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## **ATTEMPTS TO HARMONISE THE DEFINITION OF THE CRIME OF RAPE IN THE EUROPEAN UNION THROUGH THE SCOPE OF GERMAN, SPANISH AND SWEDISH LEGISLATION**

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**KLAUDIA JAKUBOWICZ**

### **Abstract**

Firstly, the aim of this paper is to discuss the measures taken by the European Union to combat gender-based violence, including attempts to ratify the Istanbul Convention. Secondly, the regulations concerning the definition of the crime of rape in three European Union states: Germany, Spain and Sweden are analysed. The main focus is on the adaptation of the definition of rape in line with the standard established by the Istanbul Convention. The analysis conducted shows that, although Sweden and Germany adopted different legal definitions of rape, where Sweden adopted the ‘only yes means yes’ model and Germany adopted the ‘no means no’ model, their regulations are in line with the standards of the Istanbul Convention. The same cannot be said of the Spanish regulation, since coercion or intimidation are still required for the existence of elements of the crime of rape.

### **Keywords**

criminal law, European Union, rape, crime against sexual freedom, Istanbul Convention

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### **INTRODUCTION**

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The principle aim of this paper is to examine whether the provisions regarding the crime of rape in Sweden, Spain, and Germany are consistent with the standards established by the Council of Europe Convention on preventing and combating violence against women

and domestic violence (hereinafter the Istanbul Convention).<sup>1</sup> The legal systems of the aforementioned countries will be used to illustrate the possible ways of defining the crime of rape. The first model requires that parties give affirmative consent so that the elements of the crime are not fulfilled. The second model requires the perpetrator to use coercive means such as threat or deceit (coercion model).<sup>2</sup> The legal systems of the selected states will serve as practical examples illustrating the three most common models of defining the crime of rape. Swedish law will be used to illustrate the model of affirmative consent, ‘only yes means yes’, the German law to illustrate the ‘no means no’ model, which emphasises sexual autonomy and subjectivity, giving choice and control over one’s own body through the ability to say ‘no’ and the Spanish law to model coercion. It should be noted that changes in the presented legislations have taken place in recent years. For example, in Germany, until 2016, there was a coercion model. A thesis is presented in an article written by this author stating that the legislations of the EU Member States that have signed and ratified the Istanbul Convention are approaching the model developed in the Convention.

## 1. MEASURES TAKEN BY EUROPEAN UNION TO COMBAT GENDER-BASED VIOLENCE AGAINST WOMEN

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The issue of gender-based violence did not go unnoticed by the European Community. Among the measures taken by the European Union to counter gender-based violence against women is the adoption, by the European Parliament and the European Council, of the Directive 2012/29/EU of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (hereinafter Directive 2012/29/EU). Recital 17 of this Directive provides that:

*Violence that is directed against a person because of that person’s gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment).<sup>3</sup>*

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- 1 Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, CETS 210.
  - 2 Poland is an example of this model. However, due to the frame of the article, the problem of definition of crime of rape in the Polish legal system will not be discussed. As an example of coercion model the current Spanish legislation will be presented.
  - 3 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57.

The invoked Directive aims to improve the situation of victims of crime through protection, support, information and access to justice, regardless of their nationality or place of residence. It pays particular attention to the support and protection of victims at risk of secondary victimisation, intimidation and retaliation by the perpetrator, especially victims of gender-based violence or victims of rape.

It has been proposed, on numerous occasions, that the possibility of the ascent to the Istanbul Convention by the European Union should be considered. It can be said that, currently, it is the most comprehensive regional instrument addressing violence that targets women. Currently, all Member States of the European Union are signatories of the Istanbul Convention. However, Hungary, Latvia, Lithuania, The Slovak Republic, The Czech Republic and Bulgaria have yet to ratify it.<sup>4</sup>

On 4 March 2016, the Commission submitted to the Council both its proposal for a Council decision on the signing of, on behalf of the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence ('the proposal for a signature decision').<sup>5</sup> Additionally, the EC submitted its proposal for a Council decision on the conclusion of, by the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence ('the proposal for a conclusion decision').<sup>6</sup>

The next step for the adoption of the Istanbul Convention was the adoption of the Council Decision 2017/865 on the signing of, on behalf of the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters<sup>7</sup> and the Council Decision 2017/866 on the signing of, on behalf of the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement.<sup>8</sup> Two decisions had to be made due to the fact that Ireland is not bound by Directives 2011/95<sup>9</sup>

4 Council of Europe, 'Chart of signatures and ratifications of Treaty 210' <<https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210>> accessed 28 January 2022.

