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The impact of top-down and bottom-up factors in shaping the status of the victim: a study of recent victim empowerment shifts in Slovenia

Nina Peršak

[221]

Abstract: Victims of crime have seen a significant shift in the criminal justice approaches towards them over time: from rather passive observers of the conflict between the state and the offender to more active agents whose thoughts, wishes and emotions are allowed to be voiced and whose participation is recognised as legitimate in its own right within the criminal process. The article analyses to what extent this empowerment shift is reflected in Slovenia, specifically how the criminal law acknowledges and defines the victim in the criminal justice setting. While the European Union (EU) legislation in this area, as a top-down factor in shaping the rights and status of the victim, has provided an important impetus for legislative changes, particularly in relation to certain aspects, rights and categories of crime victims as well as the definition of the victim, the more conceptual recent transformations (e.g., an altered model of rape) arose out of changed societal sensitivities spurred by triggering events and a wider social and political context. Implications and outstanding challenges are discussed in the concluding section.

Keywords: victim, criminal justice, contextual factors, sexual violence, Slovenia

Introduction

Historically, victims had a crucial say in the response to crime committed against them. Before and throughout the Middle Ages (cca. 5th to 16th century), it was up to the victim whose person or property was harmed and the victim's family to seek justice (Daigle, 2018). Over time, the state took over, largely squeezing the victim out from the initial victim-offender conflict, with most [222] crimes being prosecuted *ex officio* (Fattah, 2000; Kanduč, 2002; Schünemann, 1999; Sebba, 1982; Spalek, 2006) and so 'disputes between victims and offenders changed into "judicial duels"' (Elias, 1986: 11; Ziegenhagen, 1977), where the victim's role was confined to that of a witness for the prosecution. However, the legal acknowledgement of the victims of crime has come a long way in the last few decades. Crime victims have seen a significant shift in the criminal justice approaches towards them over time: from rather passive observers of the state-offender conflict to becoming more active agents whose thoughts, wishes and emotions are allowed to be voiced and whose participation is recognised as legitimate in its own right within the criminal process. Many civil law as well as common law systems have afforded rights to victims that may be enforced against the state or the defendant in the criminal process (Karmen, 2016; Kirchengast, 2015). In the United States, victims' rights have been 'proliferating in the legislative arena and expanding geographically because of the successful campaigns of a social movement' since the 1960s (Karmen, 2016: 207). In the criminal justice systems of the 1970s, victims 'emerged as the forgotten party in the criminal justice system' and the introduction of measures aimed at including victims in the criminal justice process in order to increase the fairness and justice-for-victims followed in the 1980s (Wemmers, 2010: 27). Such developments naturally led to legislative changes at the national level and, more recently but significantly, at the European Union (EU) level.

The EU has had an important role to play in these developments, as its main legal instruments in this area, that is, directives, are binding upon all EU Member States and the failure of the latter to implement them fully or correctly may result in infringement proceedings being launched by the

European Commission against the offending states.¹ The EU legislation in this area has thus provided a significant impetus for changes, particularly in relation to certain aspects, rights and categories of crime victims. The Union has already adopted, for example, a key set of victims' rights. The Victims' Rights Directive² (hereafter: the Directive) thus includes the right to access information, the right to support and protection, in accordance with victims' individual needs, and a set of procedural rights (such as a right to be heard, rights in the event of a decision not to prosecute, right to safeguards in the context of restorative justice services, right to legal aid etc.). These rights are binding; however, the legal form of a 'directive' requires implementation at the national level, as, according to Art. 288 of the Treaty on the Functioning of the European Union (TFEU), directives are binding on Member States – addressees as to the result to be achieved, while leaving national authorities the power to choose the form and methods to achieve the result. The Compensation Directive³ and EU rules on European protection orders⁴ are additional EU acts that are relevant for victims. The EU has, moreover, adopted further instruments that respond to the specific needs of victims of particular crimes, such as the Anti-trafficking Directive⁵, the Directive against sexual abuse and sexual exploitation of children⁶ and the Counter-terrorism Directive⁷ providing for specific rights for victims of terrorism. In 2017, the EU signed (and on 1 June 2023, ratified) the Council of Europe Convention on preventing and combating violence against women and domestic violence, more commonly known as the Istanbul Convention, which is the benchmark for international standards in the field.

More recent developments include the Commission proposal for a Directive on combating violence against women and domestic violence, which was presented on 8 March 2022, International Women's Day. The proposal set out targeted rules for the protection of this group of crime victims in order to strengthen the actions taken by the Member States, aiming to ensure a minimum level of protection across the EU against such violence, regardless of whether it takes place online or offline, and proposed to make 'consent' the law (i.e. adopt the consent-based [223] definition of rape), even though the latter has been eventually dropped from the text that was provisionally politically agreed upon during trilogues in February 2024, despite objections that this watering-down of the initially proposed text does not respect the Istanbul Convention (specifically, its Art. 36(1)).⁸ In December 2021, the Commission also adopted the Initiative to extend the list of so-called EU crimes to include

¹ The European Union is neither the only nor the first international or supranational organisation, however, to address the issue of victims' rights. The United Nations, for example, has been concerned with the issue since the '80s, its General Assembly adopting The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power on 29 November 1985.

² Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (the 'Victims' Rights Directive').

³ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (the 'Compensation Directive').

⁴ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order and Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters.

⁵ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

⁶ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

⁷ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (the 'Counter-terrorism Directive').

⁸ Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM/2022/105 final. On 12 July 2023, the European Parliament adopted its position on the proposal, supporting it, and the proposal has then been discussed at the level of the Council of the EU (Member States), where, however, things were not going as smoothly, particularly regarding the offence of rape. According to reports, the Council has been divided on the inclusion of rape based on the lack of consent, with some Member States further arguing that the criminalisation of non-consensual sex acts would overreach EU legal competencies (Peseckyte, 2023). On 6 February 2024, the negotiations between the European Parliament and the Council have resulted in the political agreement on the text, formally adopted on 14 May 2024, which, however, no longer includes the consent-based definition of rape.

all forms of hate crime and hate speech, which would make them a new area of EU crime or Eurocrime under Article 83 of the Treaty of the Functioning of the European Union (Peršak, 2022). In July 2023, moreover, the Commission proposed a revised Victims' Rights Directive, based on its 2020 Implementation report and its 2022 evaluation of this Directive as well as the EU Strategy on Victims' Rights 2020-2025, further developments and increased awareness of victims' needs. The proposal establishes minimum rules that go beyond those adopted in 2012, effectively addressing the evolving needs of European society as well as developments in technology and in justice. Some elements of the proposed reform include: ensuring victims are well informed of their rights and resources (including establishing the Victims' Helpline with an EU number), enhancing safety measures tailored to the specific needs of vulnerable victims, access to specialised support services for vulnerable victims (e.g., free psychological support as long as necessary), facilitating access to justice (by ensuring victims are sufficiently assisted in court, empowered to challenge the decisions affecting their rights irrespective of their status) and ensuring effective access to compensation by guaranteeing victims compensation immediately after the judgment.

Such proposals and initiatives clearly demonstrate the Union's increased sensitivity towards victims of gender-based violence and bias crimes, which legitimately raise EU concerns and have even heightened during the recent health pandemic. Nevertheless, in addition to top-down influences from the EU as well as the Council of Europe,⁹ the more local or national context as well as global social movements and circumstances (such as, e.g., the #MeToo movement), and other (triggering) events, play a role in policy and law-making that involves victims. Such situational specifics stimulate the actual regulatory and, consequently, criminal-justice changes that improve the victim's standing, and shape their role and status in the criminal process in EU Member States.

In this article, we inspect how the above-mentioned influences recently shaped the situation of the crime victim in one European country – Slovenia. While the EU legislation in this area has provided an important stimulus for change, particularly in relation to certain aspects, rights and categories of crime victims as well as the definition of the victim, the more conceptual recent transformations arose out of changed societal sensitivities spurred by triggering events and a wider social and political context, seized by forces 'on the ground' as a momentum to garner enough power to put pressure on the legislator. As a case in point, we shall inspect the recent conceptual transformation of the Slovenian criminal law in relation to the offences of rape and sexual violence – a paradigmatic albeit not unchallenged shift to the 'yes means yes' model – and the contextual factors that have led to it. Implications and outstanding challenges are discussed.

The impact of EU legislation on the crime victim in Slovenia

The impact of the EU Directive on Victims' Rights on the legal definition of the victim

Certain provisions of the Directive on Victims' Rights have already been implemented in the Slovenian national legislation, mostly in the Criminal Procedure Act¹⁰ (hereafter: CPA), as well as [224] elsewhere

⁹ The Council of Europe has adopted some important instruments in this area, such as the Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), which is the first legally binding convention on violence against women in Europe, the Convention on compensation to victims of crime and, more recently, the (non-binding) Recommendation CM/Rec(2023)2 of the Committee of Ministers to member States on rights, services and support for victims of crime (updating and replacing its 2006 Recommendation on assistance to crime victims). In contrast to EU directives, however, the Council of Europe conventions are binding merely upon those states which have signed and ratified conventions.

¹⁰ Zakon o kazenskem postopku (Criminal Procedure Act), OJ RS, no. 176/21 and 96/22). Available at: <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO362> (accessed 5 October 2022).

(e.g., in the Domestic Violence Prevention Act¹¹). Such, for example, were provisions on the right to be heard (Art. 10 of the Directive, which was reflected in Art. 59 of CPA, as well as in Art. 54, 64, 236 and 240 CPA with regards to children), the right to legal aid (Art. 13 of the Directive), the reimbursement of expenses (Art. 14), the return of property (Art. 15), a decision on compensation from the offender in the course of criminal proceedings (Art. 16), the protection of privacy (Art. 21) and so on. Some provisions were considered already fulfilled by the Ministry preparing implementation, which, however, was not the case.¹² Other provisions explicitly required implementation and hence the amendment N to the Criminal Procedure Act (amendment CPA-N)¹³ was introduced – albeit only in 2019, even though the Directive mandated transposition by 16 November 2015 (Art. 27, para. 1 of the Directive). One of these amendments included the expansion of the definition of the victim or, more correctly, of the ‘injured party’, which is the legal term traditionally used in criminal procedure.

