

British influence on continental legal tradition in Croatia: Holy Grail or a Wrong Trail?

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Abstract

The Croatian legal system is traditionally under the dominant influence of the Germanic legal tradition. This is a logical consequence of historical circumstances, which state that present-day Croatia was long part of the Austro-Hungarian Empire. In the field of criminal law, which is the focus of this paper, there is a significant influence of Austrian, German, and Swiss criminal law. However, since 2008, new trends have emerged, first evident in procedural law (through the introduction of the previously typical Anglo-American institution of plea bargaining in criminal proceedings), and then from 2013 also in substantive criminal law. In the Criminal Code of 2013, sexual offenses were modeled after the English Sexual Offences Act of 2003, which has sparked considerable controversy in theory and practice. In this text, the author critically examines this legislative shift in tradition from the perspective of comparing the historical circumstances of the English and Croatian criminal law backgrounds. The author discusses the differences in criminal justice systems of these countries, compares the circumstances of the origin and shaping of sexual offenses in the mentioned legislations, and presents the results of their own research conducted in Croatia, reflecting whether the new legal solution was successful and whether it achieved its purpose. Based on this, the author provides an answer to the hypothetical question of whether a solution implemented from one legal tradition can successfully exist in the conditions of another significantly different legal tradition.

Keywords: rape, mistake of facts, guilt, perpetrator, tradition, legality, comparative law, history of law.

JEL Classification: K10, K14, K33

DOI: 10.24818/TBJ/2023/13/4.02

1. Introduction

History and tradition play a crucial role in shaping the development of law in contemporary society.² In legal systems such as that of the United Kingdom, the weight of history and tradition is especially significant, as the law has evolved over centuries of precedent and interpretation. History and tradition can help to foster a sense of continuity and connection with certain legal system, helping to reinforce the legitimacy of the law and the authority of the legal institutions that enforce it.

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² Giraldo Gomez, Luis Felipe. "Historical background of the factors of attribution of civil liability, starting with Napoleon's Civil Code of 1804 and its reception in the Colombian Civil Code of 1873. The special case of the objective regime for hazardous activities." *Juridical Tribune* 13, no. 1 (2023): 120.

By recognizing and respecting the historical roots of certain legal system, the legislator can help to maintain public trust in the law and ensure its continued relevance and effectiveness.

Unlike common law systems, which rely heavily on judicial precedent, continental legal systems are rooted in a more codified approach, with laws and legal principles often being explicitly written into codes and statutes. In this context, legal tradition helps to provide a sense of coherence and consistency to the legal system, ensuring that legal principles are applied in a uniform and predictable manner. This is especially important in continental legal systems, where the law is often more complex and technical, and where the interpretation and application of legal principles can have significant consequences for individuals and society as a whole.

In 2013 Croatian Criminal Code introduced the new concept of sexual crimes into Croatian criminal law. Creators did not follow the usual German model. Instead, they chose the English example of Sexual Offence Act (SOA). The criminal law system of England and Wales has undergone changes, gradually redefining the concept of rape. In *DPP v. Morgan* (1975) it was declared that a man could not be found guilty of rape if he had an honest belief that the woman was consenting, even if that belief was unreasonable. This precedent set the grounds for a discriminatory policy against victims of rape that would influence the rape laws of England and Wales in the next couple of decades. The conviction rate for rape was unjustifiably low, which was most likely the main reason for the great reform made by the SOA in 2003. SOA defined consent and reformed the mistake of facts defence, introducing the requirement that belief must be not only honest, but also reasonable. Such a solution is, however, quite untypical for the Croatian legal tradition and therefore was met with a lot of resistance in doctrine and jurisprudence. This article examines how this new model is adopted and applied in jurisprudence, ten years after being implemented. It presents the results of research on Croatian jurisprudence conducted during May, June and July of 2022, and a survey conducted among judges, prosecutors and defense lawyers during September 2022, exploring their attitudes towards British legal tradition in Croatian criminal law. The research reviewed available decisions of the Supreme Court in Croatia in rape cases that were selected through the online search engine "Supra Nova". The results are analysed and compared with previous similar research in order to conclude to what extent British legal tradition was actually able to impact (and perhaps improve) Croatian legal system.

The hypothesis that we will test in this paper is that a particular legal framework, which is implemented in a legal system from a significantly different legal tradition, can only successfully exist in such a system if it corresponds to the social circumstances that exist in that system. Conversely, if a legal solution is adapted to the needs of the society in which it originated, it cannot take root in practice that is based on fundamentally different historical and political circumstances.

The subject matter of this work is not a critique of new legal solutions, nor

an analysis of the potential for their future improvement. We begin with the assumption that every legal solution has its own logic and circumstances that justify its creation, and therefore we do not engage in this type of analysis. Instead, our goal is to discover whether a provision that originated in a particular cultural-historical environment can be applied in a significantly different environment within the context of judicial practice.

