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Gert Vermeulen, Nina Peršak
& Stéphanie De Coensel (Eds.)

Researching the boundaries of **sexual integrity,**
gender violence and image-based abuse

Revue Internationale de Droit Pénal
International Review of Penal Law
Revista internacional de Derecho Penal
Международное обозрение уголовного права
刑事法律国际评论
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Internationale Revue für Strafrecht



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DEFINING RAPE IN FRENCH-SPEAKING EUROPEAN COUNTRIES: WITH AND WITHOUT A REFORM

*Salomé Lannier, Justine Arnal, Elise Delhaise and Camille Perrier Depeursinge**

Abstract

Despite the Council of Europe's Convention on preventing and combating violence against women and domestic violence, the numerous reforms of sexual offences in Europe, and the European Union's Proposal for a Directive on the same subject, there seems to be no European consensus on the definition of rape. Nevertheless, all French-speaking European countries have recently amended their Criminal Codes on the subject. Building on the European debates, this paper offers a systematic analysis of the evolution of criminal law on the definition of rape, by comparing the legal frameworks of Belgium, France, Luxembourg and Switzerland. Although there are common trends in the broadening of sexual acts and the inclusion of consent as a core element of rape, differences and challenges remain.

1 Introduction

On 8 March 2022, International Women's Rights Day, the European Commission published a Proposal for a Directive on combating violence against women and domestic violence.¹ Although limited to violence against women, its Art. 5 provided a harmonised definition of rape as 'any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object'. After four rounds of negotiations, several

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¹ COM(2022) 105 final.

countries refused this article. Notably, among these countries were France and Germany,² both EU member states with the highest number of cases of rape in 2019.³ These countries argued a lack of EU competence; however, this proposal stems from a specific context in which European countries are reforming their legal systems to include the notion of consent (or assimilation) to the offence of rape – such as Germany –⁴ while others refuse to do so – such as France,⁵ or at least until the President’s position in the media from 8 March 2024.⁶ As a result, the offence of rape is not harmonised in the adopted version of the Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence.

In fact, many European countries are required by supranational law to harmonise this offence by recognising rape as a non-consensual sexual act. In 2003, the European Court of Human Rights (ECHR) held that ‘States have a positive obligation [...] to enact criminal-law provisions effectively punishing rape’,⁷ defined as ‘any non-consensual sexual act, including in the absence of physical resistance by the victim’.⁸ In 2011, the Council of Europe adopted the Convention on preventing and combating violence against women and domestic violence, known as the Istanbul Convention. Its Art. 36.1.a similarly defines rape as ‘engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object’.

Contrary to France’s traditional refusal to introduce such a definition of rape, all European countries sharing the same legal language – French – have recently amended their criminal codes. As the Belgian reform explicitly emphasises, these changes reflect the contemporary standards and norms in that area.⁹ Thus, this paper chooses not to address

² Clara Bauer-Babef, ‘France, Germany, Netherlands Side with Conservative EU Countries in Split over Rape Definition’ (*Euractiv*, 16 January 2024) <<https://www.euractiv.com/section/health-consumers/news/france-germany-netherlands-side-with-conservative-eu-countries-in-split-over-rape-definition/>> accessed 26 February 2024.

³ Eurostat, ‘Intentional Homicide and Sexual Offences by Legal Status and Sex of the Person Involved - Number and Rate for the Relevant Sex Group’ (*Eurostat*, 23 April 2024) <https://ec.europa.eu/eurostat/databrowser/product/page/CRIM_HOM_SOFF> accessed 14 May 2024.

⁴ Tatjana Hörnle, ‘The New German Law on Sexual Assault and Sexual Harassment’ (2017) 18 *German Law Journal* 1309.

⁵ Virginie Malingre, ‘La France refuse que la Commission européenne intervienne dans la définition du viol’ *Le Monde* (15 November 2023) <https://www.lemonde.fr/international/article/2023/11/15/emmanuel-macron-refuse-que-bruxelles-intervienne-dans-la-definition-du-viol_6200220_3210.html> accessed 21 November 2023.

⁶ *Le Monde* avec AFP, ‘Emmanuel Macron dit vouloir inscrire la notion de consentement en matière de viol dans le droit français’ *Le Monde* (13 March 2024) <https://www.lemonde.fr/societe/article/2024/03/13/emmanuel-macron-dit-vouloir-inscrire-la-notion-de-consentement-en-matiere-de-viol-dans-le-droit-francais_6221813_3224.html> accessed 14 March 2024.

⁷ *M.c v Bulgaria* App no 39272/98 (ECHR, 4 March 2004), para 153.

⁸ *ibid* para 166.

⁹ *Projet de loi modifiant le Code pénal en ce qui concerne le droit pénal sexuel 2021* [55/2141–001] 3.

the issue of the EU's competence to harmonise rape, but to focus on a comparative analysis of the evolution of the intentional offence of rape against adults in Belgium,¹⁰ France,¹¹ Luxembourg,¹² and Switzerland.¹³ These four countries are all parties to both the European Convention on Human Rights and the Istanbul Convention. There is very little English-language literature on rape reform in Europe,¹⁴ let alone in French-speaking countries.

This paper addresses this research gap, and sheds light on the debate on European legal developments on the definition of rape, especially since the #MeToo movement.¹⁵ The authors will draw on legislation, case law, and literature to underline the evolution of these legal systems and to highlight criticisms and comparisons. Within a common European legal culture facing similar challenges such as gender-based violence, comparative law 'disengage[s] from the limits of national legal systems [...] that restrict the acquisition of the knowledge of law'.¹⁶ To compare the selected frameworks, the authors will focus on the legal rights protected, the sexual acts criminalised and the role of consent or coercive means in defining rape.

¹⁰ Art. 417/11 of the Belgian Criminal Code, following the Law amending the Criminal Code with regard to sexual criminal law of 30 March 2022. In Belgium, rape is defined as 'any act which consists of or comprises sexual penetration of any kind and by any means whatsoever, committed on a person or with the assistance of a person who does not consent'.

¹¹ Art. 222-23 of the French Criminal Code, following Law no. 2018-703 of 3 August 2018 strengthening the fight against sexual and gender-based violence and Law no. 2021-478 of 21 April 2021 to protect minors from sexual offences and incest. In France, rape is defined as 'any act of sexual penetration of any kind whatsoever or any oral-genital act committed against another person or against the perpetrator by violence, coercion, threat or surprise'.