The implemented EU acts, specifically the Victims’ Rights Directive, have thus impacted on the crime victim in Slovenian legislation in a variety of ways, starting with the definition of ‘victim’ within a criminal process. According to the Victims’ Rights Directive (Art. 2), the term ‘victim’ encompasses: (1) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; (2) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person’s death.

With regards to the definition of the ‘victim’ in the Slovenian legislation, however, the Criminal Code¹⁴ conventionally uses the term ‘injured party’ (*oškodovanec*), with the only exception being Art. 71.a (Ban on approaching and communicating with the victim of crime), where the term ‘victim’ (*žrtev*) as such is used. This Article is a ‘newcomer’ to the Code, adopted on the basis of the implementation of the EU law which explains the use of the term ‘žrtev’ (victim) in the legislative text. Although prevalent in everyday, ordinary parlance, the term ‘victim’ has never been considered a juridical term as such. It is the ‘injured party’ who has been endowed with certain procedural rights – which is also the reason for incurring criticism from NGOs, EU and scholars.¹⁵ ‘Injured party’ is defined rather broadly in Art. 144 of the Criminal Procedure Act as the person ‘whose personal or property rights have been violated or endangered by the criminal act’.¹⁶

This definition has been extended in 2019 with CPA-N amendment to the CPA (OJ RS, no. 22/19), implementing the Victims’ Rights Directive, specifically its Article 2, point 1(a), by adding: ‘When the death of a person is a direct consequence of a criminal offence, the injured party, for the purposes of this statute, includes the person’s spouse or a person with whom they were living in extramarital

¹¹ Zakon o preprečevanju nasilja v družini (Domestic Violence Prevention Act), OJ RS, no. 16/08, 68/16, 54/17 – ZSV-H in 196/21 – ZDOsk). Available at: <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5084> (accessed 5 October 2022).

¹² For example, Art 12 of the Directive (right to safeguards in the context of restorative justice services) has been considered as already included in the Criminal Procedure Act; however, the latter included a much narrower set of rights than that mentioned in Art. 12. In its 2020 implementation report, the European Commission (2020) noted that Slovenia was one of the 16 countries that had not communicated their transposition measures by the required date of 16 November 2015, and one among 21 countries against which infringement procedures were ongoing for not having completely transposed the Victims’ Rights Directive.

¹³ Zakon o spremembah in dopolnitvah Zakona o kazenskem postopku (Act Amending the Criminal Procedure Act), OJ RS, no. 22/19. Available at: <http://www.pisrs.si/Pis.web/pregledPredpisa?sop=2019-01-0915> (accessed 5 October 2022).

¹⁴ Kazenski zakonik (Criminal Code, KZ-1), OJ RS, no. 50/12, 6/16, 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21 and 105/22.

¹⁵ In the recent European Commission’s evaluation of the implementation of the Victims’ Rights Directive (European Commission, 2022), many EU Member States identified limitations potentially affecting the Directive’s relevance, e.g. the fact that victims must go through a process of formal recognition that limits their access to certain rights in some Member States.

¹⁶ In this regard, the CPA’s definition was and is somewhat broader than Art. 2 of the Directive, as the mere endangerment of a right of the injured party suffices; no actual harm is needed as a result.

union, the deceased person's blood relatives in the direct line of descent, their adoptee or adopter, their brothers and sisters as well as persons whom they were supporting or were obliged to support'.¹⁷

In addition to this, a new (seventh) alinea was added to Art. 144, clarifying various terms used in the statute, which introduced the notion of the 'injured party with special needs for protection'. The latter is defined as the injured party 'whose personal or property rights have been significantly violated by the criminal offence, and, due to their personal characteristics or vulnerability, the nature, gravity or circumstances of the criminal offence, or owing to the conduct of the offender or of the injured party in the pre-trial or criminal proceedings and outside of it, there exists a special need for protection of the injured party's personal integrity when certain acts of the pre-trial or criminal proceedings are being conducted'.¹⁸

[225] It should also be noted that the Domestic Violence Prevention Act has an extended definition of victim, specifying that, in cases when a child is present when abuse of another family member takes place or when a child lives in an environment where violence takes place, said child should also be considered as a victim (Art. 4, para. 2 of the Domestic Violence Prevention Act).

Vulnerable victims

Vulnerability as the concept suggesting that there are particular categories of victims that are 'vulnerable' (or especially vulnerable) and therefore require special consideration has rather recently attracted special legislative attention. The idea of vulnerability has been otherwise deeply engrained in criminological theories on offending, where it helps to explain and predict divergent risks of victimisation across the population (Schreck and Berg, 2021: 16). In Slovenia, the relevance of the vulnerability of certain victims has been recognised in Art. 65.a, second para. of the CPA, which, to a large extent, transposes verbatim Art. 4 of the Directive that lists the types of information the victims have the right to receive from the first contact with a competent authority. Art. 65.a, second paragraph thus stipulates that the extent and type of such information, listed in the previous paragraph, are dependent on the personal characteristics and vulnerability of the injured party, on their special needs for protection, on the nature, gravity and circumstances of the criminal offence, and on the stage of the pre-trial or criminal trial procedure.