2. Historical landscape of Croatian Criminal Law

In legal literature, it is common to divide European legal systems into those belonging to the civil law and those belonging to the common law legal tradition.³ Civil law systems develop in continental Europe, based on the foundations of the Roman-Germanic legal tradition. Regarding the Croatian legal system, the prevailing view is that it is a typical representative of the continental civil law system based on Germanic postulates. However, if we examine the history of Croatian law, especially if we closely consider the history of Croatian criminal law, which is the focus of this paper, it can be concluded that various influences have affected Croatian (criminal) law. Therefore, the starting thesis that we will advocate here is that Croatian criminal law is not typically civil law in the Roman-Germanic circle, but rather a hybrid model of different traditions that is constantly evolving. We believe that the traditional division of European legal systems into common law and civil law, at least when it comes to criminal law as the *ultima ratio societatis*, no longer corresponds to the actual state of affairs. Our view, which we will attempt to demonstrate using the example of Croatian criminal law, is that over the last twenty years there has been a strong infiltration of Anglo-American elements into the domain of continental legal traditions, and that these elements are leading to the development of legal models in continental Europe that could be described as hybrid.

The territory of present-day Republic of Croatia has a dynamic political past. Throughout the centuries, this region has been a part of various states. Therefore, it is not surprising that Croatian legal regulations are essentially imbued with different legal traditions. Although Croatian law is generally classified as continental law (civil law) close to the German legal sphere (systems of Austria, Switzerland, and Germany), we dare to say that such a statement is only theoretically correct in today's world, as outside Germanic influences penetrate into most legal branches.

During the long period of the Middle Ages, Croatian law was mostly customary, with occasional particular sources such as the Vinodol Code (1288), the Korčula Statute (1214), the Ilok Statute (1525), and others. The influence of Hungarian customary law was also significant, primarily in the then-continental Croatia (the so-called Croatia and Slavonia), later codified in codifications such as *Tripartitum opus iuris consuetudinarii incltyi regni Hungarie* (1572) and *Corpus*

³ Tetley, William. "Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)." *Louisiana Law Review* 60, no. 3 (Spring 2000): 677-738.

iuris Hungarici (1544).⁴

The foundations of today's modern Croatian legal system were mostly laid during the nearly one hundred and thirty years when Croatia was a part of the Austrian Empire and Austro-Hungarian Monarchy (1790-1918). In the area of civil law, the General Civil Code was in force in Croatia from 1852 (enacted in 1853), while the Austrian Criminal Code on Crimes, Offences and Misdemeanours was in force from the same year in the field of criminal law. Both laws remained in force after 1918, provided that the new authorities did not regulate a legal issue differently. However, many influences of these two significant Austrian codifications can be seen in the regulations enacted after World War I. The first comprehensive criminal law regulation was not enacted until the Kingdom of Yugoslavia in 1929 (Criminal Code of the Kingdom of Yugoslavia, in force from 1930), this time under the influence of the German Criminal Code.⁵

During World War II, which is considered the least researched period in Croatian criminal law history, there was a duality of criminal law systems. Thus, the Independent State of Croatia (1941) mainly applied the aforementioned Criminal Code of the Kingdom of Yugoslavia, supplemented by corresponding ancillary regulations relating to racial discrimination and segregation, also under the influence of the then-Nazi (German) ideology. On the other hand, in parts of the country where it had jurisdiction, the anti-fascist authorities created their own legal regulations, which also had pronounced political connotations.⁶

After the end of World War II, the so-called "second" Yugoslavia (1945-1992) was established, in which the Criminal Code was adopted in 1948. In line with the political system and socio-historical circumstances at the time, it was heavily influenced by Soviet law but did not last long. Yugoslavia quickly broke ties with the Soviet Union and in 1951 a new Criminal Code was adopted, modeled after the Swiss Criminal Code of 1937. This Code was subsequently amended six times and was replaced by the Criminal Law of the Socialist Federal Republic of Croatia at the federal level and by the Criminal Law of the Republic of Croatia at the republic level in 1976. These laws complemented each other and were applied as a whole, remaining in force even after the Republic of Croatia seceded from Yugoslavia in 1991, specifically until 1993. Then, the Criminal Code of the Republic of Croatia was adopted, which was essentially the old Criminal Law of the Federal Republic of Croatia but with a new name, and shortly thereafter the Basic Criminal Law of the Republic of Croatia was also adopted. This resulted in a rather unusual situation where two criminal laws were in force at the same time, both of which were amended and supplemented several times shortly after coming into force. In addition, during this period the President of the state used his constitutional authority to issue decrees with the force of law in the field of

⁴ Bayer, Vladimir. "Kazneno procesno pravo: odabrana poglavlja, Knjiga 2: Povijesni razvoj kaznenog procesnog prava," edited by Davor Krapac. Zagreb, 1995, 167.

⁵ Novoselec, Petar. *Opći dio kaznenog prava*. Osijek, 2016, 29.

⁶ Ibid. See also Horvatić, Željko, Davor Derenčinović, and Leo Cvitanović. *Kazneno pravo - opći dio 1: kazneno pravo i kazneni zakon*. Zagreb, 2016, 36-43.

criminal law, which were also valid alongside these laws.⁷

This rather bizarre and chaotic legal situation lasted until 1998, when the two laws were replaced by the new Criminal Code. The latter text, like its predecessors, was based predominantly on Swiss and to some extent on German solutions. It was the first comprehensive legal text in the newly established state and was in force until 2013, but during that time it was amended and supplemented a total of twelve times. Sometimes these changes were cosmetic, but at other times they were more extensive. For example, the life imprisonment was introduced in 2003, which, however, was in force for only one week, as the Constitutional Court immediately declared it unconstitutional due to the lack of an appropriate parliamentary majority in its adoption.

