

Legislative approaches to rape in the EU: an overview

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Table of Abbreviations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
IC	Istanbul Convention: the Council of Europe Convention on preventing and combatting violence against women and domestic violence
ICC	International Criminal Court
SOA	Sexual Offences Act 2003 (England and Wales)
VAW	Violence Against Women
UN	United Nations

Introduction

Violence against women is prevalent in the EU. One in three women have experienced sexual and/or physical violence since the age of 15.¹ A range of legal instruments prevent and punish violence against women in its many forms, from national legislation, to European regulations and international treaties. Understanding the efficacy and scope of these legal instruments provides an important indication of how European countries conceptualise gender-based violence and what remains to be done to safeguard women's rights to be free from violence in the region.

Violence against women (VAW) takes on many different and overlapping forms. Article 3a of the Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention) defines VAW as "all acts of gender-based based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."² The breadth of the field means that there is a vast amount of legislation that touches the prevention, prosecution, and punishment VAW. Consequently, this paper will narrow its focus to rape and sexual assault. Rape being one of the most extreme forms of VAW, and one which one in 20 of women in the EU have experienced,³ understanding how a country legislates on rape can be indicative of the stance that a country and its national legislation will adopt to VAW in general.

This paper will map the state of rape legislation in Europe. Part One begins with an overview of international law and agreements as pertains to VAW, and the standards that emerge from these instruments. Part Two then broadly outlines the state of play in the EU Member States on the whole, before concentrating on case studies of five EU Member States in Part Three: the United Kingdom, France, Italy, Poland, and Sweden. Comparison of these countries with international standards illuminates the gap between international and domestic law as regards rape law, as well as the disparities between Member States.

The concept of consent is critical to understanding legislative approaches to rape. Differences in how rape is legally defined can hinge on defining consent, and there are vast bodies of academic, sociological, and popular literature dedicated to developing societies' understanding of consent. This paper will therefore devote substantial space to examining the differing standards of consent in international and domestic law.

It is important to note that legislation is not the sole solution to stemming the prevalence of VAW. Meeting international standards with respect to rape legislation will not singularly prevent its pervasive presence in women's lives. Legislation is, however, an important part of the broader fabric of preventative measures at a country's disposal to tackle VAW. Legislation provides a baseline for prosecution and provides a legal standard applicable to all citizens. In short, legislation is fundamental because it determines what a society seems acceptable, and defines unacceptable behaviours to be punished. Thus, meeting internationally-defined standards for rape legislation is vital to guaranteeing the protection of women's basic rights.

Legislation is only effective if it is upheld. Lawmakers, law enforcement agencies, and civil society are all critical actors making a tangible difference to women's lives. This paper poses three questions against this

¹ European Union Agency for Fundamental Rights (FRA), *Violence against women: an EU-wide survey. Results at a glance*. (Vienna: FRA, 2104), p.17

² Council of Europe, *Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention)*, Art. 3a <<https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>>

³ FRA, p.10

backdrop: what are the international standards for legislating on rape? To what extent do EU Member States meet those standards? And what is the impact of differing legislative measures on rape across the Union? In exploring these questions, this paper will illuminate areas for further action in the ever-pressing movement to combat rape and promote gender equality.

Part 1: International Overview

1.1: Overview of legal instruments

The EU has no binding legal instrument specifically designed to tackle the unacceptable levels of rape in the region. While the EU and its member states have shared competencies in tackling some forms of VAW (such as human trafficking), member states have sole competence in fighting VAW, including rape.⁴ Consequently, there is an array of different legislative definitions of rape in the EU, discrepancies in the criminalisation of rape, and varying protections afforded to victims of this crime. Indeed, the European Institute for Gender Equality (EIGE) starkly exposes such variation in its online database which lists the different definitions of various forms of VAW in member states.⁵ Member States recognise the problem of VAW in general, but have adopted non-uniform approaches to the solution, resulting in non-uniform protections afforded to European women.

There are, however, a number of different statutory frameworks and bodies that protect women and girls from rape and sexual assault in Europe, both binding and non-binding. Relevant sources of law include:

1. The European Convention on Human Rights (ECHR).
2. Caselaw from the European Court of Human Rights (ECtHR).
3. Guidelines from structures such as the UN and the International Criminal Court (ICC).
4. EU treaties and directives.
5. The Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention).

International human right standards with respect to rape are largely clear and consistent between these different bodies.⁶ This report will map the legal definitions and standards provided with respect to rape, measures regarding victim protection, and requirements for prosecution of rape as a crime.

1.2: The European Convention on Human Rights

The European Convention on Human Rights (ECHR) contains four articles that protect a woman's right to be free from gender-based violence:

1. Article 2 protects the right to life.
2. Article 3 prohibits the degrading treatment of another.
3. Article 8 protects the right to private and family life.
4. Article 14 prohibits discrimination on the grounds of sex.⁷

Parties to the ECHR must uphold these rights and where they have been violated, citizens of Party states can pursue legal action up to the European Court of Human Rights. Importantly, articles 2 and 8 are affirmative rights, endowing these protections in all citizens. The ECHR provides human rights standards recognised by Parties to be common to all citizens, of which rape and its improper prosecution is a clear violation.

⁴ European Parliament DG IPOL, *The Issue of Violence Against Women in the European Union*, (Brussels: European Parliament, 2016), p.39

⁵ EIGE, 'Legal Definitions in the EU Member States' <<https://eige.europa.eu/gender-based-violence/regulatory-and-legal-framework/legal-definitions-in-the-eu>>

⁶ Collectively, the largely cohesive standard common to these international bodies will be referred to in Sections 2 and 3 as the 'International Standard.'

⁷ European Court of Human Rights and Council of Europe, *European Convention on Human Rights*, <https://www.echr.coe.int/Documents/Convention_ENG.pdf>

1.3: The European Court of Human Rights

Caselaw from the European Court of Human Rights (ECtHR) demonstrates how the ECHR is applied with respect to rape. Decisions from the ECtHR govern diverse legal systems and cultures, as they govern the 47 contracting member states to the ECHR.

With respect to defining rape, the ECtHR has established a clear consent-based standard. In its landmark decision, *M.C. v. Bulgaria* (2003), the Court found that rape is penetration without consent, and that consent must be given voluntarily and by free will. Further, it established that a lack of violence, force, or resistance from a victim cannot be used to establish consent.⁸ Although criminal law is the mandate of individual nations, this instrumental decision sent out a clear message from the Court that non-consensual activity, and not force or victim resistance, is the grounding for finding sexual assault.

Importantly, the Court ruled that the Bulgarian prosecutors had violated Articles 3, 8, and 13 of the ECHR when they dropped this case without a full investigation because of insufficient findings of the use of force in the incident that the applicant described. The Court held that parties to the ECHR who used an element of force in defining rape in national criminal law must extend their definitions of force to encompass coercive circumstances. Further, this ruling held that the ECHR must be interpreted to require the prosecution of any non-consensual act, irrespective of the presence of force or threats.⁹

The Court has also established standards regarding victim protection. In *Y v. Slovenia* (2015), the Court found that the seven-year gap between the applicant's sexual assault complaint being filed and the pronouncement of the first-instance judgment constituted a violation of Slovenia's procedural obligations under Article 3.¹⁰ Article 3's prohibition of inhuman or degrading treatment incorporates a requirement of promptness; parties to the ECHR cannot impermissibly delay proceedings. The Court also held that improper cross examination of victims in rape cases violates Article 8 of the ECHR. Here, the accused had cross examined the applicant himself, intimidating and humiliating her, which the Court found violated the applicant's personal integrity during proceedings given the sensitivity of the subject matter.¹¹

1.4: The EU

The EU does not have a specific binding instrument designed to prevent rape or to protect women from violence. Crime prevention being a Member State competence, the EU has established legal instruments in different areas in which women can be victims of violence and where there is a cross-border element, because this is where the EU has the strongest competence for crime-related action.¹²

Some of the EU instruments that incorporate space for tackling various forms of VAW include:

1. Article 2 of the Treaty on European Union mandates respect for gender equality in Member States.¹³

⁸ *M.C. v. Bulgaria* [2003] 39272/98

<https://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/M.C.v.BULGARIA_en.asp>