¹² Art. 375 of the Luxembourg Criminal Code, following Law of 7 August 2023 amending: 1° the Criminal Code; 2° the Code of Criminal Procedure; with a view to strengthening the means of combating the sexual abuse and sexual exploitation of minors. In Luxembourg, rape is defined as 'any act of sexual penetration, of any nature whatsoever and by any means whatsoever, whether vaginal, anal or oral, using in particular the sex, an object or a finger, committed on a person who does not consent to it or with the help of a person who does not consent to it, including when the person is induced to commit the act on their own body or on the body of another person, in particular by means of violence or threats, deception, trickery or surprise, or by taking advantage of a person who is incapable of giving free consent or offering resistance'.

¹³ Art. 190 of the new Swiss Criminal Code (hereinafter, SCC), following the Federal Act of 16 June 2023 on the revision of the law on sexual offences, entering in force on 1 July 2024. In Switzerland, any person commits rape when they, 'against a person's will, performs on them or causes them to perform a sexual act or a similar act involving penetration of the body or takes advantage of a person's state of shock to this end'; or when they, 'in particular by threatening or using violence against a person, by exerting psychological pressure on them or by putting them in no state to resist, forces them to commit or undergo a sexual act or a similar act involving penetration of the body'.

¹⁴ With the major exception of Tatjana Hörnle (ed), *Sexual Assault: Law Reform in a Comparative Perspective* (Oxford University Press 2023).

¹⁵ Tatjana Hörnle, 'Evaluating #MeToo: The Perspective of Criminal Law Theory' (2021) 22 *German Law Journal* 833.

¹⁶ Jaakko Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015) 59.

2 Criminalisation of rape: protected legal right

To begin with, every criminal offence protects a core societal value: criminal law aims to prohibit the worst illegal behaviour. The legal frameworks examined protect similar rights, namely sexual integrity and sexual freedom, although they are defined differently.

The distinction between the two concepts is made very clear by the amendment to the Swiss Criminal Code. Previously, rape protected sexual self-determination or sexual freedom,¹⁷ ie, the right of a person to decide freely with whom, when, under what conditions and how to have sexual relations.¹⁸ This right is violated when the perpetrator uses coercion to suppress the victim's ability to make autonomous decisions about their sexual sphere.¹⁹ The new version of rape, without coercion, also enshrines sexual integrity,²⁰ ie the respect for a person's wishes in sexual matters:²¹ it is violated as soon as the perpetrator disregards the victim's will.²² Thus, the introduction of the legal concept of sexual integrity widens the scope of rape.²³

On the contrary, the Belgian and Luxembourg frameworks do not provide for a clear distinction between both concepts. The new Belgian Criminal Code aims to protect both the right to sexual self-determination and sexual integrity. It implies the freedom to choose whether or not to engage in certain sexual activities, with the associated protection of sexual integrity.²⁴ In Luxembourg, despite the reform, rape is still an offence against family order and public morality, and not a crime against the person. Before the reform of 2023, offences related to non-consensual sexual acts were qualified as indecent assaults or rape, and thus referred to a moral understanding of acceptable or unacceptable non-consensual sexual acts based on collective morality.²⁵ Since the reform, these offences are referred to as, on the one side, an offence against sexual integrity or, on the other side, an offence of rape. Despite this binary division, rape can also be seen as a violation of sexual integrity. Thus, the reform missed an opportunity to clarify the protected legal right. Based on Belgian case law, the Luxembourg law equates sexual integrity with sexual self-determination.

¹⁷ Commission des affaires juridiques du Conseil des Etats, *Harmonisation Des Peines et Adaptation Du Droit Pénal Accessoire Au Nouveau Droit Des Sanctions, Projet 3: Loi Fédérale Portant Révision Du Droit Pénal En Matière Sexuelle* (2022) 29.

¹⁸ Felix Bommer, 'Vergewaltigung Und Sexuelle Nötigung – Neuerungen Der Revision 2023' (2024) 1 *Schweizerische Zeitschrift für Strafrecht/Revue Pénale Suisse* 58, 73.

¹⁹ Commission des affaires juridiques du Conseil des Etats (n 17) 29.

²⁰ Bommer (n 18) 73.

²¹ Commission des affaires juridiques du Conseil des Etats (n 17) 38.

²² Bommer (n 18) 74; Véronique Jaquier and Camille Montavon, 'Rapports Sexuels Non Consentis En Droit Pénal Suisse : Pourquoi Une Telle « résistance » ? 2e Partie' (2023) 2 *Schweizerische Zeitschrift für Strafrecht/Revue Pénale Suisse* 178, 180.

²³ Bommer (n 18) 74.

²⁴ *Projet de loi modifiant le Code pénal en ce qui concerne le droit pénal sexuel* (n 9) 9.

²⁵ [2019] *Cour d'appel de Luxembourg* 28/19.

At the intersection of these two categories, rape in France is a violation of physical integrity but above all of sexual freedom. It was this freedom that led the judiciary to accept the criminalisation of marital rape in 1990.²⁶ In the absence of a legal or judicial definition, sexual freedom is defined in the literature as ‘the individual’s ability to act erotically without constraint’.²⁷

3 Qualifying rape: defining sexual acts

To qualify rape, it is necessary to specify the purpose of the act (3.1), the specific acts criminalised (3.2), and the possible influence of the gender and behaviour of the victim and offender on the characterisation of the offence (3.3).

3.1 Sexual purpose of the act

The selected legal frameworks provide that acts must have a sexual purpose in order to be classified as rape.

The concept of sexual purpose is largely open to interpretation, which has not escaped the attention of the Belgian legislator: in this country, for penetration to be classified as sexual, it must be an act that a reasonable person could describe as a sexual experience and as an attack on their sexual integrity.²⁸ For example, one judgment held that breastfeeding should not be considered rape, unless the context of the facts shows that the child was used for sexual purposes.²⁹ In Switzerland, too, an act violates the sexual integrity of the victim only if it is of a sexual nature. An act of a sexual nature is defined as a ‘bodily activity on oneself or on another which is intended for the arousal or sexual pleasure of at least one of the participants’.³⁰ Despite this definition, the Federal Court accepts that acts which, from the point of view of a neutral observer, have an obvious sexual connotation always fulfil the objective conditions for an offence against sexual integrity, regardless of the perpetrator’s motives.³¹ Penetration of a body orifice is generally an act with an obvious sexual connotation, so that classification as rape should often not be difficult from this point of view. However, case law has not yet clarified how to deal with cases of forced penetration that are not imposed for sexual purposes, such as a gynaecological examination in which a doctor inserts a medical instrument into a patient’s vagina to carry out an examination despite the patient’s refusal. In France, a sexual purpose also seems to be required by courts, although it is not requested by the law.³² The High Court

²⁶ [1990] Cour de Cassation française 90-83.786.

