosophy of sexuality'*

which challenges God's plan regarding humanity, because 'according to this philosophy, sex is no longer a given element of nature." Patternote and Kuhar (2018) added another ´milestone´ to the spread of anti-gender campaigns. They consider the enormous French mobilization against same-sex marriage known as "*Manif pour Tous*" reaching its highest intensity in 2012, to be one of the breaking points in terms of successful massive mobilization against gender. This movement brought thousands of protestors in the streets of Paris and various other cities for a period over two years and had a serious effect on policy-making related to gender and sexuality (Patternote, Kuhar, 2018). Inspired by the successful mobilization in France, similar initiatives were spread across a number of other European countries, including Russia, Poland, Germany or Slovakia (Patternote, Kuhar, 2018). While the triggers of those campaigns or movements vary, similarities in terms of patterns and language may be identified. The mobilizations have in common a critique of gender, labelled as "gender ideology", "gender theory" or "(anti)genderism" (Patternote, Kuhar, 2018). All of these initiatives claim: "*to combat ´gender´ which is seen as the root of their worries and the matrix of the reforms they want to oppose*" (Patternote, Kuhar, 2018 p.8). Patternote and Kuhar (2018 p.9) argue that *"´gender ideology´ is not only regarded as an anthropological and epistemological threat but also as a covert political strategy, a sort of conspiracy aimed at seizing power and imposing deviant and minority values on average people*." They added that *"[a]nti-gender ideologues often invoke George Orwell's concept of "newspeak", and accuse feminists, LGBT activists and gender scholars of manipulating language and hiding their objectives behind a democratic sounding language of equality and human rights*" (Patternote,Kuhar, 2018 p.9). Korolczuk and Graff (2018) identified a much broader trend related to fighting against "gender ideology". They argue that "*the opposition to gender is key for the ideological coherence of the present illiberal turn and that anti-genderism has become a new language of resistance to*

neoliberalism" (Korolczuk, Graff, 2018 p.800). They elaborated that "*despite its focus on issues of morality, anti-genderism is in fact a political movement, which results from and responds to the economic crisis of 2008. The crisis revealed the weakness not only of the neoliberal economic model but also of liberal democracy as a space for processes of inclusion, equality, and freedom. Anti-gender mobilization is part of this process: anti-genderists claim to represent true civil society, which aims to replace bureaucratized and alienated elites and their foreign-funded nongovernmental organizations (NGOs) and supranational institutions*" (Korolczuk, Graff, 2018 p.799). Every ´movement´ has its actors and anti-gender movements are no exceptions. The actors carry out regular and systematic day-to-day activities in order to reach their goal. It is therefore important to attempt to identify the most relevant actors in the anti-gender movements in the selected countries.

Austria

Mayer and Sauer (2017, p.27) generally identified five clusters of actors with noteworthy activities on "gender ideology" across Austria. The first cluster consists of groups with a background in right-wing extremism and populism. This cluster includes a spectrum of political parties – most notable the FPÖ – but also other smaller groups (Mayer, Sauer, 2017, p.27). As a recent example, a statement from Petra Wagner, FPÖ parliamentary group leader in the parliamentary committee for petitions and citizens' initiatives who claimed that *"[g]ender mainstreaming should serve to realize the equality of men and women, however, in the meantime, it only serves to enforce a pseudoscientific ideology*" (FPO, 2018). Currently, it is becoming more and more common not to hear (insultingly) strong statements on issues such as for example gender equality, however, it is more common to irrationally question certain terms and bring a confusion to their meaning as proved in the statement from Wagner.

The second cluster includes right-wing (Catholic) conservatism. While many of the political demands voiced by actors in this cluster are similar to those of the firsts one, their historically developed ideological background differs, most notably in a sense that the right-wing extremism has historically been anti-religious and the actors of the second cluster have significantly traditionally relied on Catholicism. As an example can be named the more extremist segments of the Christian conservatives from ÖVP (Mayer, Sauer, 2017, p.27-28).

