Sexualität in Recht und Gesellschaft 3

Elisa Hoven | Thomas Weigend (Eds.)

Consent and Sexual Offenses

Comparative Perspectives

Nomos

Sexualität in Recht und Gesellschaft

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Introduction

Sexual offenses have moved to the top of the global criminal policy agenda. Long ignored by mainstream criminal law scholarship, violations of sexual autonomy, especially of women, have since the turn of the millenium become the object of vivid debates in criminology, criminal law theory, and legislation. Demands for better protection of vulnerable groups against sexual exploitation and more effective sanctions for sexual assaults beneath the level of forcible rape have led to a flurry of new legislation.

One key point in the debate on sexual offenses is the role of consent. While there clearly is no reason for criminal penalties if two responsible adults agree to have sex with each other, there exist a host of situations in which the presence or the legal validity of consent is doubtful. Consider, for example, two 15-year-olds experimenting with sex – can each of them give valid consent to being touched sexually? If the answer is 'yes', does it make a difference if one or both are drunk? Or if one of them is not 15 but 22 years old? Even among adults, a declaration of consent can be influenced by a variety of factors that may raise doubts about its validity. What if an employee agrees to have sex with her boss because she is afraid of getting fired if she refuses? Or if a woman consents to have intercourse with a man wearing a condom but the man secretly removes the condom?

Even a quick glance at these questions shows the massive practical and theoretical difficulties of defining what "consent" means in sexual relations. Yet, delineating the preconditions and limits of valid consent is of great relevance for the criminal law. The existence of consent is likely to make the difference between a mutually pleasurable experience and the commission of a serious crime. Since the issue of consent is bound to arise, in some form or other, in every legal system, the editors sought to collect perspectives and solutions from various jurisdictions, hoping that useful conclusions for policymaking can be drawn from the experiences of different countries.

As a focal point of these efforts, an international conference on the topic was held in September 2021. The Covid19 pandemic regrettably made it necessary to abandon the original plan of meeting in Leipzig. But the online conference nevertheless ignited spirited debates on selected topics, based on previously circulated national reports from twelve jurisdictions on three continents.

The present volume collects eight topical, comparative essays as well as eleven national reports, followed by a synopsis designed to put together the main findings and remaining issues for debate. The chapters of this book are based on the contributions to the 2021 conference, which have been expanded and brought up to date by the authors. We hope that this volume can be of help to scholars as well as to judges and policymakers faced with potentially criminal situations in which consent to sexual acts is at issue.

The editors are most grateful to the contributors to this volume, who have, in a spirit of friendly debate and cooperation, succeeded in providing up-to-date information on the situation in their countries and in furthering international exchange on the multiple issues raised by the law of sexual offenses.

Elisa Hoven
Thomas Weigend

Comparative Essays

Defining Rape. In Quest of the Optimal Solution

Wojciech Jasiński

At first sight, it may seem that defining criminal offenses, especially those qualified as *mala in se*, should not pose too many problems or raise controversies. For various reasons, however, reality is the opposite. In general, the challenges faced by lawmakers stem from the simple fact – often overlooked, particularly by lay persons – that criminalization is not a simple task of mapping reality. What should be qualified as an offense is deeply dependent on people's (especially policy makers') perceptions, which in turn are shaped by various cultural and political factors. As a result, plenty of value judgments are involved in every decision regarding the scope and method of criminalization, even if it refers to behaviors conceptualized as *mala in se*. Not surprisingly, if the scope of penalized wrongdoing as well as the cultural patterns influencing these decisions are the subject of heated debates, the process of drafting relevant legal provisions becomes even more challenging. Defining criminal offenses cannot simply be reduced to the question of how to name the relevant wrongdoing. In some cases, the wording of definitions of criminal offenses (including sexual offenses) are influenced by other important factors such as the potential impact on the ability to collect evidence and investigate the crime.[1] The fear of overcriminalization also plays a crucial role. In the case of sexual offenses it has to be noted that the decision to engage in sexual relations affects the most intimate sphere of people's privacy where interference, especially by means of the criminal law, should be limited to a necessary minimum. All these issues, coupled with political bargains and other random factors

1 This is particularly true with respect to rape. Westmarland and Gangoli have rightly pointed out that 'problems with rape and the criminal justice system are often dismissed on the grounds of rape "being a difficult crime to investigate"'. See: Nicole Westmarland and Geetanjali Gangoli, 'Introduction: approaches to rape' in: Nicole Westmarland and Geetanjali Gangoli (eds), *International Approaches to Rape*, 2012, 9. See also Vanessa E. Munro, 'From consent to coercion. Evaluating international and domestic frameworks for the criminalisation of rape' in: Claire McGlynn and Vanessa E. Munro (eds), *Rethinking Rape Law. International and Comparative Perspectives*, 2010, 19. Munro emphasizes the 'unease at the prospect of women's false rape allegations' and its influence on rape laws.

influencing policy decisions, make the task of devising an optimal solution difficult.

The topic of redefining rape has become one of the central issues regarding sexual offenses due to the entry into force of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) in 2014, important rulings of international courts and tribunals referring to the criminalization and prosecution of rape,[2] and the pressure exerted by international bodies like the United Nations Committee on the Elimination of Discrimination against Women.[3] Although the definition of rape had been discussed for several decades,[4] the beginning of the 21st century clearly brought important changes. In addition to a growing consciousness about the significance of this issue, its cultural background and its interdependence with women's position in society, the crucial aspect is a progressive trend around the globe toward reshaping rape laws.[5] The direction of this reform has often been presented as a shift from a 'coercion-based' model toward a 'consent-based' model of defining rape. The central idea is to replace definitions of rape based on the use of violence or threats by a definition focusing on lack of consent. Recent debates on how to define rape have shown, however, that lawmakers are facing a complex problem. The challenges multiply when the topic of consent is analyzed carefully. Should a 'yes means yes' or 'no means no' model be adopted? How should consent be externalized? When should it be expressed? Can consent be withdrawn? What external factors make it impossible to give valid consent? These and several other questions indicate that making changes is neither quick nor simple.

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2 See e.g., ECtHR, *Z. v Bulgaria*, App no. 5925717, Judgment of 28 May 2020; *I.C. v. Romania*, App no. 36934/08, Judgment of 24 May 2016; *M.G.C. v. Romania*, App no. 61495/11, Judgment of 15 March 2016; *M.C. v. Bulgaria*, App no. 39272/98, Judgment of 4 December 2003. See also Alison Cole, 'International Criminal Law and Sexual Violence' in: Claire McGlynn and Vanessa E. Munro (eds), *Rethinking Rape Law. International and Comparative Perspectives*, 2010, 47–60.

3 See e.g., Right to be free from rape – overview of legislation and state of play in Europe and international human rights standards, 2018 – https://www.amnesty.org/en/documents/eur01/9452/2018/en/.

4 On the discussion of this topic in the U.S., see Stephen J. Schulhofer, 'Reforming the Law of Rape' 35 *Law & Ineq* 335, 336 (2017).