²⁷ Thomas Besse, ‘Les Agressions Sexuelles Dans La Sphère Conjugale, Casse-Tête de Cupidon à l’adresse Du Juge Répressif’ (2018) 1 *Revue de science criminelle et de droit pénal comparé* 21, 23.

²⁸ *Projet de loi modifiant le Code pénal en ce qui concerne le droit pénal sexuel.*

²⁹ [2014] Cour de Cassation belge (2014) 7–8 *Revue de Droit Pénal et de Criminologie* 803.

³⁰ [2018] Tribunal fédéral TF 6B_1122/2018 para 3.2; TF 6B_1019/2018 para 3.1.3.

³¹ [1999] Tribunal fédéral ATF 125 IV 58 para 3b; [2020] Tribunal fédéral TF 6B_123/2020 para 6.3; [2018] Tribunal fédéral TF 6B_1122/2018 para 3.2.; [2007] Tribunal fédéral TF 6B_820/2007 para 3.2; [2011] Tribunal fédéral TF 6B_253/2011 para 6.

³² Michèle-Laure Rassat, ‘Fasc. 20: Agressions Sexuelles’ [2023] *JurisClasseur Pénal Code* para 28.

has a restrictive definition of the sexual nature of an act: for example, it refused to classify forced fellatio with a dildo as rape,³³ a decision that has been criticised in the literature as ‘the object introduced was clearly sexual in purpose’.³⁴ In Luxembourg, a court considered that sexual connotations depend ‘on the state of the collective consciousness’.³⁵

3.2 Acts covered

Historically, studied legislations have limited the offence of rape to penetration of the vagina by the penis.³⁶ In all selected countries, the definition of rape has recently been extended to include other forms of penetration.

In this sense, in Luxembourg, since 2011,³⁷ rape is ‘any act of sexual penetration of any kind and by any means whatsoever’. Since 2023, the penetrated element explicitly includes the vagina, the anus, or the mouth, codifying a 1998 decision.³⁸ However, the law does not indicate if this list is exhaustive or not, leaving other situations in question, such as penetration of the urethra. Regarding the penetrative element, the law explicitly provides for a non-exhaustive list, including ‘sex, object or finger’.

Likewise, under Swiss law as of 1 July 2024, penetration is the central element of rape. The offence is now characterised by ‘sexual intercourse’ (ie coitus) or a ‘similar act involving penetration of the body’.³⁹ Penetration, directed at any orifice of the body, can be by the penis, another part of the body (eg fingers, hand, tongue) or an object.⁴⁰ Thus, any sexual act involving penetration of the body can be covered by Art. 190 nSCC according to the legislator.⁴¹ Notwithstanding the foregoing, some legal scholars believe that only

³³ [2007] Cour de Cassation française 06-89.543.

³⁴ Rassat (n 32) para 30.

³⁵ Sam Tanson, *Projet de loi n°7949 renforçant les moyens de lutte contre les abus sexuels et l’exploitation sexuelle des mineurs portant transposition de la directive 2011/93/UE relative à la lutte contre les abus sexuels et l’exploitation sexuelle des enfants, ainsi que la pédopornographie, et portant modification 1° du Code pénal et, 2° du Code de procédure pénale 2022* 13.

³⁶ In France, see Audrey Darsonville, ‘Viol – Éléments Constitutifs Du Viol’ [2022] *Répertoire de droit pénal et de procédure pénale* paras 15–20. In Switzerland, see [1997] Tribunal fédéral ATF 123 IV 49 para 2.e; Andreas Donatsch, *Strafrecht III* (11th edn, Schulthess Verlag 2018) 541; [2011] Tribunal fédéral 6B_311/2011 para. 5.2 and 2.2; Bernard Corboz, *Les Infractions En Droit Suisse* (3e edn, Stämpfli 2010) Art. 190 N 4. In Luxembourg, under the old Criminal Code, rape was ‘illicit conjunction of the sexes by partial or complete intromission of the male member’, [1993] Tribunal d’arrondissement de Luxembourg 1214/93.

³⁷ Law of 16 July 2011: 1. approving a) the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, opened for signature in Lanzarote on 25-26 October 2007 b) the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; 2. amendments to certain articles of the Criminal Code and the Code of Criminal Investigation

³⁸ [1998] Cour d’appel de Luxembourg 5/98.

³⁹ Loi fédérale portant révision du droit pénal en matière sexuelle (FF 2023 1521).

⁴⁰ Commission des affaires juridiques du Conseil des Etats (n 17) 39.

⁴¹ Camille Perrier Depeursinge and Justine Arnal, ‘Révision du viol en droit suisse : Dix questions suscitées par la modification de l’art. 190 CP’ (2024) 1 *Schweizerische Zeitschrift für Strafrecht/Revue Pénale Suisse* 21, 23.

penetration of an intensity comparable to coitus can be classified as rape, which would not be the case, for example, of digital penetration of the vagina.⁴² There is a consensus that if the act does not involve penetration, as in the case of masturbation of the penis or cunnilingus, or involves forced lingual kissing, which is of lowest intensity, it is sexual assault (Art. 189 nSCC).⁴³

In Belgium, rape is now defined as ‘any act that consists of sexual penetration of any kind and by any means whatsoever’. The term ‘act of sexual penetration’ must be interpreted broadly, to allow the concept to evolve. Many acts can be considered as ‘acts of sexual penetration’, such as incomplete penetration,⁴⁴ forced fellatio⁴⁵ or even forced lingual kissing.⁴⁶ The terms ‘of any nature whatsoever’ mean that penetration can involve the vagina as well as any other orifice that can be penetrated (anal or oral intercourse) and ‘in any manner whatsoever’ means that penetration can be achieved by the perpetrator using their genitals, but also other parts of the body (fingers) or specific or non-specific instruments.⁴⁷

In France, rape is defined as ‘any act of sexual penetration of any kind’, and, since 2021, ‘any act of oral-genital intercourse’, in particular to include cunnilingus. This addition results from the refusal of the High Court to classify as rape the voluntary insertion of the tongue into the vagina without sufficient penetration.⁴⁸ The jurisprudence has thus accepted as rape acts of vaginal or anal penetration by sexual intercourse, fellatio, cunnilingus or vaginal penetration by objects.⁴⁹

France seems to be the only country where external cunnilingus can be classified as rape. Otherwise, all the countries surveyed limit rape to acts involving penetration.

⁴² Bommer (n 18) 65.

⁴³ Commission des affaires juridiques du Conseil des Etats (n 17) 39.

⁴⁴ Projet de loi modifiant le Code pénal en ce qui concerne le droit pénal sexuel (n 9) 29.