Catholic organizations, which aim at spreading religion and Christian values in society represent the third cluster. The representatives of this group are for example a number of small Christian parties, independent Christian organizations such as Human Life International or Jugend für das Leben (Youth for Life), and a number of other actors directly associated with the Catholic Church (Mayer, Sauer, 2017, p.28). Despite the small numbers, the fourth cluster is formed of groups that mobilize for "men's" and "father's rights". While being of small numbers these groups receive regular mass media representations (Mayer, Sauer, 2017, p.28). The fifth cluster consists of groups of "concerned parents" that aim to lobby against sexual education or the use of gender-sensitive language in schools. Some of these groups have a provable record of links to political actors. As an example of the affiliation to the high politics serves the chairwoman of the Dokumentationsarchiv der Intoleranz gegen Christen [Observatory on Intolerance and Discrimination against Christians], Catholic pro-life activist, and ÖVP representative Gudrun Kugler-Lang appeared among the "concerned mother" lobbying against sexual education (Mayer, Sauer, 2017, p.28).

Despite the presence of anti-gender efforts, I do not see the situation of women´s rights protection in Austria to deteriorate significantly. It might not advance in the desired pace, nevertheless being a well-established democracy with a strong voice of civil society, Austria still represents one of

the countries with the best-developed mechanisms of protection and additionally there are no signs of withdrawal from the Istanbul Convention or other systematic efforts to reverse the course in the field gender equality. The most worrying developments may be the defunding of the sector which could be seen as a tool to deteriorate the progress, nevertheless the de-funding which took place was not in a great scale. Naturally, the argument can also be that the fact that a field such as promotion and protection of women´s rights and human rights in general does not advance in a desired pace, it in itself represents an unacceptable situation, nevertheless with such a track record of tireless hard work of a number of non-governmental actors and generally supportive political representation, the situation should not resolve into any major backward trend.

Andrea Krizsan and Conny Roggeband (2018 p.90) in their recent article claim that "*[w]omen's rights are particularly vulnerable in fragile and nascent democracies where such rights have been more recently established and where the space of civil society actors to defend such rights is limited and even shrinking*." The Czech Republic and Slovakia, both representing young democracies (under 30 years of recent democratic tradition, excluding the 20 years of democratic experience gained between the world wars) fall within the ambit of this claim.

Czech Republic

The current Babis´ Government, although itself being in favor of ratification, is far from securing a smooth ratification process. It is a minority government, meaning the governmental parties occupy only 93 of 200 seats in the first chamber of the Parliament. Additional troublesome may be caused by divided stands of the strongest governmental party ANO. There are already voices from the Prime Minister´s party MPs openly rejecting the ratification of the Convention, which might have a significant impact on the success of the ratification procedure. An even major obstacle may be the second chamber of the Parliament, the Senate, in which the majority seats are

occupied by parties with strong oppositionist rhetoric towards possible ratification (Bartonicek, 2018). Furthermore, the Czech president Zeman, whose signature would be necessary for the completion of the ratification process stated that "*the Istanbul Convention is great for underdeveloped countries, mostly the Muslim countries. For us, it is useless*" and added that "*It is useless, but it is not harmful*" (aktuality.sk, 2018a). The complicated political situation in Czech Republic may hinder or possibly eliminate any efforts to lead the ratification into a successful end. To follow the cluster division adapted to the current Czech environment, the first cluster would represent mostly political parties and groups from the Christian-conservative, extremist and populist political spectrum. The first cluster in Czech Republic consists mostly of parliamentary political parties which are advocating strongly against ratification of the Convention. The most vocal party with significant powers is the already mentioned KDU-CSL [Christian-Democrats] which has been consistently critical towards the Convention for many years (KDU-CSL, 2018). The extremist and populist representative of this cluster is the SPD [Freedom and Direct Democracy] which among many irrational declarations also proclaimed that one of the reasons why the SPD is fundamentally against the ratification is the fact that it diminishes the sovereignty of the state towards increased powers of non-profit sector and that the Convention focuses on a progressive elimination of traditional family and national traditions (SPD, 2018). The last representative mostly of the populist spectrum is the oppositionist party ODS [Peoples´ Democratic Party] whose chairperson "*does not really trust similar documents…the Czech Republic already has sufficient legislation…and therefore it is not necessary to adopt such documents*" (ODS, 2018).