⁹ *Ibid.*

¹⁰ *Y v. Slovenia* [2015] 41107/10 <<http://hudoc.echr.coe.int/eng-press?i=003-5091847-6273156>>

¹¹ *Ibid.*

¹² European Parliament DG EPRS, *Violence Against Women in the EU: State of Play*, (Brussels: European Parliament, 2018), p.6

¹³ European Union, *Treaty on European Union*, Art. 2, <https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf>

2. Article 4 of the Treaty on the Functioning of the European Union provides possibilities for the EU to develop measures to combat VAW with the Member States.¹⁴
3. The Charter of Fundamental Rights of the European Union is legally binding when implementing EU law.¹⁵
 - a. Article 3 prohibits discrimination based on gender.
 - b. Article 4 prohibits inhumane and degrading treatment of another.
4. With respect to victim protection, two EU directives impose standards on Member States that victims of VAW can benefit from. EU directives are binding in the sense that they specify the results that all Member States must achieve, but they do not specify how member states must achieve these results. Member States are left to transpose Directives into national law, which gives them substantial leeway on what they choose to adopt from Directives and thus endows Directives with less force than the aforementioned legal instruments.
 - a. The Victims' Directive – Directive 2012/29/EU – obliges Member States to support victims of crime and their family members. It also gives victims of all crimes the right to remain informed throughout the prosecution process. Article 9 of the Directive specifically includes protection and support for victims of sexual and gender-based violence, obliging Member States to provide “targeted and integrated support for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling.”¹⁶
 - b. The European Protection Order can also be beneficial to victims of VAW as it expands national protection orders across member state borders.¹⁷

The EU has a number of monitoring mechanisms in place to track adherence to these measures, notably through the EU Fundamental Rights Agency and the European Institute for Gender Equality. On the whole, though, the EU has little legislative power in this area. Monitoring mechanisms and the exchange of best practices cannot be compared to the legal obligations under binding European instruments such as its treaties. To be truly effective in this field, the EU needs to recognise VAW as a discrete issue that requires a binding instrument specifically dedicated to its elimination.¹⁸

1.5: International Tribunals and UN Guidelines

The ICC works with a comprehensive definition of rape, which includes “all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.”¹⁹ With respect to consent, the ICC specifies that rape includes the bodily invasion of a person incapable of giving genuine consent.²⁰ These definitions centre the absence of consent in rape, and serve as important guidance for the international community on the elements of this crime. Relatedly, the United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee) urges countries to

¹⁴ European Union, *Treaty on the Functioning of the European Union*, Art. 4, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>>

¹⁵ European Union, *Charter of Fundamental Rights of the European Union*, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>>

¹⁶ European Union, *Directive 2012/29/EU*, Art. 9 § 3b <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=en>>

¹⁷ European Parliament DG IPOL, p.33

¹⁸ The European Parliament has acknowledged as much, see European Parliament DG EPRS.

¹⁹ Amnesty International, *Right to be Free From Rape*, (London: Amnesty International, 2018) p.6

²⁰ International Criminal Court, *Elements of Crimes, PCNICC/2000/1/Add.2 (2000)*, Art. 7(1)-(g)1(1) <<http://hrlibrary.umn.edu/instreet/icc/elementsofcrimes.html>>

define rape based on the absence of consent. We will see this emerge as a theme across international standards on rape, and one to which few EU Member States abide.

The International Criminal Tribunal for the former Yugoslavia has also outlined a consent-based standard for rape. In *Prosecutor v. Kunarac* (2001), the Chamber observed that “sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it.”²¹

As regards victim protection, the UN Handbook for Legislation on VAW contains some important recommendations. These include free legal aid for victims (especially in criminal proceedings), specialist in-court support for victims, and provisions to ensure that victims of VAW are protected when testifying, such as not having to meet defendants when appearing in court, *in camera* proceedings, and testifying via videolink.²² The Handbook also recommends that evidence of survivors’ past sexual history never be introduced into criminal or civil proceedings.²³

1.6: The Istanbul Convention

The Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention) is by many measures the most important legislative instrument in the European region with respect to tackling VAW. Comprehensive and legally binding, it is the first treaty to outline minimum standards on criminalising VAW, consent, and victim protection. All Parties to the convention are bound to take appropriate legislative steps to comply with it.

1.6.1: Criminalisation

The Istanbul Convention outlines the scope of violence against women and is an excellent point of reference for the current international standard to which most EU Member States, if they have ratified the Convention, are bound.²⁴ Articles 33-42 specifically recognise 8 different forms of VAW and give specific information on the measures that Parties must take to tackle them. The Convention is premised on the understanding that these forms of violence are committed against women because they are women. States having ratified the Convention are obliged to fully implement it, which requires taking measures to prevent VAW, to protect its victims, and to prosecute its perpetrators. National legislation that is not in line with the Istanbul Convention must, therefore, be changed.

Article 36 of the Istanbul Convention concerns rape. It requires the criminalisation of:

1. The “non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object”;
2. “Other non-consensual acts of a sexual nature with a person”;
3. The “causing [of] another person to engage in non-consensual acts of a sexual nature with a third person.”

Article 36 then goes on to specify that it also applies to acts committed against former or current spouses or partners, and Article 43 further specifies that Article 36 applies irrespective of the nature of the

²¹ *Prosecutor v. Kunarac* [2001] IT-96-23-T <<http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>>

²² United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, (United Nations: New York, 2010), pp.40-43

²³ Ibid.

²⁴ All EU Member States are signatories to the Istanbul Convention; seven are yet to ratify it. See the full list on the Council of Europe website <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>>

relationship between the perpetrator and the victim. This is a comprehensive and progressive definition of rape.

Importantly, the Istanbul Convention requires that rape and sexual assault be defined as crimes against a person's body, autonomy, and privacy. This conception is in line with ECtHR decisions anchoring rape as a violation of the ECHR, and not as crimes against morality, social order, or honour.²⁵ In approaching rape as a crime of bodily violence, the Convention centres women, their experiences, and the unacceptable violation of their bodies in the criminalisation of rape. The primary harm caused by rape is to a person, usually a woman, and this should be recognised in all national legal definitions of the crime.

1.6.2: Consent

Article 36 of the Istanbul Convention defines rape by a lack of consent. Consequently, the Convention's conceptualisation of consent is important; Article 36(2) states that "consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances."

The Explanatory Report to the Convention expands on this definition, stating that a case by case assessment to determine consent is required. Further, it mandates that interpretations of rape legislation not be influenced by stereotypes and myths about male and female sexuality.²⁶

Notably, the Convention does not provide a definition of consent that Parties must adhere to, opting instead to provide guidelines on a context-sensitive assessment of consent. Indeed, the Explanatory Report notes that it is "left to the Parties to decide on the specific wording of the legislation and the factors that they consider precluding freely given consent. Paragraph 2 [of Article 36 of the Convention] only specifies that consent must be given voluntarily as the result of the person's free will, as assessed in the context of the surrounding circumstances."²⁷

The most important thing to note here, then, is the use of an affirmative consent model to guide Parties. Parties are encouraged to look for whether consent was freely given and expressed, as opposed to presuming consent in the absence of contrary information from the victim. This is the same standard used at the International Criminal Court.²⁸

1.6.3: Victim protection

The Istanbul Convention also provides minimum standards with respect to victim protection that Parties must adhere to. Responding to ECtHR caselaw, Article 50 of the Convention requires that law enforcement respond "promptly" to cases and offer immediate protection to victims.²⁹ Importantly, investigations and judicial proceedings must be "carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings."³⁰ In line with the UN Handbook for Legislation on VAW, evidence related to the sexual history and conduct of the victim is not permitted, unless it is relevant and necessary.³¹

Under Article 20, Parties are also required to facilitate victim recovery. Parties must take necessary measures to ensure that victims have access to services including legal and psychological counselling,

²⁵ See also UN Women, *Handbook for Legislation of Violence Against Women*, (UN Women: New York, 2012), p.12

²⁶ Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combatting violence against women and domestic violence*, (Istanbul: Council of Europe, 2011), ¶192

²⁷ Ibid. ¶193

²⁸ International Criminal Court, *Rules of Procedure and Evidence, UN Doc ICC-ASP/1/3 (2002)*, Rule 70(a)-(c) <<https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>>

