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A long way to end rape in the European Union: Assessing the commission's proposal to harmonise rape law, through a feminist lens

Carlotta Rigotti
Vrije Universiteit Brussels, Belgium; Durham Law School, Durham University, UK

Abstract
On 8 March 2022, the European Commission presented a proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence. *Inter alia*, the proposal includes minimum rules on the definition of certain forms of violence against women and domestic violence, including rape. Building on a historical overview of what counts as rape and on the legal context in which the European Commission has tabled the proposal, this article will critically discuss whether the European Union (hereinafter: the EU) has the competence to harmonise the crime of rape pursuant to Article 83 of the Treaty on the Functioning of the European Union and what the desirable content of EU legislation in this field should be. For this purpose, the article will use long-lasting, feminist scholarship as an analytical tool to address the transformations that these feminist discourses have traditionally brought into rape law, stressing the legal gaps that still need to be filled, and suggesting a possible new synergy between EU criminal law and feminist scholarship and activism.

Keywords
Rape, gender-based violence, Article 83.1 TFEU, harmonisation, serious crime, cross-border crime, sexual autonomy

Introduction

On 8 March 2022, the European Commission presented a proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence

Corresponding author:
Carlotta Rigotti, Vrije Universiteit Brussels, Pleinlaan 2, Brussel 1050, Belgium.
E-mail: Carlotta.Rigotti@vub.be

(hereinafter: the Commission Proposal).[1] Briefly, the Commission Proposal aims to criminalise rape in the absence of consent, female genital mutilation, and certain forms of cyber violence. Moreover, it seeks to strengthen the protection, access to justice and support of victims, as well as to prevent violence against women and domestic violence and enhance coordination and cooperation across the European Union (hereinafter: the EU or the Union).

At the heart of the Commission Proposal lies the idea that 'violence against women and domestic violence are matters of criminal law, violations of human rights and forms of discrimination. Combating them is part of the European Commission's action to protect the core EU values and to ensure that the EU Charter of Fundamental Rights is upheld'.[2] The document goes on to demonstrate that the incidence of violence against women and domestic violence is still dramatically high across the Union and refers to the long-lasting commitment of the EU to combat them.[3]

The Commission Proposal comes after the EU has struggled for years to get all the Member States fully on board with the instruments adopted by the United Nations (hereinafter: the UN) and the Council of Europe (hereinafter: the CoE) to curb violence against women.[4] Moreover, as in the rest of the world, various waves of feminism have long tried to challenge and influence the social, political and legal processes condoning violence against women and blaming its victims in Europe. Most recently, the #MeToo movement has raised new awareness about the widespread prevalence of violence against women, generating significant support for victims and shifting the blame on the male offender. Simultaneously, it has ushered the criminal response to violence against women into a new era, where sexual autonomy is starting to be considered a new legal interest to protect, and law enforcement is seeking not to discount the credibility of rape victims' before court, as has traditionally been the case so far.[5]

Against this backdrop, this article has a twofold aim. First, we seek to critically discuss whether the EU has the competence to harmonise the crime of rape. Second, we aim to sketch what the desirable content of EU legislation in this field should be. In doing so, the starting point of our analysis is the above-mentioned Commission Proposal, while we look at the overall research questions through a feminist lens. Because rape mostly affects women, feminist scholarship has traditionally seen it in the context of the existing, unequal power relations between women and men in society, while posing significant challenges to the way the law is used to treat rape and raising new questions about its criminalisation. As a result, considering that the EU has also traced rape back to the social issue of equality between women and men and gender equality has become a political battlefield within the EU, it is our opinion that feminist scholarships can provide a useful, analytical tool addressing the transformations that feminist discourses have brought into rape law, highlighting the legal gaps that still need to be filled and suggesting a possible, new synergy between EU criminal law and feminist scholarship, as well as activism.

The paper is composed of 4 sections.

Section 1 begins with a historical overview and a terminological clarification of what counts as rape through feminist lenses. Section 2 then moves on to provide the legal context in which the Commission has tabled its proposal. It illustrates how significant divergences in the interpretation of

1. Commission, 'Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence' COM(2022) 105 final
2. ibid. 1
3. ibid. 1-2
4. European Parliament Research Service, 'Violence against Women in the EU. State of Play' PE644.190(2019)
5. T. Hörnle, 'Evaluating #MeToo: The Perspective of Criminal Law Theory' (2021) 22 *German Law Journal* 833, 846

the crime of rape and prosecution rates and policies still exist across the national jurisdictions composing the EU. Because all the Member States are also Parties to the CoE, its legal framework, binding on EU Member States is also analysed. Sections 3 discusses whether the EU has the competence to harmonise rape, by focusing on Article 83.1 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), the article the Commission grounded its proposal on. Ultimately, Section 4 investigates what should be the desirable minimum requirements for the definition of the crime in the EU legislative intervention. Conclusions are provided.

What counts as rape: Some historical and terminological clarifications

In the feminist classic 'Against our will: Men, Women, and Rape', Brownmiller describes rape as 'a conscious process of intimidation by which all men keep all women in a state of fear'.[6] In support of this statement, she explains that, since the beginning of the social order based on the *lex talionis* (namely, the offender should receive as punishment the same harm they have inflicted upon the victim), men realised that they could violate women's physical integrity without any risk because they tended to be significantly stronger. This biological reason of strength resulted in the female fear of rape and in their dependency on male protection. As a result, the author concludes, rape has traditionally been a means of female oppression, where men have control over the female body and a crime committed against it becomes a crime against their estate.[7]

The very idea that women were not independent human beings, and that their rape harmed the men protecting them emerges from the first written laws. In the 1750s B.C., the Babylonian Code of Hammurabi explicitly criminalised rape since it violated the property rights which the woman's father or husband had on her body.[8] A similar prohibition could also be found in Mosaic law, where the severity of this property crime stemmed from the social status of the woman and other circumstantial evidence, like where the rape had occurred. Besides, since the victim of the crime was the father or the husband, women had to prove their innocence before court to avoid the charge of adultery.[9]

At the heart of the connection between rape and adultery lay an idea of indecency because both sexual intercourses were occurring outside of marriage and were considered morally wrong. This connection was even more evident in Ancient Rome, where the Latin word for rape, namely, *stuprum*, was understood to mean 'shame', insofar as any form of sexual violence against women violated the honour of her family.[10]

This interpretation was later transposed in the *ius commune* and the Canon law from the Middle Age, where criminal law sought to protect the moral integrity of women, meaning that a shotgun wedding or a contribution to the dowry could repair damage and restore moral order.[11] As in the past, however, circumstantial evidence continued to be essential to criminally prosecute rape: the severity of punishment, for instance, varied depending on the age of the women.[12]

6. S. Brownmiller, *Against Our Will. Men, Women and Rape* (Fawcett Columbine, New York, 1975) 15
7. ibid. 16-17
8. S. Gold & M. Wyatt, 'The Rape System: Old Roles and New Times' (1978) 27(4) *Catholic University Law Review* (1978) 695, 696
9. ibid. 696-699
10. N. L. Nguyen, 'Roman Rape: An Overview of Roman Rape Laws from the Republican Period to Justinian's Reign' (2006) 13(1) *Michigan Journal of Gender & Law* 75, 83-85
11. L. Nepi, *Violenza Sessuale e Soggettività Sessuata* (Giappichelli, Torino, 2017) 7
12. G. Walker, 'Sexual Violence and Rape in Europe 1500-1750', in S. Toulalan & K. Fisher (eds.), '*The Routledge History of Sex and the Body. 1500 to the Present'* (London, Routledge, 2013) 431

Another change in the law occurred in the XVII century, when the criminal responsibility for rape also rested on women. Indeed, women were considered the co-author of the crime and had to undergo psychological, medical and anthropological evaluations to prove themselves innocent. The legal rationales behind this reform were twofold. First, shotgun weddings (which had so far allowed the rapist to avoid any criminal liability) created social turmoil, by favouring the marriage between the female victim and socially inferior men and vice versa. The introduction of co-responsibility sought to minimise this risk, by requiring evidence that one of the parties had not been deceived or provoked to have sex with the other. Second, the provision for co-responsibility legitimised and strengthened certain society's views about gender roles and sexual conduct. At the time, women were divided into 'honourable' and 'fallen'. While the former were bound by the household, overlaid with purity, crowned with marital obedience, and did not deserve to be criminally charged, the latter had to be punished to convey social censure for their sexually deviant and morally wrongful character.[13]

Having explained how the law has historically silenced women who were victims of rape and put male interests at the forefront of legal protection, the next two sections (1.1 and 1.2) turn to the cultural and legal evolutions that took place in the XIX century in the sanctioning of rape. They show how the feminist discourses have framed rape and its criminalisation and, to what extent, their reference to the unbalanced power relations between women and men within society and the concept of gender-based violence have been transposed into the EU commitment to end rape.

The mutual dialogue between feminism and the law in defining rape

The legal qualification of rape as a crime against male property, family's honour, and female respectability has been challenged since the late 1960s, when part of feminist activism and scholarship started discussing gender, sexuality, and power in a way that had been unimaginable before.

At that time, women responded to the social invisibility and injustice arising from society and its law, by speaking out against the continuous sexual abuse they had suffered and tracing its origin back to the unequal power relations between women and men within society.