The second cluster of the oppositionist contains a mixture of recently established civic initiatives and civil organizations. An important event took place in November 2018 when a Petition

Committee hearing was held. In this hearing the highest recorded number of public representatives participated (Bartonicek, 2018a). During the hearing, Ivana Schniederova, a member of SPD and a self-proclaimed leader of civil initiative ´Traditional Czech Family´ brought in over eight thousand hand-written signatures calling against the ratification of the Convention and claimed that she has collected many more electronically (Bartonicek, 2018b). She claimed that she was inspired by the Slovak petition against the Convention, so she decided to put together a Czech version. She also had a floor to share her views on the Convention. She stated "*It is a genocide of the family, genocide of the children, men and women, fathers and mothers. Whoever agrees with the ratification, agrees with a genocide of his/her own nation. Who supports the ratification, supports human trafficking…*" to which many of the present ratification oppositionists applauded (Bartonicek, 2018b). A former MP and a representative of a civil initiative ´Central European Inspiration´ Nina Novakova, also brought over twelve thousand signatures under a petition demanding rejection of the ratification (Bartonicek, 2018b). Another example could be the Alliance of National Forces (ANS, 2018), initiative ´Preserve Traditional Family´ (ZTR, 2018). These initiatives mostly call for preserving traditional families but do not hesitate to build their arguments based on spreading disinformation on gender ideology, homosexual adoption etc. (Fatym, 2018b).

The third cluster includes (mostly) Christian church representatives, church organizations and their allied media. They focus on the establishment of alliances which then produce various statements, petitions, articles sharing disinformation and other methods of political influence through public engagement. Among other we can restate the sermon by priest Pitha backed by archbishop Duka, the alliance of seven churches publishing statements and organizing petitions against ratification etc. (Siuda, 2018). The Czech Bar Association also contributed to the anti-Convention campaign

by formulating fears referred to article 28 of the Convention which according to them might negatively impact their work (Srajbrova, 2018).

Contrary to the oppositionist rhetoric, there are also actors on the side of supporting the ratification of the Convention. In the Czech Republic, the supporters dedicate significant efforts to balance the public discourse which is manageable mostly by increasing the number of open and vocal supporters of the Convention. For example in October 2018, the Evangelical Church of Czech Brethren publicly proclaimed their support of the ratification of the Convention (CNA, 2018a). The Czech Women´s Lobby in cooperation with Amnesty International Czech Republic brought to the public Petition Committee hearing a petition with over ten thousand signatures demanding ratification of the Convention (CWL, 2018a). Additionally, several other relevant actors voiced up and joined the ´camp´ of supporters. Among others, the Police (Kabatova, 2018), representatives of (Catholic) church, for example, Tomas Halik (Krestan…, 2018), and a number of NGOs from various sectors. Importantly, there are also political actors who support the Convention. The second coalition party CSSD and the opposition party Pirati both support the ratification of Convention (Kopecky, 2018). With a (voting) discipline within the strongest ANO party, plus the support from CSSD and Pirati, the Government would have the sufficient number of votes to proceed with the ratification. Radka Maxova, an MP for the coalition party ANO and one of the most vocal supporters of the Convention, stated that the Convention should be forwarded for voting to the Parliament in January or February 2019 (CNA, 2018b).

