Università
Ca'Foscari
Venezia

Master' s Degree programme in
International Comparative Relations

Second Cycle (D. M. 270/2004)

Final Thesis

Marital Rape as a violation of women's autonomy and human rights.

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Academic Year 2019 / 2020

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Abstract

Il riconoscimento del crimine di stupro coniugale ha promosso una reinterpretazione della dicotomia pubblico-privato su cui si basa la società, focalizzando l'attenzione sulla violazione prodotta dal crimine in sé, indipendentemente dal contesto in cui si verifica, sia esso pubblico o privato.

Questa tesi propone un'analisi del fenomeno dello stupro coniugale in relazione allo sviluppo del diritto internazionale e dei diritti umani, coinvolgendo diversi ambiti: quello storico-culturale, quello concettuale e quello giuridico internazionale. Il primo capitolo fornisce il quadro storico e studia il crimine nella sua dimensione culturale. Il secondo capitolo si concentra sulla concettualizzazione della definizione di stupro e indentifica il crimine quale risultato dell'intersezione di diverse forme di violenza, questionando sull'ingiustificato minor grado di severità che normalmente viene attribuito a tale crimine rispetto ad altre sottospecie di stupro. Il terzo capitolo si occupa della criminalizzazione dello stupro coniugale a livello internazionale, esaminando il fenomeno dello stupro coniugale quale violazione di specifici diritti umani e del concetto di autonomia individuale. Il quarto e ultimo capitolo, infine, considera il reato di stupro coniugale nel contesto europeo, presentando casi specifici in contraddizione con l'approccio adottato dalla Convenzione di Istanbul nella definizione dello stupro. Per quanto riguarda quest'ultima analisi, la presente tesi sostiene la definizione europea del reato di stupro coniugale basata sul consenso, in quanto, in primo luogo, facilita il riconoscimento di tale reato all'interno di diversi contesti (compreso quello coniugale) e, in secondo luogo, lo identifica come un crimine diretto a violare l'integrità corporea, l'autonomia individuale e specifici diritti umani, indipendentemente dal contesto in cui si verifica.

LIST OF ABBREVATIONS

ASEAN	Association of Southeast Asian Nations
ASEAN RPA on EVAW	ASEAN Regional Plan of Action on the Elimination of Violence against Women
AU	African Union
CAHVIO	Committee for Preventing and Combating Violence against Women and Domestic Violence
CAT	Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
CEDAW	Conventions on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
CSW	Commission on the Status of the Woman
DEVAW	Declaration on the Elimination of all forms of Violence against Women
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	Economic and Social Council
EU	European Union
GA	General Assembly
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights

IACHR	Inter-American Commission on Human Rights
IACrtHR	Inter-American Court of Human Rights
ICHRP	International Council of Human Rights Policy
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
LIBE	Committee on Civil Liberties, Justice and Home Affairs
OAS	Organization of American States
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of the Islamic Conference
SADC	South African Development Community
SDGs	Sustainable Development Goals
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
WHO	World Health Organization
WRVH	World Report on Violence and Health

INTRODUCTION

"Violence against women is perhaps the most shameful human rights violation, and it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development and peace." (Kofi Annan)

Violence against women is an international issue that is still affecting the lives of women globally. Besides the numerous steps taken by governments and by the international community in recognizing women's rights as human rights and the principle of equality of men and women, the phenomenon is still widespread all over the world and, in many cases, not yet completely criminalized. Moreover, in an emergency situation like the contemporary pandemic the world is experiencing today, the phenomenon of violence against women has become more and more alarming.

This thesis stems from a reflection on the COVID-19 crisis by Phumzile Mlambo-Ngcuka, the Executive Director of UN Women: "with 90 countries in lockdown, four billion people are now sheltering at home from the global contagion of COVID-19. It's a protective measure, but it brings another deadly danger. We see a shadow pandemic growing, of violence against women"[1].