As previously said, Susan Brownmiller traced the root causes of this social asymmetry of power and the predominance of female rape back to biological differences.[14] Another feminist author, Millet, claimed instead that women were not used to committing rape because they had never been socialised or trained to do so. This meant that the origin of rape was cultural, and this form of sexual violence against women amounted to a male mechanism of social control.[15] Ultimately, MacKinnon transposed this social understanding of rape as an instance of the unequal power relations between women and men within society into the realm of criminal law and legally qualified it as a form of sexual violence impinging on 'women's dignity and intimate integrity'.[16] For the first time, rape was understood to mean the violation of fundamental rights, in need of criminal protection. This also implied that, when describing the *actus reus*, rape law was expected not to rely on whether the offender has resorted to force, menace and/or threat. Conversely, numerous authors started

13. S. D'Cruze, 'Sexual Violence since 1750', in S. Toulalan & K. Fisher (eds.), *The Routledge History of Sex and the Body. 1500 to the Present* (London, Routledge, 2013) 446-449
14. Brownmiller (n 6) 17
15. K. Millett, *Sexual Politics* (Avon, New York, 1971) 69
16. C. McKinnon, *Toward a Feminist Theory of the State* (Cambridge MA, Harvard University Press, 1989) 172

identifying the threshold for rape in sexual consent, thereby requiring all people engaging in sexual conduct to have the liberty and capacity to agree on it.[17]

Against this backdrop, feminist groups engaged in political action taking a wide range of diversified initiatives such as, among others, the establishment of shelters and the organisation of self-defence courses. Feminist activism thus unfolded and brought to light the significance, prevalence, and impact of rape. It condemned the poor treatment of victims within the criminal justice system and society, while seeking to dismantle all the stereotypes and myths underpinning what counted as 'actual' rape, and what did not, arguing against the relevance of personal features and circumstances, like the victim's skimpy clothes or drunkenness.[18] Overall, the rape culture, where women's social, political, and legal subordination set the 'natural' conditions for rape to occur and were normalised, was unmasked.

This feminist critique of the current regulation rape also made its way into the political agenda, and legal reform transposing some feminist demands was adopted. Although much has been written about the legal reform and new case-law occurring in the United States, European countries have also slowly started to modify their legislation since the 1970s.[19] At the same time, part of feminism managed to put their concerns and claims on the international agenda, as arising from the adoption of the Convention on the Elimination of all Forms of Discrimination against Women (hereinafter: CEDAW) by the UN General Assembly in 1979.

Since the later 1960s, women have continued scrutinising rape law, by critically analysing its formulation and implementation. In this way, they have offered significant and variable insights into the ways the law should see and treat rape, which we use as a starting point for our analysis. Briefly, in the 1980s and 1990s, great emphasis was placed on the personalisation of violence and the emotional costs of rape,[20] whilst the #MeToo movement in the 2000s used social media to connect with other victims, putting their personal experiences under public scrutiny and calling for a tough-on-crime approach.[21] For Burghardt and Steinl, #MeToo brought to light three things. First, it demonstrated how widespread the experience of sexual violence (and rape) still is. Second, it urged society to reconsider when sexual conduct violates the sexual autonomy of another person. Third, it expressed the frustration of victims with the response, or lack thereof, by societies, legislators and courts.[22] For us, their remarks are significant in at least two major respects.

First, when acknowledging the pervasiveness of sexual violence, Burghardt and Steinl described rape as a form of gender-based violence arising from 'gendered power hierarchies in society'.[23] In doing so, they endorse a new interpretation of rape based on the very idea that sex and gender differ. Indeed, following Simone de Beauvoir's maxim 'one is not born, but rather becomes a woman',[24]

17. See, inter alia, S. J. Schulhofer, *Unwanted Sex. The Culture of Intimidation and the Failure of Law* (Cambridge MA, Harvard University Press, 1998)
18. R. Loney-Howe, *Online Anti-Rape Activism: Exploring the Politics of the Personal in the Age of Digital Media* (Bradford, Emerald Publishing, 2020) 20, 26; L. Goodmark, 'The Anti-Rape and Battered Women's Movements of the 1970s and 1980s', in D. Brake, M. Chammallas & V. Williams (eds), *The Oxford Handbook of Feminism and Law in the United States,* (digital edn, Oxford University Press, 2021) 3-4
19. M. A. Gómez Duque, 'Towards Legal Reform of Rape Laws under International Human Rights Law' (2021) 22 *The Georgetown Journal of Gender and the Law* 487, 502-505
20. R. Loney-Howes, 'The Politics of the Personal: The Evolution of Anti-Rape Activism from Second Wave Feminism to #MeToo', in B. Fileborn & R. Loney-Howes (eds), *#MeToo and the Politics of Social Change,* (London, Palgrave Macmillan, 2019), 25
21. ibid. 28
22. B. Burghardt & L. Steinl, 'Sexual Violence and Criminal Justice in the 21st Century' (2021) 22 *German Law Journal* 691
23. ibid. 693
24. S. de Beauvoir (C. Borde & S. Malovany Chevallier trs.), *The Second Sex* (Digital edition, Vintage Books: 2011)

there has been a terminological distinction between sex and gender within the feminist discourse. While, in brief, sex refers to the different biological and physiological characteristics of males and females, gender is understood to mean the social condition of being female or male. As such, gender is allegedly the result of a recurring set of performances, in compliance with dominant societal norms and out of the individual's control.[25]

Over time, part of feminism has also recognised that gender is inextricably intertwined with other personal characteristics, such as ethnicity and class, and therefore creates divergent modes of privilege and discrimination. In Crenshaw's words, gender had to reflect the intersectionality (namely, the simultaneous interaction between multiple identities) of the individual.[26] More recently, it has also been established that each person could experiment, switch and/or choose amongst divergent gender preferences and identities, going beyond the female–male dichotomy.[27] The very idea that gender can be personally and changeably constructed, however, is mostly restricted to part of academia and activism. In this regard, it is interesting to remember that even some feminist authors claim that sex and gender should continue being interpreted in an overlapping way, thereby believing in the biology-based notions of womanhood and femaleness.[28]

As later emerges in this paper, the possible construction of rape with reference to gender and intersectionality provides fertile ground for debate at the EU level and, in our opinion, should be fully part of the Commission Proposal.

Second, in their considerations, Burghardt and Steinl stress that the #MeToo movement has contributed to important changes in the perception of the right to sexual autonomy and its legal protection.[29] Briefly, sexual autonomy has a two-fold nature since it allows the individual to either engage in or refrain from sexual conduct. Within the fundamental rights discourse, this concept has been inextricably intertwined with the respect for human dignity, security, and integrity, the right to private life and health, and the prohibition of discrimination.[30] In this scenario, the chance for the individual to freely engage in sexual conduct (*i.e.* positive, sexual autonomy) is central to their conception of well-being: this also implies that the law should create the conditions for their sexual autonomy to flourish. Conversely, the interference with sexual autonomy is likely to result in severe harm, meaning that the criminal law should prevent the individual from experiencing sexual conduct they do not wish to have (*i.e.* negative sexual autonomy).[31]

Seeing rape in the context of gender-based violence in the EU

When it comes to the EU, the influence that the feminist discourses on rape have had on its legal order emerges from some soft law instruments adopted by the European Parliament and the European Commission in the 1980s. Section 2.2 gets back to this point and provides a more

25. J. Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40(4) *Theatre Journal* 519
26. K. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241
27. L. C. Graydon, *Gender and Sexual Fluidity in the 20th Century Women Writers. Switching Desire and Identity* (London, Routledge, 2021) 2
28. R. Pearce, S. Erikainen & B. Vincent, 'TERF Wars: An Introduction' (2020) 68(4) *The Sociological Review Monograph* 677
29. Burghardt & Steinl (n 22) 692 ff.
30. D-S. Valentiner, 'The Human Righ To Sexual Autonomy' (2021) 22 *German Law Journal* 703
31. S. P. Green, *Criminalizing Sex: A Unified Liberal Theory* (Oxford, Oxford University Press, 2020) 24 ff

comprehensive overview, but it is now important to make it clear that the EU currently sees rape in the context of gender-based violence, to be understood as arising from the current, unbalanced relations between women and men in society and in compliance with the feminist discourses described in the previous section.

More precisely, Recital no. 17 of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (hereinafter: the Victims' Rights Directive), explicitly recognises rape as a form of gender-based violence.[32]

The same legislation also defines gender-based violence as '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' and recognises it as 'a form of discrimination'[33] and reads it through intersectional lenses. This means that the victim of crime should be recognised and treated without discrimination of any kind based on grounds such as race, colour, ethnic and social origin, genetic features, language, religion or belief, political or any other membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health.[34]

Against this backdrop, it is interesting to note that most Member States do not formally recognise gender-based violence as arising from gender inequality (namely, from the unequal power relationships between women, men, and eventually non-binary people) within society, nor they do so in an intersectional way.[35] Even more alarmingly, some Member States are well-known to oppose the conceptual distinction between sex and gender because, in a nutshell, it allegedly threatens the natural order of society, where men and women play different and complementary roles.[36]

As emerges from Sections 3 and 4, this divergence between the Union and its Member States is a double-edged sword, serving as a catalyst and a restraint for the harmonisation of rape laws.

Rape and its criminalisation in Europe: Divergent responses to a shared problem

Before discussing the Commission Proposal and, more broadly the EU competence on the harmonisation of rape law, it is necessary to position them within the broader scenario of the current criminalisation of rape across Europe. The following subsections therefore focus on the law of the CoE, the long-lasting commitment of the European Union, as well as the legal fragmentation of its Member States.