From the previous statements, it can be concluded that Croatian criminal law has been influenced by various legal cultures over many years and that its foundations are clearly intertwined with Roman-Germanic elements as well as Soviet influences. Interestingly, it is sometimes difficult to distinguish between the two. For example, if one looks at the genesis of one of the central institutes of the general part of criminal law - the institute of attempt and voluntary abandonment of attempted criminal offense - one will come to the conclusion that it is very similarly regulated, both in Swiss and Soviet criminal law. If one then looks at Croatian criminal legislation from the time of the second Yugoslavia, it will be seen that the provision on attempt is similar to both of the mentioned systems. When this is brought into the context of the previously described influence of both legal systems, the only logical conclusion is that, due to the intertwining of different influences and very frequent legal and political upheavals, it is no longer possible to say with certainty what belongs to which legal climate.

However, despite frequent changes and various influences, the fact is that until 2008, there was no influence from the common law system in Croatian criminal law (in the broader sense of the word: substantive, procedural, and executive). However, in that year, a thorough reform of criminal procedure was undertaken, and the so-called state prosecutor's investigation was introduced, instead of the previous judicial investigation. In addition, the institute of plea bargaining, typical of the Anglo-American system, was introduced, previously unknown in Croatian criminal procedure. It should be noted here that the hidden motive of this reform was to create conditions for joining the European Union, given that this process implied providing effective instruments for dealing with the then widespread systemic corruption in society. This procedural turnaround, which was soon followed in practice by the opening of several major criminal proceedings against (former) prime ministers and some prominent ministers, was actually a harbinger that similar changes would occur in the field of criminal substantive law.

And indeed, on January 1, 2013, the new Criminal Code entered into force, which introduced clear elements of British law into substantive law. The legislator

⁷ Ibid, pp. 29-32.

did not even try to hide this, and in the explanation of the draft law, he declared that sexual offenses, and especially the offense of rape, were modeled after the English example: the Sexual Offence Act of 2003 (hereinafter: SOA).⁸ We will delve into the analysis of these provisions a little later, but at this point, we will add that this change was introduced without any extensive research being conducted on the state and needs of practice. Only one study of the previous case law was carried out, but on a very small sample and within the jurisdiction of only one court.⁹ Therefore, this change was largely greeted with skepticism in scientific and professional circles. It should also be noted that the Criminal Code of 2013, which is in force at the time of writing this text, has been further amended seven times since that year, and new changes are announced. Some of these changes also related to sexual offenses.

From the description, it can be inferred that there exists a certain tradition of frequent legal regulation changes in Croatia. This tradition was initiated by the disintegration of the Habsburg Monarchy in 1918, which brought about a series of political upheavals on the territory of present-day Croatia, leading to the adoption of new regulations. This trend continued throughout the rest of the 20th century and appears to have persisted until the present day. For how else can we explain the fact that over the past twenty-five years, criminal legislation in Croatia has been amended on average once every year and a half (or more frequently, in the case of procedural legislation)? Of course, some of these changes may be justified by the process of EU accession, when the state was obliged to harmonise its regulations with the *acquis communautaire*, which necessarily encompassed the field of criminal law. However, the majority of these changes are independent of the accession process and are fundamentally detrimental as they lead to legal uncertainty.

Let us now return to the thesis of this chapter, which states that Croatian criminal law is not a typical product of the civil law tradition but rather a hybrid model. We believe that the previous exposition has demonstrated that, due to frequent socio-political changes during the 20th and 21st centuries, Croatia has essentially moved away from its Romance-Germanic roots. Today, the Croatian system of criminal law represents a highly complex hybrid model, which uniquely links civil law and common law. It is precisely this characteristic that makes this model intriguing for further scientific research.

3. Comparison with English Criminal Law tradition: the other end of the spectrum

Given that the aim of this paper is to evaluate whether an English legal model can function effectively in a Croatian context, it is necessary to briefly

⁸ Turković, Ksenija et al., *Komentar Kaznenog zakona*. Zagreb, 2013, 206.