²⁹ *Istanbul Convention*, Art. 50

³⁰ Ibid., Art. 49

³¹ Ibid., Art. 54

financial assistance, housing, education, training, and assistance in finding employment. Under this same article, parties must also take necessary measures to ensure that victims have access to health care and social services. The Council of Europe task force on combatting VAW recommends one rape crisis centre per 200,000 women and one counselling centre per 50,000 women.³²

³² Council of Europe Task Force to Combat Violence Against Women, including Domestic Violence (EG-TFV), *Final Activity Report*, (Strasbourg: Gender Equality and Anti-Trafficking Division, 2008), available online at <https://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/Final_Activity_Report.pdf> p.84

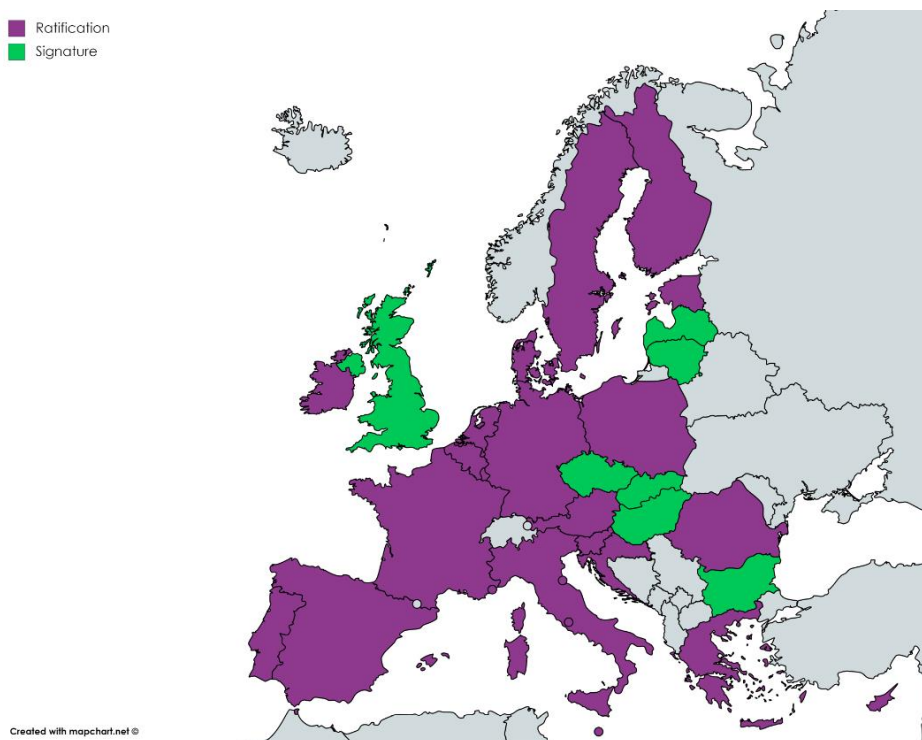
Part 2: Overview of Members States

Despite comprehensive international guidelines and binding legal instruments as outlined in Part One, many EU Member States' legislation on VAW is lacking. Most Member States recognise the issue of VAW, and have national action plans against VAW, but what is classified as VAW is not always consistent with the international standards outlined supra. These differences result in different approaches to criminalising behaviour associated with VAW; what is a crime in one Member State is not necessarily so in another. For example, in 2015 marital rape had still not been criminalised in Bulgaria, Hungary, Latvia, Lithuania, Poland, and Slovakia.³³

Broadly speaking, domestic physical violence and sexual violence (including rape) are the main forms of VAW punishable by law in Member States. Domestic psychological violence, sexual harassment, and FGM are generally punishable in different ways depending on the Member State.³⁴

Not all EU Member States have ratified the Istanbul Convention. Of those that have, most have more to do to be entirely compliant with the Istanbul Convention's rape provisions, as will be seen infra. The power of the Convention has not yet transformed into a strong, uniform legislative standard on rape across the European Union.

Figure 1: EU Member States that have ratified the Istanbul Convention



³³ European Parliament, 'Parliamentary questions – rape within marriage', (online question session, 2015) <http://www.europarl.europa.eu/doceo/document/P-8-2015-004211_EN.html?redirect> [accessed 08/01/2019]

³⁴ European Parliament DG EPRS, p.7

2.1: Rape legislation

Most Member States do not define rape based on a lack of consent, in spite of international agreement on a consent-based standard.³⁵ A detailed and comprehensive 2018 report from Amnesty International notes that the vast majority of EU countries have legal definitions of rape based on the existence of certain circumstances – force, duress, and coercion.³⁶ Commonly, the use of force and coercion is used to distinguish between rape and lesser offences such as sexual assault or sexual intercourse without consent, meaning that an element of force is necessary in order for a crime to be prosecuted as a rape, as opposed to the defining element of rape being the absence of consent.

As will be seen in Part Three, many EU countries have laws which require the physical resistance of a victim in order to prove rape, a stance from which Germany, for example, has just removed itself: prior to November 2016, German legislation required a victim to have physically resisted in order to prove rape.³⁷ Attendant circumstances such as the victim's age, disability, or the perpetrator's relationship to the victim can also be factors in defining rape across Europe. To illustrate, in Finland, if a victim is aged between 16 and 18 and the perpetrator is in a position of authority over the victim (for example, as a schoolteacher) then Finnish law classes this situation as sexual abuse, and not as the harsher offence of rape. As a result, perpetrators in such situations get lesser sentences than perpetrators of rape.³⁸

There are movements in some countries, especially in the wake of the #MeToo movement, to adopt consent-based definitions of rape. For example, recent high-profile rape cases in Spain involving multiple perpetrators are paving the way for Spanish legislation to recognise sex without consent as rape.³⁹

Although the Istanbul Convention, ECtHR caselaw, and other international legal instruments require that rape and assault be defined as crimes against a person's body and privacy, the sexual violence laws of several Member States are still framed in the language of honour and morality. In Malta, sexual offences fall under the chapter of "Crimes affecting the good order of families"; in Belgium and Luxembourg, rape is a "crime against the order of families and public morals"; in the Netherlands, rape is an offence against "public morals."⁴⁰ Such language is worrying; framing rape in this way perpetuates harmful stereotypes about women's bodily autonomy and sexuality.

2.2: Consent

In all but seven of the 33 countries that have ratified the Istanbul Convention, the legal definition of rape is not in line with the Convention's consent-based definition. Only Belgium, Cyprus, Germany, Iceland, Ireland, Luxembourg and Sweden define rape based on a lack of consent.⁴¹ The role of activists and civil society will be instrumental in pressuring legislators to amend rape laws and definitions according to the Convention, as seen in Sweden: the legal definition of rape was changed to be consent-based in May 2018, after years of activism from women's rights groups.⁴² The three common law jurisdictions under the

³⁵ See Part One supra; Amnesty International, pp.10-12

³⁶ Ibid., p.12

³⁷ Amnesty International, p.10

³⁸ Ibid., p.12

³⁹ Notably, the so-called *La Manada* case in Pamplona caused many protests because the perpetrators were found guilty of the lesser offence of sexual abuse, and not the more serious offence of 'sexual aggression', because they did not meet the legal standard for sexual aggression. In Spanish law, sexual aggression requires violence or intimidation, which the court did not find was present in this case.

⁴⁰ Amnesty International, p.14

⁴¹ Ibid., p.9

⁴² See Part Three, § 3.2 infra.

Convention (England and Wales, Scotland, and Northern Ireland) all have consent-based definitions of rape, but the UK is yet to ratify the Convention.

With respect to defining consent itself, Europe has a lot of work to do. Although international standards in the Convention and other bodies outline an affirmative consent model, Member States generally use other markers to establish a lack of consent.⁴³ Notably, the negative consent ('no means no') model is still predominant.

The difference between affirmative consent and the 'no means no' model is critical in establishing consent and thus defining the scope of crimes for which consent is required. The Istanbul Convention's implementation mechanism, GREVIO, noted as much in their assessment of Austrian rape legislation: "there is [...] a difference between sexual acts committed against the will of the victim (Austrian legislation), and non-consensual sexual acts (the Convention)."⁴⁴ One relies on negative consent, the other requires affirmative consent.