⁴⁵ [2015] Cour d’Appel Bruxelles (14e chambre) (2018) 12 Revue de Jurisprudence de Liège, Mons et Bruxelles 540; (n 29); [2014] Cour de Cassation belge RG n° P 13 1869; [2003] Cour d’Appel Liège (4e chambre) (2018) 12 Revue de Jurisprudence de Liège, Mons et Bruxelles 540.

⁴⁶ Thomas Henrion, ‘Le Viol et l’atteinte à l’intégrité Sexuelle’ in Thierry Bayet and Nathalie Colette-Bassecqz (eds), *Droit pénal sexuel: nouvelles dispositions et approche pratique des acteurs de terrain* (Anthemis 2023) 64; Thomas Henrion, ‘Le Viol et l’atteinte à l’intégrité Sexuelle’ in Pauline Colson (ed), *Actualités en matière de droit pénal sexuel* (Anthemis 2022) 21; [2022] Cour correctionnelle de Bruxelles 2573/2022, [2022] Cour correctionnelle de Bruxelles 182/2022; [2019] Tribunal correctionnel de Hainaut (2020) 1 Revue de Droit Pénal et de Criminologie 196, quoted by Anne Karcher and Olivier Bastyns, ‘L’atteinte à l’intégrité Sexuelle et Le Viol’ in Anthony Rizzo (ed), *Le nouveau droit pénal sexuel* (1st edn, Larcier 2022).

⁴⁷ Henrion, ‘Le Viol et l’atteinte à l’intégrité Sexuelle’ (n 46) 63; Henrion, ‘Le Viol et l’atteinte à l’intégrité Sexuelle’ (n 46) 19.

⁴⁸ [2020] Cour de cassation française 20-83.273.

⁴⁹ Darsonville (n 36) para 15.

3.3 Perpetrators and victims

Traditionally, rape has been limited to sexual penetration of the victim by the perpetrator, and in some jurisdictions even to sexual penetration of a *female* victim by a *male* perpetrator.

For example, in France, until 2018, only the penetration of the victim's body could be qualified as rape. Such a narrow understanding disqualified rape in case of sexual acts forced by a female perpetrator on a male victim⁵⁰ or forced fellatio committed by the victim on the perpetrator.⁵¹ Also, in Luxembourg, before 2023, rape was only a sexual penetration on the victim. The previous Swiss legislation was even more restrictive, providing that rape only occurred when a male perpetrator forced⁵² a female victim⁵³ to have coitus.

The 2018 French reform specifies that the offence of rape now includes any sexual act committed on the victim or on the perpetrator. On the contrary, a non-consensual sexual act forced to be committed on a third party or by the victim on their own body cannot be qualified as rape but as sexual assault, since 2021.⁵⁴ There is no case law yet on this new version of the provision.

In Switzerland, the new Code provides that anyone can be a victim or a perpetrator of rape, regardless of their gender.⁵⁵ Furthermore, it doesn't matter whether the victim penetrates the perpetrator's body or vice versa.⁵⁶

In Luxembourg, the reform extends rape to any sexual penetration committed 'with the help of a person who does not consent, including when the person is led to commit the act on their own body or on the body of a third party'. This definition means that the penetration can be of the victim's body, of the perpetrator's body or of a third party's body.

In Belgium, the offence of rape can also be applied in cases of penetration of the body of either the perpetrator or the victim, as in the case of forced fellatio⁵⁷ or vaginal penetration forced by a man or a woman.⁵⁸ There is no gender restriction: a man can be a victim as well as a woman, heterosexual and homosexual sexual relations⁵⁹ are included. Then, the element 'an act committed [...] with the assistance of a person' is new in the definition

⁵⁰ [1998] Cour de Cassation française 98-83.843.

⁵¹ [1997] Cour de Cassation française 97-85.455; [2001] Cour de Cassation française 01-84.024.

⁵² Donatsch (n 36) 540.

⁵³ Günther Stratenwerth, Jenny Guide and Felix Bommer, *Schweizerisches Strafrecht, Besonderer Teil* (8e edn, Stämpfli 2022) 175 N 4.

⁵⁴ Art. 222-22-2 of the French Criminal Code.

⁵⁵ Perrier Depeursinge and Arnal (n 41) 23.

⁵⁶ Commission des affaires juridiques du Conseil des Etats (n 17) 39.

⁵⁷ (n 29); (n 45).

⁵⁸ (n 45).

⁵⁹ Henrion, 'Le Viol et l'atteinte à l'intégrité Sexuelle' (n 46) 62.

of the rape and means that the victim is used by the perpetrator as an instrument (for example, in order to penetrate oneself or to penetrate someone else). This definition therefore includes the offence of rape at a distance.⁶⁰

All laws surveyed criminalise rape between stable partners, such as spouses,⁶¹ and do not anymore consider a specific gender for perpetrators and victims.

4 Qualifying rape: the role of consent and coercive means

Sexual acts must convey a specific illegality to be criminalised as rape. Historically, rape was defined as a coercive offence: the simple act of overriding a victim's wish not to have sexual intercourse, without using any particular means to do so, did not constitute an offence. With the exception of France, all the countries surveyed have amended their legislation to place consent at the core of the offence. In this context, we will describe the role and effect of coercion (4.1) and consent (4.2) in each legislation.

4.1 Coercion or consent

Is coercion a constituent element of rape, a circumstance to prove lack of consent or simply an aggravating circumstance?

In France, coercion is a constituent element of rape: the sexual act must be committed 'by force, coercion, threat or surprise'. The literature struggles to draw the line between these different elements. According to one author,

violence refers to physical coercion exerted on the victim to obtain the desired sexual behaviour. Coercion is traditionally considered to be either physical or moral. Physical coercion is the act of exerting physical pressure to get what you want. In other words, it is the same as violence. Moral coercion, on the other hand, consists of threatening someone with harm [...]. In this case, it overlaps with [... threat].⁶²

In general, the High Court refuses to assess the constituent elements and refers to the interpretation of first- and second-instance judges.⁶³ Only the concept of surprise has been defined by the High Court, as the use of a stratagem by the perpetrator to surprise the victim's consent,⁶⁴ according to the literature, prior to the sexual act⁶⁵. Even then, the concept of surprise has been extended to other situations not provided for in the law – such as the abuse of position of vulnerability. This has been the case when penetration is

⁶⁰ [2021] Cour correctionnelle de Anvers 2021/4095; *Projet de loi modifiant le Code pénal en ce qui concerne le droit pénal sexuel* (n 9) 27.