5 Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence', Brussels, 4 March 2016, COM (2016) 111 final.

6 Commission 'Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence', Brussels, 4 March 2016, COM (2016) 109 final .

7 Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters [2017] OJ L 131/11.

8 Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement [2017] OJ L 131/13.

9 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of

and 2013/32.<sup>10</sup> On 13 June 2017, the European Union signed the Act of Accession to the Istanbul Convention.<sup>11</sup> Although the Istanbul Convention was signed on behalf of the European Union on 13 June 2017, the Council has not yet taken any decision on the conclusion of that convention by the European Union, due to the fact that, according to the Parliament, the Council seems to want to make the adoption of such a decision contingent on securing the prior ‘common accord’ of all the Member States.

In the absence of ratification, the European Parliament adopted a resolution of 28 November 2019 on the accession of the EU to the Istanbul Convention and other measures to combat gender-based violence.<sup>12</sup> In this resolution, the Parliament calls on the Council to urgently conclude the EU ratification of the Istanbul Convention and recalls that EU accession to the Istanbul Convention does not exempt Member States from national ratification of the Convention. In point three, the Parliament condemns the attempts by some Member States to revoke measures aimed at implementing the Istanbul Convention and combating violence against women (para 2).<sup>13</sup> The measures taken illustrate how important it is for the European Union to protect women against gender-based violence. It should also be mentioned that, a few months earlier, the European Parliament adopted a resolution of 4 April 2019 seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposals for the accession by the European Union to the Council of Europe Convention on preventing and combating violence against women and domestic violence and on the procedure for that accession.<sup>14</sup>

In the Opinion 1/19 of the Court of Justice (Grand Chamber) issued on 6 October 2021 (hereinafter the Opinion), the Court provided that the Istanbul Convention, assuming it is concluded, should be regarded as a mixed agreement, concluded between the third parties and the European Union in one respect, and the third parties and the Member States on the other.<sup>15</sup> Each party must act within the scope of its own competences and also respect the competences of any other contracting party. It requires two separate acts, one of which entails a consensus of the representatives of the Member

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international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

10 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

11 Press release, ‘EU signs Council of Europe convention to stop violence against women’ <[https://search.coe.int/directorate\\_of\\_communications/Pages/result\\_details.aspx?ObjectId=0900001680724be9](https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=0900001680724be9)> accessed 16 January 2022.

12 European Parliament resolution of 28 November 2019 on the EU’s accession to the Istanbul Convention and other measures to combat gender-based violence [2021] OJ C 232/48.

13 Ibid.

14 European Parliament resolution of 4 April 2019 seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposals for the accession by the European Union to the Council of Europe Convention on preventing and combating violence against women and domestic violence and on the procedure for that accession [2021] OJ C 116/7.

15 CJEU, Opinion 1/19, *Convention d’Istanbul*, 6 October 2021, para 239. See also Opinion procedure 1/19, *Convention d’Istanbul*, EU:C:2021:198, Opinion of AG Hogan.

States, whereas the other must be adopted by the Council (by a qualified majority in accordance with Article 218(8) TFEU). The Court expressly provides that those acts cannot be adopted in one procedure or in the form of one ‘hybrid act’. In this regard it should also be noted that, in accordance with the paragraph 259 of the Opinion, when concluding mixed agreements, the Member States and the European Union shall not encroach upon the competences of each other.

The Treaties do not require the Council, before concluding the Istanbul Convention on behalf of the European Union, to await a common agreement of the Member States to be bound by that Convention in the areas of their competence. They do, however, prohibit it from making the opening of the procedure for the conclusion of that Convention, presented in Article 218(2), (6) and (8) TFEU, subject to the prior establishment of such a ‘common agreement’.<sup>16</sup> The conclusion of an international agreement by the EU itself depends on whether the Council is able to gather the required majority.<sup>17</sup>

The Treaties do not prevent the Council, acting in accordance with its Rules of Procedure, from waiting for a common agreement of the Member States to be bound by the Convention before adopting a decision on its conclusion on behalf of the EU (if the requirements set out in Article 218(2), (6) and (8) TFEU are fulfilled). However, the Treaties prohibit the Council from adding a further step to the procedure for the conclusion of the Convention provided for in that Article by making the adoption of the decision on the conclusion of that Convention subject to the prior establishment of such a ‘common agreement’.<sup>18</sup>