The fight against rape in Europe: The Council of Europe's response

The European Convention of Human Rights (hereinafter: the ECHR) was adopted in 1950 when debates on women's rights and gender equality were only starting to emerge. Yet, the European

32. 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, Recital 17
33. vi
34. ibid Recital 9
35. S. De Vido & L. Sosa, 'Criminalisation of Gender-Based Violence against Women in European States, including ICT-Facilitated Violence. A Special Report' (Luxembourg, Publications Office of the European Union, 2021) 45, 47, 51
36. On the concept of 'gender ideology', see: A. Graff, 'Gender Ideology: Weak Concepts, Powerful Politics' (2016) 6(2) *Religion & Gender* 1

Court of Human Rights (hereinafter: the ECtHR) has progressively developed a case-law, which has increasingly demanded the State Parties of the CoE to criminalise and prosecute certain wrongdoings based on the current unequal power relationships between women and men in society, as well as to remove obstacles that victims of violence against women encounter in their efforts to seek legal protection and access to justice within their national jurisdictions.[37]

Since the *Aydin v. Turkey* case (1997), the ECtHR has legally qualified rape as an act of torture or degrading treatment, in breach of Article 3 ECHR.[38] Rape, the judges held,

> 'must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally […] Against this background the court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3'.[39]

In the *X and Y v. The Netherlands* case (2003), the ECtHR introduced the so-called positive obligations doctrine requiring the State to mobilise the criminal law to protect the individual against, as well as redress, serious human rights violations, the violation in point being that of rape.[40]

The ECtHR case-law recognises the severe harm that rape causes to the victim but has traditionally done so through gender-neutral words and without acknowledging that this wrong disproportionately affects women.[41] On the contrary, the Convention on preventing and combating violence against women and domestic violence (hereinafter: the Istanbul Convention) adopted by the CoE in 2011 positions rape within the broad analysis of gender-based violence, building on the very idea that women experience rape much more often than men, due to the unequal power relationships between them within society.[42] In doing so, it supports that part of feminism arguing that rape and, more broadly, sexual violence do not stem from sex and its biological attributes, but from a social construct of overarching social attitudes and perceptions of how women and men should look like and behave in society.

Due to this gender-based nature, numerous State Parties (including Hungary, Bulgaria and Slovakia) have not ratified the Istanbul Convention and oppose to the EU accession arguing that it might jeopardise the natural order of our society.[43] What is interesting to observe, instead, is that, although the Istanbul Convention sees rape in the context of gender-based violence and acknowledges that it

37. P. Londono, 'Defining Rape under the European Convention on Human Rights. Torture, Consent and Equality', in C. McGlynn & V. E. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspective* (London, Routledge, 2010), 109
38. *Aydin v. Turkey* App no 57/1996/676/866 (ECtHR, 25 September 1997)
39. ibid. 86
40. *X and Y v. The Netherlands* App no 8978/80 (ECtHR, 26 March 1985) 23
41. Londono (n 37) 111, 113-114
42. 'The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): Questions and Answers <https://rm.coe.int/istanbul-convention-questions-and-answers/16808f0b80> accessed 9 April 2022
43. C1/19 Istanbul Convention [2021] ECLI:EU:C:2021:198 para 189-190

mostly affects women, Article 36 adopts a gender-neutral language, by defining rape as any intentional conduct which involves:

> 'a) 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; b) engaging in other non-consensual acts of a sexual nature with a person; c) causing another person to engage in non-consensual acts of a sexual nature with a third person'.

This means that, although at the heart of this criminalisation lies the aim to eradicate gender inequality, the minimum standards for the approximation of rape law put the sexual autonomy of the individual in front, meaning that all people are equally protected from harm of like degree regardless of their gender (or sex).

Ultimately, it is important to stress that, for sexual autonomy to be legally protected, the Istanbul Convention defines rape as sexual conduct in the absence of consent, meaning that if a person rejects sexual advances, they must be seen as withdrawing their consent (also known as the 'no means no' approach).

The fight against rape in Europe: The EU commitment

As explained in Section 1.3, along with the CoE the EU has traditionally considered gender-based violence as arising from the unbalanced power relations between women and men within society and has let rape fall within the scope of its cause and definition.

The following EU commitment to end gender-based violence and, more specifically, rape can be traced back to the European Parliament Resolution of 11 June 1986 on violence against women, where the EU institution called the Member States, *inter alia*, to define it as a crime against the person rather than morality, to eradicate sexist and outdated attitudes towards victims within the judicial system, and to criminalise marital rape.[44] In doing so, the European Parliament seemingly transposed the contemporary feminist claims described in Section 1, while stressing the gender dimension of rape and the human rights violation it embeds.

Since then, though, the EU commitment to eliminate rape has mostly remained restricted to soft law instruments. *Inter alia,* numerous European Parliament Resolutions have called the Member States to collect statistics, raise awareness, financially support organisations working in the field and criminalise rape in the absence of consent. Simultaneously, the fight against rape has fallen within the broader request from the European Parliament to the European Commission to adopt a strategy and action plan against violence against women, as well as to the Council to include gender-based violence in Article 83.1 TFEU and accede to the Istanbul Convention.[45]

Moreover, to our knowledge, the only secondary legislations mentioning rape are Article 2 of the Council Framework Decision 2002/584/JHA stating that there is no need for the establishment of

44. European Parliament Resolution of 11 June 1986 on violence against women [1986] OJ C 176/73

45. *Inter alia,* European Parliament Resolution of 26 November 2009 on the elimination violence against women [2009] OJ C 285E; European Parliament Resolution of 6 February 2013 on the 57th session on UN CSW: Elimination and prevention of all forms of violence against women and girls [2013] OJ 2016/C 024/02; European Parliament Resolution of 25 February 2014 with recommendations to the Commission on combating violence against women [2014] OJ 2017/C 285/01; European Parliament Resolution of 9 June 2015 on the EU Strategy for equality between women and men post 2015 [2015] OJ 2016/C 407/01; European Parliament resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU OJ 2022/C117/09

dual criminality in the execution of a European Arrest Warrant (hereinafter: EAW),[46] the said Recitals of the Victims' Rights Directive,[47] and the Annex of offences to which Article 11 refers in the Directive 2014/41/EU regarding the European Investigation Order.[48]

As said in the Introduction, however, the EU commitment to end rape is slightly turning into action considering the recent presentation of the Commission Proposal.

Overall, in its Recitals, the Proposal reiterates that women are disproportionately affected by rape and all other forms of sexual violence, which are deeply rooted in unequal power relations between women and men and in the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for women and men. Said otherwise, the Commission Proposal reiterates the very idea that rape falls within the scope of gender-based violence.

Then, pursuant to its Article 5:

> 1. Member States shall ensure that the following intentional conduct is punishable as a criminal offence:
>
> (a) engaging with a woman in any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object;
>
> (b) causing a woman to engage with another person in any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object.
>
> 2. Member States shall ensure that a non-consensual act is understood as an act which is performed without the woman's consent given voluntarily or where the woman is unable to form a free will due to her physical or mental condition, thereby exploiting her incapacity to form a free will, such as in a state of unconsciousness, intoxication, sleep, illness, bodily injury or disability.
>
> 3. Consent can be withdrawn at any moment during the act. The absence of consent cannot be refuted exclusively by the woman's silence, verbal or physical non-resistance or past sexual conduct.

Similar to the Istanbul Convention, this draft provision legally qualifies rape as sexual conduct in the absence of consent, thereby protecting the sexual autonomy of the individual. Conversely, however, Article 5 is expected to protect women only.

Before moving to the critical discussion of the EU competence and approach to harmonising rape law, as well as to a more desirable content of the constituent elements of its criminal provision, we look at the state of play within the Member States. In this way, we can better understand the legal differences amongst them and the following need for the EU call for harmonisation, with all due regard to their national identities.

46. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190
47. 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
48. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1

The fight against rape in Europe: The Member States' divergences

The crime of rape is currently included in all the national jurisdictions of the Member States. Nevertheless, divergences in their legal definitions and rationales remain.[49]

Starting from a systematic interpretation, it is possible to show a discrepancy between the criminal codes of those Member States classifying rape as a crime against sexual integrity, self-determination and/or autonomy, as can be evinced by the position of the crimes definition in the criminal la code, such as in the case of Italy,[50] and those categorising it as a criminal offence against morality, like Bulgaria.[51] Some jurisdictions adopt a mixed approach, like Latvia where rape is included in Chapter XVI entitled 'Crimes against morality and sexual integrity'.[52] This classificatory difference, which can be inferred from the title of the chapters or sections of the criminal codes, demonstrates that the crime of rape is still sometimes understood with reference to sexual morals, meaning that it might impose shame and stigma upon the victim, belittle the severe consequences rape has on them and does not recognise them as a rational, autonomous, and responsible human beings.

However, as clarified below, no matter how they are framed, national legislations are marked by history and their implementation is often grounded on harmful and sexist stereotypes, which impinge on the enjoyment of the victim's right to access and redress as a means to protect their fundamental rights. As seen in Section 1, rape has been traditionally addressed through the problematic frameworks of property rights and family's honour. Notwithstanding the feminist struggles from the 1970s onwards, this interpretation is still reflected in the judicial system, where rape myths and gender stereotypes permeate national case-law. This is evident, *inter alia*, in the Italian 'Blue jeans' case (1998), where the Italian Supreme Court presumed that the victim had consented to the sexual intercourse due to the blue jeans she was wearing at that time. Skin-tight blue jeans, the judges explain, would have been hard to take off without the victim's acquiescence.[53] Twenty years on, in the Spanish 'Wolf pack' case (2018), the Navarra criminal court acquitted five men of gang rape because the victim had shut her eyes and had waited for the sexual intercourses to end, meaning that her conduct had implicitly expressed consent.[54]

Moving to the specific legal definition of rape, divergences in its constitutive elements and surrounding circumstances even seem to be increasing across the EU.