⁶¹ France, see above section 2; Luxembourg, [1994] Cour d'appel de Luxembourg 223/94 V; Belgium, [1979] Cour d'appel de Bruxelles F-19790621-1 (89/3060); Art. 190 of Swiss Criminal Code.

⁶² Rassat (n 32) para 8.

⁶³ See for instance [2018] Cour de cassation française 17-87.133.

⁶⁴ [2019] Cour de cassation française 18-82.833.

⁶⁵ Fabrice Gauvin, 'Agression Sexuelle - Viol Par Surprise : L'émule de Zeus' [2019] *Droit pénal* 42, 42.

carried out by a health professional without medical justification⁶⁶, or on people who are ‘depressed, addicted to alcohol and on medication prescribed by their psychiatrist’.⁶⁷ Despite the lack of a clear definition of these constituent elements, the High Court refused to refer the assessment of the constitutionality of the provision to the Constitutional Council.⁶⁸ As a result of this exhaustive list of constituent elements, the qualification of rape for non-consensual sexual acts largely depends on the interpretation of the courts, which may be biased by stereotypes.⁶⁹

In Switzerland as well, the previous definition of rape required that the perpetrator uses a means of coercion in the form of threats, violence, or psychological pressure, or that he puts the victim in a state of incapacity to resist, to achieve his aims.⁷⁰ The case law continues to classify rape as a ‘violent’ offence,⁷¹ which requires that the means of coercion reach a certain level of intensity.⁷² Otherwise, even if the victim does not want to have sexual intercourse, the offence is not qualified.⁷³ Furthermore, although there is no such requirement in the text, the courts infer from the element of coercion an obligation on the victim to resist to the best of her ability.⁷⁴ To date, the majority of sexual assaults are not classified as rape if there is no evidence of coercion or resistance.⁷⁵ By removing coercion from the basic form of rape, the legislature sought to remedy the inadequacy of the narrow definition of rape and to fill the resulting gaps in punishment.⁷⁶ Thus, under the new law, coercion is no longer the central constituent element, but merely an aggravating circumstance.⁷⁷

⁶⁶ [2017] Cour de cassation française 16-85.186.

⁶⁷ [2010] Cour de cassation française 09-87.533. However, the literature considers too far from the notion of surprise the situation of drugged or drunk victims, Julien Portier and François Sobry, ‘L’importance d’être Consentant : Les Enjeux d’une Exigence de Consentement Sexuel Explicite En Droit Pénal Français’ [2019] *Actualité juridique Pénal* 431, 432.

⁶⁸ [2012] Cour de cassation française 12-90.052; [2013] Cour de cassation française 13-83.409; [2013] Cour de cassation française 13-90.021.

⁶⁹ Rosie Cowan, ‘Asking for It: How Rape Myths Can Prejudice Trials and Potential Solutions’ in Rachel Killeen, Eithne Dowds and Anne-Marie McAlinden (eds), *Sexual Violence on Trial* (1st edn, Routledge 2021).

⁷⁰ José Hurtado Pozo, *Droit Pénal, Partie Spéciale* (Schulthess Verlag 2009) 884–885 N 2968.

⁷¹ [2020] Tribunal fédéral 6B_1498/2020 para 2.2.

⁷² [2005] Tribunal fédéral ATF 131 IV 167 para 3.1.

⁷³ Nora Scheidegger, *Das Sexualstrafrecht Der Schweiz: Grundlagen Und Reformbedarf* (Stämpfli 2018) 170 N 312; Donatsch (n 36) 533; [2012] Tribunal fédéral 6B_710/2012 para 3.1; [2017] Tribunal fédéral 6B_1306/2017 para 2.1.2.

⁷⁴ [2012] Tribunal fédéral ATF 139 IV 48 para 4; [2005] Tribunal fédéral ATF 131 IV 64 para 3.1.

⁷⁵ Jaquier and Montavon (n 22) 226; Camille Perrier Depeursinge and Mathilde Boyer, ‘Infractions Contre l’intégrité Sexuelle: Jurisprudence Récente, Difficultés Pratiques et Modifications Législatives En Cours’, in Camille Perrier Depeursinge and Nathalie Dongois (eds) *Infractions contre l’intégrité sexuelle* (Stämpfli 2022) 7 ss.

⁷⁶ Commission des affaires juridiques du Conseil des Etats (n 17) 22–23; Jaquier and Montavon (n 22) 180.

⁷⁷ Commission des affaires juridiques du Conseil des Etats (n 17) 28.

In Belgian and Luxembourg law, coercion is not a constituent element of rape, but it can be used to prove that the victim did not consent to the sexual act committed.

Pursuant to Art. 417/5 of the Belgian Criminal Code, there is no consent if the perpetrator uses the following means of coercion: threat (causing the victim to fear harm if they resists the will of the perpetrator), physical or psychological violence (the perpetrator has forced the victim to perform their acts), coercion, surprise (for example, rape on a victim working on a computer)⁷⁸, trickery (for example, rape on a sleeping victim)⁷⁹ or any other punishable behaviour.⁸⁰ In Luxembourg too, the use of coercion by the perpetrator proves that the victim did not consent to the sexual activity that took place. The law gives a non-exhaustive list of circumstances that may constitute lack of consent: force, threats – which, since 2023, no longer need to be serious – deception, trickery or surprise, or by taking advantage of a person who is unable to give free consent or to resist. According to case law, violence includes physical and material coercion of the victim and must be serious enough to paralyse the victim's resistance,⁸¹ for example by restraint.⁸² The seriousness of the threats required to prove lack of consent will still have to be interpreted by the courts, as it was previously requested a serious fear of exposing oneself or one's close relatives to substantial and present harm.⁸³ Deception or trickery could, for example, be used to convict a person of rape of a sleeping person.⁸⁴ Finally, the abuse of a person incapable of giving free consent is defined by courts as 'both the state of a person who lacks discernment (ie a person incapable of giving consent) and that of a person who has such a discernment but whose consent has been vitiated by force or threats (a person who is incapable of giving free consent)'.⁸⁵ It led to the condemnation of the rape of an intoxicated person⁸⁶ or of a minor by an ascendant relative.⁸⁷

4.2 Defining consent

Consent tends to become the central element of the offence of rape in most jurisdictions surveyed, with the notable exception of France.

As a matter of fact, the French definition of rape makes no mention of consent. Therefore, according to one author, the definition is based on a presumption of consent, which must be rebutted by proving one of the constituent elements, ie the use of a means of coercion.⁸⁸

⁷⁸ [2019] Cour de Cassation belge RGP190873F.

⁷⁹ Ibid.