The increased focus on the protection of the rights of (vulnerable) victims has also spurred other actions. After the formal implementation of the Victims' Rights Directive, the Ministry of Justice formed a group of relevant stakeholders (sourced from the police, state prosecutor's offices, courts, Ministry of Interior Affairs, Ministry of Labour, Family, Social Affairs and Equal Opportunities, NGOs etc.), which oversaw the actual implementation. This group has also created a leaflet (translated into the main European languages), listing the basic rights of the victim, which is disseminated to victims for their information at their first contact with the authorities, as well as a working tool – a form used by police officers and state prosecutors to individually assess each victim for the dangers of secondary and repeated victimisation and so on, thereby in a sense assessing their further vulnerability. In addition, the two biggest district courts (in Ljubljana and Maribor, respectively) created special units, tasked with helping victims enforce their rights as well as serving as a sort of intermediary in communication between judges and victims – who are usually invited to the court in a procedural role of the witness or of the injured party. Each victim receives information on this unit jointly with the invitation to the trial. Experts from such a unit can help victims access the court, explain rights to them and thus lessen the risk of secondary victimisation. Consequently, the practice of respecting the rights of victims is becoming unified, and problems are being identified on time and promptly solved,

¹⁷ The CPA uses the masculine form for the injured party (i.e. *oškodovanec*), which has here – in the translation (by the author, as there is no official translation of the CPA) – been replaced with more inclusive 'they' and 'their'.

¹⁸ Author's translation.

increasing protection also for future cases. In this way, the system learns from past issues and updates regularly.¹⁹

Impact on policy making

While the implementation of the Directive on Victims' Rights did not alter significantly the way in which policy and law as such are being made, it did bring about heightened awareness of the plight of victims in the criminal process and increased the concern for a criminal justice that would include a more victim-oriented dimension. Victims or, more commonly, victim support organisations can have a say in the process of law-making, as each proposal for changes of existing regulations that [226] concern victims is always published online as well, allowing representatives of civil society (including associations engaged in victims' rights issues or representing victims) to provide their thoughts, comments and suggestions by a given deadline. Furthermore, NGOs are frequently included in the working groups, consisting of various experts and established by a competent Ministry, that are tasked with preparing legislative solutions and thereby directly contribute to the law-making.

The modification of the Criminal Code in relation to sexual autonomy: focus on consent

The above-mentioned augmented sensitivity to the plight of victims has likely, at least to some extent, stimulated also the ensuing discussions on possible amendments of the Criminal Code in relation to the model of rape. However, the pro-victim orientation and awareness of the importance of including a victimological perspective in policy making were insufficient to generate the well-meaning change in 2019 when this amendment was first discussed. Something else was needed, and this highlights the importance of other, more contextual or situational factors, which will be explored next – in relation to the specific amendment of the Criminal Code relating to the offences of rape and sexual violence.

Amendments to the Criminal Code

The former articulation of the offence of rape, under Art. 170, para. 1, of the Criminal Code had stipulated that whoever compels a person of the same or opposite sex to submit to sexual intercourse with him *by force or threat* of imminent attack on life or limb shall be sentenced to imprisonment for not less than one and not more than ten years. Paragraphs 2-4 then stipulate, respectively, an aggravating offence (if the offence has been committed in a cruel or extremely humiliating manner or successively by several perpetrators or against offenders serving a sentence or other persons whose personal freedom was taken away), a mitigating offence (if done by threatening the victim with large loss of property belonging to the victim or their relatives, or threatening with the disclosure of any matter concerning the victim or their relatives, which is capable of damaging them or their relatives' honour and reputation), and that, in case the conduct from this article has been committed against a spouse or an extra-marital partner or partner of a registered same-sex civil partnership, the prosecution shall be initiated upon a complaint.

As can be seen from the definition of the basic offence of rape, the elements of force or threat were required as necessary elements to be established for the offence, which has been heavily criticised by the NGOs, such as Amnesty International Slovenia, in view of the international standards and empirical findings regarding the actual or likely behaviour of victims of rape (e.g. the tendency to 'freeze' during rape: Burgin, 2018; Galliano et al., 1993; Hopper, 2015; Selby, 2020). Furthermore, the Ministry of Justice's commissioned study revealed the unusually low sentences and a large number of criminal complaints being rejected by the prosecution as well as the judicial practice and case-law defining

¹⁹ Information provided by the Ministry of Justice.

rape very narrowly, that is, as always requiring force. This led to acquittals in cases where victims did not resist or fight back with force, as courts did not recognise these types of events as criminal (Volk, 2022).²⁰

In February 2021, under the new, right-wing government, which first tried to opt for the model of veto (whereby the victim has to expressly state 'no'), the changes to the definition of rape, which [227] reflected the shift to the affirmative model, were proposed. The amendment brought the new first two paragraphs of Art. 170 and 171, which stipulate the offence of rape and sexual violence, respectively. Both were changed in a way that they criminalise infringement in the sexual autonomy of the individual *without their consent* – which represents a move away from the until-then established model of rape. To prove the offence of rape, it therefore ceased to be necessary for the offender to use force or threat, or for the victim to physically resist the offender, as consent became the focus delimiting rape from non-rape – the victim must have freely, unequivocally and perceptibly consented to (and before) any sexual act.