5 According to an Amnesty International report, 13 legal systems within the EEA base their definition of rape on lack of consent: Right to be free from rape – overview of legislation and state of play in Europe and international human rights standards, 2018 – https://www.amnesty.org/en/documents/eur01/9452/2018/en/.

In general, it can be said that the coercion vs. consent dichotomy correctly describes the main axis of the dispute on how to define rape. It would, however, be an oversimplification to say that the controversies about defining rape can be reduced to a 'coercion vs. consent' dilemma. Moreover, this formulation appears to indicate that we are facing an either/or choice, which is not necessarily true.[6] It is therefore worth taking a closer look at the process of devising an optimal legal definition of rape.

The analysis conducted in this chapter will focus primarily on national reports provided by specialists from Australia, Austria, England and Wales, Germany, Italy, Poland, Spain, Sweden, Switzerland and the USA in the scope of the project managed by Professors Thomas Weigend and Elisa Hoven, supported where necessary by other sources.

At first it should be noted that the call to redefine rape implies two things: first, that the current legal definition of rape is for some reason inadequate; second, that change is necessary to achieve desirable outcomes. The initial question is, however, how the demand for redefinition should be understood. The word 'rape' has a certain linguistic connotation. In Polish, for example, '*zgwałcenie*' or '*gwałt*' is understood as forcing someone to engage in a sexual act.[7] Similar definitions can be found in other languages.[8] In general it can be said that rape is traditionally perceived as 'an act of sexual intercourse accomplished by a man with a woman not his wife, by force and against her will'.[9] From a legal perspective, however, the focus is not on the meaning of the term 'rape' in ordinary language, even if its redefinition in ordinary language may also be on the agenda of some social movements. But what is relevant here is the legal definition. It deserves emphasis that there is no necessary relation between ordinary language and the terminology applied in legal provisions. Lawmakers are not obliged to employ ordinary language in statutes; it is thus not necessary that the criminal offense of rape is formulated in the same way as in ordinary language. The legal definitions of rape adopted in some countries

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6 It is worth referring to Blackstone's definition of rape which included both force and lack of will of the victim: '[c]arnal knowledge of a woman forcibly and against her will.'; quoted after Stephen J. Schulhofer, 'Reforming the Law of Rape', 35 *Law & Ineq* 335, 336 (2017).

7 Jarosław Warylewski, 'Przestępstwo zgwałcenia' (art. 197 KK) in: Jarosław Warylewski (ed), *System Prawa Karnego. T. 10. Przestępstwa przeciwko dobrom indywidualnym*, 2010, 600.

8 See, e.g., https://dictionary.cambridge.org/dictionary/english/rape.

9 Lucy Reed Harris, 'Towards a Consent Standard in the Law of Rape' 43 *University of Chicago Law Review* 613 (1976).

confirm that observation. For example, in the Polish Criminal Code of 1997 the offense of rape is understood as the use of force or the threat of its use in order to engage a person in sexual intercourse, or as deceiving a person in order to induce him or her to engage in sexual intercourse. The latter makes the legal understanding of rape broader than in ordinary language, since it includes deceit.[10] Legal doctrine does not, however, regard that use of legal terms as wrong.

It should also be noted that the word 'rape' does not even appear in all criminal codes or other relevant criminal statutes. Instead, expressions like 'sexual assault' (*Crimes Act 1900* (NSW) Division 10), 'sexual penetration' and 'sexual coercion' (*Criminal Code Act 1913* (WA), Chapter XXXI) are used in Australia, 'sexual violence' (*violenza sessuale*) in Italy, or 'sexual assault' (*agresiones sexuales*) and 'sexual abuse' (*abusos sexuales*) in Spain.[11] In such a situation, the obvious question is how a demand for the redefinition of rape should be understood, since there is no such statutory term as 'rape'.

In light of the above, it can be said that calls for change are in fact not about a simple redefinition of rape. That is only a simplification used in public discourse to promote a reform which is in fact far more complex than a simple re-definition of one word. The crucial and much broader question that should be asked is what kind of sexual behavior is blameworthy and how it can effectively be criminalized. The problem of whether rape should be redefined can of course be isolated and even treated as central. Nonetheless, it is necessary to see the bigger picture encompassing all types of offenses involving various kinds of sexual assault and abuse. Only by taking such a perspective, one can see how the relevant legal provisions, including those on rape, are interrelated and how they should be modified. Therefore the calls for reform are in fact about a wider redefinition of the approach toward the criminalization of sexual assault and abuse.

A comparative analysis of coercion-based and consent-based criminal-law provisions confirms that the discussion about rational criminalization

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10 Jarosław Warylewski, 'Zgwałcenie – zagadnienia definicyjne', in: Lidia Mazowiecka (ed), *Zgwałcenie. Definicja, reakcja, wsparcie dla ofiar*, 2016, 18.

11 In some legal systems, apart from a word for 'rape' other expressions are used. This is the case in Germany, where the terms sexual assault (*sexueller Übergriff*), sexual coercion (*sexuelle Nötigung*), and rape (*Vergewaltigung*) are applied, the latter being an aggravated form of sexual coercion. Similarly, the Swiss Criminal Code employs the terms sexual coercion (*sexuelle Nötigung*) and rape (*Vergewaltigung*).

of sexual behavior cannot be limited only to the coercion vs. consent dichotomy. This dichotomy is undoubtedly central in situations where persons are able to express valid consent to other people's actions. However, it must be noted that there also exist a wide range of sexual behaviors commonly accepted as deserving criminal punishment where a victim cannot express consent, or where they do so but their consent is not treated as legally valid. In numerous legal systems,[12] adhering to both coercion-based and consent-based models, there exist separate provisions penalizing sexual acts with persons who are unable to express valid consent because of their age, mental deficiencies, relation of dependence, or other relevant external factors. In all these instances, the perpetrator does not need to use violence or threats to commit a criminal offense. This clearly indicates that the lack of violence (or threat of its use) does not necessarily make a sexual encounter legal. The same is true about factual consent given in sexual relations. Neither the lack of coercion nor factual consent can exclusively determine whether a sexual offense has been committed. It is also worth emphasizing that the coercion vs. consent dichotomy refers to law in the books. In Italy, for example, where the coercion-based model is still in force, courts have exceeded the literal meaning of the word 'violence' and have interpreted it very broadly, focusing in fact more on dissent than on the classically understood use of force[13]. This proves that even coercion-oriented models may in practice focus more on consent than one would expect.

Going beyond the coercion vs. consent dichotomy allows us to identify a wider range of factors that need to be taken into account when discussing the optimal scope of criminalization of blameworthy sexual behavior, including rape, and to optimally shape the relevant criminal-law provisions. Three such factors should be mentioned: the specific features of the perpetrator and the victim, the relation between the perpetrator and the victim, and the *modus operandi* of the perpetrator.

Among the specific features of perpetrators and victims of nonconsensual sex, gender primarily comes to mind. The classical approach to criminalizing rape assumed that the perpetrator is a male and the victim is a female. This initial gender-specific perception has been widely abandoned. However, rare exceptions can still be found. The most prominent one exists in English law, which has preserved the definition of rape based on penile penetration (Section 1 of the Sexual Offences Act 2003). That

12 For details see the national reports in this volume.
13 See Gian Marco Caletti, 'Italy', in this volume.

of course does not mean that female rapists cannot be prosecuted. But the legal basis for their criminal liability is different. Depending on the circumstances, the prohibited act can be qualified as causing a person to engage in sexual activity without consent or as an assault by penetration (Sections 2 and 4 of the Sexual Offences Act 2003).