⁸⁰ Henrion, 'Le Viol et l'atteinte à l'intégrité Sexuelle' (n 46) 53–54; Henrion, 'Le Viol et l'atteinte à l'intégrité Sexuelle' (n 46) 10–11.

⁸¹ [2008] Cour d'appel de Luxembourg 341/08 V.

⁸² [2017] Cour de cassation de Luxembourg 05/2017.

⁸³ As interpreted by first instance courts, see for example, [2005] Cour d'appel de Luxembourg 157/05 V.

⁸⁴ [2005] Cour d'appel de Luxembourg 532/05 V.

⁸⁵ [2007] Cour d'appel de Luxembourg 13/07.

⁸⁶ [2023] Tribunal d'arrondissement de Luxembourg 2158/2023.

⁸⁷ [2018] Cour de cassation de Luxembourg 71/2018.

⁸⁸ Catherine Le Magueresse, *Les pièges du consentement: pour une redéfinition pénale du consentement sexuel* (Éditions iXe 2021) 50.

The list of means is equated in most of the literature to the lack of consent of the victim.⁸⁹ According to some authors, the list covers ‘every conceivable case of lack of consent or excessively vitiated consent’.⁹⁰ On the other hand, others consider the list to be incomplete in order to criminalise all situations of non-consensual sexual activity.⁹¹

In Luxembourg, the notion of consent has been introduced into the Criminal Code since 1992. According to case law, consent must be given beforehand by a person who is free and mentally capable of assessing the scope of the agreement thus given.⁹² Consent is given for a specific person and cannot be general.⁹³ With the 2011 reform, the notion of consent becomes the main criterion: rape is a sexual act ‘committed on a person who does not consent’. In 2023, the legislature introduced a new Art. 372-1 to define the concept of consent. It states that ‘consent to one sexual act shall be assessed in the light of the circumstances of the case. It cannot be inferred from the victim’s lack of resistance. Consent may be withdrawn at any time before or during the sexual act’. Despite this addition to the law, proving lack of consent will still be a challenge for courts. For example, while the law requires the assessment of contextual consent, a decision of a Luxembourg Court of First instance in 2023 requires the assessment of the victim’s consent at the moment of the sexual act, which may overlook previous elements.⁹⁴ The same decision led to the condemnation of certain sexual acts against certain victims, and not others against another victim: according to the judges, consent must be presumed in absence of real indication of refusal and in the absence of means that put the victim in no position to resist.

In Switzerland, although there was broad agreement among the parliamentarians on the need to remove coercion from the basic form of rape⁹⁵ and to replace it with the concept of consent, major differences emerged over the precise wording of the new offence.⁹⁶ The National Council wanted to criminalise the behaviour of a perpetrator who acts ‘without the consent’ of the victim (‘only a yes is a yes’ solution), whereas the Council of States wanted to punish a perpetrator who acts ‘against the will’ of the victim (‘only a no is a no’ solution).⁹⁷ The consent solution would have implied that a sexual act would have been unlawful unless both partners had previously expressed their consent, either tacitly

⁸⁹ On the contrary see for instance, Christian Guéry, ‘On Crée Le Crime En Le Nommant : Pour Une Redéfinition Du Viol’ (2020) N° 2 Revue de science criminelle et de droit pénal comparé 255, 257.

⁹⁰ Stéphane Detraz, ‘Le Dédoublément Des Agressions Sexuelles Commentaire de Certaines Des Dispositions de La Loi Du 21 Avril 2021 Visant à Protéger Les Mineurs Des Crimes et Délits Sexuels et de l’inceste’ [2021] Droit pénal 12, 12; Michèle-Laure Rassat, *Droit pénal spécial: infractions du code pénal* (8th edn, Dalloz 2018) 686.

⁹¹ Carole Hardouin-Le Goff, ‘Grandeur et décadence du consentement en droit pénal’ (2021) 4 Les Cahiers de la Justice 573, 577.

⁹² [1992] Tribunal d’arrondissement de Luxembourg 701/92.

⁹³ [1994] Cour d’appel de Luxembourg 64/94.

⁹⁴ (n 86).

⁹⁵ Sommaruga, BO 2022 CE 388 ; Markwalder, BO 2022 CN 2115 ; Arslan, BO 2022 CN 2117 ; Mahaim, BO 2022 CN 2117 ; Steinemann, BO 2022 CN 2118 ; Keller-Sutter, BO CN 2022 2119 ; Caroni, BO 2022 CE 402 ; Fehlmann Rielle, BO 2022 CN 2112.

⁹⁶ Bommer (n 18) 79.

⁹⁷ Ibid.

or explicitly, whereas the refusal solution is based on the premise that a sexual act is lawful unless one of the parties has expressed his or her refusal.⁹⁸ After much back and forth between the two chambers, the Federal Assembly finally opted for a compromise, making it a criminal offence to act ‘against the will’ of the victim, but also to take advantage of the victim’s state of shock, ie her inability to express her refusal, to force her to perform a non-consensual sexual act.⁹⁹ The words ‘against their will’ refer to the fact that the victim must refuse – verbally or non-verbally –¹⁰⁰ the sexual act in the sense that they must communicate to the perpetrator their unwillingness to perform a specific sexual act.¹⁰¹ The victim can validly express their refusal non-verbally by crying, turning away, shaking their head,¹⁰² pushing away the perpetrator’s hands, crossing their legs, crouching or protecting certain parts of their body with their hands or arms.¹⁰³ The fact that the victim must actively express their refusal does not make it possible to criminalise the behaviour of the perpetrator who takes advantage of their lack of reaction to force them into a non-consensual sexual act, which is why the use of the state of shock (‘freezing’) completes the typification of the Art. 190 nSCC. The legislator’s intention was to criminalise the behaviour of a perpetrator who takes advantage of the victim’s inability to express their refusal in order to achieve their aims.¹⁰⁴ This state of shock is the result of an uncontrollable neurophysiological response designed to maximise a person’s chances of survival in the face of danger.¹⁰⁵ When in the grip of such a state, the victim suffers a temporary loss of executive function, which reduces or eliminates their ability to react and is manifested by an inability to move, scream, or even simply react.¹⁰⁶ Such a reaction may occur in the absence of coercion, as the mere subjective perception of danger is sufficient,¹⁰⁷ which is precisely the reason for introducing a variant in which coercion is not an objective constituent element of rape. In order to determine whether rape has been committed, it will be necessary to establish, on the one hand, that the victim was in a state of shock by means of the above-mentioned manifestation and, on the other

⁹⁸ Commission des affaires juridiques du Conseil des Etats (n 17) 30–31.

⁹⁹ Sandra Hadorn, ‘Gesetzgebung’ (2023) 3 *forum* poenale 238.