It is logical then, insofar as the Council acts in accordance with its Rules of Procedure and the effectiveness of Article 218(2), (6) and (8) TFEU is guaranteed, there is nothing to prevent the Council from extending its deliberations in order to achieve, in particular, the largest possible majority for the conclusion of an international agreement. This is in addition to the majority required for the wider exercise of the European Union’s external competences or, in the case of mixed agreements, closer cooperation between the Member States and the institutions of the Union in the process of concluding that agreement, which may require waiting for the ‘common agreement’ of the Member States.<sup>19</sup>

In summary, the Treaties do not require the Council, before concluding the Istanbul Convention on behalf of the European Union, to await a common agreement of the Member States to be bound by that Convention in the areas of their competence but they do prohibit it from making the opening of the procedure for the conclusion of that Convention, presented in Article 218(2), (6) and (8) TFEU, subject to the prior establishment of such

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16 *Ibid*, para 249.

17 *Ibid*, 250.

18 *Ibid*, 274.

19 *Ibid*, 253.

a ‘common agreement’.<sup>20</sup> The conclusion of an international agreement by the EU itself depends on whether the Council is able to gather the required majority (para 250 of the Opinion). Additionally, the Treaties do not prevent the Council, acting in accordance with its Rules of Procedure, from waiting for a common agreement of the Member States to be bound by the Convention before adopting a decision on its conclusion on behalf of the EU (if the requirements set out in Article 218(2), (6) and (8) TFEU are fulfilled). The decision of the Union to conclude the Istanbul Convention would be compatible with the Treaties if it were adopted in the absence of a common agreement of all Member States on their consent to be bound by that Convention. In addition, however, it would also be compatible with the Treaties if it were adopted only after such common agreement had been established. It is exclusively for the Council to decide which of those two solutions is preferable.<sup>21</sup>

In Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commissions ‘Work Programme 2021: A Union of vitality in a world of fragility’, the Commission remains committed to the EU accession to the Istanbul Convention but pledges to bring forward a new proposal to combat gender-based violence.<sup>22</sup> Point 39 of the ‘Annex I: New initiatives’, presents a proposal to prevent and combat specific forms of gender-based violence and point 41 announces the fitness check of EU legislation on violence against women and domestic violence, which would cover each piece of legislation in all EU Member States until 2020. This aims to identify regulatory gaps and analyse whether further action is required.<sup>23</sup> It should also be noted that the current President of the Commission, Ursula von der Leyen, said, in her opening statement delivered on 16 July 2019, that the EU should ratify the Istanbul Convention.<sup>24</sup> According to the Gender Equality Strategy published on 5 of March 2020, concluding an agreement on the accession of the EU to the Istanbul Convention is a key priority for the Commission for the years 2020–2025.<sup>25</sup>

## 2. DEFINITION OF THE CRIME OF RAPE IN ARTICLE 36 OF THE ISTANBUL CONVENTION

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Article 36 of the Istanbul Convention defines sexual violence, including rape. The definition of rape includes the intentional engaging in non-consensual, vaginal, anal or oral

<sup>20</sup> Ibid, 249.

<sup>21</sup> Ibid, 274.

<sup>22</sup> Commission, Communication, ‘Commission Work Programme 2021. A Union of vitality in a world of fragility’, Brussels, 19 October 2020, COM (2020) 690 final.

<sup>23</sup> Ibid.

<sup>24</sup> Ursula von der Leyen, Candidate for President of the European Commission ‘Opening Statement in the European Parliament Plenary Session’, Strasbourg, 16 July 2019 <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_19\\_4230](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_4230)> accessed 16 January 2022.

<sup>25</sup> Commission, ‘A Union of Equality: Gender Equality Strategy 2020–2025’, Brussels, 5 March 2020, COM (2020) 152 final.

penetration of a sexual nature of the body of another person with any bodily part or object, engaging in other non-consensual acts of a sexual nature with a person or causing another person to engage in non-consensual acts of a sexual nature with a third person. Consent must be given voluntarily. In assessing the voluntariness of consent, the context and circumstances of the event must be taken into account. Letter b. covers all acts of a sexual nature without the freely given consent of one of the parties involved which do not include penetration. Lastly, letter c. covers situations in which the victim is caused, without consent, to perform or comply with acts of a sexual nature with or by a person other than the perpetrator. What is important, is the ‘Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence’ in paragraph 179 points out that ‘The interpretation of the word «intentional» is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence’.<sup>26</sup> According to paragraph 3 of this Article, the requirement to take the necessary legislative action rests with the state party to the Convention.