Switzerland also presents an interesting case. The offense of rape regulated in Article 190(1) of the Swiss Penal Code provides that the victim can only be a female.[14] However, as in English law that does not mean that male victims of rape are not protected. In such a case, the perpetrator can be found guilty of a different offense, namely sexual coercion (*sexuelle Nötigung*). Both examples prove that even the adoption of a questionable definition of rape does not necessarily result in an inadequate scope of criminalization. Behaviors lying outside the scope of the statutory definition of rape are simply covered by other provisions penalizing coerced sex.

The obvious question is whether that difference matters. From the perspective of holding a person criminally liable, the answer is probably no; yet different labels may have different legal consequences, such as a different assessment of the gravity of the crime and a different sentence. One should also not ignore the message that such a variation in criminalization sends to society. It has rightly been pointed out that using a gender-neutral approach to defining sexual coercion 'would be an indication that the government recognizes that women can be sexually aggressive and dominant, that men are not always "up for" sex, and that *both* men and women have an interest in their sexual integrity and autonomy not being violated. This would not mean denying that rape has been and continues to be a tool used systematically by men as a way to oppress women, nor would it mean claiming that rape affects men and women in the same way. It could, however, undermine some of the sexual gendered stereotypes that cloud the way that sex between men and women is viewed and which can be particularly harmful to women'.[15] A gender-neutral way of defining rape therefore seems to be a good solution[16] even though the vast majority of perpetrators are male and victims female.

Apart from abandoning gender as an element of the offense of rape (sexual assault), marital status or race are also for obvious reasons no longer regarded as relevant. However, some features of the victim remain

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14 See Nora Scheidegger, 'Switzerland', in this volume.

15 Natasha McKeever, 'Can a Woman Rape a Man and Why Does It Matter?', 13 *Criminal Law and Philosophy* 599, 616–617 (2019).

16 For various arguments in favor see Natasha McKeever, 'Can a Woman Rape a Man and Why Does It Matter?', 13 *Criminal Law and Philosophy* 599 (2019).

very important in drafting sexual offense provisions. The age and mental state of the victim are two main bases for distinguishing specific types of offenses involving nonconsensual sex. It is widely accepted that minors and people with various mental deficiencies are incapable of making responsible decisions in the area of their sexuality and should be protected even if they outwardly consent to sex. This is the case regardless of whether the coercion-based or the consent-based model has been adopted.[17]

The relation between a perpetrator and a victim is another widely acknowledged element of statutory definitions of sexual offenses. It is not disputed that the exploitation of various factual or legal situations of dependence between a perpetrator and a victim (abuse of trust or professional relations, exploiting a person in a desperate situation, etc.) should be punished even if the dependent person consented. Similarly to entering into sexual relations with minors or persons with mental deficiencies, this is not a matter of dispute, and coercion-oriented and consent-oriented models adopt a similar approach.[18] Of course, there exist differences in how the law defines situations of dependence. Some legal systems are more specific (e.g., England and Wales), whereas others (e.g., Poland) have generally drafted provisions on that topic. But their laws nevertheless cover a similar range of blameworthy behavior.

The distinction between coercion-based and consent-based definitions of rape (sexual assault) is not very helpful for comparing how a perpetrator's sexual behavior affects the classification and labeling of sexual offenses. Regardless of the model adopted, criminal laws distinguish between types of nonconsensual sexual penetration (vaginal, anal or oral) and other sexual activity and also take into account the degree of any violence or coercion used. Some countries treat all types of sexual penetration equally (e.g., England and Wales, Poland, Sweden); others differentiate among types of penetration (e.g., Switzerland)[19]. Some draw a distinction between acts involving and not involving penetration (e.g., Poland, England and Wales); others do not (e.g., Sweden).[20] The classification of criminal offenses does not, however, necessarily result in different treatment of perpetrators in practice. The Swiss example is illustrative in this respect. The offense of rape in the Swiss Criminal Code covers only coerced vaginal sex. In cases of coerced oral or anal sex, the perpetrator may be held crimi-

17 See national reports in this volume.
18 See national reports in this volume.
19 For details see national reports in this volume.
20 For details see national reports in this volume.

nally liable for indecent assault (Article 189). However, the Swiss Supreme Federal Court has held that although legal qualifications are different, penalties for indecent assault should not be disproportionate to penalties imposed for rape in comparable situations.[21]

A commonly used gradation of sexual offenses is based on the use of violence. This can be seen both in countries that adopted the coercion-based model (e.g., Spain, Poland) and the consent-based model (e.g., Austria, Germany, Sweden).[22] Clearly, the move toward emphasizing the role of consent does not mean that the element of violence as an important factor in grading sexual offenses should be eliminated.

The differences in the structure of sexual offenses performed without valid consent are also visible at a more general level. In Italy, recent reforms resulted in the creation of a single type of offense (Article 609-bis Codice penale) instead of the previous distinction between rape and violent libidinal acts.[23] A similar unification is also being discussed in Spain in the context of a 2021 draft law amending sexual offenses. However, other countries that abandoned the coercion-based model in favor of the consent-based model have not adopted a unified approach (e.g., Sweden). In Germany and Austria, a new offense based on non-consent was simply added to the existing scheme focused on coercion.

All the above observations are important because they indicate that the regulation of sexual offenses in countries adopting coercion-based and consent-based models have much in common. Regardless of the models in place in various jurisdictions, there are parts of the criminalization puzzle which are uncontested. These are the use of violence (or threat of its use) and various situations where the victim cannot give valid consent (because of age, mental deficiencies, relation of dependence, or other relevant external factors). What differs is the approach to the criminalization of sexual abuse in cases where valid consent can be given. This is where the coercion vs. consent dichotomy becomes crucial. However, it is important to note that even in this area there are noticeable differences. Opting for a coercion-based or a consent-based model does not mean adopting the same shape and structure of sexual offenses. Similarly, criminalization of the same offensive sexual behaviors does not mean the application of uniform labeling. The latter is clearly visible even in legal systems which decided to amend the law to emphasize the role of consent. In Germany,

21 See Nora Scheidegger, 'Switzerland', in this volume.
22 For details see national reports in this volume.
23 See Gian Marco Caletti, 'Italy', in this volume.

although the sexual offenses were reformulated, the distinction according to seriousness was preserved (rape – *Vergewaltigung*, sexual assault – *sexueller Übergriff*, sexual coercion – *sexuelle Nötigung*). A similar gradation of sexual offenses can be seen in Austrian law after the reform of 2015. Likewise, Sweden, which opted for a consent-based model, differentiates between rape, gross rape, and sexual assault. In countries preserving a coercion-based model, similar distinctions apply (e.g., Spain, Switzerland).