¹⁰⁰ Commission des affaires juridiques du Conseil des Etats (n 17) 30.

¹⁰¹ Perrier Depeursinge and Arnal (n 41) 32.

¹⁰² Commission des affaires juridiques du Conseil des Etats (n 17) 30.

¹⁰³ Perrier Depeursinge and Arnal (n 41) 33.

¹⁰⁴ BO 2023 CE 111 ss ; BO 2023 CN 986 ss.

¹⁰⁵ Susan D Suarez and Gordon G Gallup, ‘Tonic Immobility as a Response to Rape in Humans a Theoretical Note’ (1979) 29 *The Psychological Record* 315; Brian P Marx and others, ‘Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors’ (2008) 15 *Clinical Psychology: Science and Practice* 74; Brooke A de Heer and Lynn C Jones, ‘Tonic Immobility as a Defensive Trauma Response to Rape: Bridging Public Health and Law’ [2023] *Violence Against Women* 10778012231174347; Jesús de la Torre Laso, ‘The Reality of Tonic Immobility in Victims of Sexual Violence: “I Was Paralyzed, I Couldn’t Move”’ (2024) 25 *Trauma, Violence, & Abuse* 1630; Sophie Heritage, ‘Why Didn’t She Fight Back? An Exploration of Victim Blaming through Tonic Immobility Reactions to Sexual Violence’ in Claire McLoone-Richards (ed), *Researching Domestic Abuse and Sexual Violence* (Routledge 2023).

¹⁰⁶ Perrier Depeursinge and Boyer (n 75) 9.

¹⁰⁷ Véronique Jaquier, Camille Montavon and Charlotte Iselin, ‘Rapports Sexuels Non Consentis En Droit Pénal Suisse : Pourquoi Une Telle « résistance » ? 1ère Partie’ (2023) 1 *Schweizerische Zeitschrift für Strafrecht/Revue Pénale Suisse* 1 31.

hand, that the perpetrator 'took advantage' of this, ie that they consciously exploited the victim's vulnerability in order to obtain a sexual act.¹⁰⁸

In Belgium, the reform centred on consent and created presumptions of lack of consent in several situations. Prior to the reform, there was no comprehensive definition of consent, although the reference to consent was already present. The consent is now defined at Art. 417/5 of the Criminal Code. According to it, consent can be given not only verbally, but also non-verbally.¹⁰⁹ It may be withdrawn at any time before or during the sexual act. That implies for example, that stealthing (ie when a person removes the condom without their partner's consent and continues to have sex) falls within the scope of the offence of rape.¹¹⁰ The situation of the lack of resistance of the victim cannot lead to a conclusion of consent. Indeed, it is very frequent that no physical resistance is put up, not because they consent to the sexual act, but out of fear. This reaction, called 'rape-induced paralysis' or 'tonic immobility', is covered by the offence of rape, as in Switzerland.

The Art. 417/5 of the Belgian Criminal Code provides for several cases of lack of consent:

- The fact of taking advantage of the victim's vulnerability due particularly to a state of fear, the influence of alcohol, narcotics, psychotropic substances or any other substance with a similar effect, an illness, or a situation of disability. We can regret the lack of precision of this paragraph,¹¹¹ particularly concerning the expression 'taking advantage' rather than 'abusing' and the question of the interpretation of the 'alteration of the victim's free will'.¹¹²
- The use of coercive means: threat, physical or psychological violence, coercion, surprise, trickery, or any other punishable behaviour.
- An unconscious or sleeping victim, where the victim's free will is clearly abolished.¹¹³

¹⁰⁸ [2022] Tribunal fédéral ATF 148 IV 329 para 3.2; [2007] Tribunal fédéral ATF 133 IV 49 para 7.2; [1993] Tribunal fédéral ATF 119 IV 230 para 3b.

¹⁰⁹ Projet de loi modifiant le Code pénal en ce qui concerne le droit pénal sexuel (n 9) 14.

¹¹⁰ *ibid* 19; Henrion, 'Le Viol et l'atteinte à l'intégrité Sexuelle' (n 46) 56.

¹¹¹ Maryse Alié, 'La Notion de Consentement Dans Le Nouveau Code Pénal Sexuel : Fil d'Ariane Ou Future Pierre d'achoppement?' in Anthony Rizzo (ed), *Le nouveau droit pénal sexuel* (1st edn, Larcier 2022) 92.

¹¹² Avocats.be, 'Avis Sur Le Projet de Loi Modifiant Le Code Pénal En Ce Qui Concerne Le Droit Pénal Sexuel (DOC 55/2141)' (*Avocats.be* 2021) <https://latribune.avocats.be/sites/latribune/files/2021-11/55-2141_code_penal_en_ce_qui_concerne_le_droit_penal_sexuel.pdf>; Ligue des droits humains, 'Avis Sur Le Projet de Loi Du 19 Juillet 2021 Modifiant Le Code Pénal En Ce Qui Concerne Le Droit Pénal Sexuel DOC 55 2141/001' (*Liguedh.be* 2021) 2 <<https://www.liguedh.be/wp-content/uploads/2021/10/Note-droit-pe%CC%81nal-sexuel-LDH.pdf>>.

¹¹³ Alié (n 111) 96.

Regarding the interpretation depending on the circumstances of the case, judges remain free and the list of situations in which the victim cannot consent is not exhaustive and restrictive.¹¹⁴

To summarise, French law does not mention consent and is based on the premise that all cases in which the victim does not consent to the sexual act are covered by the description of means of coercion. As for Luxembourg and Belgian law, they explicitly incriminate the perpetrator who acts without the victim's consent. Consent is essentially defined in a negative way, as the law gives examples of cases in which the victim does not consent, in particular when a means of coercion is used. Swiss law, on the other hand, makes it an offence to act against a person's will or by taking advantage of their state of shock, ie their inability to express a refusal.

5 Conclusion

Since 2011, the Council of Europe has provided a harmonised definition of rape. Eleven years later, the European Commission is proposing a similar definition. In the meantime, many European states have already reformed their Criminal Code in this respect, particularly French-speaking countries. However, there is still a reluctance, particularly in France, to make consent a core element of the offence. All four legislations focus on the lack of consent, while other countries introduce a positive requirement for consent. In Spain, the law requires consent, ie it should be 'freely given by acts which, having regard to the circumstances of the case, clearly express the person's will'.¹¹⁵ In terms of the sexual acts to be taken into account, all the legislations move away from a restrictive understanding of sex as a penetration of the vagina by the penis. While gender-based violence is a structural societal challenge, these extensions nevertheless call into question the EU's restrictive approach to harmonising rape, which risks further victimising women and leaving out a wide range of non-consensual sexual acts.