A slippery-slope phenomenon of the public debate (not only) in the Czech Republic is an effort to find a balance of arguments especially on the side of the supporters of the Convention. For example, in May 2018, the former Minister of Human rights and a current senator Dienstbier during a debate on the Czech Radio stated that a vast majority of legislative requirements proposed

by the Convention are already in place in the Czech system, therefore he does not really see the groundbreaking contribution in terms of the legislative requirements of the Convention, rather in the Convention´s symbolic value, to which the moderator of the debate responded that it is basically also an argument of the opponents, such as the Bishop´s conference (Hulkova, 2018).[18] On the one hand, it is an understandable argument that the Convention might not ´bring too many - too groundbreaking legislative changes´ into the current Czech system (depending on the perspective one looks at the potential changes) while on the other hand, it might indirectly contribute to the narrative which is used by the opponents in line with the argument that if the Convention does not change much, why to even ratify it. It is therefore very important find the balance of the argument, and to weight the words used to present and describe the potential impact of the Convention, because with a language which is too hard, the audience can fear radical changes in the *status quo*, on the other hand with a language which is too soft, the audience can reach a conclusion that actually it is not necessary since it is so soft.

Slovakia

In Slovakia in 2014, the civil initiative led by the Alliance for Family (AFF) initiate a collection of signatures for a nationwide referendum on the family (info.sk, 2014). The minimal limit of 350 000 signatures necessary to initiate the referendum was reached and in 2015, the referendum was held (Majersky, 2018). The referendum formulated questions targeting to oppose same-sex marriage and possibility for same-sex partners to adopt a child, as well as a prohibition of obligatory sex education and education on euthanasia in Slovak school curriculums. The necessary 50% electoral participation was not reached (only 21,41% of the electorate participated) therefore,

[18] Almost identical argument was recently repeated by a Czech member of European parliament. See more on https://zpravy.idnes.cz/istanbulska-umluva-charzanova-evropsky-parlament-eu-jourova-p6g-/zahranicni.aspx?c=A181128_194601_zahranicni_linv

the results of the referendum could not have been officially accepted (aktuality.sk, 2015). Despite the referendum´s failure to reach its goal, an undeniable victory was the introduction and establishment of anti-gender rhetoric within Slovak politics and society. Although the referendum could be considered as the milestone of anti-gender campaigning in Slovakia, early birds of open political opposition to 'gender ideology' can be traced back to the 2013 pastoral letter of the Slovak Bishops´ Conference, or the 2014 publication of a brief book called "Gender or gender ideology" published by the Slovak Salesians Press which was significantly inspired by Gabriele Kuby's anti-gender piece ´The Global Sexual Revolution´ (Valkovicova, Hardos, 2018). The letter distributed to all Catholic churches across Slovakia claimed that "*the supporters of the culture of death are bringing a new ´gender ideology´"* (KBS, 2013). They warned that the goal of the ´gender ideology´ is to take away the identity of men and women and introduce homosexual marriage which is a revolt of people against the Creator (KBS, 2013). Following the cluster division as proposed by Mayer and Sauer, the Slovak adaptation of anti-gender movement consists of three clusters.

The first cluster contains parties with a background in populism and extremism. Currently, this is the strongest cluster since the current Government coalition is formed of a proclaimed social-democratic party, but the recent political developments suggest rather a prime example of a populist party, Smer-SD [Direction-Social Democracy] with a chairperson being Robert Fico who in 2018 claimed that the Convention is in direct conflict with the Slovak Constitution (SITA, 2018), a traditionally strongly nationalistic party SNS [Slovak National Party] which calls for a complete withdrawal of the signature of the Convention (TASR, 2018), and a pro-Hungarian minority party Most-Híd [Bridge] whose Minister of Justice in 2017 initiated a postponement of the ratification procedure (TASR, 2017). The Smer-SD has been the strongest political party in