As seen above, there is no uniform legal construction that has been adopted in the analyzed jurisdictions. The difference lies in how the violence factor operates. In Sweden rape defined as the performance of sexual penetration, or some other sexual act that in view of the seriousness of the violation is comparable to sexual penetration, with a person who is not participating voluntarily becomes a qualified type of rape when accompanied by violence, namely gross rape (Chapter 6, Section 1 Swedish Criminal Code[24]). In Austria, acts of nonconsensual sexual penetration with and without violence constitute separate types of offenses (Article 201 and 205a respectively). The legislature supplemented the existing scheme of violent sexual offenses by a separate provision criminalizing sex without consent, placed at the end of this group of sexual offenses. A similar structure was adopted in England and Wales (Sexual Offences Act 2003, part 1, Sections 1–4). In Sweden and Germany, the statutory regulation is different. It starts with the offense of nonconsensual sex, and factors like violence are added as aggravating circumstances. In general it can be said that lawmakers can choose between having one type of offense criminalizing sexual acts without consent (rape or a differently labeled equivalent) with various aggravating (or mitigating) factors, and having more than one type. The latter option does not exclude adding aggravating or mitigating factors where necessary. A separate distinction in gravity between nonconsensual sexual penetration and other sexual activities is commonly applied, regardless of whether a legal system adheres to the coercion-based or the consent-based model.

The crucial question is whether the structure of sexual offenses matters, especially in practice. The answer is: it definitely does, as a matter of fair labelling. The distinctions mentioned above are a consequence of the belief that sexual transgressions differ and that this difference has to be acknowledged when drafting relevant criminal provisions. It has been observed correctly that fair labelling refers not only to naming wrongdoing but also

24 https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/.

to 'the way in which the range of behavior that is deemed to be "criminal" is divided into individual offenses'.[25] However, the effort to determine adequate labels for various kinds of wrongdoing is not just a quest for a perfectly structured and coherent theoretical construct. More importantly, fair labelling is about sending a message to the perpetrator, the victim, and society as well as to the criminal justice system and authorities or agencies outside the criminal justice system.[26] The information that a person has been convicted of a crime is undoubtedly relevant for his or her everyday interactions in society. For various reasons (e.g., privacy issues, passage of time), this information clearly cannot be provided in detail to everyone who has a legitimate claim to it. There is therefore a need for short, informative and, above all, adequate labels. This need is particularly pressing in the case of sexual offenses, which imply serious social stigma. Putting all types of sexual abuse and assault in the same pot therefore is not a good solution. The result might be either that the wrong of the perpetrator's act will be underestimated or that the person will be stigmatized and face social consequences disproportionate to the offense committed. The latter especially needs to be avoided, since there are numerous examples of how unfair labelling may cause unnecessary damage to people's lives. Correct labelling for sexual offenses is particularly important, because the person will be labelled as a sex offender and might be placed in an official register, sometimes accessible to the wider public.[27]

The introduction of one or several types of sexual offenses is also inherently related to establishing statutory ranges of penalties and shaping the discretionary power of judges in sentencing. Although this issue may seem technical, it is nonetheless very important because it structures the way of thinking about the imposition of penalties. Not only sexual coercion offenses are relevant here. There is also an important interdependence between provisions regarding situations where the victim cannot express valid consent because of age, mental deficiencies, external factors, etc. and

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25 James Chalmers and Fiona Leverick, 'Fair labelling in criminal law', 71 Modern Law Review 217, 222 (2008).

26 For details see James Chalmers and Fiona Leverick, 'Fair labelling in criminal law', 71 Modern Law Review 217 (2008).

27 An illustrative example of flawed attribution of sex offender stigma can be given in the context of the Polish law of 2016 on the Sex Offenders Register. It provides that personal data of a minor who committed an offense of grooming can be placed in the Register even if the victim is of similar age. The same refers to sending a person of similar age pornographic content. Paradoxically, however, a conviction for sexual intercourse by a minor with another minor (which is a criminal offense in Poland) is not placed in the Register.

provisions referring to victims who can express consent. The whole picture has to be taken into account. The crucial question is what the basic point of reference is for determining statutory penalties and how they are imposed in practice. Depending on the adopted model and structure of sexual offenses, rape can be perceived as a point of reference. On the other hand, focusing on consent may result in sex without consent being treated as the point of departure. This can very well make a difference in practice. Adopting a coercion-based model may mean that sexual offenses committed without the use of force or threats are perceived as minor and by consequence are punished leniently. The Polish regulation of sexual offenses can be given as an example. While rape is punished with imprisonment between two and twelve years, forced sexual intercourse resulting from the abuse of a relationship of dependency or abuse of a critical position of another person is punishable by imprisonment for only up to three years. If the perpetrator takes advantage of the vulnerability of another person or her inability to recognize the meaning of the act or to control her conduct, resulting from her mental deficiency or mental illness, the penalty is imprisonment between six months and eight years. Moreover, it is symptomatic that while the statutory penalty for rape regulated in Art. 197 §§ 1–2 Polish Criminal Code was raised significantly in 2005, penalties for offenses where the perpetrator abuses his dominant position over the victim remained the same.

Even in countries that adopted the consent-based model, noticeable differences remain between statutory penalties for rape and for sex without consent but not accompanied by violence. In Austria the statutory penalty for rape is between two and ten years imprisonment, for sexual coercion between six months and five years imprisonment, while for nonconsensual sex the maximum penalty is two years imprisonment. The disparities in statutory penalties are less pronounced in Germany. Nonconsensual sex is punished by imprisonment between six months and five years, rape by imprisonment between two and fifteen years. In Sweden, the penalty for rape ranges from two to six years and for gross rape from five to ten years imprisonment. In Swedish and German law, the difference in statutory penalties between rape on the one hand and forced sex where the victim is dependent on the perpetrator (but without the use of violence) on the other hand is considerably smaller than in the Polish Criminal Code.

Several general conclusions can be drawn from the comparative analysis of rape laws and their evolution. First, the distinction between coercion-based and consent-based models of defining rape definitely is useful, because it focuses on what is a crucial point of reference in thinking about sexual behavior that needs to be criminalized. The promoters of the reform

of rape laws correctly point out that the legislature's focus on how the perpetrator acts (use of violence, threats, deceit, etc.) and how the victim reacts potentially neglects situations where the victim is unable for various reasons (e.g., because of fear) to express her lack of consent and oppose the perpetrator. Legal systems that use coercion-based definitions of rape thus do not offer effective protection in all cases where sex takes place without valid consent. The example of Italian law demonstrates that an extensive interpretation of the term 'violence' can be a cure of this problem, but case law does not guarantee as effective criminalization of sex without valid consent as clear statutory provisions. Statutory provisions criminalizing blameworthy sexual behavior should therefore be consent-oriented rather than based on modalities of a perpetrator's actions.

Such an approach at least theoretically offers better protection for sexual autonomy, which is perceived as an important value that should be guaranteed by criminal provisions. If the emphasis is on sexual autonomy, it seems obvious that consent is crucial. Exercising the right to self-determination in the sexual sphere is precisely about consenting or not consenting to a person's sexual conduct. One should be aware, however, of the limits of a consent-based approach. Persons may agree to sex not because this is what they want, but because they are in an unfavorable situation in relation to other persons.[28] This does not mean, however, that consent should be eliminated as a key concept. But its definition should be sensitive to cases where consent may be given due to an unequal or abusive relationship.