Although the material elements have been reformed in most countries, the moral element has received little attention, except in Switzerland. In all the countries surveyed, rape is intentional: the perpetrator's mistaken belief that the victim has consented to sexual activity should lead to acquittal. The courts must be convinced that the perpetrator acted consciously and deliberately, at least at the stage of possible intent. According to the Swiss Federal Supreme Court, the subjective element of rape is inferred on the basis of 'external elements',¹¹⁶ such as when the victim has given 'clear and decipherable signs of their opposition [...] like crying, requests to be left alone, struggling, refusing attempts at persuasion, or trying to escape'.¹¹⁷ The nature and duration of the acts – eg, sodomy, sexual acts committed by several persons and on several occasions – also play a role in

¹¹⁴ *ibid* 88.

¹¹⁵ Art. 178 of the Spanish Criminal Code.

¹¹⁶ [2021] Tribunal fédéral TF 6B_589/2021 para 2.1.

¹¹⁷ [2022] Tribunal fédéral ATF 148 IV 234 para 3.4; [2016] Tribunal fédéral TF 6B_968/2016 para 2.1.2; [2014] Tribunal fédéral TF 6B_744/2014 para 3.3.

determining whether the perpetrator could accept the possibility of the victim's consent¹¹⁸. Thus, the more 'unusual' the sexual act, the less it is necessary to set high standards for the perpetrator's knowledge of the victim's lack of consent.¹¹⁹ On the contrary, if the victim is in a state of shock, the courts will have to assess the extent to which the victim's passivity was visible and therefore recognisable to the offender: a prolonged passivity should be interpreted as a manifestation of lack of consent.¹²⁰ Therefore, despite the recent reforms, sexual offences could still be amended to allow for the prosecution of all types of misconduct and to clarify the intent element of rape. In order to assess a possible future extension of the offence of rape, comparative research could be extended to other European countries, particularly the Nordic countries. For example, Sweden introduced the offence of negligent rape in 2018.¹²¹

Furthermore, this paper has provided a limited analysis of the drafting of legislation in light of the recent reforms. However, law does not exist in a vacuum and needs to be implemented. The identification, investigation, prosecution, and conviction of sexual offences, particularly rape, still face many challenges. In France, the practice of qualifying cases as sexual assault rather than rape is permitted by the law¹²² and upheld by the High Court,¹²³ but has been widely criticised. Based on the literature, this strategy finds primary application for three distinct reasons:

1. To alleviate congestion within criminal courts by reallocating cases to courts handling less severe offences.
2. When the prosecution perceives the case as frail, often due to the victim's conduct, a decision usually imbued with moral implications.
3. In instances where uncertainty surrounds the classification as rape, particularly in the absence of vaginal penetration.¹²⁴

More generally, many complaints lead to no further action or little investigation, as is the case in France.¹²⁵ Not all instances of rape even prompt the initiation of a judicial investigation. In Switzerland, for example, despite the lack of research,¹²⁶ a survey found that only 8% of women who have been subjected to non-consensual sex filed a complaint. Most did not, as they were ashamed, feared they would not be believed, or believed the

¹¹⁸ [2014] Tribunal fédéral TF 6B_744/2014 para 3.3.

¹¹⁹ [2015] Tribunal fédéral TF 6B_95/2015 para 6.7; [2014] Tribunal fédéral TF 6B_1149/2014 para 5.11.

¹²⁰ Perrier Depeursinge and Arnal (n 41) 44.

¹²¹ Ulrika Andersson, 'Sexual Violence in Criminal Law: Presumptions, Principles, and Premises in Relation to the Crime of Negligent Rape' in Heather Douglas and others (eds), *The Criminalization of Violence Against Women: Comparative Perspectives* (Oxford University Press 2023).

¹²² Art. 388 and 469 of the French Criminal Procedure Code.

¹²³ [2023] Cour de Cassation française 22-80.885.

¹²⁴ Sylvie Grunvald, 'Les Correctionnalisations de l'infraction de Viol Dans La Chaîne Pénale' [2017] *Actualité juridique Pénal* 269.

¹²⁵ Audrey Darsonville, 'Éléments de Réflexion à Propos Des Classements sans Suite' [2017] *Actualité juridique Pénal* 266.

¹²⁶ Marylène Lieber, *Oui c'est Oui, Le Consentement à l'épreuve de La Justice* (Seismo 2023) 25.

courts would not provide them with reparations.¹²⁷ In 2019, 660 cases of rape were reported, while 88 convictions were decided on the same offence.¹²⁸ Although the cases reported in 2019 were not tried the same year, there seems to be a significant attrition rate between the number of cases reported to the police and the number of convictions for offences against sexual integrity.¹²⁹

Therefore, the changes in the laws are to be welcomed. However, it remains up to the legal institutions to recognise the social evolution of the crime. As Rubin has since acknowledged, '[s]ex law is not a perfect reflection of the prevailing moral evaluations of sexual conduct. Sexual variation per se is more specifically policed by the mental-health professions, popular ideology, and extra-legal social practice'.¹³⁰ In this work, she argued that '[s]ex is presumed guilty until proven innocent'.¹³¹ Yet, when it comes to rape, the opposite could be argued: originally, sex was innocent, ie, not criminalised, except in certain cases where coercion could be proven – excluding, for instance, marital rape. While the presumption of innocence remains, the criteria of substantive criminal law are evolving. Increasingly, it appears that legislators are abandoning outdated definitions and evolving in line with societal values. Nevertheless, these changes are far from reaching consensus in Europe, and much remains to be analysed in order to ensure protection against and prevention of sexual violence, especially when it is fuelled by discriminatory motives.

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¹²⁸ Office fédéral de la statistique, 'Adultes: Condamnations et Personnes Condamnées Pour Un Délit Ou Un Crime Au Sens Des Articles Du Code Pénal (CP), Selon l'année de Condamnation [Dès 2008]' (*Office fédéral de la statistique* 2023) <<https://dam-api.bfs.admin.ch/hub/api/dam/assets/28205998/master>> accessed 24 January 2024; 'Violence Sexualisée: Infractions et Personnes Prévenues' (*Office fédéral de la statistique* 2023) <<https://dam-api.bfs.admin.ch/hub/api/dam/assets/29065843/master>> accessed 24 January 2024.

¹²⁹ Lieber (n 126) 72.

¹³⁰ Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Gayle Rubin (ed), *Deviations: a Gayle Rubin reader* (Duke University Press 2011) 151.

¹³¹ *ibid* 144.

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