Referring to the subject literature, two noteworthy views are quoted: Stephen J. Schulhofer expressed the view that ‘Sexual autonomy is a basic constituent of personal freedom deserving recognition and protection in its own right’.<sup>27</sup> Article 36 of the Istanbul Convention is built around the concept of sexual autonomy. In addition, Monika Płatek stated that:

*Sexual Autonomy sensitizes the relationship between the sexual relationship and the power relationship. Violence, threat, deception, and coercion into a sexual relationship are demonstrations of power, but also of authority. A law that denies the possibility of positive self-determination, merely consenting to an attempted refusal, indirectly fosters processes that reproduce enslavement.*<sup>28</sup>

In 2021, a report on gender equality in the EU was released by the Commission, which indicated the activities of the Members of the European Union in terms of the implementation of the Istanbul Convention.<sup>29</sup> The Convention inspired change of the definition of rape in the Croatian Penal Code, which came into force on 1 January 2020.<sup>30</sup> Moreover, the Danish Parliament changed Article 216 of the Danish Penal Code to define rape as intercourse without consent, thereby bringing Denmark in line with the

26 Council of Europe, ‘Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence’ 2011, CETS 210, 32.

27 Stephen J. Schulhofer, ‘Taking sexual autonomy seriously: Rape Law and beyond’ (1992) 11 Law and Philosophy 94 <<https://doi.org/10.1007/BF01000918>>.

28 Monika Płatek, ‘Zgwałcenie. Gdy termin nabiera nowej treści. Pozorny brak zmian i jego skutki’ (2018) XL Archiwum Kryminologii 266 <<https://doi.org/10.7420/AK2018F>>.

29 Commission, Directorate-General for Justice and Consumers, ‘Report on gender equality in the EU’ (Publications Office 2021).

30 The definition of rape since 1 January 2021 covers any non-consensual sexual intercourse or a sexual activity, making the law’s approach to consent broader.

Istanbul Convention. Croatia and Denmark are not the only states that have adopted the definition of rape based on the provisions of the Convention. Slovenia is the 13th state in Europe that based the definition of the crime of rape on the premise of lack of consent. Previously, the Slovenian Penal Code required evidence of force or threat in order to classify an act as rape. Consultations on similar laws are currently underway in Spain and the Netherlands.

### 3. GERMAN REGULATION

In Germany, before 2016, the definition of rape was based on the ‘coercion model’. There was no regulation that would provide that the lack of consent of the victim is sufficient to consider that a sexual crime has been committed. In 2016, a reform took place, according to which the ‘no means no’ model was adopted and a new crime designated as sexual assault [*sexueller Übergriff*] was introduced in Section 177 of the *Strafgesetzbuch* (StGB).<sup>31</sup> The changes to the StGB were dictated by pressure from non-governmental organisations and women’s organisations, as well as the desire to bring the legal regulations in line with the Istanbul Convention.<sup>32</sup> The new Section, 177 StGB, is quite extensive and attempts to cover various factual situations.

Section 177(1) StGB, contains the basic type of the crime of rape. It protects victims of both sexes from forced sexual contact with the perpetrator or third parties. It introduces five types of punishable activities: sexual activities of the perpetrator with the victim, sexual activities of the victim with the perpetrator, sexual activities of the victim without physical contact with another person, sexual activities of a third person with the victim or of the victim with a third person. The legal quality, protected by Section 177 StGB, is sexual self-determination.<sup>33</sup> The StGB has adopted a ‘no means no’ veto model. The claims of Tatjana Hörnle, on this subject, must be agreed with as she stated that the adoption of this model implies a communication obligation on the part of the victim and any rationale for refusal is sufficient.<sup>34</sup>

Section 177(1) StGB prohibits sexual intercourse without the expression of will.<sup>35</sup> In the German literature, it is argued that the refusal must either be explicitly declared or

31 German Penal Code [*Strafgesetzbuch*] in the version published on November 13, 1998, BGBl. I, 3322 with subsequent amendments.

32 Cf Tatjana Hörnle, ‘The New German Law on Sexual Assault and Sexual Harassment’ (2017) 18 German Law Journal 1319 <<https://doi.org/10.1017/S2071832200022355>>.

33 Joachim Renzikowski, ‘StGB §177’ in Jürgen Schäfer, Volker Erb (eds), *Münchener Kommentar zum StGB* Band 3 §80-184k (4th edn C. H. Beck 2021).