Second, provisions referring to sexual offenses should not only deal with coercion and consent. It also matters how other important elements of crime are defined. The common approach today is to criminalize coerced sex in a gender-neutral way (referring both to the perpetrator and the victim). This definitely is the optimal solution, even if legal systems not following this pattern do not leave male victims or female perpetrators outside of the reach of criminal law. Obviously, factors such as the marital status or the race of the persons involved are irrelevant for sexual coercion offenses. However, the age and mental capacity of the victim are factors that are very important for the proper criminalization of sexual behavior. They commonly serve as a basis for separate provisions dealing with situations where valid consent cannot be given. This also applies to relations of dependence between the perpetrator and the victim.

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28 See, e.g., Catharine A. MacKinnon, 'Rape Redefined', 10 *Harvard Law & Policy Review* 431 (2016).

Third, accepting the central role of consent does not mean that the violence component is to be abandoned. Some rational distinctions between various types of sexual assault and abuse should be retained in order to preserve the principle of fair labeling. There is a remarkable difference between sex without consent and the same act accompanied by cruelty or debasement. Therefore, the use of force or threats should be included in the structure of sexual offenses. The open question is how this can be done. Taking into account the differences between domestic legal orders, there are several options, e.g., creating separate offense types or naming the use of force or threats as an aggravating factor. Neither of these possible solutions seems to be *in abstracto* optimal. Much depends on how sexual offenses are regulated in their totality, how the national provisions have evolved, and how they are applied in practice. Only a careful analysis of the specific legal system may indicate what is the best option. However, changing existing laws based on the coercion model cannot consist in simply adding an additional provision covering sex without consent. This may result in creating the perception that "mere" sex without consent is a minor crime, especially when there is a significant disparity between statutory penalties. Instead, a comprehensive reevaluation of existing provisions should be undertaken in order to properly shape the law and its perception by law enforcement agencies and society at large. In this context, the right approach is to define rape in its traditional definition as a particularly grave violation of a person's sexual autonomy rather than as an 'anchor' for determining the gravity of other types of sexual assault and abuse (especially those without violence).

Fourth, one must keep in mind that defining sexual offenses is inherently related to the choice of sanctions. Although there can be no doubt that all sexual offenses should be penalized proportionally, this may prove difficult especially if traditional (violent) rape is used as the main point of reference in setting statutory penalties. This may lead to the result that various forms of sexual abuse committed without violence will not be punished adequately.

Summing up, the emphasis on consent in sexual offenses signifies a shift from a perpetrator-based (focused on his behavior, especially involving violence) to a victim-oriented (focused on her attitude toward the sexual behavior of another person) way of perceiving reality. This change implies a major reexamination of the meaning of various elements of sexual crimes. However, as mentioned earlier, reform should not make consent the only relevant point of reference nor should it abandon violence as an important factor in distinguishing among sexual offenses. Reformer should rather strive to re-evaluate the meaning of these concepts. Consent

should be perceived as a main point of reference in addressing sexual offenses. It would be inapposite to treat "traditional" rape as the base type of sexual offense and as a consequence to regard other types of offenses involving nonconsensual sex as much less blameworthy. The perspective should rather be the reverse, where the use of violence is either an aggravating factor or a factor constituting an aggravated type of offense. Placing consent at the center of sexual offenses necessarily raises difficult questions as to its definition. This topic will be developed in other contributions to this volume. There can be no doubt, however, that the move toward consent-based models is inevitable if the declarations about the need to effectively protect sexual autonomy are to be treated seriously. Therefore, challenges involved in defining consent, even if serious, cannot provide an excuse for abandoning this direction of criminal law reform.

Coercion by Violence and its Changing Meaning. The Experience of Italy

Gian Marco Caletti

A. Introduction

For a long time, the regulation of rape has been based on the concept of coercion, and specifically on coercion by force.[1] Italy is no exception and is, moreover, one of the few Western jurisdictions where the definition of rape still requires the use of violence.[2]

With the exception of some subsequent adjustments, the current legal framework of sexual offences was established in 1996. The reform was hailed as a victory for women and a cultural turnaround in its symbolic recognition and protection of sexual autonomy.[3] The main feature of the reform is that the law now classifies sexual offences as "offences against personal freedom". Previously, under the 1930 fascist penal code (the so-called "Rocco Code"), sexual autonomy had not been protected as an interest in itself but as a part of the public interest in "public morality and decency".[4]

Beyond this ideological message to society, the reform brought few innovations with regard to the structural elements of the offence of "sexual violence" ("*violenza sessuale*"). The crime continues to be based on coercion and predicated upon the traditional components of violence and threats. Several commentators have emphasised that retaining the old structure

1 Stephen J. Schulhofer, 'Unwanted Sex. The Culture of Intimidation and the Failure of Law' (1998), 114.

2 See the chapter on Italian law in this volume.

3 Giuliano Balbi, 'Violenza sessuale', in: Enciclopedia Giuridica (1998) 1, 3.

4 Marta Bertolino, 'La riforma dei reati di violenza sessuale', (1996) Studium Iuris 401; Rachel A. Fenton, 'Rape in Italian law: towards the recognition of sexual autonomy', in: Clare McGlynn and Vanessa E. Munro (eds), 'Rethinking Rape Law' (2010), 183.

of the offence is not entirely consistent with the reform's aim to provide stronger protection for sexual autonomy.[5]

If the law in the books remains linked to the concept of coercion, the law in action is extremely different. Although the word "violence" is associated with the use of physical force, in case law – especially of the Supreme Court – the requirement of violence has been completely dematerialised.[6] The particularity of the Italian law on sexual offences, therefore, is that – despite the official focus on coercion – the Supreme Court has consistently interpreted it in terms of consent of the victim. In order to convict the defendant, a forcible *actus reus* is no longer required.

This chapter thus will explore how the concept of coercion has been transformed over the years in Italian case law to the point of being identified with the absence of consent. This process has been influenced not only by compelling changes in social attitudes but also by external inputs from comparative analysis of other legal systems and from supranational jurisprudence. The chapter will try to demonstrate these connections, but also setbacks that occurred along the way, such as when in 1999 an Italian judge made international headlines by announcing a rule that a man could not possibly rape a woman wearing tight blue jeans (see *infra*, § 5). This case of showing a revival of the concept of coercion by force will also demonstrate that a paradigm based on violence is no longer acceptable. That model, indeed, is closely linked to false myths and stereotypes of the past and is based on a concept of sexuality rooted in bygone myths.

B. The historical origin of forcible rape and the duty to resist

Historically, the concept of rape by force arose in a context in which sexual intercourse with a married woman or a girl under the custody of her father was inherently wrongful.[7]

At the time of the ancient Greeks, forcible rape and adultery were considered to be equally serious and were treated by the law as the same

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5 See e.g., Tullio Padovani, 'Pre-Art. 609-bis c.p. Commento ad Art. 2 l. 15 febbraio 1996, n. 66', in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn. 2006) 431, 434; Bertolino (note 4), 403.