In Member States, such as Germany,[55] Luxembourg,[56] Sweden[57] and (most recently) Denmark[58] and Slovenia,[59] rape law is grounded on a consent-based definition. Generally speaking, this means that the law requires the person engaging in sexual conduct to agree to it, for it not to be considered as rape. At a closer look, however, the term 'consent' could embody a multitude of concepts and has been of continuous concern to judges and scholars. Amongst the said jurisdictions, for example,

49. De Vido & Sosa (n 35) 76
50. Book II, Title XII, Chapter III, Section II 'On crimes against personal liberty', Article 609bis of the Italian Criminal Code
51. Special Part, Chapter II, Section VII 'Debauchery', Article 152 of the Bulgaria Criminal Code
52. Chapter XVI of the Latvian Criminal Code
53. Italian Supreme Court of Cassation, Section III, judgment no 1636 of 6 November 1998
54. Navarra Audencia Provincial (Penal), Section II, judgment no 38 of 20 March 2018; P. Faraldo-Cabana, 'The Wolf-Pack Case and the Reform of Sex Crimes in Spain' (2021) 22 *German Law Journal* 847
55. Section 177 of the German Criminal Code
56. Article 375 of the Luxembourg Criminal Code
57. Section 1, Chapter 5 of the Swedish Criminal Code
58. Sections 216 and 228 of the Danish Criminal Code
59. Article 170 of the Slovenian Criminal Code

Section 177.1 of the German Criminal Code builds the definition of rape on the absence of the recognisable will of another person. As such, it enshrines the idea that any signal of refusal to sexual advances and acts is a sufficient condition for a sexual offence. Instead, pursuant to Article 170.2 of the Slovenian Criminal Code, consent must be provided by a person able to make the decision and must be freely communicated in an expressive and unambiguous way. This means that the individual must be in a position to consent, and the other party should ensure that their partner genuinely wants to engage in sex and tells them so. To complicate matters further, there is no well-established definition of consent in rape law in Article 375 of the Luxembourg Criminal Code, eventually risking transposing the traditional consent structure from other realms of law.[60] Ultimately, the literal translation of Chapter 6, Section 1 of the Swedish Criminal Code does not even explicitly mention the term 'consent', rather referring to the concept of voluntariness, to be understood as the free decision to take part in sexual intercourse.[61]

For a crime to be legally qualified as rape, however, numerous Member States require force, coercion, threat, abuse of power, deception, surprise, and/or the exploitation of a position of vulnerability. This is evident in the case of France,[62] Italy,[63] Hungary,[64] Latvia[65] and Lithuania[66] to name just a few examples. These jurisdictions do not also include different terms but also interpret them differently with regard, for instance, to the required degree of strength of resistance, the psychological dimension of force and coercion, and the possibility of passive behaviour of the victim due to the fear, shock and embarrassment. In this regard, comparative research shows that force and all the other factors have been traditionally interpreted narrowly, giving rise to a focus on physical force or explicit threat as opposed to a more contextual focus on the power dynamics at play.[67]

Moreover, it is important to stress that Croatia[68] and Greece[69] have adopted a mixed approach, meaning that they simultaneously criminalise rape, either be it committed through force, coercion, *etcetera* or without consent,[70] whilst Croatia,[71] Denmark[72] and Sweden[73] also criminalise rape by gross negligence, thereby covering all those complex cases where the offender acts under a false belief about the existence of victim's consent.

Other areas where significant differences have also been found include the types of sexual conduct covered by rape law, exemptions, aggravating and mitigating circumstances. For reason of

60. At the time of writing, a new draft law was just presented to better define sexual consent. 'Sam Tanson Lutte contre les Abus Sexuels e l'Exploitation Sexuelle dans des Mineurs en Renforçant le Dispositif Legislatif' (19 January 2022) <https://gouvernement.lu/fr/actualites/toutes_actualites/communiques/2022/01-janvier/19-tanson-projet-loi-protectionmineurs.html?> accessed: 3 March 2022
61. J. Vestergaard, 'The Rape Law Revision in Denmark: Consent or Voluntariness as the Key Criterion?' (2020) 8(2) *Bergen Journal of Criminal Law and Criminal Justice* 5, 13, 18
62. Article 222-23 of the French Criminal Code
63. Article 609bis of the Italian Criminal Code
64. Article 197 of the Hungarian Criminal Code
65. Article 159 of the Latvian Criminal Code
66. Article 149 of the Lithuanian Criminal Code
67. E. Dowds, *Feminist Engagement with International Criminal Law: Norm Transfer, Complementarity, Rape and Consent* (Oxford, Hart Publishing, 2019) 114 ff.
68. Articles 152.1 and 153.1 of the Croatian Criminal Code
69. Article 336 of the Greek Criminal Code
70. In both jurisdictions, however, sex without consent is legally qualified as a lesser offence carrying a lower penalty.
71. Articles 152.2 and 153.2 of the Croatian Criminal Code
72. Section 228 of the Danish Criminal Code
73. Chapter 6 Section 1a of the Swedish Criminal Code

space, this article cannot cover every divergence, but it is still interesting to name a few examples to further prove the fragmented landscape of rape laws in the EU.

In each Member State, vaginal penetration falls within the scope of rape law. Whereas, in jurisdictions like Poland[74] and Slovakia,[75] this sexual act is the only one made criminal by law, others, such as Ireland,[76] Spain,[77] and Romania,[78] have broadened their definition, by referring to the penetration of the body, the anus, and/or the mouth. Besides, rape is understood to be committed through means other than the male penis, including fingers and/or foreign objects pursuant to the legislation of, *inter alia*, Portugal[79] and Malta.[80] Ultimately, in 2022, the Luxembourg Ministry of Justice presented a draft law covering each sexual act the victim was led to perform on the offender and/or on a third party.[81]

Although the *actus reus* of rape often goes beyond vaginal penetration and gender-neutral language is used in most of the Member States' law, the legal frameworks of Bulgaria,[82] Cyprus,[83] and Slovakia[84] explicitly indicate women as the sole, possible victim of rape.

The harmonisation of rape law in the EU: Discussing the way forward

So far, this article has recalled how rape is a complex, pervasive problem in the EU, affecting one-fifth of the female population and deeply rooted in unequal power relations between women and men. Rape, it has been argued, has a detrimental effect on the physical and psychological well-being of the victim and prevents them from the enjoyment of their fundamental rights. Besides, it places large costs on the economy and society. Nevertheless, the national legislations of the Member States diverge in the legal interpretation of rape, as well as in the legal rationales for its criminalisation, thereby offering unequal protection to victims.

Endorsing the CoE framework on gender-based violence, the European Commission presented its Proposal last March, requiring all Member States to adopt a harmonised definition of rape.

At the heart of the Commission Proposal lies the aims of making the current EU legal instruments relevant to combating violence against women and domestic violence more effective, creating upwards convergence and filling gaps in protection, access to justice, support prevention and coordination and cooperation, as well as aligning EU law with established international standards. In doing so, however, the European Commission did not follow the recommendations enshrined in the last European Parliament resolution of 16 September 2021, where the EU institution was advised to firstly identify gender-based violence as a new area of crime listed in Article 83(1) TFEU.[85] By contrast, the European Commission is proposing to harmonise certain forms of gender-based

74. Article 197 of the Polish Criminal Code
75. Section 199 of the Slovakian Criminal Code
76. Section 4 of the Irish Criminal Law (Rape) (Amendment) Act 1990
77. Article 179 of the Spanish Criminal Code
78. Article 219 of the Romanian Criminal Code
79. Article 164 of the Portuguese Criminal Code
80. Article 198 of the Maltese Criminal Code
81. 'Sam Tanson Lutte contre les Abus Sexuels e l'Exploitation Sexuelle dans des Mineurs en Renforçant le Dispositif Legislatif' (n 102)
82. Article 152 of the Bulgarian Criminal Code
83. Article 144 of the Cypriot Criminal Code
84. Article 199 of the Slovakian Criminal Code
85. European Parliament resolution of 16 September 2021 (n 45)

violence, including rape, on the basis of its existing competence in the field of sexual exploitation (namely, an area of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis pursuant to Article 83.1 TFEU).

On such premises, the following subsections critically examine whether the existing EU competence in criminal matters allows it to regulate gender-based violence, including rape. In doing so, we also link our analysis with some considerations developed in Section 1, given that feminist scholarship has developed as a critical theory shedding new light on the concept of rape, stressing the shortcomings of current rape laws and inspiring legal reform, which for the reasons explained above is also particularly relevant to this proposal. Before proceeding, however, it is important to stress that, although the proposal is based on the combined legal bases of Articles 82.2 and 83.1 TFEU, we simply focus on the latter provision since it shows two different approaches adopted by the European Commission and suggested by the European Parliament, while also providing some food for thought concerning the inextricable linkage and mutual influence between what society counts as rape and how the law regulates it.

The European Commission proposal: Rape as a form of sexual exploitation falling within Article 83.1 TFEU

Article 83.1 TFEU provides the European Parliament and the Council with the competence to establish minimum rules concerning the definition of criminal offences 'in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. The article later presents an exhaustive list of crimes complying with these requirements, including 'sexual exploitation of women and children', which the European Commission refers to when suggesting harmonising rape law in its proposal. More precisely, the European Commission explains, 'the term "sexual exploitation" in Article 83(1) TFEU can be understood as any actual or attempted abuse of a position of vulnerability, differential power or trust, including but not limited to, profiting monetarily, socially or politically from a sexual act with another person. The exploitative element can refer to the achievement of power or domination over another person for the purpose of sexual gratification, financial gain, and/or advancement'.[86] It then goes on to state that rape presupposes all these elements, meaning that it stems from and leads to the existing, unbalanced power relationships between women and men within society.[87]

As already stressed, however, the inextricable linkage between 'sexual exploitation of women and children' and rape implies that the criminal provision will only apply to women and children, thereby excluding men and non-binary people from legal protection and bringing a new, social invisibility for their personal experiences.