⁹ Radačić, Ivana. "Kazneno djelo silovanja: pitanja definicije, (ne)odgovornosti za otklonjivu zablude o pristanku i postojanje rodnih stereotipa u sudskom postupku na primjeru prakse Županijskog suda u Zagrebu." *Hrvatski ljetopis za kazneno pravo i praksu* 19, no. 1 (2014): 105-125.

explain the specific features of English criminal law and its system for regulating sexual offenses. It should be noted that, when we use the term "English law", we refer to the law of England and Wales. This law is the subject of consideration and comparison here because the legal tradition of England and Wales differs from that of Scottish law. Although all of these countries belong to the United Kingdom of Great Britain and Northern Ireland, Scottish law retained its authenticity after the Union with England in 1707 and is still significantly influenced by continental law more than English law.¹⁰

When discussing English law, it is important to note that, like Croatian law, it has developed over centuries under the influence of various legal cultures. Different legal systems such as Germanic, Roman, Canon, and Danish law had an impact on it during different periods, and thereafter law developed from the practice of royal courts after the Norman invasion in 1066.¹¹ It should be emphasized that one of the significant differences between English law and continental law is that English law has never undergone the reception of Roman law in the way it was done in continental legal systems. Moreover, the Second Statute of Westminster from 1285 expressly prohibited the reception of Roman law, which ultimately managed to penetrate English law only in small, "homeopathic doses," as Holdsworth vividly claims.¹² Every romanization ceased in the 16th century when the English kingdom decisively opposed Catholicism in the struggle for primarily secular dominance. Due to colonization, English law is now the foundation of the legal system of many countries worldwide and forms the basis of the so-called Anglo-American law.

In contrast to continental (including Croatian) law, where the only source of criminal law is written laws (according to the principle of *nullum crimen sine lege scripta*), the situation in English law is considerably more flexible. The term "common law" encompasses three categories. In addition to the so-called general law (common law in the narrow sense), this term also includes equity law and the law contained in statutes.

The foundation of English law is the so-called common law in the narrow sense of the term, which is customary law that has arisen in the practice of royal courts since the reign of Henry II (1154-1189), whose centralizing tendencies are actually responsible for its origin.¹³ Common law was initially feudal law, intended for a limited circle of people, but then, thanks to the king's "traveling" judges, it gradually spread throughout the country and became dominant until it was gradually replaced by Parliament's laws (statutes) from the time of Edward I (1239-1307).¹⁴

¹⁰ MacQueen, Hector L. "Regiam Majestatem, Scots Law, and National Identity." *The Scottish Historical Review* 74, No. 1 (April 1995): 1-25.

¹¹ Phillips, Owen Hood. *A First Book of English Law*, 6th Edition. London, 1970, 2.

¹² Holdsworth, Sir William Searle. *A History of English Law*: Volume 1. London, 1972, 11.

¹³ For the in depth study of the development British common law system see Van Caenegem, Raoul Charles. *The Birth of the English Common Law*, 2nd ed. Cambridge, 1988, 1-110.

¹⁴ Hanbury, Harold Greville. *English Courts of Law*, 4th Edition (prepared by D.C.M. Yardley). London, 1967, 45.

English criminal law originally had a private law nature (as did all the laws of the Germanic tribes), but over time it developed the understanding that behaviors that are now known as criminal offenses represented a breach of the king's peace. Thus, this law gradually acquired a public law character and began to develop as such through case law.¹⁵ From the 13th century, offenses were classified according to their severity, and a distinction was established between treason (the most serious crimes against the king), felonies (other serious crimes), and misdemeanours (less serious crimes).¹⁶ This division has essentially been maintained to the present day. It is worth noting that in Croatian law there is no similar division, but only one category of crime (so-called criminal offenses). The only difference between them is the prescribed penalty and judicial jurisdiction.

Medieval English criminal law, like other medieval criminal laws, was very strict and harsh, completely devoid of ideas of humanity and human rights. To partially mitigate this severity, there were institutions such as asylum and benefit of clergy. However, we will not go into detail on their presentation here.¹⁷

Unlike Croatian criminal law (and other continental systems), there is no single criminal code in England that would comprehensively regulate all criminal law issues, but criminal law is contained in many special laws. Such laws usually regulate specific punishable areas or deal with appropriate parts of the judicial process and the structure of judicial bodies. In this sense, the SOA is a typical example of such particular regulation because it relates only to sexual offenses. This approach to regulating criminal law matters, together with the fact that part of criminal law is contained in binding judicial precedents (so-called binding precedents), necessarily leads to a certain confusion between legal sources. This, in turn, causes a degree of ambiguity and imprecision that will be difficult for a continental criminal lawyer to accept. Namely, a continental criminal lawyer (this also applies to Croatia) is brought up on a rigid understanding of the principle of legality.¹⁸ Therefore, that lawyer will always insist on the written nature of legal sources and on a high degree of clarity and specificity. In addition, the impact of EU law and influence is stronger in continental law.¹⁹ On the other hand, an English criminal lawyer will understand the principle of legality much more flexibly²⁰, and will seek support for his interpretations in customs and judicial precedents. For example, the subjective element of a criminal offense (the so-called

¹⁵ Hohmann, Hans. "The Nature of the Common Law and the Comparative Study of Legal Reasoning." *The American Journal of Comparative Law* 38, no. 1 (1990): 143-170.

¹⁶ Hood Philips, *A First Book*, p. 252.

¹⁷ For more details see Baker, Sir John. *An Introduction to English Legal History*, Fifth Edition. Oxford, 2015, 540-560.

¹⁸ For more details on that topic see Shcherbanyuk, Oksana, Vitalii Gordieiev, and Laura Bzova. "Legal nature of the principle of legal certainty as a component element of the rule of law." *Juridical Tribune* 13, no. 1 (2023): 21-31.