In outlining a negative consent model, many Member States still rely on the presence of force to establish a lack of consent, which necessitates victim resistance to show that force was used. This is incredibly harmful. As Amnesty International notes, "there should be no assumption in law or in practice that a victim gives her consent because she has not physically resisted the unwanted sexual conduct regardless of whether or not the perpetrator threatened to use or used physical violence."⁴⁵

Interestingly, the ECtHR suggests that even those countries that do not have a consent-based legal definition tend to give deference to the consent standard: "it is significant [...] that in case-law and legal theory lack of consent, not force, is seen as the constituent element of the offence."⁴⁶ This begs the question: why not adopt a uniform consent-based legal standard?

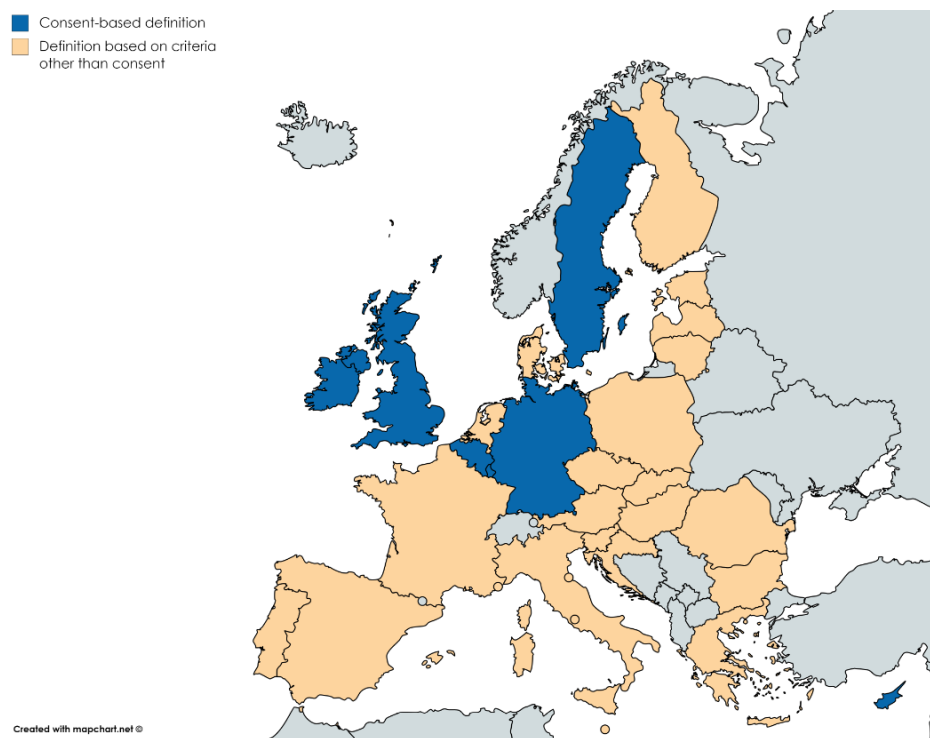
⁴³ Amnesty International, p.10

⁴⁴ Group of Experts on Action against Violence Against Women and Domestic Violence (GREVIO), *Baseline Evaluation Report Austria*, (Strasbourg, Council of Europe, 2017) available at <<http://www.rm.coe.int/grevio-report-austria-1st-evaluation/1680759619>> ¶141

⁴⁵ Amnesty International, p.6

⁴⁶ *M.C. v. Bulgaria*, ¶159

Figure 2: EU Member States that have a consent-based definition of rape



2.3: Victim support

Most Member States have some form of protective measures in place for victims of sexual violence and rape. Further, many Member States have specialist services and structures for victims, such as rape crisis centres, shelters, or refuges.⁴⁷ Such structures tend to be partly state-funded, and partly dependent on donations.⁴⁸ In Northern Ireland, for example, victims can opt to be accompanied to the police station or to court by staff or volunteers of the country's partially state-funded rape crisis centres, and staff often prepare complainants for court proceedings. The Nordic countries go even further: in Denmark, Finland, and Sweden, complainants have access to free counsel.⁴⁹

Deterrents to reporting still need to be removed in many Member States. The UN's CEDAW Committee notes that legal barriers to reporting crimes of sexual violence are an important factor in discouraging women from reporting, and lists examples of the various laws that act as deterrents to prevent women from seeking justice:

“All laws that prevent or deter women from reporting gender-based violence, such as guardianship laws that deprive women of legal capacity or restrict the ability of women with disabilities to testify in court, the practice of so-called “protective custody”, restrictive immigration laws that discourage women, including migrant domestic workers, from reporting

⁴⁷ European Parliament DG IPOL, p.40

⁴⁸ Amnesty International, p.18

⁴⁹ Ibid., p.16

such violence, and laws allowing for dual arrests in cases of domestic violence or for the prosecution of women when the perpetrator is acquitted [...]"⁵⁰

An example of good practice in removing such barriers can be found in Scotland: in April 2017, a Scottish legislative amendment introduced a duty on judges to provide the jury with instructions on rape myths and preconceptions in cases where there was a delay in reporting and when there was no physical resistance or force.⁵¹

⁵⁰ CEDAW, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/G/GC/35, ¶129(b)(iii)

⁵¹ Amnesty International, p.16

Part 3: Case Studies

The third section of this report will comprise five case studies that explore existing rape legislation in five Member States: the UK, Sweden, France, Italy, and Poland. All five of these countries are signatories to the Istanbul Convention; only the UK has not ratified the Convention.

3.1: The UK

Three common law jurisdictions make up the UK: England and Wales, Scotland, and Northern Ireland. All three jurisdictions have clear legislation on sexual offences, and have passed legislation on consent that is clearly in line with an affirmative consent model. Three major Acts of Parliament outline the relevant legislation of each jurisdiction: the Sexual Offences Act 2003 for England and Wales,⁵² the Sexual Offences (Scotland) Act 2009 for Scotland,⁵³ and the Sexual Offences (Northern Ireland) Order 2008 for Northern Ireland.⁵⁴

Legislation on rape across the UK's jurisdictions is compliant with international standards: rape is criminalised, it is framed as a deprivation of bodily autonomy, and the definition of rape is grounded in consent. Consent must be affirmative.

3.1.1: England and Wales

Rape legislation

The Sexual Offences Act 2003 (SOA) is the primary legislation regarding VAW in England and Wales. Rape carries a maximum sentence of life imprisonment and is defined thus:

A person commits rape if “he intentionally penetrates the vagina, anus, or mouth of another person with his penis” and the victim “does not consent to the penetration” nor is there any reasonable belief of consent.⁵⁵

This presents a change from previous law which was only concerned with vaginal penetration; now, both women and men may experience rape under the SOA. Notably, a person who commits the offence of rape must be male, as rape is defined with respect to penile penetration.

If penetration is by something other than a penis then the offence is an assault by penetration. A person commits assault by penetration when he “intentionally penetrates the vagina or anus of another person with a part of his body or anything else, the penetration is sexual, [the victim] does not consent to the penetration” and there is no reasonable belief of consent.⁵⁶ This offence is just as serious as rape as it still carries a maximum sentence of life imprisonment.⁵⁷

Sexual assault is a separate offence, committed when a person “intentionally touches another person, the touching is sexual” and there is no consent or reasonable belief of consent.⁵⁸

⁵² England and Wales, *Sexual Offences Act 2003*, <www.legislation.gov.uk/ukpga/2003/42/contents>

⁵³ Scotland, *Sexual Offences (Scotland) Act 2009*, <www.legislation.gov.uk/asp/2009/9/contents>

⁵⁴ Northern Ireland, *Sexual Offences (Northern Ireland) Order 2008*, <www.legislation.gov.uk/nisi/2008/1769/contents>

⁵⁵ *Sexual Offences Act 2003*, § 1(1)

⁵⁶ *Ibid.*, § 2(1)

⁵⁷ *Ibid.*, § 2(4)

⁵⁸ *Ibid.*, § 3(1)

Consent

Consent is crucial to all three of these offences and is defined in the SOA. A person consents to an act “if he agrees by choice, and has the freedom and capacity to make that choice.”⁵⁹ The SOA lists situations in which consent is presumed to not be present, including if the complainant is asleep or unconscious, if the complainant is unable to communicate consent because of a physical disability, if the defendant has incapacitated the complainant through a substance, and if the defendant uses force or threats.⁶⁰ Further, caselaw in England and Wales has now established that consent can be rescinded at any time.⁶¹

Other criminalised sexual offences under the SOA include:

- Sexual activity with a child or in the presence of a child – §§ 9-10
- Abuses of positions of trust in connection with sexual activity – §§ 16-19 and 30-33
- Taking indecent photographs of children – § 45
- Trafficking – §§ 57-59
- Incest – § 64-65
- Exposure – § 66
- Voyeurism – § 67

Impact

Not only is affirmative consent defined in law in England and Wales, but new guidance for prosecutors was introduced in 2015 which stressed the importance of requiring defendants to explain how they obtained consent.⁶² This guidance requires defendants to explain to police and prosecutors how they knew that the complainant was consenting, and that the consent was freely given in circumstances in which she was able to consent.