Although rape affects men and non-binary people to a lesser extent, the European Commission fails to acknowledge that they can likewise be rape victims and the harm they suffer does not differ from the one women experience.[88] Besides, it is important to remember that rape can be the cause and the consequences of power asymmetries within society for reasons other than unequal relations between

86. Commission (n 1) 8
87. ivi
88. Michelle Lowe and Paul Rogers, 'The Scope of Male Rape: A Selective Review Of Research, Policy And Practice' (2017) 35 Aggression and Violent Behavior 38

women and men and/or at the intersection with other grounds of discrimination. *Inter alia,* this was evident in the racial dynamics of rape during and after slavery.[89] At the same time, it is well-established that rape has traditionally been used in war times to reward soldiers for their military victory or to symbolically destroy the social and cultural stability of the enemy.[90]

To wrap up, by grounding its proposal on the area of crime of 'sexual exploitation of women and children' included in Article 83.1 TFEU, the European Commission has endorsed that part of feminist scholarship and activism arguing that rape is used to socially subordinate and oppress women, the notions of womanhood and femaleness overlap and, consequently, the very idea of gender neutrality would just make the structural dynamics of female sexual victimisation within society irrelevant.

This legislative choice, however, is not without consequences and will exclude certain people from criminal law protection, while also failing to fully protect the sexual autonomy of the individual. While Section 4 gets back to this point and critically discusses the minimum requirements of rape the EU legislator should adopt, the next Subsection takes a step back in time and examines the European Parliament Resolution of 16 September 2021, where the European Commission was recommended to submit, pursuant to Article 83.1 TFEU, a proposal for a Council decision to broaden the material scope of the Treaty provision and recognise gender-based violence as falling 'in [those] areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. As later emerges, in our opinion, had Article 83.1 TFEU been amended in this direction and had the proposal been based on a gender-based violence legal basis, this legislative option would offer the most suitable solution to criminalise rape in an effective and comprehensive way.

The European Parliament resolution: Gender-based violence as a new area of crime listed in Article 83.1 TFEU

According to Article 83.1 TFEU, the Council can adopt a decision to broaden the material scope of the Treaty provision, thereby including new 'areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. Based on the European Parliament Resolution of 16 September 2021, this should be the case with gender-based violence, including rape.

What follows is therefore a brief analysis of the legal feasibility of this policy option, focusing on the EU's competence to harmonise gender-based violence and, more precisely, on whether gender-based violence meets the standards of seriousness and cross-borderness enshrined in Article 83.1 TFEU, as well as complying with the subsidiarity principle pursuant to Article 5.3 TFEU.

Gender-based violence, including rape, as a serious crime

'Serious crime' remains a poorly defined term. Paoli et al. trace its origin back to the Council Resolution of 17 January 1995 on the lawful interception of telecommunications and observe the increased use of this expression starting from the early 2000s, with special regard to the

89. P. Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (New York, Routledge, 2005) 223

90. R. Seifert, 'The Second Front: The Logic of Sexual Violence in Wars' (1996) 19(1/2) *Women's Studies International Forum* 35

establishment of Eurojust and Europol, as well as the new phase of policy-making on justice, freedom, and security after the entry into force of the Treaty of Lisbon.[91]

Their analysis then continues, by showing a set of empirical criteria for a crime to be legally qualified as 'serious', namely, its nature, scale, significance, and impact.[92] Similarly, a study commissioned by the European Parliament defines serious crime 'as a crime that puts the EU's interests at risk, as it may pose a significant danger to the health and safety of society while also entailing high cost'.[93]

On such premises, it is our opinion that gender-based violence, including rape, can fall within the scope of serious crime because it endangers some EU core interests pursuant to Article 2 TFEU as follows.

First, gender-based violence severely harms the physical and mental health of the victim, thereby impinging on the respect for their fundamental rights to human dignity, security, integrity, and health. Briefly, according to an EU-wide survey, fear, anger, and shame are common emotional responses since the victim often perceives carrying a social stigma with them. As regards the most prevailing, long-term psychological consequences, the document refers to anxiety, a sense of vulnerability, and loss of self-confidence, whilst ca. 50% of the victims suffer from physical injuries.[94]

Second, gender-based violence has a detrimental effect on the economy. According to the European Institute for Gender Equality (hereinafter: EIGE), it places high costs on the Member States, by increasing public spending on healthcare, legal remedies, and other support services. Besides, since the harm to the victim often limits their capability to work, an additional loss of economic outputs can be registered.[95]

Third, gender-based violence gives rise to considerable social costs since it negatively impacts the victim's ability to participate fully in all aspects of society, by generating fears, precautions, and stereotypes that disadvantage people who have never even been the direct victims of this crime. From a legal angle, the General Recommendation no. 19 of the UN Committee on the Elimination of Discrimination against Women (hereinafter: CEDAW) makes it clear that gender-based violence 'seriously inhibits women's ability to enjoy rights and freedoms' on an equal footing,[96] thereby impinging on the respect for human dignity, equality, freedom, justice, and solidarity. On a more practical note, it is argued that the estimated annual social cost of gender-based violence exceeds the ones of numerous crimes listed in Article 83.1 TFEU. For example, while gender-based violence involves a societal cost of € 290 billion on an annual basis, the annual estimates for the cost of organised crime and terrorism respectively amount to € 110 billion and € 16 billion.[97]

91. L. Paoli, A. Adriaenssen, V. A. Greenfield & M. Conickx, 'Exploring Definitions of Serious Crime in EU Policy Documents and Academic Publications: A Content Analysis and Policy Implications' (2017) 23 *European Journal on Criminal Policy and Research*, 269
92. ibid. 273
93. C. Navarra, M. Fernandes & N. Lomba, 'Gender-based Violence as a New Area of Crime listed in Article 83(1) TFEU. European Added Value Assessment' (2021) 34 <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662640/EPRS_STU(2021)662640_EN.pdf> accessed: 06.03.2022
94. European Union Agency for Fundamental Rights, *Violence against Women: An EU-wide Survey* (Luxembourg, Publications Office of the European Union, 2014) 41; Eurostat, 'Violent Sexual Crimes Recorded in the EU' (2017) <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/edn-20171123-1> accessed: 02 March 2022
95. EIGE, 'The Costs of Gender-Based Violence in the European Union' (2021) <https://eige.europa.eu/news/gender-based-violence-costs-eu-eu366-billion-year> accessed 02 March 2022
96. CEDAW, 'General Recommednations no 19: Violence against Women' (1992) A/47/38 1
97. Navarra, Fernandes & Lomba n 93) 34-35

The cross-border dimension of gender-based violence, including rape

Pursuant to Article 83.1 TFEU, the EU can establish minimum rules in areas of particularly serious crime 'with a cross-border dimension resulting from the nature or impact of such offences or from the special need to combat them on a common basis'. According to Wieczorek, 'the three expressions should be interpreted as referring to different situations'.[98] This means that the EU competence to harmonisation of gender-based violence due to its cross-border nature could be theoretically justified based on three possible scenarios.

First, a criminal offence can be understood to have a cross-border nature whenever it is recognised that its harmful consequences have spread across borders, and the EU, rather than its Member States, is better placed to address them. Because the crime of rape hardly presents a transboundary character, we do not believe that its harmonisation could be justified based on this interpretation of cross-borderness.

Second, the cross-border dimension can arise from the way the crime is committed. In this regard, it is possible to infer the cross-border nature of gender-based violence, including rape, from its conceptualisation as a continuum. In brief, in 1987, Kelly defined this notion 'as a basic common character underlying many different events and as a continuous series of elements and events that pass into one another'.[99] Said otherwise, gender-based violence is understood to be a continuum because men use a variety of forms of abuse, coercion, and force to control women, and women name and experience many of them throughout their lives. Besides, new forms of gender-based violence are currently committed at the intersection between the online and the offline sphere and research shows that it is often difficult to differentiate the consequences of wrongful acts that are initiated in digital settings from offline realities, and vice versa.[100] This means that, if one were to recognise that gender-based violence occurring online is accessible to everybody everywhere and has an immediate, spill-over effect on the offline world, this could be a way to further satisfy the cross-border criterium.[101]

Incidentally, another reason, which is usually quoted to plead in favour of the harmonisation of criminal law and could likewise support the harmonisation of gender-based violence, lies in the chance to ease judicial cooperation.[102] This necessity has arisen, for example, in the *Assange v. Swedish Prosecution Authority* case (2011), where the legal uncertainty on the definition of rape was one of the issues requiring extensive judicial activity and several appeals following the issue of an EAW from Sweden to extradite Assange from the UK, where he had been living. Briefly, since the defence of Julian Assange had argued that the conduct was not fairly and accurately described in the Swedish EAW, the decision of the Queen's Bench Division of the High Court fully focused on what was meant by rape and what differed between the British and the Swedish definitions.[103] Notwithstanding the fact that the crime of rape is listed in Article 2 of the Council Framework Decision

98. I. Wieczorek, *The Legitimacy of EU Criminal Law* (London, Hart Publishing, 2020) 116
99. L. Kelly, 'The Continuum of Sexual Violence', in J. Hanmer & M. Maynard (eds.), *Women, Violence, and Social Control* (London, Palgrave MacMillan, 1987) 58
100. O. Jurasz & K. Barker, 'Sexual Violence in the Digital Age: A Criminal Law Conundrum?' (2021) 22 *German Law Journal* 784, 786
101. N. Lomba, C. Navarra & M. Fernandes, 'Combating Gender-Based Violence: Cyberviolence. European Added Value Assessment', 2021, 14-17, 125-127 < https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662621/EPRS_STU(2021)662621_EN.pdf> accessed: 15.10.2022
102. Wieczorek (n 98) 116
103. Julian *Assange v. the Swedish Prosecution Authority* [2011] EWCHC 2849

2002/584/JHA and, consequently, does not need to satisfy the requirement of dual criminality, this case-law shows that there are still difficulties with cooperation and building mutual trust between competent judicial authorities in rape cases. Harmonisation of rape law could facilitate this process.