¹⁹ Novačkova, Daniela, and Jana Vnukova. "Relationship between EU law and national law in the context of case law of judicial bodies." *Juridical Tribune* 12, no. 4 (2022): 539.

²⁰ Mokhtar, Aly. "Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects." *Statute Law Review* 41, no. 1 (2005): 41-55.

actus reus) is built up in English law through long-standing case law and is generally incomprehensible to a continental lawyer. We are free to conclude that criminal law, as a very formal branch of law, is still more formal in continental law than in the English system. Simplistically, if something is not provided for and exhaustively regulated by law, a continental lawyer will very likely refrain from applying it. An English lawyer, on the other hand, in such a case will very likely have a more progressive mindset and will dare to interpret legal problems by combining customs, practice, and regulations in the spirit of tradition.

The main and most important difference between the English and Croatian legal (and therefore criminal legal) traditions can be summed up in two characteristics of English law: archaism and continuity. Earlier, we established that frequent changes, dynamic development, and widespread acceptance of different cultures and influences (especially those of the EU and the Council of Europe) characterize Croatian law. English law is precisely the opposite of this system. It has almost uninterrupted historical continuity since King Ethelbert (560-616). In literature, it is most commonly accepted that the development of English law began with the Norman Conquest in 1066.²¹ It is important to note that this law does not accept the cessation of the validity of a legal rule due to its long-term non-application in practice (desuetude), which is not the case in continental legal systems. Furthermore, unlike continental laws (and therefore Croatian law), the English system is recognizable for its tradition of applying customary law. Thus, the English judge is partially a creator of legal norms²², unlike the Croatian judge who is only its interpreter and enforcer. In addition, the English system is based on jury trials, which means that the verdict of guilt is given by laypeople (jurors) who have no experience in judging. In contrast, in Croatia, professional judges sometimes work with so-called jury judges to form a court council. This difference is very important because it is partially the basis for the legal regulation of sexual offenses in English law, which will be discussed later in this text. Of course, it is necessary to emphasize once again that Croatian law is under significantly greater influence of the Roman legal tradition than English law, which also represents a significant difference in the traditional foundations of the legal environment.

4. Law in books and law in action: between expectations and reality

Earlier, we mentioned the major reform of sexual offenses that the Croatian criminal law underwent in 2013. Now, we will briefly explain what this specifically entailed. Firstly, it must be said that a legal provision, no matter how well-conceived and innovative it may be, must have practical confirmation. Otherwise, it remains a dead letter on paper and in any case, its initial ratio legis is undermined. In the sphere of sexual offenses, the last thirty years have been characterized by two diametrically opposed trends in Croatian criminal law. On

²¹ Baker, *An Introduction*, pp. 3 – 6.

²² Mason, Anthony. "The Judge as Law-Maker." *James Cook University Law Review* 3, no. 1 (1996): 1-15.

one hand, we have witnessed a constant liberalization of this area through the decriminalization of homosexual relations and the introduction of gender neutrality. On the other hand, there has also been a permanent tightening of repression - examples include the incrimination of a wider range of punishable acts, the punishment of marital rape, and the strengthening of sanctions, among others.²³

When we speak of the major changes that were introduced in the sphere of sexual offenses in 2013, when the English model was adopted, they brought about the most significant tightening of repression ever in this legal area in Croatian law. The ratio legis behind these changes was to provide more effective legal protection to victims of rape.²⁴ For years, the Croatian judiciary, at least when it comes to sexual offenses, has been perceived by the public as very conservative and chauvinistically oriented. The rigid judicial practice of the 1990s stood out, which insisted on resistance by the victim as proof of rape, a stance that has been overcome in modern law.²⁵ At the beginning of the new millennium, the Supreme Court accepted the views of the European Court of Human Rights in the case of *M.C. v. Bulgaria* and changed the practice of insisting on resistance by the victim, placing emphasis on the issue of consent. Certain cases have contributed to the negative public impression. One can mention the famous, scandalous case from 2005, also known as the case of "Lika handshake" (*Croat. „ličko rukovanje“*).²⁶ This was a trial for the rape of an influential entrepreneur from Lika who attacked an American basketball player who was playing for his club at the time and raped her by inserting his finger into her anus. The local judge apparently wanted to favor him, so he acquitted him of criminal responsibility and stated in the reasoning of the verdict that such behavior cannot be considered rape because neither the finger nor the anus are sexual organs. On the contrary, this judge argued, the defendant's conduct can be equated with a handshake. However, this verdict was quickly overturned by the Supreme Court, and the Lika rapist was soon thereafter convicted of rape in a retrial. It should be noted that this verdict was not in line with the then-existing legislation, which not only criminalized sexual intercourse but also all actions that are equated with sexual intercourse in their effects and accompanying phenomena. Already at that time, it was customary to classify such behavior as rape, so the described verdict was actually an exception to established practice.

²³ Turković, Ksenija and Maršavelski, Aleksandar. "Kaznena djela protiv spolne slobode." In Cvitanović, Leo et al., *Kazneno pravo - posebni dio*. Zagreb, 2018, 207.