The new Art. 170, para. 1, thus stipulates that '[w]hoever, without consent of the other person, achieves that the latter engages in sexual intercourse or sexually equivalent conduct shall be sentenced to imprisonment from six months to five years'. Its para. 2 defines consent in the following way: 'Consent from the previous paragraph shall be given if the person consented to sexual intercourse or sexually equivalent conduct with their outwardly perceptible, unequivocal and free will and was capable of making such a decision'. By adding the condition that the individual must be 'capable of making' such a decision with regards to her sexuality, cases of victims who are younger than 15 years are excluded, as for them it is presumed that they cannot give such consent. Other paragraphs remained in a renumbered form.

Similarly, Art. 171, criminalising sexual violence, has been modified to include the phrase 'without consent' in paragraph 1 ('Whoever, without consent of the other person, achieves that the latter commits or submits to any sexual act not encompassed in the preceding Article shall be sentenced to imprisonment up to five years') and the same definition of consent, as in Art. 170, was included in its paragraph 2.

It has to be acknowledged that this move to the affirmative consent model – which predated the EU legislative proposal on gender-based violence, adopting the same consent-based approach (see above) – has not been entirely unchallenged. Some legal scholars deemed it controversial, putting forward certain legal concerns (e.g., the concern about a possible *de facto* switch of the burden of proof) but mostly non-legal arguments, such as the one that the proposed amendments if adopted would then 'change the whole sexual game in the country, especially for men'.²¹ This supports the observation by Walklate (2007) that 'changes in the law, which may have some symbolic resonance, are not necessarily accompanied by changes in public attitudes' (p. 143). The Special Eurobarometer on gender-based violence, published in 2016, revealed that more than one in four respondents held a view that sexual intercourse without consent can be justifiable.²²

Contextual or situational factors

What is often overlooked, particularly in the juridical domain, is the influence of various contextual factors, which are often extra-legal, that is, lie outside of law, and of the time factor (momentum) on

²⁰ From the interview with Jasna Podreka, in *Mladina* (weekly magazine), 2 September 2022, p. 40.

²¹ An argument made by an Associate Professor of law, voiced on 3 February 2021 on the national tv channel TV Slovenia 1.

²² Twenty-seven percent of the respondents said that sexual intercourse without consent could be justified in at least one of the situations proposed and they were most likely to say that this may be the case when a person is 'being drunk or using drugs' (12%), 'voluntarily goes home with someone' (11%), wears 'revealing, provocative or sexy clothing' or is 'not clearly saying no or physically fighting back' (both 10%) (European Commission, 2016).

the actual legislative change that occurs. Rational reasons and reasonable legal argumentation aside, it is often the former which stimulate the right activating emotions and provide impetus for action. Considering the interactive nature between the setting or environmental factors and human agency required for stimulating and activating the modifications to the Criminal Code, these factors could also be considered 'situational'²³ (Wikström, 2006, 2010).

The momentum required for the changing of the Criminal Code in 2021 included the following factors: [228]

Wider social context: #MeToo

In October 2017, the Weinstein scandal broke with *The New York Times* and *The New Yorker* reporting that several women (eventually more than 80) had accused a powerful film producer Harvey Weinstein of rape, sexual assault and sexual abuse over a period of at least 30 years. Denying 'any non-consensual sex', Weinstein was charged with rape and other offences, found guilty and sentenced to 23 years of imprisonment. This widely publicised scandal opened the Pandora's box of similar behaviour of other powerful men, not limited to the film industry, and encouraged many women to share their own experiences of rape, sexual assault or harassment on social media under the hashtag #MeToo.

The rise of the #MeToo and Time's Up movements have put an unprecedented focus on the issue of what is acceptable sexual behaviour with some cases, such as the one of the comic Aziz Ansari, which concentrated specifically on what constitutes 'consent', highlighting the rift between the idea that consent can (still) be implied or inferred and the move towards a pure affirmation (yes means yes) model (Goldsworthy, 2018). These movements sensitised societies across the globe to the topic of sexual harassment and brought it to the fore, raising awareness of the prevalence of this offence, of the institutional culture of silence surrounding such behaviour and of the role and responsibility of witnesses to such conduct – which could be likened to one of bystanders²⁴ to the crime, their inactivity normalising or even being perceived as condoning such behaviour. It also shed significant light on the effect, harms and trauma or long-term detrimental consequences of such victimisation²⁵ as well as on the dynamics of (the impossibility) of reporting such events earlier, immediately after the event. The non-immediate reporting of the offence is a common charge levelled against victims coming forward late in the day, years after the rape, querying why they are telling their story 'only now', attributing opportunistic motivation to them and thereby trying to undermine their credibility and the credibility of their testimonial. This goes often hand in hand with blaming the rape victim, that is, stripping her

²³ According to Situational Action Theory – SAT (Wikström, 2006, 2010), situational action is based neither on individual nor on environmental factors but rather on the interaction between these levels. People's perception of action alternatives, process of choice and execution of action are triggered and guided by people's interaction with the setting or environment. While this is a criminological theory, i.e., meant to explain criminal activity, its basic concept of a situational action can be applied to a wider social or sociological domain.