Third, for a crime to have cross-border implications, it is necessary to identify a special need to combat it on a common basis. While Zapatero and Muñoz de Morales Romero trace this interpretation back to the need to harmonise to support judicial cooperation in the fight against crime, and we could thus cross-refer the reader to what has just been said with respect to the Assange case, Turner focuses on the symbolic potential harmonisation might have. More specifically, she argues that the need to respond to crimes on a common basis can arise from the simultaneous need to use criminal law to re-affirm the EU normative identity.[104] Consequently, the harmonisation of gender-based violence can foster a stronger sense of belonging to the EU community, where, as previously stated, equality between women and men and non-discrimination are an EU value (Article 2 TFE), objective (Article 3 TEU) and fundamental right (Articles 21 and 23, the EU Charter). This point is further elaborated on in the next subsection on the respect for the subsidiarity principle.

The respect for the subsidiarity principle: final considerations on the national identities of the Member States

Next to having the competence to harmonise rape, the EU must also comply with the subsidiarity principle. Briefly, the TFEU and the TEU make a list of the EU competencies and leave a residual one to the Member States. The EU competencies are classified into exclusive, shared, and supporting. Except for the first category, this means that Member States maintain the right to regulate, unless the EU exercise its competence. To delimit this power, Article 5.3 TFEU and its Protocol no. 2 on the applications of the principles of subsidiarity and proportionality provide that the EU can intervene, whenever an objective of an action cannot be sufficiently achieved by the Member States but can be better achieved at Union level, by reason of the scale and effects of the proposed action. In this way, actions are not only taken as close as possible to the EU citizens but can also respect the national identities of the Member States in compliance with Article 4.2 TEU.

As clarified by Wieczorek, the Treaty says nothing about whether we should understand subsidiarity as defining the EU as better placed to achieve the objective of action through a better specific decision-making procedure or simply because it can adopt more effective legislation. The Commission Communication of 1992 on the principle of subsidiarity explicitly referred to 'a comparative efficiency test', meaning that the EU could act, whenever the Member States cannot sufficiently address a phenomenon and the EU is comparatively more efficient.[105] What has emerged from past legislative action, instead, is that the EU has sometimes acted because of normative considerations (namely, because of the importance of the interests at stake, which arguably deserved criminal law protection). Said otherwise, the main rationale for harmonisation has sometimes lain in the symbolic value of the legislation, reaffirming the EU commitment to certain values which establish its identity and using criminal law to defend them. In this regard, one could argue with Turner that this was particularly evident in the adoption of the Framework Decision on racism and xenophobia.

104. J. I. Turner, 'The Expressive Dimension of EU Criminal Law' (2012) 60(2) *The American Journal of Comparative Law* 555

105. I. Wieczorek 'The Principle of Subsidiarity in EU Criminal Law', in C. Brière & A. Weyembergh, *The Needed Balances in EU Criminal Law: Past, Present, and Future* (London, Hart Publishing, 2017) 77, 79

According to the author, EU institutions justified this harmonisation based on 'the prevalence of racist crime, the diverse national laws addressing the issue, difficulties with mutual legal assistance, and the problems of combating racist crime in countries where prosecution depends on the complaint by the victim'.[106] No empirical support regarding subsidiarity and the cross-border dimension of the crime was provided.[107]

Similar arguments can be raised when it comes to the possible inclusion of gender-based violence in the list of Article 83.1 TFEU, considering that it has been shown that one of the rationales for harmonisation seemingly relies on the EU desire to convey its moral position on the matter, thereby ensuring that this harmful conduct is repressed across the Union and re-asserting its identity as an actual policy where gender-based violence is not tolerated. More precisely, as affirmed in the 2013 European Added Value Assessment on combatting violence against women, the adoption of a comprehensive tool to combat gender-based violence would significantly contribute to making the core human rights values proclaimed in the Charter, such as equality between women and men and non-discrimination, more concrete. It would also contribute to reinforcing the general values and principles that the EU is based upon, like 'economic and social progress', 'cohesion', 'human dignity', and 'justice'. The fight against gender-based violence, indeed, is also a way of strengthening public health, economic growth, inclusion and participation, and the elevation of general quality of life standards.[108]

In our opinion, however, the harmonisation of gender-based violence following its inclusion in the list of Article 83.1 TFEU could more easily satisfy the principle of subsidiarity, when considering the way the crime is committed. In other words, considering that Section 3.2.2 clarified that the harmonisation of gender-based violence could further ease judicial cooperation and its commission is increasingly at the intersection between the online and the offline life of the individual, one could argue that the EU can perform comparatively better than its Member States.

Yet, unlike the Framework Decision on racism and xenophobia,[109] the harmonisation of gender-based violence is known not to have high-level political support for a common response to this social phenomenon. Sections 1 and 2 already addressed this point, by explaining that certain Member States reject the very idea of 'gender', insofar as it allegedly threatens the natural order of society, where men and women play different and complementary roles. In doing so, they might rely on the said respect for the national identities of Member States. In any event, because the political resistance and the legal question are two separate ones, this discussion falls within the scope of this paper but would be a fruitful area for further work.

Minimum requirements for the legal definition of rape in the EU

The previous section has discussed whether the EU has the competence to harmonise rape law. In the pages that follow, we briefly discuss, should one agree that the EU indeed has the competence to act in this area, what minimum requirements should, in our opinion, be included in this legislative intervention. For this purpose, the focus is mostly on the competing notions of force, coercion, their threat and consent since they are the most common constitutive elements enshrined in the national definitions touched upon in Section 2.3. Besides, we discuss gross negligence, which is often understudied but

106. Turner (n 104) 569
107. Ibid 570
108. M. Nogaj, 'European Added Value Assessment: Combatting Violence against Women' [2013] PE 504.467 22
109. Turner (n 104) 566

might still provide some food for thought, when aiming at the comprehensive protection of rape victims. Before proceeding to the following analysis, though, two considerations are still necessary.

First, it should be noted that Recital 14 of the Commission Proposal set sexual autonomy as the protected interest by the law criminalising rape. This is to be understood as the right to be free from sexual violence, coercion and discrimination, as well as the right to control over one's body and over the free engagement in sexual conduct. This conceptual starting point has important implications on how the law on rape should be shaped, as is illustrated below, especially relying on a feminist lens to analyse the law on rape, and to inform all our discussion below.

Second, throughout history, rape has been understood as sexual violence against women alone. As reported in Section 2.3, this approach still emerges from the phrasing of some national provisions across the Union. Similarly, Section 3.1 stressed that the proposal of the European Commission understands rape as a form of 'sexual exploitation of women and children' pursuant to Article 83.1 TFEU. By contrast, it is important to restate that, in our opinion, the law should not separate the commission of rape from other unequal power relations within society. Accordingly, the respect for the equality principle demands criminal law to evenly protect people from harm and be responsive to all personal experiences of sexual violence, rather than resulting in further discrimination. On a practical note, this means that the EU harmonisation of rape laws should adopt gender-neutral language and cover the penetration of each body part, notwithstanding the means used.

The refusal to legally qualify force, coercion and their threat as a constituent element of the crime of rape

As previously emerged, force, coercion, and their threat have traditionally defined rape and many Member States still retain a definition limited to their use. Conversely, Article 5 of the Commission Proposal does not legally qualify rape with reference to force, coercion, and their threat, while regarding them as aggravating circumstances pursuant to Article 11(h). On such premises, it is necessary to assess whether they would be a desirable constituent element of the crime.

For Anderson, the words 'force' and 'coercion' are often used interchangeably because both invoke ideas of compulsion, constraint, and overtaking by means of superior power.[110] But due to their common usage, these notions have been used in different times and places to mean different things. Since both force and coercion involve physical strength, case-law has historically requested the victim to resist and demonstrate the unlawful nature of the sexual conduct. The demand for resistance to be proven in court, however, has varied. *Inter alia,* resistance could be expected to be continuous and to the utmost, it could derive from the victim's inability to escape or resist the offender due to the lack of strength and/or the number of people attacking.[111]

Over time, the material scope of force and coercion has often been broadened. The mere threat was considered a good reason not to physically resist, given that the victim could be in a state of apprehension of imminent bodily harm. Additionally, it was recognised for force and coercion to

110. S. A. Anderson, 'Conceptualizing Sex as Coerced Sex' (2016) 127 *Ethics* 50, 73

111. H. F. Fradella & C. Fahmy, 'Rape and related offences' in H. F. Fradella & J. M. Summer (eds.), *Sex, Sexuality, Law and (In)justice* (London, Routledge, 2016) 143

have a psychological dimension and be used to stress the existence of a position of authority, domination, or custodial control over the victim.[112]

On this last point, Mackinnon explicitly supports a legal definition of rape based on force and coercion because it allows rape to be labelled as a crime deeply rooted in sex inequality.[113] Similarly, Anderson conceptualises rape as coercion, to be understood as the ability to overpower the victim or broadly inhibit her actions. In this way, the author argues, it is possible to capture the social reality where men enjoy an advantage in the relevant sort of power over women that allow some of them to impose sexual demands with reasonable expectations of securing compliance with them.[114]

No matter how it is framed, we think that the definition of rape with reference to force, coercion, and their threat does not consistently protect rape victims and risk putting them in an unfair position in the courtroom. For example, force- and coercion-based definitions risk ruling out the chance for the victim to remain passive because they might fear even further brutalisation or might be shocked, surprised, embarrassed. This was evident in the aforementioned Spanish 'Wolf pack' case. Besides, when requiring the victim to prove their resistance, the law does not consider that it could take time for them to report the act, meaning that some evidence could change in the meanwhile (*e.g.,* the healing of bruises). Likewise, it disregards the long-term consequences rape has on the psychological well-being of the victim.