²⁴ It is important to note here that rape is one of the most severe crimes, for which in many European systems, even in the last century, the death penalty was prescribed. Adams, Will. "Capital Punishment in Imperial and Soviet Criminal Law." *The American Journal of Comparative Law* 18, no. 3 (Summer 1970): 575-594.

²⁵ Turković, Ksenija and Radačić, Ivana. "Rethinking Croatian rape laws: Force, consent, and the contribution of the victim." In McGlynn, Clare and Munro, Vanessa E. (eds.), *Rethinking Rape Law: International and Comparative Perspectives*. London, 2011, 169-182.

²⁶ More at: <https://www.jutarnji.hr/vijesti/hrvatska/slucaj-licko-rukovanje-silovanoj-kosarkasici-dosudena-odsteta-jer-joj-je-policija-otkrila-identitet-15125647> (28 Apr 2023).

In order to increase protection and strengthen repression, a new law was introduced in 2013 defining consent to sexual intercourse and listing situations in which it will be presumed that such consent does not exist (which will also lead to a shift in the burden of proof from the prosecution to the defence). Within these situations, certain forms of rape were normalized which had previously been atypical for Croatian law. This primarily refers to rape by deception, which had not been criminalized before, nor were such cases recorded in practice. The definition of rape was set similarly to that in the SOA. However, the biggest change came with the criminalization of mistaken belief in the existence of consent (mistake of facts), indirectly criminalizing the negligent form of rape (because such a belief always excludes intention according to Croatian law). In practice, this means that a perpetrator will be punished for the (less severe) form of rape A, where they engaged in sexual intercourse with B, believing that the victim consented, although this was not the case. Rape has thus suddenly become a negligent offense, which has understandably met with skepticism and disapproval from most legal scholars who have dealt with this issue. The immediate reason for the introduction of the negligent form in the Croatian system was a disgusting case in which the perpetrator had for years abused, beaten, and mistreated his wife, forcing her into sexual relations with unknown men. He found men through advertisements and brought them home, convincing them that his wife agreed to it. He then left them alone in the room with his wife, secretly recording their sexual intercourse. The victim, out of fear of beatings and other forms of abuse, actually pretended to consent to sexual intercourse, so these men could argue that they did not know that there was no consent, and such a defence would have led to exclusion of criminal responsibility.²⁷ Under the new law, such a defence could primarily lead to a reduction in liability (because it would not be punished for intention but for negligence), and exclusion only if it were found that their belief was irremovable (i.e., even with more care, they could not have realized that there was no consent).

In this paper, we will refrain from critiquing the legal provisions themselves as this is not the subject of this paper. Instead, we will attempt to determine to what extent these provisions have been implemented in practice and whether they have led to greater protection for victims of sexual offences, in line with the proclaimed *ratio legis*.

Given that it has been stated that this legal solution is modelled after the English Sexual Offences Act of 2003, we will also examine that legislation. The concept of rape in English law underwent a long developmental process before the SOA was enacted. The origins of rape law in England and Wales can be traced back to medieval common law. In this system, rape was considered a crime against property and not against the victim, who was typically seen as the property of a man, usually her father or husband.²⁸ Initially, rape was defined as forcible sexual

²⁷ Novoselec, Petar. "Razgraničenje kaznenih djela prisile na spolni odnošaj i silovanja (sudska praksa)." *Hrvatski ljetopis za kazneno pravo i praksu* 16, no. 1 (2009): 335-337.

²⁸ Pistono, Stephen P. "Susan Brownmiller and the history of rape." *Women's Studies* 14, no. 3 (1987): 265-276.

intercourse between a man and a woman who was not his wife, but this definition was later expanded to include sexual intercourse with a woman who was unable to give consent, such as a minor or a mentally disabled person.²⁹ However, the burden of proof was often placed on the victim to demonstrate that she did not consent to the sexual act, which made it difficult to secure convictions. Furthermore, rape was often not punished as severely as other crimes, such as theft or assault.

Rape was first defined in statute in 1956. The Sexual Offences Act of 1956 in England and Wales defined rape as "*the act of a man having sexual intercourse with a woman without her consent, knowing that she does not consent or being reckless as to whether she consents.*"

This definition was narrow and limited as it only applied to male perpetrators and female victims and did not consider other forms of non-consensual sexual acts. Additionally, it required that the perpetrator must have had knowledge of the lack of consent, which made it difficult to prove rape in cases where the victim did not explicitly resist or say no.