In particular, as pointed out by the UN Secretary General, the major increase in violence against women has been registered within the context of the family.[2] Indeed, under the COVID-19 emergency, domestic violence has found fertile ground on which to be practised: "confinement is fostering the tension and strain created by security, health, and money worries and it is increasing isolation for women with violent partners, separating them from the people and resources that can best help them. It's a perfect storm for controlling violent behaviour behind closed doors. And in parallel, as health systems are stretching to breaking point, domestic violence

[1] UN Women (2020) "Violence against women and girls: the shadow pandemic", statement by the Executive Director Phumzile Mlambo-Ngcuka, available at: https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic (accessed May 3, 2020).
[2] Ibid.

shelters are also reaching capacity, a service deficit made worse when centres are repurposed for additional COVID-response"[3]. As pointed out, there is evidence that, despite international condemnation of violence against women, this phenomenon is still present in our societies, in particular in the private sphere.

This thesis aims to analyse a form of violence that takes place within the home, which has only recently been recognised by the international community and has started to be integrated within national legislations: marital rape.

Conjugal rape is a form of underhand violence, which is often hidden not only within the domestic sphere, but also behind the fragile facade of marriage as an institution based on free consent, love and mutual respect of the spouses. The crime of marital rape brings to light numerous issues concerning different forms of violence against women, such as questions linked to stereotypes attributed to the image of women as the property of men or as inferior beings; questions linked to the lack of respect for the differences in physical strength between men and women, a physical strength which, used at the mercy of human instinct and inclination towards power, favours the subjection of one gender to the other; questions which underline the intrinsic meaning of human rights not only in relation to violations suffered by the State, but also with reference to inter-individual violations of rights.

Moreover, the recognition of the crime of marital rape challenges the common definition of rape as a forced-base definition, by raising the question on the role played by the notion of "consent" in determining rape. Should consent be explicit in order to prove that rape is not rape? Or should a lack of consent be enough to affirm it is not rape? In this regard, this thesis supports the approach provided by the European framework through the Istanbul Convention, according to which consent must be explicit, because the expression of consent not only reflects individual autonomy in deciding one's own actions, but acts as a guarantor of that autonomy. On the other hand, however, the very element of consent does not totally exhaust the contradictions related to the definition of rape: consent cannot always be

[3] Ibid.

defined as genuine in a patriarchal society such as the contemporary one where women's rights, despite being recognized, are continuously trampled underfoot.

In analysing the crime of marital rape in relation to its definition and to human rights violations, this thesis is articulated in four chapters.

The first chapter presents an historical analysis of the development of the crime of marital rape. Starting from Sir. Matthew Hale's statement on the exemption of marital rape towards the end of the XVIII century, the chapter retraces the historical path that has involved the conceptualization of marital rape up to the present day, highlighting how historical events and values and social and cultural norms have contributed to defining marital rape as a crime as well as a violation of human rights. The chapter continues shifting the focus from the historical to the cultural sphere. It deals with the issue of social stereotypes that have historically characterized human societies and that have fostered the consolidation of the conception of women as being inferior to men. Two contemporary examples of societies discriminating women are analysed: the case of India, in relation to the idea of the woman as private propriety and the case of the religious Islamic justification on the subordination of women with reference to Iran.

The second chapter focuses on the conceptual scope of the definition of rape. First of all, the thesis analyses the notion of rape from a consensus-based perspective and from a forced-based approach. It supports the important role of consent as a primary structural element in defining the crime of rape, as it includes subcategories of rape that otherwise could not be taken into account (for example, with reference to the conjugal sphere where consent is generally taken for granted). Secondly, the chapter focuses on delineating marital rape as the intersection of different forms of violence, which cannot be reduced exclusively to physical and sexual violence, but that includes also phycological and economic violence. It is, thus, taken into account the context in which the crime takes place, the familiar context that is not in itself but that may involve third party issues and actors (such as the presence of children).