Despite the absence of a requirement of force, threat, or violence in the SOA’s definition of rape, the reality is that prosecution is unlikely to proceed in the absence of these elements.⁶³ This raises questions regarding implementation; defining progressive legal standards and enforcing them are separate inquiries, and point to the necessity of proper police and prosecutor training on sexual offences standards.⁶⁴

With regards to victim support structures in England and Wales, several charitable organisations provide services for victims that meet the requirements of the Istanbul Convention. One of the main victim support organisations is the Rape Crisis network. Rape Crisis Centres across England and Wales provide services to victims, such as mental health care and legal support, and promote the needs of women and girls who have experienced sexual violence. Rape Crisis is supported by the government: it receives both government funds and private charitable donations.⁶⁵

It must be noted that in spite of comparatively strong legislative grounding, many British women do not feel adequately supported by rape laws in England and Wales, or that the English legal system and its

⁵⁹ *Ibid.*, § 74

⁶⁰ *Ibid.*, § 75(2)

⁶¹ *R v. DPP and “A”* [2013] EWHC 945 (Admin) <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/f-v-dpp-judgment.pdf>>

⁶² See Crown Prosecution Service, ‘What is consent?’ available at <www.cps.gov.uk/publications/equality/vaw/what_is_consent_v2.pdf>; Crown Prosecution Service, ‘Rape and Sexual Offences Legal Guidance’, available at <www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/>

⁶³ *MC v. Bulgaria*, ¶141

⁶⁴ For an example of good practice in this domain, see Case Study 3.2: Sweden, *infra*.

⁶⁵ See Rape Crisis England and Wales <<https://rapecrisis.org.uk/>>

actors are equipped to manage sexual offences.⁶⁶ Rates of reporting, conviction, and attrition are discouraging, and legal protections tend to overlook and leave behind the most vulnerable women, such as immigrant women. As such, in March 2019 the UK government announced a full review into how rape and sexual violence cases are handled across the criminal justice system. The changes that this review will bring remain to be seen.⁶⁷

3.1.2: Scotland

Rape legislation

The major piece of Scottish legislation regarding rape is the Sexual Offences (Scotland) 2009 Act, which defines rape thus:

A person commits rape if, with his penis, he “penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth” of another without their consent and without reasonable belief of consent.⁶⁸

Section 1 goes on to define penetration as “a continuing act from entry until withdrawal of the penis”, and specifies that both “penis” and “vagina” include surgically constructed anatomy. Again, rape must be committed by a male, but legally victims of rape can be both men and women. Rape carries a maximum sentence of life imprisonment.

Just as in England and Wales, penetration by an object constitutes the separate offence of sexual assault by penetration, and it still carries a maximum sentence of life imprisonment. Sexual assault by penetration is committed when a person “penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus” of another with “any part of [their] body or anything else,” without consent or a reasonable belief of consent.⁶⁹

The offence of sexual assault makes it a crime for a person to do any of the following without consent or a reasonable belief of consent:

- Sexually penetrate the vagina, anus, or mouth.
- Sexually touch the victim.
- Engage in any other form of sexual activity which results in physical contact with the victim directly, though clothing, with a part of the body or an object.

⁶⁶ See, for example, Lizzie Dearden, ‘Justice system in ‘crisis’ as only 8% of crimes prosecuted in England and Wales’, *The Independent*, (25 January 2019), available at <https://www.independent.co.uk/news/uk/crime/crime-statistics-uk-justice-prosecution-rates-rape-victims-disclosure-police-funding-a8747191.html?fbclid=IwAR2tkPLgNmIKG35Be4IIBVtPNvrHFA6lICkVoeTmPUZKYMzT_CyaNV20Pu4>; Alexandra Topping, ‘Rape prosecutions plummet despite rise in police reports’, *The Guardian*, (26 September 2018) <<https://www.theguardian.com/law/2018/sep/26/rape-prosecutions-plummet-crown-prosecution-service-police>>; and Loulla-Mae Eleftheriou-Smith, ‘Rape victims facing ‘humiliating questions about clothing and sexual history during trials, MP reveals’, *The Independent*, available at <<https://www.independent.co.uk/news/uk/crime/rape-sexual-history-assault-cross-examine-trial-court-voices4victims-plaid-cymru-mp-liz-savile-a7570286.html>> [accessed 05/03/2019]

⁶⁷ UK Home Office, ‘Government sets out key measures to tackle violence against women and girls’, (6 March 2019), available at <<https://www.gov.uk/government/news/government-sets-out-key-measures-to-tackle-violence-against-women-and-girls>>

⁶⁸ *Sexual Offences (Scotland) Act*, § 1

⁶⁹ *Ibid.*, § 2

- Ejaculate semen onto the victim or urinate on the victim sexually.⁷⁰

The Sexual Offences (Scotland) Act also criminalises the following acts:

- Sexual coercion – § 4
- Communicating indecently – § 7
- Sexual abuse of trust involving children or mentally disabled persons⁷¹
- Administering a substance for sexual purposes – § 11
- Incest⁷²
- Sexual exposure – § 8
- Voyeurism – § 9

Consent

Consent is defined as “free agreement.”⁷³ The Act explicitly provides that consent can be withdrawn at any time, that consent to conduct does not of itself imply consent to any other conduct,⁷⁴ and it lists circumstances where consent is presumed to be absent.⁷⁵ These include when a person is intoxicated to the point of being unable to consent, when a person is asleep, when violence or threats have been used, and when the only expression of consent is from a person other than the complainant.

Impact

Of the Act, the European Women’s Lobby says that it represents a positive change in how rape is defined in Scotland compared to previous legislation pre-2009, not least by including male rape for the first time.⁷⁶ However, only 24% of reported rapes reach court in Scotland, which the European Women’s Lobby argues is partly due to the major barrier of corroboration. Scottish law requires corroboration for all crimes, and the nature of rape makes it difficult to meet this requirement.⁷⁷

Similarly to England and Wales, Rape Crisis is one of the primary networks for rape victims in seeking support in Scotland. Partly government-funded and partly supported by charitable donations, Rape Crisis Scotland provides essential services and support to victims of sexual assault.⁷⁸

3.1.3: Northern Ireland

Rape legislation

In Northern Ireland, sexual offences are defined in the Sexual Offences (Northern Ireland) Order 2008. Rape carries a maximum sentence of life imprisonment. Just as in England and Wales, rape is defined thus:

⁷⁰ Ibid., § 3

⁷¹ Scottish Government, ‘Information and help after sexual assault’, (2016) <<https://www.gov.scot/publications/information-help-rape-sexual-assault/pages/7/>>

⁷² Ibid.

⁷³ *Sexual Offences (Scotland) Act*, § 12

⁷⁴ Ibid., § 15

⁷⁵ See Ibid., §§ 13-14

⁷⁶ European Women’s Lobby, *Barometer on Rape in Europe, National Analysis: UK*, (Brussels: EWL, 2013), p.1

⁷⁷ Ibid.

⁷⁸ See Rape Crisis Scotland <<https://www.rapecrisisscotland.org.uk/>>

A person commits the offence of rape if “he intentionally penetrates the vagina, anus, or mouth of another person with his penis” without the victim’s consent to penetration or a reasonable belief of consent.⁷⁹

The offences of assault by penetration and sexual assault are also defined identically to how they appear in the SOA.⁸⁰ Northern Ireland takes an identical approach to consent to England and Wales.

The European Women’s Lobby argues that in spite of legislative protections, prosecution rates for rape in Northern Ireland “remain disgracefully low,”⁸¹ illustrating the importance of going beyond legislation to address educational, social, and cultural factors in tackling VAW.