6 Among several scholars, recently Matteo L. Mattheudakis, 'L'imputazione colpevole differenziata. Interferenze tra dolo e colpa alla luce dei principi fondamentali in materia penale' (2020), 418–422.

7 Tullio Padovani, 'Violenza carnale e tutela della libertà', (1989) Riv It Dir Proc Pen, 1301, 1306.

crime ("*moicheia*").[8] However, from the perspective of the man who owned his wife or his daughter, the conduct of another male who seduces the woman secretly was more dangerous than that of the rapist who, driven by an overwhelming sexual desire, occasionally forces her to have sexual intercourse.[9] As Lysias states in *On the murder of Eratosthenes*, "seducers corrupt minds, to the point that the wives of others belong to them more than to their husbands; they become masters of the house and one no longer knows who is the father of the children".[10]

During the Roman Empire, force was the element that made it possible to draw a line between adultery and rape. The *lex Iulia de adulteriis* punished very harshly (with exile, loss of property, in later times even death) both the man and the woman who were complicit in adultery.[11] Proof that sexual intercourse had been brought about by force allowed the woman to avoid criminal liability and exempted her husband from the duty of repudiating her.[12]

The history of rape developed along these lines until the age of Enlightenment. In the criminal law of the *ancien régime*, sexual activity did not constitute a right of the person or an expression of autonomy; it was an instrument for procreation within the legal family.[13] For this reason, any sexual intercourse not directed toward legitimate procreation was criminalised, leaving aside any concern about consent.[14]

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8 Eva Cantarella, 'I reati sessuali nel diritto ateniese. Alcune considerazioni su "moicheia" e violenza sessuale', in: Alberto Maffi and Luca Gagliardi (eds), 'Eva Cantarella. Diritto e società in Grecia e a Roma. Scritti scelti' (2011), 373, 385.

9 Isabella Merzagora, 'Relativismo culturale e percezione sociale in materia di comportamenti sessuali deviati', in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (1996), 343, 345; Keith Burgess-Jackson, 'A History of Rape Law', in: Keith Burgess-Jackson (ed), 'A Most Detestable Crime. New Philosphical Essays on Rape' (1999), 15.

10 Lysias, 'On the murder of Eratosthenes', 32–33.

11 Giunio Rizzelli, 'Lex Iulia de adulteriis. Studi sulla disciplina di adulterium, lenocinium, stuprum' (1997), 171.

12 Fabio Botta, 'Per vim inferre. Studi su stuprum violento e raptus nel diritto romano e bizantino' (2004), 57.

13 Padovani (note 7), 1303.

14 To be accurate, during the period of so-called 'intermediate' law, there was a kind of presumption of rape, even where there was the woman's consent, in all cases where sexual interaction was illegitimate because it took place outside of a regular marriage. The woman's consent was assumed to be invalid. The qualification of such sexual interactions as rape served to force the man to marry the woman in a so-called 'reparative' marriage, restoring the family order and the legitimacy

While the crime of adultery survived until late in the 20th century, for the crime of rape a distinction was introduced between "simple" (when the sexual encounter takes place with an unmarried woman), "qualified" (when the woman is persuaded by a non-fulfilled promise of marriage) and "violent" (when there is forcible coercion) rape.[15] Consistently, even violent rape of prostitutes was not criminalised, since they were neither the property of a husband nor in the custody of a father waiting for marriage and maternity.[16]

The Enlightenment approach of separating law from morality – of not punishing mere sins – led 19th century lawyers to challenge the figure of "simple rape". The legal justification for decriminalising this form of rape was based on the woman's consent.[17] As one scholar has argued, however, the emphasis on women's free consent did not reflect the transposition of new values and principles into the law, because in that period society was not ready to recognise women's sexual autonomy.[18] The change can be explained in political terms: The upper classes wished to abolish mandatory marriage as a consequence of any "simple rape" to prevent lower class men from gaining access to wealthy families by seducing young women.[19] Consent was therefore a rhetorical device to justify the loss of ancient protections for women, such as marriage after "simple rape". It was not seen as an act of women's freedom, but as a sign of their guilt.

On this basis, it became important for the lawyers of the time not to grant protection to seductive women who did not deserve it, i.e., those who failed to demonstrate that they were not complicit in the sexual intercourse and that they had resisted with all their strength. It is in this historical period that numerous stereotypes of seduction were established.

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of the union. See Giovanni Cazzetta, 'Praesumitur seducta. Onestà e consenso femminile nella cultura giuridica moderna' (1999).

15 Padovani (note 7), 1304.

16 For a debate on the rape of prostitutes, see Isabella Rosoni, 'Violenza (diritto intermedio)', in: 'Enciclopedia del diritto' (1993), 843, 854.

17 This was, for example, the opinion of the most renowned Italian criminal lawyer of the 19th century, Francesco Carrara. See Giovanni Fiandaca, 'I reati sessuali nel pensiero di Francesco Carrara: un onorevole compromesso tra audacia illuministica e rispetto per la tradizione', (1988) Riv It Dir Proc Pen, 903.

18 Giovanni Cazzetta, 'Colpevole col consentire. Dallo stupro alla violenza sessuale nella penalistica dell'Ottocento', (1997) Riv It Dir Proc Pen, 424.

19 Ibid.

C. "Vis grata puellae": from "vis atrox" to force of "any intensity"

Nineteenth-century lawyers rediscovered the "wisdom" of the ancient poets and, among others, that of Ovid, who contended that a little force is appreciated by maidens in order to overcome their modesty and reluctance ("*vis grata puellis*").[20] The woman in Ovid's poetry "*pugnando vinci se tamen illa volet*" ("although fighting, wants to be defeated").[21]

In view of that, not all degrees of force were considered sufficient for a rape conviction. Physical force against the victim's body was required with such intensity that nothing could be done to overcome it in any way (so-called "*vis atrox*").[22] A lesser amount of force was held inadequate, because it was assumed that the woman could have eluded the assault with some resistance, if she were truly committed. The presence of particularly intense force was also required to make sure that the complainant was not lying about the rape.

This approach was followed for decades by the Italian courts,[23] surviving even in the period after the Second World War and only being abandoned gradually from the 1960s. Even in 1986, the Court of Cassation felt obliged to make the following clarification with regard to resistance: *"It is not necessary for the victim to resist vividly, constantly and to the point of exhaustion of her physical strength, which inevitably leads to physical signs*".[24] In fact, the false myths of resistance and the impossibility of raping a woman if she really does not want it continued to surface in some local courts' judgments.[25]

The "*vis atrox*" model has evolved into a less strict one, but still based on the use of some amount of force. The violence required to commit rape became that force which coerces the victim's will, even without completely overwhelming it. In this perspective, coercion, i.e., the absence of free consent, is the effect caused by violence. Italian scholarship describes violence

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20 Ovidio, 'Ars amatoria', Liber I, 613–614.