The third chapter addresses the criminalisation of marital rape at the international legal level. A number of conventions within the UN framework as well as within regional contexts promote the respect and the protection of women's rights. The Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the Conventions on the Elimination of All Forms of Discrimination against Women as well as many regional Conventions (such as the Istanbul Convention or the Maputo Protocol) are international instruments requiring the criminalization of the crime of marital rape. In the following part of the chapter, the phenomenon of marital rape is examined in relation to violations of specific human rights such as the right to life, the right not to be subjected to torture or inhuman and degrading treatment or the right to health. Finally, the chapter concludes with an analysis of the actions that must be taken by States in compliance with the obligation of due diligence as States Parties to the Conventions set out previously.

The fourth and final chapter considers the crime of marital rape within the European context. It is in this context that the consent-based definition of rape developed. In the first paragraph, after providing an overview of the point of view adopted by the Istanbul Convention in defining the crime of rape, specific European approaches are analysed in relation to the issue of consent as a structural element. In particular, two cases presenting a differing notion of consent from the one supported by the Istanbul Convention are exposed: the German "no means no" model and the Spanish "*La Manada*" case. The chapter continues with the analysis of two other types of cases in contrast with the European approach to marital rape: the Turkish case on the proposal to reintroduce the "Marry-your-rapist" law and the case of several European countries (including for example Belgium, the Netherlands, Poland) that still link the crime of rape to a crime against morality and honour, dissociating it from the definition given at international level of human rights as a crime against the bodily integrity of the person.

The analysis of specific European cases gives evidence of the widespread diffusion of violence against women, in particular of marital rape, all over the world, even in those societies considered "advanced" in the implementation and respect of

human rights. In particular the current situation has challenged all the targets achieved until now and all those targets set by the international community in relation to women's rights[4]. As underlined by Phumzile Mlambo-Ngcuka, "COVID-19 is already testing us in ways most of us have never previously experienced, providing emotional and economic shocks that we are struggling to rise above. The violence that is emerging now as a dark feature of this pandemic is a mirror and a challenge to our values, our resilience and shared humanity. We must not only survive the coronavirus, but emerge renewed, with women as a powerful force at the centre of recovery"[5].

The road to effective recognition of equality between men and women is still a long one and a greater action by States and by the international community is required in order to fight the phenomenon, not only at the legal level, but also by promoting cultural and social models in line with the approach adopted by human rights.

[4] See Transforming Our World: The 2030 Agenda for Sustainable Development (2015), Goal 5. For more information on the SDGs, see: http://www.un.org/sustainabledevelopment/ (accessed May 3, 2020)

[5] UN Women (2020) , available at: https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic

CHAPTER 1- A general framework over marital rape.

There has always been historical evidence of the position of the women is not equal to the one of men and this, regretfully, continues to empower the gender gap on which society is still based today. On one hand, equality between man and woman is targeted as a political, social, economic, cultural and juridical goal at the public national and international level[6], on the other hand, in the individual private sphere, addressing the issue of women subjugation in society encounters considerable difficulties.

The dichotomy between public and private has interfered with individual human rights in an ambiguous way, especially with reference to women's rights. The historical division between the private and the public sphere concerning the exercising of power by the State has always designated a sort of private area that could not be controlled and managed by the institutional public power. In western societies, for example, the same evolution of the modern State developed in line with the existence of a private sphere the State cannot invade. At the end of the XVII century, the Natural Law Doctrine and the process of secularisation contributed to the creation of a State as a guarantor of the private liberties of man. Indeed, the Natural Law social contract is nothing more than an exchange of duties and rights between the State and the citizens. In Locke's "Second Treatise", the State's final aim is to protect the three fundamental natural rights of the man (the right to life, the right to private property and the right to freedom), by administrating the individual private spheres within which these rights should not either be violated. The same approach toward this type of relation public-private has not only developed with reference to political and social relations, but also toward the economic ones, as pillar of the capitalist neoliberalist contemporary system in the western societies[7].