²⁴ It is known that diffusion of responsibility – whereby as the number of bystanders increases, the personal responsibility that an individual bystander feels decreases and, as a consequence, so does their tendency to help – is one of the bystander effects (Blagg, 2019) but also that their responsibility – as enablers (moral if not legal) – is there and increasingly called upon (e.g., Staley, 2013). This perhaps explains why social behaviour that seems so widespread and normalised (sexual predatory behaviour, boys-will-be-boys types of excuses, patriarchal patterns) and which is witnessed by many is not conducive to a third individual intervening and stopping it (or playing a whistleblower), as well as why these 'bystanders' or witnesses of such behaviour are now (decades later) coming out with their stories – possibly also out of the sense of guilt.

²⁵ These longer-term effects are, unfortunately, still understudied and therefore little understood. As Shapland and Hall (2007) have pointed out, 'effects of crime on victims vary considerably over time, with some victims suffering very minimal or negligible effects – both as seen by themselves and others – and others suffering serious, long-lasting effects which do not necessarily dissipate over time' (p. 207) and advocated for designing measures of the effects of crime that would take these properly into account.

of the characteristics of innocence or blamelessness, thereby eliminating one of the crucial qualities of an 'ideal victim' (Christie, 1986) who most easily acquires public support and acknowledgement of her victim status.

Political context

The Slovenian Ministry of Justice has been working on drafting amendments to the Criminal Code since 2019, in particular as regards the definition of rape. The then minister Andreja Katič (of the left-centre coalition) advocated the adoption of the model of 'yes means yes'; however, the law was not passed during that time. The change of government and of minister has brought about also a change in perspective, as the new Ministry announced, mid-2020, a draft amendment based on the model of 'no means no'. This model, also known as the veto model, requires the victim of rape of sexual violence to actively express her disapproval. This has been criticised from various sides, particularly NGOs working in this field, highlighting that what should be of interest is whether the person in question expressed 'yes', not whether they conveyed 'no'. This, however, requires an affirmative rape model or a 'yes means yes' model, which puts emphasis on the idea that each person should decide for themselves whether they are ready and want to engage in a sexual act. If they did not actively and freely (whether in words or actions) consent, such a sexual act is 'rape'. Under the pressure from NGOs and public – as well as in light of the fact that parliamentary elections were coming up in a few months and it was not looking well for the existing coalition (people were, among others, dissatisfied with the anti-Covid measures that were instituted, some of which were pronounced unconstitutional by the Constitutional Court) – the government caved in and so the new, consent-based model of rape was eventually adopted (still under the centre-right government). [229]

Triggering events

At the beginning of 2021, new testimonials on sexual harassment, particularly institutional ones, have emerged, first in the other former Yugoslav republics (Cvitanin, 2021) and then in Slovenia. An actress, Mia Skrbina, a former student at the AGRFT (Academy of Theatre, Radio, Film and Television), University of Ljubljana, has come forward and publicly described her traumatic experience of sexual harassment from one of her professors when she was a student (Šter, 2021). Her very emotional testimony, which was broadcast widely in the mainstream media, elicited ample public response and concern, including some victim shaming. Another highly publicised story involved a well-known Associate Professor of philosophy at the Faculty of Arts, University of Ljubljana, frequently appearing in the media, who was exposed as sexually harassing his students – allegations that he denied – which eventually led to his habilitation (formal qualification, required for teaching at the university level) not being renewed (Ferlič Žgajnar, 2021; The Slovenian Press Agency (STA), 2021b). These events and revelations acted as triggering events, generating sufficient moral indignation among the public and NGOs to pick up the fight for the model of consent more actively.

Civil society, NGOs

Nongovernmental organisations, particularly those active on social media with a significant following, generated also by the previous successful actions (e.g., on the referendum on water),²⁶ have played a

²⁶ Opposing the recently adopted legislative amendment on water (which would have added exceptions to the prohibition on construction in water and coastal zones and thereby, in the eyes of many, jeopardised clear drinking water, increased pollution, affected recharge of groundwater supplies etc.; Greenpeace Slovenia, 2021), several NGOs (specifically, Umanotera, Inštitut 8. marec and Cipra) have, first, successfully collected the required number of citizen signatures for a referendum on water and then, through awareness campaigns, managed to persuade a record number of voters to attend the referendum, guaranteeing that the strict quorum requirement of 20% of all voters was achieved as well as that the end result was favourable to their cause. The referendum, in fact, attracted 45.89% of eligible voters, which was one of the highest turnouts in the history of independent Slovenia (Rus, 2021).

crucial role in the discussion on the need to change the model of rape and in activating the civil society.²⁷ The involvement of the NGO Institute 8 March (Inštitut 8. marec), was particularly crucial, as due to the governmental changes (the right-wing or right-centre government preferring the so-called veto or 'no means no' model of rape), their activities played a key role in adding the necessary pressure on the government towards the adoption of the affirmative model. In this critical moment in time, the Institute took over the initiative with their draft amendment to the Criminal Code, based on the model of 'yes means yes', for which they quickly garnered 5,000 citizen signatures required for the formal submission of the proposal for amendment of the Code, supported also by several other NGOs. Once the Institute publicly declared that they were planning to officially submit their proposal, however, a swift turn of events ensued. The government quickly adopted its own draft amendment, which, however, now incorporated the yes-means-yes model (Amnesty International, 2021). When voting on the draft amendment, the members of parliament themselves emphasised that 'the credit should go to NGOs that mobilised the public into a true social movement' (STA, 2021a).