Slovakia for the last 12 years, continuously forming the Government with a short break between 2010 and 2012 when the Government of Iveta Radicova was in power. It was the achievement of the Radicova´s government that Slovakia signed the Convention as one of the first countries, however, the Government did not last until a successful ratification. Generally opposing views on ratification are held by other parliamentary parties in the opposition. In 2017, OLANO called upon the coalition not to ratify "the controversial Convention" (OLANO, 2017). A right-wing extremist party LSNS [People´s party – Our Slovakia] is surprisingly silent in media on the issue of ratification of the Convention, however, generally, they claim to be anti-system and call for a withdrawal of Slovakia from any ´pro-western alliances´ such as the EU or the NATO. In 2018, LSNS also proposed an amendment to the current law, significantly restricting legal access to abortion in Slovakia (Gehrerova, 2018b).

The second cluster gather voices of strong Catholic conservatives. The most influential is the KDH [Christian-Democratic Movement] which is currently not in the parliament, but the latest polls see them back with around 8% support (Focus, 2018). In 2018, KDH warmly welcomed the statement from ex-prime minister Fico not to ever ratify the Convention, and KDH claims that the Convention introduces ´gender ideology´ (aktuality.sk, 2018b). Also a fraction of LSNS the right-wing extremist parliamentary party which has strong references ´for the God and for the nation´ fall under this cluster.

Arguably, the third and currently the most influential cluster consists of Catholic organizations and the Catholic Church itself. Just to name a few actors, the prime example would be the Alliance for Family, the initiative "Let´s stop the Evil from Istanbul," the Slovak Convention for Family and the Catholic church institution the Slovak Bishops´ Conference. Practically, it was the achievement of a collaboration of all mentioned actors from the third cluster that managed to

influence the Government and the Parliament to amend the Constitution to adopt a constitutional provision stating that "*the marriage is a unique union between a man and a woman*" which de facto eliminated a possibility to adopt legislation securing rights of same-sex couples to enter into marriage (Slovak Constitution, 2014). It was the third cluster representatives who delivered over twelve thousand signatures calling upon the Government for refusal of ratification of the Convention (TASR, 2016). It is this cluster actors who continue to collect signatures for a petition calling for a complete withdrawal of a signature from the Convention and in February 2018 they already claimed to collect over 40 000 signatures (Zbinovsky, 2018). One can hardly foresee what the Government´s response will be when they stopped ratification process after receiving 12 000 signatures and now there is a chance of submitting over 40 000 signatures demanding a complete withdrawal of the signature of the Convention.

In October 2018, Andrej Danko, the chairperson of the SNS and the chairperson of the Slovak Parliament (requesting a complete withdrawal from the Convention) visited the Council of Europe. After posting the official photo on twitter, the CoE spokesperson – Daniel Holtgen - provided a short comment:

> "*The Istanbul Convention (coe) is being misinterpreted by certain groups. It is not about special rights, it is solely about preventing violence against women. Our experts can come to clarify, CoE´s Jagland offers leaders in Slovakia today. All member states CoE should ratify it*" (Holtgen, 2018).

In Slovakia, the only parliamentary party openly supporting the ratification of the Convention is the strongest opposition party in the Parliament – SaS [Freedom and Solidarity] (SITA, 2017). Outside of the parliament, there are several civil society organizations calling upon the Government to ratify the Convention. There are also various ministerial units, (truly) human rights-

oriented institutions and others also in favor of ratification, however, there is not any relevant cooperation among the supporting actors, there are rather fragmented, and their public influence is limited. Generally, the public discussion is rather stagnant, at least compared to the recent developments in the Czech Republic, on the other hand, the oppositionists continue to organize public "lectures" and also claim to continue collecting signature calling for a complete withdrawal from the Convention (SDR, 2018).

Overall, if there is a (political) will, there is a way… An inspiration can be taken from Croatia. In April 2018, despite mass protests in Zagreb and Split, the Croatian Prime Minister stated that the goal of the Convention is to prevent violence against women and within families, and it does not impose any legal obligation to recognize third sex neither to change the definition of marriage or the educational curriculums (Ilic, 2018). Subsequently, the Croatian Parliament ratified the Convention.