In 1975, in the case of DPP v. Morgan, a rule was established that a perpetrator who acted in good faith in the belief that the victim had consented could not be convicted. This paved the way for discriminatory and sexist criminal policy and significantly impacted this aspect of criminal law in the following decades. In 1976, the Sexual Offences Act was passed, which only limited the admissibility of evidence of the victim's prior sexual conduct but did not significantly improve the situation. Statistically speaking, the number of convictions for rape was very low, even negligible. This gradually led to louder calls for reform, which ultimately resulted in the enactment of the aforementioned SOA in 2003. That law defined consent according to the so-called "consent plus" concept and introduced changes to the mistake of consent. The new concept implied that, for such a defence to succeed in a criminal trial, the accused must prove not only that they acted in good faith but also that their belief was reasonable, from the perspective of an average reasonable person in the same circumstances. It was believed that this would narrow the defence's room for manoeuvre to abuse this mistake-of-consent doctrine.³⁰ However, over the years, the SOA has become the subject of much criticism, and it is generally considered that it has not entirely eliminated the shortcomings of the previous law.³¹

At this point, however, it is important to highlight a fundamentally significant difference between the ways in which English and Croatian criminal proceedings are conceived. Namely, we have already pointed out that in the English system the decision on guilt is entrusted to a jury, meaning a group of citizens inexperienced in trial proceedings. In Croatia, on the other hand, the

²⁹ Smith, Cyril J. "History of Rape and Rape Laws." *Women Lawyers Journal* 60, no. 4 (Fall 1974): 191.

³⁰ Sjölin, Catarina. "Ten years on: Consent under the Sexual Offences Act 2003." *The Journal of Criminal Law* 79, no. 1 (2015): 20-35.

³¹ Ibid. See also Westmarland, Nicole. "Still Little Justice for Rape Victim Survivors: The Void between Policy and Practice in England and Wales." In *International Approaches to Rape*, edited by Nicole Westmarland and Geetanjali Gangoli, 1st ed., Bristol, 2011, 79-100.

decision is made by a judicial council composed of a combination of professional judges and so-called lay judges, the latter of whom in practice actually have no significant role. This difference is very important here because the purpose of the English criminal process is to convince the jury that the truth is as one side or the other presents it. In this regard, the speaking and presentation skills of lawyers appearing before the jury will be of great importance, as will their ability to persuade.³² In Croatian law, the criminal procedure does not contain such a dose of theatricality. It is harder to convince a professional judge with years of experience of the subjective truth of one side or the other in the proceedings. Using their knowledge, education and experience, as well as their ability to interpret legal norms, they will be able to make a more objective decision and will be more difficult to deceive with rhetorical skills. In this sense, an unconvincing defense (in this case by invoking a misconception about the existence of consent) will be much harder to succeed with in front of a professional judge than in front of a jury, which may only find themselves in a trial once in a lifetime and is not accustomed to such argumentation presentations.

In the introduction, we explained that our thoughts are based on the hypothesis that a legal solution implemented from a different legal tradition can only exist successfully if social circumstances and needs are similar. We will now test this hypothesis through an analysis of our own research, which consists of three parts. In the first part, we will present the results of a short questionnaire that we conducted with thirty practitioners in the field of criminal law, exploring their views on the usefulness of these changes. In the second part, we will analyze the results of the study of judicial practice on a sample of seventeen final judgments on rape, rendered under the new legal concept, and we will see in how many cases the new (controversial) solutions were actually applied in practice. In the third part, we will compare these results with the results of an earlier study of judicial practice from the period before the new legal solutions came into force, and we will conclude whether the practice differs significantly then and now.

Theoretically, it is possible for a legal solution from one legal tradition to exist successfully in an opposite legal tradition, but it may require adaptations and adjustments to accommodate the differences in legal frameworks and cultural norms. The success of such a transfer will depend on a variety of factors, including the degree of adaptation necessary to make the solution work in the new context, and the willingness of the legal actors and society to accept and integrate the solution into their legal system.

In order to find out what views those who apply these provisions have towards introducing English elements into the Croatian concept of sexual offenses, we conducted a survey by the method of direct conversation with thirty practitioners in the field of criminal law. We talked to ten judges, ten state attorneys, and ten defense attorneys. The age structure of the respondents ranged

³² Demleitner, Nora V. "Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?" *The American Journal of Comparative Law* 46, Issue suppl_1 (Supplement 1998): 641-664.

from those born in 1982, the youngest respondent, to those born in 1956, the oldest respondent. The majority of respondents, 70%, were born between 1971 and 1979, which means that they are people with adequate life and work experience. In terms of gender, the majority of respondents, 60%, were male. All respondents were educated in one of the countries that made up the former Yugoslavia (if they studied before the breakup of that state), or in the Republic of Croatia. Only one respondent stated that they had professionally trained abroad after their studies, but not in Anglo-American legal circles.

We asked them three questions. The first question was whether they were aware that the 2013 legal model was shaped after English law. With this question, we wanted to establish their knowledge and awareness of the change in the usual legal tradition. Most, 75%, of the respondents gave a negative answer to this question. 15% said they knew the origin of the new legal solution, while the remaining 10% stated that they were not sure. We asked a supplementary question about how familiar they were with English legal tradition in general, but the only answer we received was that they were aware that juries decide in English law, whereas this is not the case in most continental systems. Other features of the English system were not known to them.

In the second question, we asked for their opinion on whether the new solutions, which significantly deviate from the previous system, were necessary given the law and practice that existed prior to their adoption. In this case, 90% of the respondents answered that such a reform was unnecessary. The remaining 10% were of the opinion that the new legal solutions were necessary, but only in specific cases. It is interesting that there was no significant difference in the structure of respondents according to the criterion of occupation in this response, so it can be concluded that the attitude towards the unnecessary reform is common for judges, prosecutors, and defense attorneys. Similarly, no significant deviation was observed in terms of the gender structure of the respondents, so it can be stated that men and women have approximately the same attitude towards this issue.