34 Hörnle (n 32) 1314.

35 Section 177(1) Whoever, against a person’s discernible will, performs sexual acts on that person or has that person perform sexual acts on them, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person incurs a penalty of imprisonment for a term of between six months and five years.



must be unambiguously apparent. The assessment of consent depends on the context. It is also noted that arousal is not a substitute for consent. It is undisputed that the legal standard also covers ‘stealthing’, i.e. unprotected sexual intercourse, while the other party has consented to protected sexual intercourse. *Amtsgericht* [AG] Berlin-Tiergarten [District Court Tiergarten in Berlin] rightly assessed such a case as sexual assault, which is punishable under Section 177(1).<sup>36</sup> Since the partners had explicitly agreed to protected sexual intercourse beforehand, continuing intercourse without protection did not correspond with expressed will.

The German legislator rightly assumed that the victim, in certain circumstances, does not have the opportunity to express ‘no’, whether by words, gestures or behavior. The law cannot be based on the veto model in this case. The incapacity of the victim to express his or her will is casuistically covered in section 177(2) StGB, according to which whoever performs sexual acts on another person or has that person perform sexual acts, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person incurs the same penalty if the offender exploits the fact that the person is not able to form or express a contrary will. This is in addition to whether the offender exploits the fact that the person is significantly impaired in respect of the ability to form or express a will due to said person’s physical or mental condition, unless the offender has obtained the consent of that person, the offender exploits an element of surprise, the offender exploits a situation in which the victim is threatened with serious harm in case of offering resistance or the offender has coerced the person to perform or acquiesce to the sexual acts by threatening serious harm.<sup>37</sup>

What distinguishes sections 177(1) and 177(2) StGB is the fact that the first refers to the incapacity to form or express an opposite will and there is no reference to what this incapacity or inability may be due to. It is a premise of a more objectified nature. Section 177(2) StGB refers to a characteristic of a particular person which affects the capacity to express the will, i.e. a physical or mental state. However, the legislative materials clearly state that psychological discords are not sufficient and that only pathological states identifiable in a clinical way are covered.<sup>38</sup> Section 177(2) StGB indicates that sexual contact with a person with the characteristics listed in the disposition of the provision will, however, be possible when consent has been obtained (the concept of affirmative consent). Consent therefore excludes the criminalisation of the act. The element of surprise, referred to in Section 177(3) StGB, is the sudden performance of the sexual act, without the person concerned expecting sexual contact. In this situation, the expression of will by the victim is impossible. Section 177(4) StGB para 4 states that the victim is not obliged to refuse if there exists a threat of serious evil by the perpetrator without

36 Quoted in Renzikowski (n 33) (as cited in AG Berlin-Tiergarten, 278 Ls, 284 Js 118/18 (14/18)), 11 December 2018, Rn. 46-53.

37 German Penal Code [*Strafgesetzbuch*] in the version published on 13 November 1998, BGBl. I, 3322 with subsequent amendments, Section 177(2).

38 Parlamentsarchiv [Parliamentary Documents], Deutscher Bundestag, Drucksachen [BT] 18/8210.

the perpetrator uttering a threat.<sup>39</sup> This is an implicit threat, in contrast to the explicit threat regulated in para 5. It should be noted that there is a view in doctrine, according to which, it is part of positive sexual freedom to use sexuality for pleasure, love but also, instrumentally, as a means to avoid an expected inconvenience.<sup>40</sup> According to Section 177(3) StGB attempted rape is also punishable.

The 2016 reform introduced two new crimes. Section 184i StGB stipulates that whoever touches another person in a sexual manner, and, thereby, harasses that person (184(1) StGB).

Section 184j StGB introduces the offences committed by groups [*Straftaten aus Gruppen*]. It concerns people who promote an offence by participating in a group of persons who exert pressure on another person to commit an offence against that person. According to Tatjana Hörnle ‘The aider must have seen and accepted the likelihood of a crime and any type of criminal offense will do’<sup>41</sup> and ‘It is not necessary to prove an act or contribution other than the participation in a group that cornered the later victim, and it is not necessary to prove intent concerning the sexual nature of the ensuing crime’.<sup>42</sup>

According to German police statistics, 1,356 people were punished for crimes under Section 177 StGB in 2017, while in 2016, under previous law, 1016 people. However, in 2018, the police recorded 15,525 crimes, in 2017 14,260 crimes, in 2016 13,838 crimes, and in 2015 11,808 crimes. ‘The increase in the number of crimes recorded by the police is probably mainly due to the expansion of the paragraph’.<sup>43</sup>

#### 4. SPANISH REGULATION

Spanish legal regulations, regarding offences against sexual freedom, are included in the Organic act 10/1995 of 23 November 1995, *Código Penal*<sup>44</sup> hereinafter referred to as the Spanish Penal Code. Title VIII of the Spanish Penal Code is devoted to criminal offences against sexual freedom and indemnity. The Spanish legislator in Penal Code has made a distinction between ‘sexual abuse’ and ‘sexual aggression’. In this context Patricia Faraldo-Cabana highlighted:

*both sexual aggression and sexual abuse include penetrative and non-penetrative offenses. The difference between sexual aggression and sexual abuse is centered only in the use of violence or intimidation. Spain, like other EU member states, legally recognizes an assault as rape – also called aggravated*

39 Hörnle (n 32) 1323.

40 Ibid.

41 Ibid 1328.

42 Ibid.

43 Renzikowski (n 33) Rn. 13-15.

44 Spanish Penal Code (1995) [*Código Penal*], *Ley Orgánica 10/1995* with subsequent amendments.

*sexual aggression – only when unwanted oral, anal, or vaginal penetration is achieved through violence or intimidation.*<sup>45</sup>

Sexual assault is regulated in Articles 178, 179 and 180 of the Spanish Penal Code. As with the German regulation, the protected aspect is the sexual freedom of the individual. According to Article 178 of the Spanish Penal Code, it follows from this provision that for sexual assault to occur under this legislation, one of the two elements of the prohibited act, namely the use of violence or intimidation of the victim of the offence, must be met. As correctly noted by Patricia Faraldo-Cabana:

*Violence and intimidation correspond with each other as they both contain elements of coercion, injury, and threats. It must be clear that these elements are effective and sufficient to overcome the will of the victim. It is necessary that, but for the violence or intimidation caused by the accused, the victim would not have been assaulted.*<sup>46</sup>

Violence involves the use of physical force. It must be immediate, intense, severe and with sufficient force to break the victim's resistance. For this violence to be typical as an element of the crime of sexual assault, a causal link between the violence used and the sexual contact achieved is decisive.<sup>47</sup> Intimidation has been defined by case law as 'a verbal threat or threat of unjust harm that instils fear in the victim'.<sup>48</sup>

Article 179 of the Spanish Penal Code determines an aggravated type and introduces a higher penalty if the sexual assault consists of vaginal, anal or oral penetration, or inserting body parts or objects into either of the former two orifices, the offender shall be convicted of rape. Article 180 of the Spanish Penal Code provides for special circumstances which, if they occur, increase the penalties under Articles 178 and 179 of the Spanish Penal Code. The higher penalty will be imposed if the violence or intimidation are of a particularly degrading or humiliating nature; if the deeds are committed by joint action of two or more persons; if the victim is especially vulnerable due to age, illness, handicap or circumstances; if, in order to execute the criminal offence, the offender has availed himself of superiority or relationship, due to being an ascendant, descendent or brother or sister, biological or adopted or in-law of the victim; if the doer uses weapons or other equally dangerous means which may cause death or the bodily harm foreseen.

Article 181 of the Spanish Penal Code protects the sexual freedom and indemnity of another person. It is not necessary to use violence and intimidation in order to fulfil the

45 Patricia Faraldo-Cabana, 'The Wolf-Pack Case and the Reform of Sex Crimes in Spain' (2021) 22 German Law Journal 847, 850 <<https://doi.org/10.1017/glj.2021.38>>.

46 Ibid, 849.

47 Cf Antonia Monge Fernández, 'Los delitos de agresiones y abusos sexuales a la luz del caso "la Manada" ("sólo sí es sí")' in Antonia Monge Fernández and Javier Parrilla Vergara (eds), *Mujer y derecho penal ¿Necesidad de una reforma desde una perspectiva de género?* (Bosch Editor 2019) 341.

48 Ibid, 345.

elements of the crime set out in this article but only to act against the will of the victim. In addition, Article 181 paragraph 2 of the Spanish Penal Code states that non-consensual, sexual abuse is deemed to be that perpetrated on persons who are unconscious, or whose mental disorder is taken advantage of, as well as those committed by overcoming the will of the victim using narcotics, drugs or any other natural or chemical substance that is appropriate for such a purpose. According to Article 181 paragraph 3 of the Spanish Penal Code, the same punishment shall be imposed if consent is obtained by the offender availing himself of a situation by manifesting superiority that deprives the victim of liberty. If the sexual abuse involves penetration, the legislator has chosen to increase the penalty.