21 Ibid. 666.

22 Matteo Vizzardi, 'Violenza sessuale (art. 609-bis)', in: Carlo Piergallini, Francesco Viganò, Matteo Vizzardi, Alessandra Verri (eds), 'I delitti contro la persona. Libertà personale, sessuale e morale. Domicilio e segreti' (2015), 47, 84.

23 Cass. pen., 7.2.1934, GP, 1934, II, 1334; Cass. pen., 10.5.1948, RP, 1949, II, 34; Cass. pen., 18.5.1954, GP, II, 706.

24 Cass. pen., 20.1.1986, CP, 1987, 753.

25 Trib. Bolzano, 30.6.1982. Luigi Domenico Cerqua, 'Considerazioni in tema di violenza carnale', (1984) Giur Mer, 135.

as an "instrument" by which the perpetrator turns the victim to his own will.[26]

This second paradigm requires a minimum of physical force as did the previous one. On this basis, the Supreme Courts acquitted a man who ejaculated on a woman's leg, taking advantage of the overcrowding of a public transport vehicle.[27]

D. The paradigm of "improper violence" and the dematerialisation of the concept of violence in the wake of German scholarship and case law

In Italy, as elsewhere (see, for instance, the theory of "inherent force" in United States law[28]), the courts have tried to expand the concept of violence in order to offer greater protection to sexual autonomy. While this broader conception of force has never really been implemented in U.S. case law,[29] in Italy this occurred with the adoption of the so-called "improper violence" interpretation,[30] according to which "coercion" need not be the effect of the use of physical force.

In 1986, the Court of Cassation stated: "*For the purposes of the penal code, violence should also be the actus reus which, depending on the circumstances, puts the victim in a position where she is unable to provide all the resistance she would have wished to, and coercion may occur even if the victim has not called for help, raised alarm, suffered lacerations to clothing and injuries to the body…*". The Court thus relieved the victim of the burden of resisting and regarded as "violent" any coercion brought about by the circumstances and not by physical violence.[31]

The Italian courts also created a type of violence where the perpetrator employs an element of surprise.[32]. In such situations, it is the suddenness and rapidity of the act which overcomes the victim's opposition and constitutes "violence", e.g., when a doctor suddenly penetrates the patient's

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26 Ferrando Mantovani, 'Diritto penale. Parte Speciale. I delitti contro la persona' (7th edn. 2019), 444.

27 Cass. pen., 19.11.1965, GP, 1966, II, 464.

28 Sanford H. Kadish, Stephen J. Schulhofer, Carol S. Steiker, Rachel E. Barkow, 'Criminal Law and its Processes. Cases and materials' (9th edn. 2012), 363.

29 See the criticism by Susan Estrich, who believes that American appellate courts have always applied masculine standards to the concepts of force and resistance; Susan Estrich, 'Real Rape' (1987), 63.

30 Mantovani (note 26), 405.

31 See supra note 24.

32 See the chapter on Italian law in this volume.

vagina with his fingers during a gynaecological examination without any medical purpose.[33]

This theory is also called the "theory of coercion" since violence is dematerialised to such an extent that it does not require any force. Violence, which was originally meant to constitute the causal antecedent of coercion, now merges with coercion itself. In order to justify their approach, courts often refer to the sexual self-determination of the victim as the true objective of protection of sex crimes.[34]

It should be noted that sexual offences are not the only field in which the concept of violence has been dematerialised. Sex crimes have indeed been the last area of criminal law to develop this concept of violence independent of physical force[35], perhaps because of the resistance of myths and stereotypes linked to sexuality as a predatory activity. In all the other numerous crimes in the penal code that require violence as a constitutive element, the process of abandoning force took place many years earlier.

According to three prominent commentators, this trend of dematerialisation was strongly influenced by the German criminal literature and case law.[36] In Germany, there has been a process of "spiritualization" (*Vergeistigung*) or "dissolution" ("*Auflösung*") of the "*Gewaltbegriff*" (concept of violence), in which the latter has come to coincide fundamentally with coercion.[37]

The German Constitutional Court, however, in 1995 declared this broad interpretation of the concept of violence to be unconstitutional because it violated the principle of predictability of the law.[38] In response to the adoption of a restrictive interpretation of the concept of violence by the courts, the German legislature in 1997 introduced the so-called "*Ausnutzungsvariante*", i.e., a new variant of rape based on taking advantage of a situation in which the victim is helpless and at the mercy of the

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33 Cass. pen., Sez. III, 16.4.1999, RP, 967. See Alberto Cadoppi, 'Art. 609-bis c.p.', in Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn. 2006), 439, 501.

34 David Brunelli, 'Bene giuridico e politica criminale nella riforma dei reati a sfondo sessuale', in Franco Coppi (ed), 'I reati sessuali. I reati di sfruttamento dei minori e di riduzione in schiavitù per fini sessuali' (2nd edn. 2007), 37, 68–69.

35 Marta Bertolino, 'Libertà sessuale e tutela penale' (1993), 115–130.

36 Giulio De Simone, 'Violenza (diritto penale)', in: 'Enciclopedia del diritto' (1993), 881; Marco Mantovani, 'Violenza privata', in: 'Enciclopedia del diritto' (1993), 930; Francesco Viganò, 'La tutela penale della libertà individuale. L'offesa mediante violenza' (2002).

37 De Simone (note 36), 892–901.

38 Viganò (note 36), 96.

perpetrator. Surprise sexual acts still did not fall under the German definition of violence but were explicitly criminalised in the 2016 reform of sex offences.[39] In Italian jurisprudence, by contrast, these situations continue to be encompassed in the definition of violence, although there have been several setbacks.

E. Reviving resistance: The "blue-jeans" decision"

As indicated above, in 1996, when the reform of sexual crimes did not remove the element of coercion by violence from the definition of the offence, violence had already been dematerialised in case law and no longer implied the use of force. Myths, however, are firmly rooted in social culture and sometimes re-emerge from hidden chasms. Very surprisingly, the Court of Cassation in 1999 returned to a traditional interpretation of violence, re-creating a burden of resistance on a young girl raped by her driving instructor.[40] The judgment is so awkward that it made international headlines[41], in particular for the ridiculous statement that it is impossible to rape a woman wearing blue-jeans.

An 18-year-old girl was picked up from her home by her driving instructor, as had happened on other occasions. The man, who was married, took her from the town centre to an isolated road in the fields on the pretext of picking up another girl for a lesson. He threw her to the ground and, after removing her jeans from one leg, penetrated her. He then drove back to the village, letting the girl drive only for the last part of the way to avoid arousing suspicion.

In the opinion of the judge who wrote the judgment the victim's account was not credible because

a) "as rule of thumb, it is almost impossible to remove even part of a woman's jeans without her active cooperation, since it is an operation that is already very difficult even for the people wearing them";

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39 Tatjana Hörnle, 'The new German Law on Sexual Assault and Sexual Harassment', (2017) Germ LJ, 1309.

40 Cass. pen., Sez. III, 6.11.1998 (dep. 1999), Foro It, 1999, II 163. See Giovanni Fiandaca, 'Violenza su donna "in jeans" e pregiudizi nell'accertamento giudiziario', (1999) Foro It 1999, 165.