Furthermore, the legal definition of rape based on force, coercion, and their threat cannot fully protect the right to sexual autonomy of the victim. While it might defend the individual against unwanted and external interferences in their sexual sphere, it does not recognise them as rational, autonomous, and responsible human beings and, as such, capable of conveying their decision to engage in sexual conduct or not.[115] Said otherwise, the violation of their sexual autonomy occurs when falling within the scope of the legal conceptualisation of force, coercion and their threat, but the individual could have other reasons not to accept sexual advances. In conclusion, we agree with the Commission Proposal that force, coercion, and their threat should not be chosen as the constituent elements of the crime of rape. Their inclusion as aggravating circumstance pursuant to Article 11(h), however, might need further investigation.

For the time being, it is possible to argue that, if one could understand force, coercion, and their threat with reference to McKinnon and Anderson's definition, the criminalisation of rape could give further recognition to the unbalanced, power asymmetry within society that the act of rape allegedly implies within the feminist discourses. On the contrary, if one accepted that rape is more harmful when committed with force, coercion, and their threat, there could be the risk that the evidence to be given in court will play on the current gender biases and rape myths.

Defining consent as the desirable constituent element of the crime of rape

As already emerged in Section 2.3, there is no agreed definition of what counts as consent. For this paper to partially agree with the Commission Proposal to adopt a consent-based definition of rape, it is first necessary to provide some clarity on the matter.

112. Hörnle describes in detail this judicial development of rape law in Germany in: T. Hörnle, 'The New German Law on Sexual Assault and Harassment' (2017) 18(16) *German Law Journal* 1310, 1312 ff.. For similar case-law in other jurisdictions, inter alia: E. Dowds, 'Towards a Contextual Definition of Rape: Consent, Coercion, and Constructive Force' (2019) *Modern Law Review,* 1, 16-17
113. C. A. MacKinnon, *Women's Lives. Men's Laws* (Cambridge, MA, Harvard University Press, 2007) 240-248
114. S. A. Anderson, 'Conceptualizing Sex as Coerced Sex' (2016) 127 *Ethics* 58, 78
115. Dowds, 'Towards a Contextual Definition of Rape: Consent, Coercion, and Constructive Force' (n 112) 17-18

Before discussing the main points of disagreement, it is important to focus on the consensus amongst scholars that consent serves to distinguish between permissible and impermissible sexual conduct. Precisely, Hurd argues, consent does the magic, by changing the moral and legal relationships between those individuals who engage in a certain sexual act.[116] Said otherwise, the provision of consent makes a certain sexual act morally or legally permissible in circumstances in which it otherwise would not be and changes the rights and duties amongst the concerned individuals, as well as between the individuals and the State. When consenting to another person's sexual advances, indeed, one puts that person at liberty to do what it was previously constrained not to do and likewise refrains the State from protecting her against undesirable intrusion in her personal sphere.

Against this backdrop, it is already possible to note that, unlike force, coercion, and their threat, consent per se can fully protect the victim's sexual autonomy because it does not only refrain a third party to interfere in their sexual sphere, but also guarantees that it is the victim themselves to decide whether and to what extent they want to engage in sex.

To unfold the main intricacies of consent in rape law, we borrow Westen's classification as being one of the most recent, legally grounded, and well-argued criminal theory on this thorny issue and integrate it with some nuances from other scholars. Briefly, Westen describes two legal theories enshrining the competing factual and legal natures of consent.[117]

Factual consent

Factual consent can be a subjective and/or objective attitude. This means that consent is an internal attitude of willingness, intention, and acquiescence and/or involves the explicit permission by words or conduct to another's act. The very idea of factual consent describes how people perceive the reaching of a mutual agreement in their daily interactions.

When it comes to negotiating consent, our society has a lot of dominant beliefs about sexuality and gender roles, many of which we internalise and influence our choices and actions.[118] In this vein, the factual interpretation of consent often produces undesirable results in the realm of law, such as the frequent reference to rape myths and gender stereotypes in the courtroom.

A central consideration of factual consent has also been the feminist debate about the competing 'no means no' *versus* 'yes means yes' models, as they further specify what counts as factual consent. Briefly, the 'no means no' approach implies that, if a person rejects sexual advances, she must be seen as withdrawing her consent. Indeed, people are free and can decline consent whenever sexual advances are unwanted. This means that men are responsible for respecting women's expressions of non-consent.[119] Instead, the 'yes means yes' framework requires the individual to communicate consent to the other party. The reason behind this model lies in the gender asymmetry of our society, meaning that women cannot often genuinely consent and, consequently, men should ensure that

116. H. M. Hurd, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121, 123-124
117. For more details, P. Westen, *The Logic of Consent. The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (London, Routledge, 2004) 15-304
118. M. Popova, *Sexual Consent* (Cambridge MA, The MIT Press, 2019) 19
119. See, inter alia, E. Sherwin, 'Infelicitous Sex' (1996) 2 *Legal Theory* 209; S. Estrich, *Real Rape* (Cambridge, MA, Harvard University Press, 1987)

their partners want sex and tell them so. Furthermore, women are not required to prove that they did not consent anymore.[120]

Factual consent plays a key role in determining how people define and talk about rape. In this scenario, the engagement in sex becomes relational, and it is up to both parties to secure there is consent. Nevertheless, some legal difficulties might arise from factual consent. For example, the sole recognition of the subjective attitude, albeit important to fully empower the victim, might be problematic when presenting evidence. For this reason, there should always be some link between the victim's subjective and objective attitude. Moreover, since rape is deeply rooted in unequal power relations within society, it could occur that consent is provided explicitly but is not genuine. Similarly, expressive consent might sometimes risk being misinterpreted due to what the other person might consider 'natural' or 'customary'.

Against this backdrop, legal consent ensures that factual consent gives fair notice to the other person of what they would like to do or not, while protecting the weaker party.

Legal consent

For Westen, consent is legal, insofar its attitudinal and expressive provision complies with the normative standards of a given community that, in our case, are identifiable in competence, freedom, and knowledge.[121]

Although, as stressed by Witmer-Rich, 'determining specifically how much freedom, knowledge, and competence is required for consent to be legally valid is a difficult normative question over which there is significant disagreement',[122] we can still sketch how these criteria have been mostly understood in academia and have later influenced law in practice.

Starting from competence, this legal notion loosely requires the person to possess certain cognitive and emotional capabilities allowing them to comprehend what they are consenting to and what the risks and the benefits of their consent are.[123] For these abilities to be meaningful, there are social competences that must be acquired and familiarised with.[124] More interestingly, legislation and court are progressively presuming the incompetency in all those sexual activities involving people who are asleep, drugged, and drunk to the point that they vomit or have a memory black-out or experience any other form of unconsciousness. Article 609*bis* 2(1), Italian Criminal Code, Article 177.2(2), German Criminal Code, and Article 222-24(12), French Criminal Code exemplify this form of State intervention aimed to the protect citizens that cannot make any decision, nor can prevent another individual from accomplishing a sexual act. Article 5(2) of the Commission Proposal likewise builds on this legislative trend, by providing that rape can be understood as a non-consensual act 'where the

120. See, inter alia, N. J. Little, 'From No Means No to Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law' (2005) 58(4) *Vanderbildt Law Revie* 1321; S. J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of the Law* (Cambridge, MA: Harvard University Press, 1998)
121. Westen (n 117) 7
122. J. Witmer-Rich, 'It's Good to be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in Criminal Law' (2011) 5 *Criminal Law and Philosophy* 377
123. M. Waites, *The Age of Consent. Young People, Sexuality and Citizenship* (London, Palgrave MacMillan, 2005) 19
124. A. Moore & P. Reynolds, *Childhood and Sexuality. Contemporary Issues and Debates* (London, Palgrave MacMillan, 2018) 83 The authors also acknowledge that part of academia claim that underaged people should be considered sexual beings able to exercise choice and agency.
M. L. Perlin & A. J. Lynch, *Sexuality, Disability and the Law. Beyond the Last Frontier?* (London: Palgrave MacMillan, 2016) 56 ff.

woman is unable to form a free will due to her physical or mental condition, thereby exploiting her incapacity to form a free will, such as in a state of unconsciousness, intoxication, sleep, illness, bodily injury or disability'. In doing so, the European Commission shows that its minimum rules on the definition of rape will not clash too strongly with most of the old, national ones, but will mainly eliminate some domestic features, such as the use of force, coercion, and their threat as the sole constitutive elements of the crime, deemed to be incompatible with the normative purpose of rape law (namely, to end the unbalanced, power relations between women and men in society and protect the sexual autonomy of the victim).

For the requirement of knowledge to be met, the person must be adequately informed to make a rational decision, meaning that she must be aware of the circumstances and the potential consequences that might arise.[125]

Although some scholars and policy-makers reject the use of this concept or overlap it with the criterium of freedom we examine below,[126] rape by deception (sometimes also known as rape by fraud) is set in across legislation and literature and shows the importance of knowledge.[127] Briefly, rape by deception could occur, whenever an individual is pushed to engage in sexual activities on the false assumption about the nature of the act she is consenting to, the identity of the sexual partner and other external circumstances, like the use of contraceptives. The rationale behind this offence, Herring clarifies, lies in the denial of consent enshrined in deception. Like fraud, the author continues, deception makes the person unaware of her options, thereby manipulating her into acting against her will.[128]

For sexual conduct to be free, the individual must be able to exercise a real choice and there is no risk of coercion, manipulation, or severe negative consequences, if she does not consent. According to Archard, the line between consent and non-consent lies (and becomes contested) in relation to issues such as power asymmetry.[129] Particularly, at the heart of part of feminism lies the idea that consent stems from male coercion over women, meaning that the provision of consent will never be free, insofar as the law addresses the social structures that currently compel them to agree on sexual conduct they do not want.[130] Arguably, the feminist critique could be applied to any situation of social subordination, namely, whenever there is a socio-economic imbalance between the parties engaging in sex and choice is therefore restricted by material resources and/or social opportunities available to the vulnerable individual.[131]

Consequently, although the Commission Proposal says nothing about it, consent should be legally valid, insofar as its provision satisfies the three requirements of competence, knowledge, and freedom.