If the political will is very limited or absent, one of the strategies to ensure some progress in the area of gender equality and human rights protection may be a push or even a long-term substantial pressure from the civil society actors towards the state. As stated by Krizsan and Roggeband:

> "*During the democratization period, women's rights groups strongly relied on transactional rather than grassroots activism to pursue gender policy change, meaning that they focused on networking with other organizations, including state actors. It is through strategically chosen patterns of engagement with the state and with other civil society actors that gender policy progress could take place across the region"* (2018, p.95).

The more interconnected and globalized the world is, the more important it is to keep building and strengthening transnational alliances just as about 30 years ago in the central and eastern European

region. Besides the transnational cooperation, there is a great necessity of establishing and strengthening grass root initiatives and collaboration. Nowadays a strong grassroots component needs to be added to the overall strategy of pursuing gender policy changes. The struggle of securing progress in the areas of gender equality cannot be left up to a handful of overloaded organizations, usually based in the capitals. More actors, at more levels, from all around the countries are needed in order to provide a stable structure for the progress of gender equality.

If there is no will from the state authorities or rather contrary there is one or another form of backsliding, the women´s rights movement actors still have ways of resistance. Krizsan and Roggeband generally identified three strategies of resistance. These are:

a, Turn to Grassroots and Disruptive Protest

– for example as was the case in 2016 in Poland were massive protests took place against the governmental proposal to further restrict their abortion laws.

b, New Patterns of Coalition Building

– which suggests looking for all possible allies even beyond women´s rights actors, which should eventually strengthen the structures of women´s rights movements as happened in Romania in 2012 or Poland 2016.

c, Abeyance and Demise

– which should only be used as the strategy of the last resort to ensure the survival of the movement under the unbearably hostile circumstances, for example as in Hungary since 2016 (2018, p.96-97).

As Krizsan and Roggeband summarized the application of strategies by stating that the:

"*Strategies of resistance will partly depend on the patterns of backsliding. Active dismantling of policies will more likely generate disruptive protests and wide*

> *coalitions of protest. Meanwhile, high levels of mobilization and active coalition work in ideologically inconsistent coalitions are difficult to sustain over the long term, in cases of incremental backsliding. Gradual and subtle forms of backsliding make feminist responses more difficult as they require evidence to pinpoint the change and communicating this in order to mobilize constituencies and bystanders. Also, gradual backsliding makes it necessary for movements to be able to sustain their activity over a longer time, while resources are declining*" (2018, p.98).

It is necessary to ensure a detailed monitoring and evaluation of the situation especially in countries where the democratic and liberal values are under threat. Only with well-developed strategies and multi-sectoral cooperation the resistance actors will not need to apply the third strategy as proposed by Krizsan and Roggeband.

Conclusion

The thesis analyzed the current criminal law provisions on sexual violence including rape through the lenses of compliance with article 36 of the Istanbul Convention. It was done not only through the analysis of the provisions but also by an engagement with a number of different level courts´ rulings. Based on the analysis, although geographically very close, the individual national criminal law systems have various distinct features.

The adoption of the 2016 amendment to the Criminal Code brought the Austrian system much closer to the general minimum standard of criminalizing all non-consensual sexual acts, nevertheless, several gaps still need to be overcome. Austrian courts, through active judicial interpretations significantly expanded the application of the ´older´ provisions on rape and sexual coercion was. At this point, it is uncertain how the courts will engage with interpreting the §205a provision, whether the wording "against person´s will" truly covers all "non-consensual" sexual act cases, whether there will be effective prosecution and punishment of all non-consensual sexual acts. Some mistakes or omission of the legislators can be corrected through the court rulings, on the other hand, the courts can only interpret within the limits of the law itself, therefore it would be recommended that Austria adopts a legislative amendment to the criminal code and incorporates the recommendations obtained through the GREVIO evaluation cycle. Until then, the Austrian Criminal Code is not in full compliance with the minimum standards introduced by Article 36.