The last, third question was to clarify the previous answer and compare the old and new solutions, and to explain which one they believed was better and why. Here we received different answers, but their essence can be reduced to the fact that they considered the old solution simpler to implement and that practice did not show the need to expand the scope of criminal liability in the way it was done. The respondents generally expressed skepticism that new solutions could lead to long-term abuses, such as filing unfounded rape charges, and that the defense would more often invoke the mistaken belief in consent and thus delay the criminal proceedings. They also added that in their practice, they rarely encounter the application of new institutions that have been adopted from the common law tradition. From this, we concluded that there is a fundamental reluctance of practitioners to accept new, drastically different legal models, and that in reality, they try to maintain the status quo as much as possible.

The second part of the study involved an analysis of judgments rendered under the new law from 2013. Using the publicly available search engine "Supra

Nova,"³³ corresponding legally binding court judgments in cases of rape from 2013 to (March) 2023 were searched for using the keywords "deception," "mistake," and "consent." No judgment was found for the deceptive form of rape. As for mistake and consent, a total of seventeen relevant decisions were found. This sample may seem relatively small, but upon closer examination, it becomes clear that it is not. In fact, the incidence of rape in the official statistics of legally binding judgments in the Republic of Croatia is not generally high. A review of statistical reports from 2001 to 2021 shows that this number usually ranges from 0.18% to 0.42% of the total number of convicted offenders, amounting to between one hundred and two hundred judgments per year. We did not consider cases where these relatively new legal solutions for Croatian law were not discussed. We only looked at cases where problems under the new law were discussed because only those judgments are relevant to this study. In other words, the research suggests that the defense of mistaken consent is used in a very small number of statistically insignificant cases. Further analysis revealed that all seventeen judgments were convictions, meaning that this defense was not successful in any case. We examined the facts upon which the claim of mistake was based and found that such a defense is mainly based on the fact that the victim did not offer any (physical) resistance in the specific case. Courts consistently rejected such a defense as unconvincing. This means that the 2013 solution, according to which the situation in which the perpetrator is actually mistaken is punishable, has not been applied in practice even once. It seems that there was no need for it: such a need would only exist if such a defense were likely to be successful in criminal proceedings.

Finally, we wanted to compare the results of this study with a comprehensive study of case law under the old legislation, which we conducted ourselves several years ago. This research was conducted on a significantly larger sample that examined reports, charges, and verdicts in rape cases from 1991 to 2016. It was found that during that period, 2,817 individuals were reported for this crime and 1,761 were charged (interestingly, nine women were also charged). Of those, 1,354 (48.06%) were ultimately convicted (seven women). However, it is interesting to note that out of the 1,761 individuals charged during that long period, only forty-four (2.49%) invoked the defense of mistaken belief in the victim's consent. Out of those forty-four, only ten (0.56% of the total charged) were successful in obtaining an acquittal through this defense.³⁴

From this comparison, we draw two conclusions. First, this type of defense in rape cases is atypical in Croatian criminal procedure. Second, when this defense is used, it is usually unsuccessful. These two facts support the argument that the introduction of the new legal solution is generally unused in judicial practice and, in essence, contrary to Croatian legal tradition. However, we also note something that can be considered an undesirable trend: during the application of the old law, this type of defense was attempted only forty-four times. During the (considerably shorter) period of the new law's validity, this defense has already been used

³³ Available at: <https://sudskapraksa.csp.vsrh.hr/search> (28 Apr 2023).

³⁴ Mrčela, Marin, Vuletić, Igor, and Livazović, Goran. "Negligent Rape in Croatian Criminal Law: Was Legal Reform Necessary?" *Review of Central and East European Law* 45, no. 1 (2020): 126-160.

seventeen times (it should be noted that not all verdicts are entered into the Supra Nova system, only those selected by the competent department of the Supreme Court of the Republic of Croatia, which maintains this database). This speaks to the potential effort of the defense to abuse this institute for the purpose of delaying the judicial process.

5. Conclusion

From previous debate follows a conclusion that legal provisions from one country are unlikely to be successfully applied in another country with a different legal tradition. This is because legal systems are deeply rooted in the social, cultural, and historical contexts of the countries in which they operate, and thus, legal provisions that may work well in one country may not be applicable or effective in another. A lack of understanding of these fundamental differences can lead to confusion, misinterpretation, and ultimately, failure in the application of legal provisions. Therefore, a deep understanding of the legal traditions and cultural contexts of a country is essential for the successful implementation of legal provisions in that country. In that context, we consider that the initial hypothesis has been proven.

In conclusion, legal history plays a crucial role in shaping current law. It provides a framework for understanding how laws have developed over time and the reasoning behind their creation. By examining past legal decisions and the social and political contexts in which they were made, we can gain valuable insights into the current legal system and identify areas for improvement. Legal history also helps to ensure that laws remain relevant and effective in today's society by providing a basis for legal interpretation and guiding future legal developments. Therefore, a thorough understanding of legal history is essential for anyone seeking to navigate the complexities of the modern legal system.

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