41 Alessandra Stanley, 'Ruling on Tight Jeans and Rape Sets Off Anger in Italy', N.Y. TIMES, Feb. 16, 1999.

b) "the girl could have falsely accused someone to justify to her parents the sexual intercourse, which she preferred to keep hidden because she was worried about the possible consequences";

c) "it is instinctive, especially for a young girl, to oppose with all her energy anyone who wants to rape her and it is illogical to affirm that a girl can be submissively subjected to rape, a serious violence to the person, for fear of suffering other hypothetical and certainly not more serious offences to her physical safety";

d) "it is very peculiar that a girl, after becoming the victim of a rape, is in a state of mind which permits her to drive a car with her rapist sitting beside her".[42]

The judgment appears as a collection of rape myths: a set of banalities that have been debunked over the years by criminology. Regarding certain circumstances, such as driving home after the sexual assault, the judge's preconceptions led him to the point of manipulating the facts that emerged during the trial.[43]

The "blue-jeans" decision raised a lot of criticism and debate, showing that certain stereotypes were no longer part of social attitudes. It remained an exception in the process of shifting violent coercion away from concepts of force and resistance.

Recently the courts went even further in this direction.

F. From coercion to dissent and coercive circumstances: European influences from Strasbourg and Istanbul

In confronting new case situations, in particular the so called "rape by omission",[44] or "post-penetration rape",[45] the "improper violence" model eventually led to a consent-based definition of the offence. The Court

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42 See supra note 40.

43 Francesco M. Iacoviello, 'Toghe e jeans. Per una difesa (improbabile) di una sentenza indifendibile', (1999) Cass pen, 2194. The same applies to the consideration that the girl might have lied out of fear of a possible pregnancy (*sub* b), since the defendant had reported in his testimony that he had used a condom.

44 Maria Chiara Parmiggiani, 'Rape by omission, ovvero lo "stupro omissivo": note a margine di un recente caso californiano', (2005) Ind Pen, 311.

45 This terminology was first utilised by Amy McLellan, 'Post-penetration rape — Increasing the penalty', (1991) Santa Clara Law Review 31, 779. For an updated overview of the issue in Anglo-American scholarship, see Theodore Bennett, 'Consent interruptus: rape law and cases of initial consent', (2017) Flinders Law Journal 19, 145.

of Cassation stated that "in interactions between adults, the originally given consent to sexual acts must continue throughout the act without interruption, with the result that the offence extends to the continuation of intercourse if a manifestation of dissent, even if it is not explicit, intervenes 'in itinere' through conclusive facts which clearly indicate the partner's contrary will"[46].

If the sexual interaction was initially consensual, a manifestation of dissent then occurred, and the defendant did not consider it but continued with his conduct, he will be charged with "*violenza sessuale*" according to art. 609-*bis* of the Penal Code. Earlier judgments' more superficial references to consent have now become more explicit: The criminal liability of a person who continues with sexual intercourse when it has become unwanted is justified on the basis of a mere (even non-verbal) expression of dissent. This obviously reminds of the "no means no" paradigm. In this case, as in many others, the Court of Cassation refers to consent without trying to cloak the decision in overstretched definitions of "violence".

In other judgments, the Court of Cassation highlights the coercive circumstances, especially in cases where the victim decides to consent to the defendant's sexual desires because of the situation (e.g., previous episodes of violence, the isolated location in which the events take place, the time of night)[47]. In the past, these situations were qualified as "improper violence". In recent case law, there is no longer any mention of violence, and such coercive circumstances are considered sufficient to establish criminal liability. In some judgments, the conviction is justified not by reference to violence but rather by the invalidity of the consent given under such "environmental" circumstances.[48]

It does not seem arguable that the attention of Italian courts to coercive circumstances is linked to the famous Akayesu judgment of the International Criminal Tribunal for Rwanda (ICTR)[49] – a judgment which part some, especially feminist, scholars have proposed as a model[50].

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46 Cass. Pen., Sez. III, 11.12.2018, n. 15010. Previously in the form of *obiter dictum* already Cass. Pen., Sez. III, 24.2.2004, n. 25727. On the concept of "sexual act" under the Italian law, see Alberto Cadoppi and Michael Vitiello, 'A Kiss is Just a Kiss, or is It? A Comparative Look at Italian and American Sex Crimes' (2010) Seton Hall Law Review, 191.

47 Cass. pen., Sez. III, 12.1.2010, n. 6643.

48 Cass. pen., 22.11.1988, RP, 1990, 565; Cass. pen., 8.2.1991, GP, 1991, II, 366.

49 ICTR-96–4-T, Judgement of 2 Sept.1998.

50 See Vanessa Munro, 'From consent to coercion. Evaluating international and domestic frameworks for the criminalization of rape', in: Clare McGlynn, Vanessa E. Munro, 'Rethinking Rape Law' (2010), 17, with further references.

The shift from coercion to lack of consent seems to be influenced, however, (also) by the jurisprudence of the European Court of Human Rights on rape and by the definition of rape by the Istanbul Convention, even if this is hardly mentioned in the judgments. Starting with the well-known case of M.C. v. Bulgaria[51], the European Court of Human Rights has held that a regulation of rape is in line with the principles established by Articles 3 and 8 of the European Convention on Human Rights only if it makes punishable any sexual act with a non-consenting person, without any limitation regarding the modalities of the actus reus[52]. Adherence to the Istanbul Convention, moreover, would imply that Italy adopts a consent-based definition of rape (Art. 36).

Due to its case law on consent, Italy can contend to be compliant with both Conventions, at least in the law in action[53].

G. Towards an affirmative consent model?

In the last three years, the Supreme Court seems to be moving towards an affirmative consent model ("only yes means yes").[54] The following judgment presents several clues in this direction, especially with the exclusion of any defence of mistake on consent, arguing that it is a mistake of law rather than of fact: "The objective element of the offence of sexual violence is not only conduct invading the sphere of the sexual freedom and integrity of others carried out in the presence of a manifestation of dissent by the victim, but also conduct carried out in the absence of the consent, not even tacit, of the victim. It follows that the consent must be validly given and must remain throughout the period during which the sexual acts are performed. The defence of putative consent of the victim is

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51 M.C. v. Bulgaria, Case no. 39272/98, Judgment of 4 Dec.2003.

52 Patricia Londono, 'Defining rape under the European Convention on Human Rights: torture, consent and equality', in: Clare McGlynn and Vanessa E. Munro, 'Rethinking Rape Law' (2010), 107.

53 It should be noted, however, that the prevailing scholarship denies the courts the authority to interpret offences in accordance with the positive obligations of incrimination arising from the Convention. This is said to violate the principle of legality, which is protected by the Convention itself in Article 7. See Francesco Viganò, 'Diritto penale sostanziale e Convenzione europea dei diritti dell'uomo', (2008) Riv It Dir Proc Pen, 42, 95.

54 On the features of this paradigm, see Stephen J. Schulhofer, 'Consent: What it means and why it's time to require it', (2016) University of the Pacific Law Review 47, 665; Aya Gruber, 'Not affirmative consent', *Ivi*, 683.