The participation of NGOs in legislative activity is not, of course, in any way novel. It is a normal part of democratic law-making, allowing citizens to participate in the procedure. In November 2009, Slovenia adopted a Resolution on Legislative Regulation, which is a document that is supposed to implement standards of quality law-making, thereby fulfilling one of the basic postulates of the functioning of the rule of law. This Resolution envisages collaboration with the civil society, 'welcoming its help when drafting laws' and stipulating that 'the government should incentivise the organisation of civil society and identify target groups for collaboration at the drafting of statutes' – but under the caveat that the public, civil society and experts external to public administration cannot and may not perform tasks instead of the latter, as they are 'not adequately equipped for this job nor have a complete insight into the situation in the field'.²⁸

Despite this already existing possibility of NGOs to participate, however, what we have witnessed in this case (and continue to witness) is the enhanced role of NGOs in law-making, particularly those NGOs who are social media-savvy and possess significant social capital (Coleman, 1988), facilitating the achievement of certain aims and power to mobilise the masses, including the [230] young, precarious-and disenfranchised who often abstained from voting.²⁹ By using the rhetoric of protest and resistance, for example, 'Fajtamo dalje!' (Let's fight on! Or, more literally, (We're) Continuing the fight!) as well as (left) populist rhetoric, specifically 'the rhetoric of the underdog' that gains a lot of sympathy among the Slovenian population tired of politicians and various 'fat cats', they are becoming not only sites of resistance and dissent but also new sites of power. As such, they often present a threat to the old and established power structures. The latter are then seen adopting various tactics to neutralise them or capitalise on them, such as the tactic of ignoring or disregard (ignoring them), criminalisation (using criminal law or regulatory offences to silence its protagonists and other more

²⁷ In this respect, one could perhaps draw parallels with what Andrew Karmen (2016) calls the 'self-reinforcing cycle' of victim's rights: 'As more victims become aware of their rights and begin to exercise them, these rights become accepted and honored within the criminal justice system. These victories encourage victims and their allies to raise new demands for further rights' (p. 208). Similarly, victories of the mentioned and similar NGOs encouraged them to go on and 'sort out' other areas as well, pick up unfinished fights and raise new demands for rights and equality. The victims' rights movement, as noted by Karmen (2016), 'has institutionalized this self-reinforcing cycle of calling attention to a festering problem and then mobilizing a coalition to bring about reforms by setting aside special days, weeks, and even months each year to attract media attention' (p. 210).

²⁸ Resolucija o normativni dejavnosti (ReNDej), OJ RS, no. 95/09 (translation by the author); URL (last accessed 10 December 2023): <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5516>. The text in the original: 'Pri tem ravnanju jim je vsekakor dobrodošla pomoč javnosti, civilne družbe ali posameznih strokovnjakov izven uprave, vendar ti ne morejo in ne smejo opravljati nalog namesto njih, saj za to delo niso ustrezno usposobljeni, niti nimajo celovitega vpogleda v stanje področja.'

²⁹ The NGOs growing influence in mobilising people for various aims, including elections as well as protect movements, has been noted in various parts of the world (see, e.g. Boulding, 2016).

visible members, also through criminalising and over-policing protests)³⁰ or cooperation (affiliation with them, joint photo opportunities).

Contemporary trends in criminal policy

The observed trend of emotionalisation of law (Karstedt, 2002) and emotion-influenced criminal law and policy-making (Peršak, 2019), which spans from victim-named legislation to legislation triggered by an emotive event cannot be entirely disregarded in this kaleidoscopic picture of factors paving the way for the adoption of a rape model that is more in line with current societal sensitivities and victimhood realities. While individual victimisation events as emotive moments are sometimes seized on by politicians as well as various organisations and associations, in many instances with their own agendas that do not necessarily overlap with interests of victims or criminal law principles and criminalisation criteria, the generally welcoming approach of criminal policy to narratives based on sentiments and sensitivities certainly assists in taking seriously the emotion-laden testimonials, emotive discourses and, more generally, the plight of victims that may not be couched in legal terms.