The need for change in Spanish criminal law was indicated by the case, known as *La Manda* or *The Wolf-Pack*. In brief, it was the controversial trial of five men who were accused of the gang rape of a young woman during the *San Fermín* [Running-with-the-Bulls] festivities in July 2016 in Pamplona. This case demonstrated the inadequacies of Spanish criminal regulations regarding the definition of sexual offences, especially the existence of the requirement of violence and intimidation.<sup>49</sup> As the reaction to this situation, the draft of Organic Law on the Comprehensive Guarantee of Sexual Freedom [*El proyecto de Ley Orgánica de Garantía Integral de la Libertad Sexual*] was approved by the Spanish Council of Ministers [*el Consejo de Ministros de España*] on 6 July 2021 at the request of the Ministries of Equality and Justice, which aims to comprehensively protect the right to sexual freedom and eradicate all sexual violence.<sup>50</sup>

The draft introduced the ‘only yes means yes’ affirmative, consent model inspired by the Istanbul Convention. Importantly, the silence or passivity of the victim under this regulation will not constitute consent. It also abolishes the criticised distinction between sexual abuse and sexual aggression, emphasising consent and not the manner in which the attack takes place. It also abandons the premise of intimidation and violence for the crime of rape.<sup>51</sup>

## 5. SWEDISH REGULATION

Sweden established The Sexual Offences Committee, which presented a report titled ‘Enhanced protection of sexual integrity’ to the Minister for Justice and Migration, Morgan Johansson, in 2016.<sup>52</sup> In the report, the Committee recommended changes to

49 For more on the *La Manda* case see the article: Faraldo-Cabana (n 45) 847-859.

50 La Moncloa, ‘Proyecto de Ley Orgánica de garantía integral de la libertad sexual’ <[https://www.lamoncloa.gob.es/consejodeministros/Paginas/enlaces/060721-enlace-libertad-sexual.aspx?fbclid=IwAR3YbJUhY83W0gtlvS4Ys\\_gh9FRR74v7c3wUyIidGedWGMMy0JJTvI-cZOAsA](https://www.lamoncloa.gob.es/consejodeministros/Paginas/enlaces/060721-enlace-libertad-sexual.aspx?fbclid=IwAR3YbJUhY83W0gtlvS4Ys_gh9FRR74v7c3wUyIidGedWGMMy0JJTvI-cZOAsA)> accessed 16 January 2022.

51 Ibid.

52 Regeringskansliet, ‘Ett starkare skydd för den sexuella integriteten. Betänkande av 2014 års sexualbrottskommitté’, SOU 2016:60 accessed <<https://www.regeringen.se/contentassets/8216d40ecc814613bccb394b4b1dfa38/ett-starkare-skydd-for-den-sexuella-integriteten-sou-2016-60.pdf>> accessed 28 January 2022.

the Swedish Penal Code<sup>53</sup> in relation to the offence of rape. The most significant change proposed that ‘Sexual offences legislation shall be amended to ensure that the dividing line between punishable acts and acts exempt from punishment is determined by whether participation in a sexual act was voluntary or not’.<sup>54</sup> Thus, the Committee proposed that:

*criminal responsibility is borne by a person who performs sexual intercourse or another sexual act that, with regard to the seriousness of the violation, is comparable to sexual intercourse, with a person who is not participating voluntarily.*<sup>55</sup>

The Swedish Government accepted the recommendations of the Committee and, on 23 May 2018, the Swedish Parliament passed the law.<sup>56</sup> The new legislation came into effect on 1 July 2018. Ultimately, Sweden has introduced an affirmative consent model ‘only yes means yes’. The crime of rape is regulated in chapter 6 ‘On sexual offences’ of the *Brottsbalken* (hereinafter the Swedish Penal Code). Section 1 of chapter 6 contains a definition of rape which is based on voluntariness and the assumption that, for the crime of rape, it is irrelevant what behaviour precedes or accompanies the sexual intercourse (although not only), only whether the sexual intercourse is accompanied by the aforementioned voluntariness, passivity will not be considered as consent. In order to assess voluntariness, the Swedish courts take into consideration, as a starting point, whether the voluntariness was expressed in words, deeds or in any other manner (Section 1 of the Swedish Criminal Code). Special circumstances are also indicated in which consent cannot be assumed not to have been given voluntarily. It is a criminal offence to have sexual intercourse without consent in addition to, or, another sexual act that in view of the seriousness of the violation is comparable to sexual intercourse.

Additionally, Section 1 of chapter 6 of the Swedish Penal Code describes the aggravated type of offence. An offence is classified as such when it is considered to be gross. In this assessment particularly, the use of violence or threats of a high degree of severity, assault by a greater number of persons on the victim, in addition to the victim’s young age, ruthlessness and brutality should be considered. Section 2 of chapter 6, penalises sexual assault. This offence is committed by a person who performs a sexual act other than those referred to in Section 1 with a person who is not participating voluntarily. In addition to the basic type, there is also an ‘aggravated type’, gross sexual assault. Two new offences of ‘negligent rape’ and ‘negligent sexual assault’ have also been introduced. Negligent rape has been regulated in Section 1a the Swedish Penal Code. In order to

53 Swedish Penal Code (1962) [*Brottsbalken*], SFS 1962:700, with subsequent amendments.

54 Press release, ‘Enhanced protection of sexual integrity’ <<https://www.government.se/press-releases/2016/10/enhanced-protection-of-sexual-integrity/>> accessed 28 January 2022.