3.2: Sweden

Rape legislation

Moving on to civil law jurisdictions, Sweden’s penal code defines rape with respect to voluntary participation.

As of July 2018, a person commits rape under Swedish law when he “carries out sexual intercourse or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse *with a person who is not participating voluntarily*”⁸² (emphasis added). Rape carries a mandatory minimum sentence of two years, and a maximum of six years’ imprisonment.⁸³

This definition of rape is incredibly current, and is one of the few consent-based definitions to be found in European civil law rape legislation.⁸⁴ Prior to July 2018, Chapter 6, § 1 of the Swedish penal code defined rape by the presence of violence or threat: “A person who by assault or otherwise by violence or by threat of a criminal act forces another person to have sexual intercourse [...] shall be sentenced for rape.”⁸⁵ In removing the requirement of violence or threat by the perpetrator, Sweden proposed – in the words of the government – “the introduction of sexual consent legislation that is based on the obvious; sex must be voluntary.”⁸⁶

Importantly, this new legislation also introduced the offences of ‘negligent rape’ and ‘negligent sexual abuse.’⁸⁷ These offences concern the intent of a person accused of rape, and occur when the perpetrator reasonably should be aware of the risk that the victim is not voluntarily participating but nevertheless engages in sexual activity. Negligent rape is punishable by a maximum of four years in prison. The introduction of this offence represents a welcome recognition of different situations in which consent is

⁷⁹ *Sexual Offences (Northern Ireland) Order*, § 5

⁸⁰ See *Ibid.*, § 6 and § 7 respectively.

⁸¹ EWL, *Barometer on Rape: UK*, p.1

⁸² Regeringskansliet, Ministry of Justice Sweden, *Swedish Penal Code*, Chapter 6 § 1, (unofficial translation), <<https://www.government.se/4a95e7/contentassets/602a1b5a8d65426496402d99e19325d5/chapter-6-of-the-swedish-penal-code-unofficial-translation-20181005>>

⁸³ *Ibid.*

⁸⁴ Other civil law countries with consent-based definitions include: Belgium, Cyprus, Germany, and Iceland.

⁸⁵ Regeringskansliet, Ministry of Justice Sweden, *Swedish Penal Code*, Chapter 6, § 1, (translated by Norman Bishop), <<https://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf>>, p.24

⁸⁶ Government Offices of Sweden, ‘Consent – the basic requirement of new sexual offence legislation’, (April 2018), available at <<https://www.government.se/press-releases/2018/04/consent--the-basic-requirement-of-new-sexual-offence-legislation/>>

⁸⁷ *Swedish Penal Code*, Chapter 6, § 1(a)

silent but not given; the test for negligent rape is whether a person could and did take all reasonable steps to determine whether consent was actually given. Adapting legislation to recognise liability for negligent is a new departure in rape law going beyond current international standards, responds to current debates about standards of proof for establishing consent, and sets a new high bar for other countries to follow.

Sweden's penal code defines sexual assault other than rape thus: "A person who carries out a sexual act not referred to in Section 1 with a person who is not participating voluntarily is guilty of sexual abuse and is sentenced to imprisonment for at most two years."⁸⁸

Consent

Sweden's new definition of rape is entirely consent based. Its language closely mirrors that of the Istanbul Convention and other international standards. The Swedish government summarises the core idea of the legislation thus: "Sex must be voluntary – if it is not, then it is illegal."⁸⁹

In assessing whether sexual participation is voluntary or not under the revised Swedish penal code, "particular consideration shall be given to whether the voluntariness was expressed through words or deed or in some other way."⁹⁰ The penal code provides some examples of what is not considered voluntary participation. Notably, a person is never considered to be participating voluntarily if their participation is in response to violence or threats, the person is unconscious, asleep, bodily injured, in grave fear, intoxicated, or under the influence of drugs, or if the perpetrator "seriously abusing the person's position of dependency on the perpetrator."⁹¹

Certain attendant circumstances can reduce or augment the seriousness of a rape offence, which has an impact on the maximum sentence that can be served. For example, if the offence is considered gross (considering circumstances such as whether the perpetrator was physically violent, if there was more than one perpetrator, or if the victim was young), the perpetrator can be imprisoned for up to ten years. Consequently, the language of violence and threats has been retained in the revised penal code, but is now an attendant circumstance that can aggravate the crime of rape and not a required element.

Impact

In introducing a consent-based standard, the Swedish legislature responded to long-standing campaigns in Swedish civil society. According to the Swedish National Council for Crime Prevention, the first decade of the new millennium saw an increase in the number of reported sexual offences, which has been attributed to an increase in crime and a rising trend of reporting.⁹² Accordingly, activist movements sought to pursue legislative change that could tackle the prevalence of rape in Sweden. The EWL already noted in 2013 that there was an active movement across lawyers, women's organisations, and civil society to amend Swedish rape law according to the consent standard described in the Istanbul Convention.⁹³ In discussing the legislative change, the Swedish government sought to design its legislative modification to respond to the increasing incidence of sexual violence in Sweden and this civil society movement.⁹⁴

To this end, as part of the 2018 legislation, the legislature tasked the Swedish Crime Victim Compensation and Support Authority with running information and education campaigns on sexual offences. These campaigns, which primarily target young people, seek to make all victims aware of their rights and to

⁸⁸ Ibid. § 2

⁸⁹ Ibid.

⁹⁰ Ibid., § 1

⁹¹ Ibid.

⁹² European Women's Lobby, *Barometer on Rape in Europe, National Analysis: Sweden*, (Brussels: EWL, 2013), p.1

⁹³ Ibid.

⁹⁴ Government Offices of Sweden

encourage them to report.⁹⁵ The Compensation and Support Authority was also tasked with producing an online training course and a teachers' guide. Its activities are running for three years and are government funded. Engaging schools, producing information campaigns, and publicising rights under the new laws represent excellent practice. Not only do Sweden's new laws recognise every person's right to bodily autonomy and sexual freedom, but Sweden's approach beyond the legislation itself respects and enforces the Istanbul Convention's guidance on civil society engagement and victim support. Given how new the legislation is, it remains to be seen how it will be enforced.

3.3: France

Rape legislation

The primary legislation on rape in France is the French penal code. The rape of an adult is a crime, punishable by 15 years' imprisonment. Rape is defined as "Any act of sexual penetration, of whatever nature, committed by violence, constraint, threat or surprise."⁹⁶ This means that any one of violence, constraint, threat, or surprise must be present for a person to legally be raped. French law makes clear that it includes rape by a husband or civil partner in its definition.⁹⁷

French penal law outlines attendant circumstances under which a sentence greater than 15 years' imprisonment can be imposed. For example, rape committed on a vulnerable person is considered an aggravating circumstance to the crime, as is marital rape, gang rape, or incest, and all are punishable by 20 years' imprisonment.⁹⁸

Sexual assault is a secondary crime in France, and is defined as "any sexual infringement committed with violence, constraint, threat or surprise"⁹⁹ and is punishable by a 5 year sentence.¹⁰⁰

Consent

There is a notable absence of consent in France's definition of rape. Legally defining rape based on the presence of violence, as opposed to the absence of affirmative consent, is not conform with the international standard outlined in Part One. This is especially noteworthy as France has ratified the Istanbul Convention, which outlines an affirmative consent model.

Impact

France's definition of rape has resulted in some holdings that have shocked French and international communities, and which seem out of place in the post-#metoo era.

In 2017, the *cour d'assises* of Seine-et-Marne acquitted a 22-year-old man accused of raping a girl aged 11 because he did not meet the legal definition of rape. The girl's family only learned of the rape when they discovered that she was pregnant. The man has since been convicted by the Paris *cour d'assises* and

⁹⁵ Ibid.

⁹⁶ France, *Code pénal*, Art. 222-23, <<https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006417678&cidTexte=LEGITEXT00006070719>> (translated by author).

⁹⁷ Service-public.fr, 'Viol d'une personne majeure', (19 décembre 2018), available at <<https://www.service-public.fr/particuliers/vosdroits/F1526>>

⁹⁸ France, *Code pénal*, Art. 222-24

⁹⁹ *Code penal*, Articles 222-22 and 222-27 (translated by author).