Conclusion

In this article, we aimed to examine the top-down (legislative) and bottom-up (contextual) influences that more recently shaped the situation of the crime victim in Slovenia. Among the former, the EU legislation on victims turns out to be a very prominent factor that has triggered amendment of laws, particularly in relation to certain aspects, rights and categories of crime victims. The latter, bottom-up factors that influenced more conceptual changes to the Slovenian Criminal Code, however, arose out of changed societal sensitivities prompted by triggering events and a wider social and political context (general dissatisfaction with the ruling governmental coalition, forthcoming elections, #MeToo movement, and contemporary trends of emotion-influenced law and policy-making). The influence of the last two, more international, factors is evident also from similar legislative developments in the area of sexual integrity, particularly as regards the notion of 'consent', that have taken place in many other EU states, such as Belgium (Chini, 2022; Vermeulen, 2022), Spain (Burgen, 2022), Croatia, Denmark and Sweden (Le Monde with AFP, 2022). An additional, crucial bottom-up factor, which together with other mentioned factors eventually led to action conducive to the altered, consent-based model of rape and sexual violence, was NGOs' agency. NGOs, and in particular one NGO, were successful in mobilising civil society on an unprecedented scale, garnered a kind of Robin Hood aura and became a proper social media influencer. The role of social media in today's 'network society' (Castells, 2000; Castells and Cardoso, 2005; Van Dijk, 2006), allowing one to reach thousands without cost, engage and mobilise people instantaneously, often in an emotion-driven (especially, indignation-driven) manner, could not be underestimated in this endeavour.

[231] It is perhaps too soon to fully assess the judicial implications of the legislative change to the affirmative model; any noticeable changes at the judicial level will only become evident in time. Due to the prohibition of retroactivity in criminal law, the new, more stringent law may not be applied to acts that were committed before the new provision entered into force. However, some initial reports suggest that, currently, not much change can be observed at the level of courts, highlighting also the need for judicial training in this area.³¹ This also reminds us that, while one might logically expect that

³⁰ Criminalisation of protests and dissent, more generally, has been progressively observed in many countries across the globe (see, e.g. da Silva Ribeiro Gomes et al., 2021; Khumalo, 2018; Pickard, 2019; McNamara and Quilter, 2019).

³¹ It has been reported that despite the change of the Criminal Code in the area of sexual inviolability towards the yes-means-yes model, practice still reveals cases where explicit consent is not the central element of assessment but, for example, factors such as 'hormonal imbalance' of perpetrators are being used to mitigate and define conduct (Greif, 2023; Valenčič, 2023). Members of The Left (Levica) political party have thus called upon the Ministry of Justice to consider, among others,

legislative changes generated bottom-up (in contrast to those mandated or seen as forced top-down) were more readily accepted or perceived as legitimate by people, the ‘audiences’ that matter and must embrace the change are diverse: the civil society (particularly its younger, vocal, social media-savvy segment) and the judiciary (particularly its more traditional or conservative segment); but also politicians and civil servants may be very different audiences that all need to be taken into consideration.

At the law enforcement level, however, the heightened awareness and commitment to fight sexual violence can be distilled: since 1 September 2022, one can anonymously report to the police also sexual violence, that is, the option of complaint regarding violent sexual conduct (*nasilna spolna ravnanja*) has been added to the already existing online form on anonymous e-complaints. This can be done either via the state portal eUprava (gov.si portal) or via the website of the police.

Furthermore, the mentioned developments have also acted as a catalyst for wider societal changes. On the one hand, the raised awareness and sensitivity to this deviance stimulated, for example, demonstrations in solidarity with victims of sexual violence,³² TV shows and responses to it. It also stimulated others to come forth with their stories of sexual violence to which they have been subjected in the past or merely witnessed. These events and accompanying societal debate have, however, revealed that much of the sexual violence is still cultural and as such ingrained in patriarchal societies, socialised into as well as silenced. On the other hand, owing to the topical issue and new discovery of cases against known public figures and artists, a certain usurpation of the victim and victimhood narrative could be observed as well. Claiming victimhood, even if one was just a witness, not a direct victim, to a crime or has played a bystander role has become profitable, publishable and political. Telling-it-all and implicating, with names, actual victims (who have not chosen to reveal themselves) can guarantee media interest.

While the change of mentality – where still required – does not happen overnight, the changes in the law on the books, such as the amended definition of rape and sexual violence, can support socialisation and normative integration of contemporary norms. As could be seen from the public debate around the legal changes and #MeToo revelations in Slovenia, however, actual victims can easily get lost (or even abused) in translation of public outrage into public action about rape and sexual violence, even though legislative changes may be made ‘in their name’. It is for this reason of utmost importance that not only the law but also supportive mechanisms are put in place to facilitate victims’ decision to come forth and file a charge, while being mindful or respectful of the fact that this is *their* decision to make.

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mandatory training for judges handling cases of sexual violence (Levica, 2023); however, the Ministry of Justice has held an opinion that training must be voluntary to be effective (Petrovčič, 2023). It is perhaps surprising that the Ministry of Labour, Family, Social Affairs and Equal Opportunities (led by a (male) member of The Left political party) seems to show more understanding of the complexities of the problem of sexual violence, including its impact, needs of victims and how to tackle it at judicial level, than the Ministry of Justice (led, at the time, by a (female) member of the political party of Social Democrats), even though it was one of the former Ministers of Justice, Andreja Katič (also a female member of the Social Democrats) who was among the first to actively advocate for the adoption of the affirmative model, recognising this area of crime to be of their particular concern. However, the Ministry’s views may now change, since the mentioned former Minister Katič was recently reappointed as the new Minister of Justice.

³² For example, the rally #NisiSama (#NotAlone) in support of victims of sexual violence, organised on 5 September 2022 in Ljubljana.

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