With regard to the issue of gender inequality, the dichotomy public-private has always played a central role. Indeed, as it will be analysed in the first part of the

[6] Transforming Our World: The 2030 Agenda for Sustainable Development (2015), Goal 5. For more information on the SDGs, see: http://www.un.org/sustainabledevelopment/
[7] Harvey, D. (ed.2007) *A brief History of Neoliberalism*. Oxford University Press.

chapter, historically speaking, women have never been considered as independent and autonomous human beings, but as part of men's private sphere. Consequently, the idea of the woman as a man's possession reduced the issue of woman submission to a private matter. Over history, resulting from the evolution of the figure of the woman in the society, the problem of women's inferiority has been addressed at the public level within contexts administrated by the State, such as political contexts, in relation for example to the right to vote, cultural contexts, with reference to the right to get an education, or economic and social ones, with regard to the equal access to work or to equal salaries for equal work between men and women. Despite numerous steps taken in order to reduce the gender gap, there is a particular area where the disparity between man and woman is really difficult to access: the private sphere. It is in this context, that the problem on the submission of women has become explicit particularly within the familiar and domestic context, being the primordial private core.

Consequently, with regard to marital rape, the private aspect explains the difficulties in addressing it as a crime in many jurisdictions, as recognising it would not only call for the attention of the public sphere toward the private figure of the woman, but it would deny the same concept of private property in relation to the woman as chattel of man and to sexuality as a private matter.

The first chapter, thus, aims at providing a general framework over the phenomenon of marital rape. It is divided into three sections: in the first part, it will present the evolution of the concept of marital rape over history, starting from the assumption of Sir. Matthew Hale on the marital rape exemption, that provided a precedent in not recognising the phenomenon as a crime for different centuries; in the second part, it will attempt to explain the gender gap issue by focusing on the role played by violence in the relation of power between men and women, emphasising the physical force factor; in the third and ultimate part, the chapter will focus on the past stereotypes of the figure of the woman that are still alive in contemporary societies, referring to the conception of the woman as man's property, as well demonstrated by the Indian case, and to their justification by law through religion in the Iranian Law system.

1.1 The history of marital rape: from the XVIII century to the XXI century.

Marital rape is still today a serious societal issue and a public health problem that has received limited attention until relatively recently. The fact that rape in marriage has not been targeted over history as a "crime" finds explanation in the basic structure of the patriarchal society, a form of social organization that has marked the general course of human evolution from the earliest times. The term "patriarchy" refers to "a social system in which family systems or entire societies are organized around the idea of father-rule, where males are the primary authority figures"[8]. As it will be analysed in this chapter, patriarchy was, historically, the fertile ground that allowed the survival of marital rape as a legally justifiable practise. Indeed, according to some jurists[9], the existence itself of marital rape as a crime could not be accepted as sexual intercourse was foreseen by the marriage bond itself, which, since the past, has always placed the emphasis on the rights of the husband, leaving aside and ignoring the role and figure of the wife as an independent subject.

To explain the difficulties in accessing marital rape issues in our modern society, this thesis will start by providing a general framework on the historical evolution of the concept and of the law over marital rape since the XVIII century in the western Anglo-Saxon societies. This period is conceived particularly important, insomuch it is seen as the turning point for the creation of human rights as we conceive them today.

Unlike the modern-contemporary era, in the Middle Age the *jus* was linked to the will of God and it did not have the fundamental character of universality, on which, on the contrary, our rights are based today.[10] In the Middle Ages, society was

[8] Crossman, A. "Patriarchy." ThoughtCo, available at: https://www.thoughtco.com/patriarchy-3026445 (accessed June 16, 2020).