The Czech system also experienced some significant positive developments. Similarly to Austria, the scope of application of criminalizing sexual violence cases is not limited to cases of sexual intercourse with a penetrative element. Both of system, unlike the Slovak system, recognize *´equivalent or comparable forms of sexual intercourse´* which enabled the criminalization of significant broader variety of incidents. A noteworthy element of the Czech system is the wording

of the second paragraph of the sexual coercion provision which explicitly engages with different hierarchical or power relations between the offender and the victim. Although the possible scope of criminalizing sexual violence cases is considerably broad, the absence of consent-based legislation prevents meeting the principles and requirements of article 36.

The Slovak criminal law provisions on sexual violence including rape desperately require a legislative intervention, because the gaps created by the adoption of the current legislation cannot be overcome by any judicial interpretations. Slovak courts have a very limited scope of application of the current law. The criminal code does not recognize any comparable or equivalent conduct to heterosexual genital intercourse that can be punishable under the provision on rape. The last amendment to the criminal code related to cases of sexual violence was adopted over thirteen years ago. It is highly recommended that Slovakia will adopt an amendment to the criminal code which will reflect the standards and knowledge related to crimes of sexual violence including rape.

The governments of all three selected countries argued in their analysis that the current legislation is in compliance with the requirements and principles of article 36. The Austrian government admitted the mistake and tried to correct it by adopting a new criminal law provision. So far, the Czech Republic and Slovakia do not seem to accept the expert opinions by their national civil society actors neither by the international institutions and experts. There is already enough theory as well as practice on the adoption and the application of consent-based criminal law provisions. It is difficult to argue whether it is ´just´ the lack of knowledge or an actual active attempt to protect the offenders, not the victim of the crimes. An optimistic conclusion would be that it is only the lack of the knowledge of the legislators, however, the second part of the thesis might suggest a less optimistic conclusion. In the second part, the analysis of the socio-political context related to adoption of the Istanbul Convention, an attempt to identify the most relevant groups of actors and

framing the national context into broader trends of anti-gender movement was provided. In each of the selected countries, there are various clusters of actors of the anti-gender movements. Although the experience from Austria in relation to the adoption of the Istanbul Convention suggests that with a government that is not based on solely populistic foundations, the impact of the various cluster actors may be limited. Unfortunately, the experience from Slovakia and the Czech Republic is different. The anti-gender movement actors have managed to influence the national politics in a significant manner. In both countries, the largest obstacle to ratification of the Convention is undeniably the result of anti-gender lobbying from the various actors as identified in the second chapter. Naturally, the adoption of the Istanbul Convention does not necessarily need to be the only way how to progress in terms of the elimination of sexual violence. The governments and the parliaments can use the Convention only as an inspiration and adopt such legislations which set even higher minimum standards and are even more human rights oriented, nevertheless it is very unlikely that a country which sees so many obstacles for adoption of the Convention would be dedicated to improving the situation of mainly women and girls facing sexual and domestic violence. Especially in Slovakia and the Czech Republic, the anti-gender movement actors have already established strong political ties which have a very real impact on the willingness of the political representation to adopt the Convention. Without adoption of the Convection, it is very unlikely that the gaps of the criminal law provisions related to sexual violence including rape would be overcome in the near future. The impact is much broader than as illustrated on the selected three countries. Fourteen countries have not yet ratified the Convention. The efforts of the supporters of the Convention, to balance and eventually dominate the misinterpreted and dangerously simplified public discourse on such a complex issue as the combating of violence against women and domestic violence, cannot be halted. In 2019, it will be

the 100th anniversary of equal voting rights for men and women in Slovakia and the Cech Republic. One can hardly think of a better timing for completion of ratification processes of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

> "*Not until half of our population represented by women and girls can live free from fear, violence and everyday insecurity, can we truly say we live in a fair and equal world"* (Guteress, 2018).

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