¹⁰⁰ France has three levels of unlawful activity which increase in severity and punishment: the least severe is a *contravention*, then a *délit*, then a *crime*. Rape is a *crime* and sexual assault is a *délit*.

sentenced to a prison term of seven years.¹⁰¹ Similarly, a court in the *Val d'Oise* reduced the charge of man accused of raping an 11 year-old-girl from rape to sexual assault, because the legal requirements for rape could not be met.¹⁰²

These cases, which caused outrage and drew international media attention, raised many questions about the definition of rape in France and the lack of consent as the baseline standard where minors are concerned. France did not, and does not, have a minimum age of consent to sexual intercourse. Consequently, no matter the age of the victim, the requirements of penetration by violence, constraint, threat or surprise must be met. This is especially concerning when the government's own Gender Equality Office notes that young women and children are the population most at risk from sexual assault and rape in France.¹⁰³

Many civil society actors thus drew on these cases to advocate for the establishment of statutory rape with a minimum age of consent. President Emmanuel Macron's minister for gender equality, Marlène Schiappa, proposed tackling this by explicitly removing the requirements of violence, constraint, threat or surprise for the penetration of a person under 15. After much controversy in summer 2018, the *loi Schiappa*, which would have established statutory 'sexual assault with penetration' in France, was not passed. Thus, although France retains the age of 15 as the threshold for statutory sexual assault (without penetration),¹⁰⁴ there is no statutory rape under the French penal code.¹⁰⁵ There has been no movement in the legislature to progress to a consent-based standard for the rape of an adult.

The European Women's Lobby notes that many rape cases in France are not fully prosecuted because of prevalent stereotypes and 'rape myths' in the French judiciary.¹⁰⁶ Many rape cases are dismissed (*sans suite*) and others are sent to non-criminal courts where there are not judged as crimes but rather as sexual offences; consequently, many victims do not receive adequate compensation or have proper recourse to justice through the French legal system. Indeed, the number of rape convictions has dropped by 40% in the ten-year period from 2006 to 2017.¹⁰⁷

With respect to social services and support, resources are scarce in France. Victims of rape and sexual assault rely on NGOs to provide services such as confidential telephone lines to give information and guidance to victims.¹⁰⁸ There is no national rape crisis service or support beyond NGOs, and legal support

¹⁰¹ Martine Brésou, 'Viol d'une enfant de 11 ans : l'homme d'abord acquitté aux assises condamné à sept ans de prison en appel', *France Bleu*, (28 November 2018), available at <<https://www.francebleu.fr/infos/faits-divers-justice/viol-d-une-enfant-de-11-ans-en-appel-sept-ans-de-prison-infliges-a-l-homme-qui-avait-d-abord-ete-1543389369>>

¹⁰² Marjorie Lenhardt, 'Val d'Oise : un homme de 28 ans jugé pour une relation sexuelle avec une fillette de 11 ans', *Le Parisien*, (12 February 2018), available at <<http://www.leparisien.fr/val-d-oise-95/montmagny-relation-sexuelle-a-11-ans-le-consentement-au-coeur-du-proces-12-02-2018-7555485.php>>

¹⁰³ Secrétaire d'Etat chargé de l'égalité entre les femmes et les hommes et de la lutte contre les discriminations, 'Enquête virage : viols et agressions sexuelles en France – premiers résultats', (November 2016), available at <<https://www.egalite-femmes-hommes.gouv.fr/publications/droits-des-femmes/lutte-contre-les-violences/premiers-resultats-de-lenquete-virage-violences-et-rapports-de-genre/>>

¹⁰⁴ *Code pénal*, Art. 227-26

¹⁰⁵ Critically, a lot of the controversy around this law surrounded the fact that the statutory 'sexual assault with penetration' of a person under 15 years of age was classified as a *délit* and not as a *crime*, thus undermining the severity of the act.

¹⁰⁶ European Women's Lobby, *Barometer on Rape in Europe, National Analysis: France*, (Brussels: EWL, 2013), p.1

¹⁰⁷ Ministère de la Justice, 'Bulletin d'information statistique, no 164', (September 2018), available at <http://www.justice.gouv.fr/art_pix/stat_Infostat_164.pdf>

¹⁰⁸ See Collectif féministe contre le viol <<https://cfcv.asso.fr/>>

is limited. The European Women's Lobby also argues that social services do not have the means to effectively help victims in France.¹⁰⁹

3.4: Italy

Rape legislation

Italy is unusual in its legislative approach to rape in that it doesn't define this crime separately from other forms of sexual assault. Article 609bis of the Italian Criminal Code states:

"Whoever, by force or by threat or abuse of authority, forces another person to commit or suffer sexual acts shall be punished with imprisonment from five to ten years."¹¹⁰

Italy uses the term "sexual acts" to cover various forms of sexual violence. Further clarity on the elements of force, threat, or abuse of authority is provided in the legislation: Article 609bis condemns those who induce another person to commit or suffer sexual acts by abusing the conditions of physical or mental inferiority of the victim at the time of the act, or misleading the victim through hiding their identity.¹¹¹

Outlined in Article 609ter, attendant circumstances to rape include:

- Using weapons or substances dangerous to a victim's health (including alcohol),
- Deceiving a victim by feigning to be a public official exercising official duties, and
- Taking advantage of a victim's physical or mental infirmity.¹¹²

Italy explicitly recognises statutory rape. Article 609 defines two forms of "*violenza presunta*", where there is no requirement to show the elements of threat, force, or abuse of authority. Firstly, Italy recognises statutory rape when the victim is under the age of 14. Secondly, Italy finds statutory rape when a victim is under the age of 16 if the offender is the victim's ascendant, parent (including adoptive parents), guardian, or any other person into whose care the victim has been entrusted.¹¹³

Italy also explicitly recognises the crime of 'group sexual assault'. When more than one person participates in acts of sexual violence as defined under Article 609bis, each perpetrator is to be sentenced to six to twelve years' imprisonment.¹¹⁴

Notably, in February 1996, sexual violence ceased to be a "crime against public morality and decency" and was fully recognised as a "crime against the person".¹¹⁵ Feminist movements in Italy had been campaigning for such a change for over 20 years.¹¹⁶ The move away from a crime of public morality towards one of bodily autonomy, as per the Istanbul Convention, represents an important step forward for Italian legislation.

Consent

The Italian definition of rape is not consent based, but requires a showing of force, threat, or abuse of authority. This does not conform with international standards on consent, much less with the Istanbul Convention's guidance of affirmative consent.

¹⁰⁹ EWL *Barometer on Rape: France*, p.1

¹¹⁰ EIGE, 'Legal Definitions in the EU'

¹¹¹ Ibid.

¹¹² European Women's Lobby, *Barometer on Rape in Europe, National Analysis: Italy*, (Brussels: EWL, 2013), p.1

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.; EIGE 'Legal Definitions in the EU'

¹¹⁶ EWL, *Barometer on Rape: Italy*, p.1

With respect to statutory rape, Italy does make one consent-based exception to this strict liability provision: it has adopted a close-in-age exemption. This type of exemption, otherwise known as a ‘Romeo and Juliet law’, prevents the prosecution of underage couples who engage in consensual sex when both parties are close in age to each other, and one or both are below the age of consent.¹¹⁷ This is designed to prevent the prosecution of underage consensual sex as statutory rape.

Impact

The lack of a legal definition specifically for rape in Italy is highly concerning. As noted in Part One of this paper, it is difficult to begin to address the prevalence of rape if the act itself cannot be defined separately to other related acts. A crime that is undefined cannot be prosecuted; notice of legality is one of the founding principles of criminal law.

Italy has seen many high-profile and controversial rape cases, and activists on this subject remain very vocal. One such case, which highlights the country’s complex and problematic relationship with sexual assault as a subject matter, concerns a court ruling which suggested that a woman cannot be raped if she is wearing tight jeans; the court reasoned that tight jeans could not be removed without the help of the wearer, thus suggesting a lack of force or threat.¹¹⁸ Though much discussed in the public arena, Italy’s rape laws are yet to be modernised.