55 Regeringskansliet, ‘Ett starkare skydd för den sexuella integriteten’ (n 52) 43.

56 Regeringskansliet, Proposition från Justitiedepartementet ‘En ny sexualbrottslagstiftning byggd på frivillighet’, Govt. Bill 2017/18:177 <<https://www.regeringen.se/rattsliga-dokument/proposition/2018/03/prop.-201718177/>> accessed 28 January 2022.

commit this offence, the elements of Section 1 must be fulfilled and there must be gross negligence with regard to the fact that the other person does not participate voluntarily. This means that a person should be aware of the risk that the other person may not voluntarily engage in sexual intercourse and yet engage in a sexual act with that person. In conjunction with additional factors, it may be that the perpetrator should have taken steps to ensure that the other person participated voluntarily, for example by asking a direct question.

Additionally, in the discussion regarding criminal offences that threaten sexual freedom, the voices of Lisa Wallin, Sara Uhnöo, Åsa Wettergren and Moa Bladini, should be invoked, who, in their article, state:

*the legal operationalization of the concepts voluntariness and negligence, central to the new Swedish rape legislation, and found that they tie in closely with the evaluation of credibility. Credibility as we have seen is the «matter» on which evaluations actualizing voluntariness and credibility are based. Our analysis shows that the evaluation of voluntariness and negligence differs between judgements in roughly similar cases, and that credibility depends at least in part on background emotions of sympathy/antipathy, doubt, scepticism and trust, which in turn intertwine with gendered stereotypes. In so far as rape myths remain unreflected, they are comfortable roads to reach conclusions when legal decisions must rely on contrasting accounts.<sup>57</sup>*

## CONCLUSION

To date, the Istanbul Convention has yet to be ratified by the European Union. Despite this, EU institutions are taking action to protect victims of crimes against sexual freedom. Moreover, in at least some of the EU Member States we can observe a tendency to harmonise the definition of the crime of rape to the *de minimis* standards put forth by the Istanbul Convention.

However, not all Member States have ratified the Istanbul Convention and, among those that have done so, not all have adjusted their regulations to the standard established by it. In practice, it is apparent that Member States choose different models of the victim's behavior. The 'no means no' model has been adopted in German law, with the exception of affirmative consent in the event that the victim is unable to object to his or her characteristics, and Swedish law adopted the 'consent' model according to which 'any intercourse without voluntary given consent' amounts to being a crime. The examples of Germany and Sweden illustrate that the state legislators may take different approaches to implement the standard

57 Lisa Wallin, Sara Uhnöo, Åsa Wettergren and Moa Bladini, 'Capricious credibility – legal assessments of voluntariness in Swedish negligent rape judgements' (2021) 22 Nordic Journal of Criminology 18 <<https://doi.org/10.1080/2578983X.2021.1898128>>.

specified in the Istanbul Convention. The Spanish regulation is an example of a regulation that has not yet been adapted to the standards specified in the Istanbul Convention, although, interestingly, it distinguishes two types of crimes, sexual aggression and sexual abuse. In these cases, in order to fulfill the characteristics of sexual aggression, the perpetrator must use violence or intimidation (the use of violence, intimidation or threats are typical for the regulation of European countries that have not adjusted their definition of the crime of rape in accordance with standard set forth in the Istanbul Convention). Currently in Spain, work is in progress on the introduction of the ‘only yes means yes’ model, in which the premise of the use of violence or intimidation is no longer required. States that have ratified the Istanbul Convention should implement the definition of the crime of rape, provided in this convention, into their legal systems, as they have committed to do so. In practice, many countries have not yet done so. If the European Union does not ratify the Istanbul Convention, the Member States will still have autonomy in defining the crime of rape in any way they see appropriate. Then there will be no possibility of unification and this means that the model based on consensual consent will prevail in the EU.

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### ..... **INFORMATION ABOUT THE AUTHOR** .....

Klaudia Jakubowicz is a Law and Polish Philology student at the University of Silesia. She is also a Member of the Student Legal Clinic at the Faculty of Law and Administration of the University of Silesia.