Moreover, we think it is important to stress that consent should always be seen as a dynamic process. In other words, insofar as sex influences the sphere of intimate identity and personal development

125. M. Waites (n 123) 21
126. S. Cowan, 'Freedom and Capacity to Make a Choice. A Feminist Analysis of Consent in the Criminal Law of Rape', in V. Munro & C. F. Stychin (eds.), *Sexuality and the Law. Feminist Engagements* (London: Routledge, 2007) 55-56
127. See, inter alia, N. Scheidegger, 'Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception' (2021) 22(5) *German Law Journal* 769; C. Kennedy, 'Criminalising Deceptive Sex: Sex, Identity and Recognition' (2021) 41(1) *Legal Studies* 91
128. J. Herring, Mistaken Sex' (2005) *Criminal Law Review,* 511, 515
129. D. Archard, *Sexual Consent* (London, Routledge, 1998) 2-3
130. MacKinnon(n 16) 175
131. Popova (n 118) 21, 23

and is best understood as a process stemming from a set of inferences, hints, and permissions, the person should give and/or withdraw consent for each sexual act.[132] A lesson learnt from this interpretation can be drawn from sadomasochism, where people receive or give sexual pleasure from the infliction of or submission to pain or humiliation. Although sadomasochism is still categorised as a psychiatric disorder by the International Classification of Diseases and might sometimes provoke the response of criminal law for paternalistic or moral reasons,[133] numerous authors welcome the role of choice and self-determination underpinning its practice. In any case, to the same extent, Article 5(3) of Commission Proposal recognises this dynamic process, when stating that 'consent can be withdrawn at any time'.

Ultimately, as we believe that consent should be dynamic, it is also our opinion that it should be affirmative following 'the yes means yes' approach in order to comprehensively protect the sexual autonomy of the individual. Recital 14 of the Commission Proposal likewise identifies sexual autonomy as the legal interest to protect. Nonetheless, Article 5 of the Commission Proposal legally defines rapes based on the absence of consent that, according to its third paragraph, 'cannot refuted exclusively by the woman's silence, verbal or physical non-resistance or past sexual conduct'. In this way, the Commission Proposal seems to be the middle way between the 'no means no' and 'yes means yes' approaches and can respect the legal diversities of the Member States, where a consent-based definition is already in force. But, according to us, the legal protection would be much more effective on the basis of the sole affirmative consent for two reasons. First, affirmative consent requires the person to explicitly permit to engage in mutually agreed sexual activity. This means that all those gender biases, rape myths and, more generally, social expectations underpinning sexual conduct are challenged and replaced with personal, sexual norms and gender scripts. Second, since the individual decides and conveys whether and how to engage in sexual activities, criminal law does not only serve as a mechanism for repressing harmful conduct but also enables the parties to together determine what is good for them in sexual conduct and gender relations, thereby encouraging diversity. In other words, criminal law protects and fulfils the sexual autonomy of the individual, in its negative and positive interpretations.

Gross negligence as an ancillary, constituent element

Be it framed with reference either to force, coercion, and their threat or to consent, the crime of rape is only committed with intent. This means that the offender knew that they engaged in sex without the victim's consent and wanted to do so, or that they could know, but chose to deliberately act anyway. Consequently, whenever the offender acted under a false belief about the existence of the victim's consent, they would be acquitted. This is also the approach adopted in the proposal of the European Commission.

Nonetheless, as seen in Section 2.3, a few Member States broaden criminal responsibility, by including gross negligence as an additional constitutive element of rape law. In this way, a person who was not aware of the absence of consent but should have is criminally prosecutable.

When criminally prosecuting a person for rape by gross negligence, the main assumption is that the offender's false belief is unreasonable and therefore avoidable.

132. M. J. Anderson, 'Rape Law Reform Based on Negotiation. Beyond the No and Yes Model', in P. H. Robinson, S. P. Garvey & K. Kessler Ferzan (eds.), *Criminal Law Conversations* (Oxford: Oxford University Press, 2009) 299-301
133. S. P. Green, *Criminalizing Sex: A Unified Liberal Theory* (Oxford, Oxford University Press, 2020) 279-281

For a false belief to be considered unreasonable, case-law usually evaluates 'not only the (objective) standard of the average person in such circumstances, but also the (subjective) standard of the perpetrator'.[134] Nevertheless, as Mason points out, this assessment risks leading to the acquittal of the offender, who is seldom equipped to detect genuine consent because they live in a society where gender stereotypes and rape myths are common. Accordingly, she continues, for the criminalisation of rape by gross negligence to be effective, it is necessary to conceptualise this notion from a moral angle. This means that the offender is criminally responsible, whenever they do not know something that a morally, well-informed person would have known.[135] At the heart of this interpretation lies a duty of care on the offender, without questioning the victim's voluntariness and credibility and avoiding the perpetuation of gender stereotypes and rape myths in the courtroom. Although a recent analysis of the Swedish case-law shows that this has not been the case yet,[136] the criminalisation of rape by gross negligence could still be considered as an ancillary, constituent element of the criminalisation of rape in the Commission Proposal, which instead says nothing about it.

Conclusion

Since the Babylonian Code of Hammurabi, significant changes have occurred in the legal definition, rationale and response to rape. Particularly, from the 1970s onwards, feminism has sought to shift from the traditional view that rape infringes the legally protected interests of men, namely the property rights or the family's honour, to a more egalitarian position where the woman is recognised as the victim suffering from harm, while simultaneously being an autonomous, independent person capable of expressing her own will to engage in sexual interaction. Legal reform has often stemmed from the feminist struggles, within and outside of Europe.

Nonetheless, in the European Union, as in the rest of the world, the incidence of rape is still dramatically high, whilst its reporting, conviction and sentencing remain low and affected by gender biases and rape myths. Moreover, although rape negatively affects anyone everywhere, the national responses of the Member States differ significantly, although they are State Parties to the CoE and are part of the EU, where a commitment to end rape has been shown and intensified in the last decades.

Against this backdrop, on 8 March 2020, the European Commission presented a proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, which also includes the harmonisation of rape law. Our main research objectives were therefore to critically discuss how the EU is exercising its competence and to investigate the desirable content of its legislation.

As a result of our analysis, it is possible to draw the following conclusions.

First, the Commission Proposal justifies the harmonisation of rape law, by framing rape as a form of 'sexual exploitation of women and children', that is to say, one of 'the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis' pursuant to Article 83.1 TFEU. Although we welcome the Commission Proposal, it is important to remember that, as emerging from the most

134. M. Mrčela, I. Vuletić & G. Livazović, 'Negligent Rape in Croatian Criminal Law: Was Legal Reform Necessary?' (2020) 45 *Review of Central and East European Law* 126, 135

135. E. Mason, 'Rape, Recklessness and Sexist Ideology', in V. Rodriguez-Blanco & G. Pavlakos, *Agency, Negligence and Responsibility* (Cambridge, Cambridge University Press, 2021) 214-215, 221

136. L. Wallin, S. Uhnoo, Å. Wettergren & M. Bladini, 'Capricious Credibility – Legal Assessments of Voluntariness in Swedish Negligent Rape Judgements' (2021) 22(1) *Nordic Journal of Criminology* 3, 18

recent waves of the feminist discourse, rape can be the cause and the consequences of power asymmetries within society for reasons other than unbalanced power relations between women and men and/or at the intersection with multiple grounds of discrimination. This implies that the crime of rape should ensure equal protection under the law and be framed in gender-neutral terms, in compliance with a more nuanced interpretation of rape. In this scenario, the legislative aim should be to acknowledge the significance, prevalence, and impact of non-consensual, sexual conduct and to therefore protect the sexual autonomy of each individual against harm.

Second, it is our opinion that the harmonisation of rape law could do that, if gender-based violence as a new area of crimes were to be added to Article 83.1 TFEU as also recommended in the European Resolution of 16 September 2021 and could be based on that legal basis. Gender-based violence, indeed, is a serious crime affecting the fundamental rights of the victim and, more broadly, causing significant economic and social costs. At the same time, gender-based violence is proven to have a cross-border dimension due to the common drivers and impact across the Union, meaning that it impinges on EU fundamental values and hampers legal clarity in cooperation matters. Yet, we can infer from these considerations that the harmonisation of gender-based violence would rely on normative grounds, thereby reaffirming the EU commitment to certain values which establish its identity and using criminal law to defend them.

Third, building on the idea that the crime of rape should seek to protect the right to sexual autonomy as established within the Commission Proposal and should be framed in gender-neutral terms, it is fundamental for the EU legislator to reject force, coercion, and their threat as constituent elements of the crime. Instead, according to us, rape law should be based on the provision of consent, in compliance with the legal requirement of competence, freedom, and knowledge. Unlike the Commission Proposal, though, we stress the importance for consent to be dynamic and affirmative. In this way, it is possible to challenge gender biases, rape myths and, more generally, social expectations underpinning sexual conduct, by allowing each person to determine what is good for them in sexual conduct and gender relations. Ultimately, we examined the possible inclusion of gross negligence. We think it might be a useful ancillary, constituent element of the crime able to catch complex cases and give credit to the gender-biased dimension of this social phenomenon.

ORCID iD

Carlotta Rigotti https://orcid.org/0000-0001-8956-0677