As regards victim protection, Italy’s 1996 reform to rape legislation included provisions to protect the privacy of a victim pursuing prosecution. Within these provisions, Italy criminalized the divulgence of personal details or images of a rape victim, making this offence punishable by three to six months’ imprisonment.¹¹⁹ Further, the Italian Code of Criminal Procedure provides that victims may request their sexual assault trial be partially or completely closed to the public, though – with the exception of minors – there is no guarantee that such a request will be granted.¹²⁰

In conformity with international standards, the prosecution is not permitted to question a victim on her sexuality or sexual history unless the prosecution can show that it is necessary for the reconstruction of the facts of the case.¹²¹

3.5: Poland

Rape legislation

Rape is an offence against public decency and sexual freedom in Poland and is punishable by a term of imprisonment between two and twelve years.¹²² Poland’s definition of rape is similar to Italy’s in the standard it sets and the language used. Under Article 197 of the Polish Criminal Code, a person commits rape when “by force, illegal threat or deceit, [he] subjects another person to sexual intercourse.”¹²³

¹¹⁷ ‘Age of Consent in Italy’, available at <<https://www.ageofconsent.net/world/italy>>

¹¹⁸ Alessandra Stanley, ‘Ruling on Tight Jeans and Rape Sets Off Anger in Italy’, *New York Times*, (16 February 1999), available at <<https://www.nytimes.com/1999/02/16/world/ruling-on-tight-jeans-and-rape-sets-off-anger-in-italy.html>> replace with IT language piece and/or ruling itself if possible?

¹¹⁹ EWL, *Barometer on Rape: Italy*, p.1

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Poland, *Criminal Code (Poland) 1997, Kodeks karny, Dz.U. 1997 Nr 88 poz. 553*, Chapter XXV, <<https://www.legislationline.org/documents/section/criminal-codes/country/10>>

¹²³ EIGE

Within this same Article, the Polish legislature notes some special circumstances which have a bearing on the sentences available for the court to impose:

- If the perpetrator makes another person submit to a sexual act or perform such an act, he can be imprisoned for a term between six months and eight years.
- In cases of group rape, rape of a minor (under 15 years of age), or incest or parental abuse, a perpetrator can be imprisoned for a minimum term of three years.
- If the perpetrator acts with particular cruelty, he can be imprisoned for a minimum term of five years.¹²⁴

Poland thus provides for statutory rape, and the aggravating circumstances of gang rape, abuse of authority, and particular cruelty, though naturally the latter necessitates a moral judgment in the place of a legal rule.

Importantly, rape is not classed as a crime of deprivation of bodily autonomy in Poland. Rather, it is included in Chapter XXV of the Penal Code Offences against Sexual Liberty and Decency, and appears alongside such crimes as forced prostitution and adultery.¹²⁵

Consent

Poland's definition is another example of rape legislation that does not take consent as its basic standard. Poland requires a showing of force, illegal threat, or deceit to convict a person for rape. Further, EWL notes that often, Polish legislation is interpreted to raise expectations that a woman should use active resistance against a person attempting to rape her in order to make her a credible victim.¹²⁶

Impact

Poland has a low number of reported rapes for its large population size. For example, in 2011 1,748 cases of rape were reported for a population of 38 million.¹²⁷ This is unlikely to suggest that rape rates in Poland are uncommonly low; according to the EU Fundamental Rights Agency (FRA), 10-19% of Polish women have experienced sexual and/or physical violence since the age of 15.¹²⁸ This low reporting level thus is more likely to point to issues inherent in the prosecution of rape and the perception of sexual violence in Poland. Exceedingly burdensome procedures, an inadequate system of compensation for victims, and the stigma associated with sexual assault could be alternative explanations for such low reporting figures.¹²⁹

On the subject of victim compensation and protection, the EWL notes that in spite of its obligations under the Istanbul Convention, Poland has few victim support structures in place and no basic standards of training for police and prosecution in working with sexual assault cases.¹³⁰ In 2013, the Sejm (the Polish Parliament) passed provisions that were designed to protect victims from retraumatisation: a victim could henceforth be interrogated only once, in the presence of a psychologist, and the interview would be recorded.¹³¹ Though centring the needs of the victim is an important step, Poland remains far from the standards outlined in the Istanbul Convention.

¹²⁴ EIGE, 'Legal Definitions in the EU'

¹²⁵ European Women's Lobby, *Barometer on Rape in Europe, National Analysis: Poland*, (Brussels: EWL, 2013), p.1

¹²⁶ Ibid.

¹²⁷ Ibid., p.2

¹²⁸ FRA, p.18. The FRA notes that this figure is likely to be a conservative estimate.

¹²⁹ For more on these issues, see EWL, *Barometer on Rape: Poland*, p.2 and GenPol, *Can Education Stop Abuse? Comprehensive Sexuality Education Against Gender-Based Violence*, (Cambridge: GenPol, 2018)

¹³⁰ EWL, *Barometer on Rape: Poland*, p.2

¹³¹ Ibid.

Poland includes rape in the chapter of its Criminal Code dealing with sexual liberty and decency, not the chapter on “Offences Against Life and Health.” The EWL posits that this may suggest rape is a violation of social and cultural norms in Poland, and not seen as a threat to women’s life and health.¹³² Although Poland’s legislation links rape to “decency”, the relevant chapter also treats sexual liberty. The issue would seem to be more that Poland treats sexual liberty and decency as part of the same legislative family, and less that rape is included in this chapter. As made clear in the international instruments discussed in Part One supra, sexual liberty and autonomy should be disassociated from societal moral judgments. This is especially pertinent in Poland, where societal values remain heavily influenced by religious conservatism.¹³³

¹³² Ibid., p.1

¹³³ For more on this, see GenPol, Chapter 1.

Conclusions

The EU comprises 27 EU Member States, 21 of which have ratified the Istanbul Convention and all of which are contracting member states of the ECHR. Few have national rape legislation that complies with the international standards outlined in comprehensive and important legal instruments, despite their obligations under both the Istanbul Convention and the ECtHR's binding interpretations of the ECHR.

One of the most important sticking points is the definition of rape. As outlined in Part One, comprehensive international guidelines and treaties call for consent-based standards in rape and sexual assault legislation, yet only seven EU Member States have legislation that defines rape based on consent. International instruments also outline the need for tailored victim support services, yet not all Member States have adequate provision for victims. Specifically, the Istanbul Convention requires rape to be defined as a violation of bodily autonomy, yet the language of morality and decency persists in some countries' definitions of the crime. Europe has work to do.

Importantly, there are some examples of good practice among Member States. Sweden's new approach is one to watch; victim-centred and responsive to civil society advocacy, Sweden's model will show in the years to come how a consent-based approach can be implemented in a civil law jurisdiction. As regards common law jurisdictions, the UK provides a good legal standard, despite not having ratified the Istanbul Convention.

Having an affirmative consent-based standard for rape is critical. This standard provides a threshold for rape that responds to trends in contemporary moral thinking on sexual violence. Introducing elements of force, violence, threat, or power into the definition of rape creates room for courts to misinterpret these elements, and compels victims to show resistance to such force or threats in order to carry the burden of her case. Force, violence, threat, and abuse of power can be *evidence* of non-consent, but should not be per se elements of rape. Indeed, the ECtHR has noted that "there is a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse [and] the evolution of societies towards effective equality and respect for each individual's sexual autonomy"¹³⁴ – let us embrace this trend. Consent is at the heart of what constitutes rape; consent should be the baseline definition for rape.

To achieve this, countries must bring their national legislation in line with the instruments that bind them: treaties such as the Istanbul Convention, and international tribunals such as the ECtHR. Another path to achieving this goal is through a legally binding instrument at EU level. The EU has recognised its current lack of authority in this domain, which suggests the need for corrective action:

"At the moment, the EU policy against violence against women at large is based on Council conclusions, resolutions of the Parliament, and Commission strategies. However, none of these documents are legal instruments which bind the Member States to make a change for women."¹³⁵

It must not be forgotten that legislation is but a step in effectively tackling violence against women. There is gap between what the law requires, and how police and prosecutors choose to go forward. The road from first reporting a rape to seeing a conviction is long and complex in all countries, with many stages at which a case can be abandoned or fall apart. With respect to legal definitions, the law might not need a showing of force or resistance on the part of the victim but prosecutors typically won't choose to go forward in the absence of these elements. Legislation is important, but a multifaceted approach to criminal justice in this field is essential to tackling the endemic levels of rape and violence against women in Europe.

¹³⁴ *M.C. v. Bulgaria*, ¶163

¹³⁵ European Parliament DG IPOL, p.41

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