[9] See Archbold, J. F., & Jervis, J. (ed. 2012) *Summary of the Law Relative to Pleading and Evidence in Criminal Cases: With Precedents of Indictments, &c. and the Evidence Necessary to Support Them* (1831). Miami: HardPress and Hale, M. (1736) *The history of the pleas of the crown. Historia Placitorum Coronae.*

[10] The three main cyclones of the philosophy of Medieval law are based on a strong interdependence between reason and faith, which becomes explicit in law. In patristics, according to St. Augustine, reason is the instrument that leads to faith (guardian of the truth) and faith delivers truth to reason:

essentially divided into different entities (the Church, classes, corporations), each of which had a quotient of power. Consequently, the role of the State was reduced to the mere jurisdiction and the political and social power were locked within these circumscribed realities on which the State was built. In this way, the aim of the medieval State was not the one of guaranteeing unity and universality to the law, but the one of coordinating all these social actors, administrating their social relations, without alienating itself as an independent entity from the society.[11]

In the XVIII, the legislative landscape evolved, following the birth of the modern State. In particular, the two revolutions of the late XVIII century, born from the ashes of the Enlightenment and sixteenth-century doctrine of the Natural Law, attributed the character of universality to the law, created the notion of the rule of law and defended the principles of separation of powers and of equality in the justice system. Based on the concepts of liberty, equality and human dignity, the rights declared by the Bill of Right (1689), the Declaration of the Rights of Man and the Citizen (1789) and by the American Declaration of Independence (1776) untied the concept of "jus" from God's will, shifting the focus of the legislative will to the man. In the XVIII, the process of secularisation paved the way to the development of the very idea of human rights as conceived today, as universal and equal for all men and women as human beings. The main problem concerned the fact that, initially, the universality and equality of the law was only applied to men, referring to the male gender, even if also within the male context, these concepts have not either succeeded in practice yet. In other words, from a theoretical point of view the declarations cited above opened the path for the recognition of human rights, but at the substantial level the concrete implementation of the respect of human rights would develop gradually over the centuries.

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the law is thus called to be in conformity with the "*lex eterna*", defined by the philosopher as "*ratio vel voluntas dei ordinem naturalem conservari iubens, perturbari veritas*" ("De Libero arbitrio"). In the "Summa Theologiae" of St. Thomas Aquinas too, the "*lex umana*" is subordinated to the "*lex eterna*", conceived as expression of God's rationality. Finally, also in Scoto, exponent of the Franciscan voluntarism, the "*lex eterna*", conceived as "*potentia dei absoluta*", is the founding logical and ontological principle from which human law then emerges ("De primo Principio").

[11] Fioravanti, M. (2015). *Lo Stato moderno in Europa: istituzioni e diritto*. Gius. Laterza & Figli Spa., 8-9

In addressing the gender gap, that the French Revolution had not taken into account into its project of universality and equality, different efforts were made by female exponents in order to recognize the woman as a rightsholder as well as the man. Indeed, in 1791, Olympe de Gouges promoted the drafting of the *Déclaration des droits de la Femme et de la Citoyenne*, by reiterating all those rights that the French declaration had attributed only to men.

Despite the numerous battles by women to get their rights recognised as equal to the ones of the man, the gender gap did not resolve in the past and it is still present today. The idea of the woman as an inferior being has always been part of the western cultural context and to understand why in this revolutionary framework the woman was not included, there is the need to take into account which was the cultural and social attitude toward the role of the woman in the society and first of all within the family, being the basic unit of patriarchy. Indeed, since the past, the first and main sphere where the gender gap was always consistent was (and still is) the family context and specifically the marital relation. The marriage is still today the more direct link through which it is possible noting the different roles played in the spousal relation to understand the importance given to the figure of the woman in comparison to the one of the man. As noted by Susan Okin, the marriage reflected the inferiority of the woman in attitudes and ideologies in other societal contexts, such as work: she identified the unpaid work of women within the family as the cause of gender differences, claiming that this asymmetry of power was than reported toward contexts outside the private sphere.[12]

At the turn of the XVII and XVIII centuries, these differences between wife and husband were explicitly taken for granted in relation to marital rape. The actual legal genesis of the marital rape exemption is a statement made by the British jurist Matthew Hale: "but the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract"[13].

[12] Okin, S. (1999) *Le donne e la giustizia. La famiglia come problema politico*, Bari: Dedalo, 52
[13] Hale, M. (1736) *The history of the pleas of the crown. Historia Placitorum Coronae*, 628, PDF available at:

With regard to marital rape, in "Pleas of crown" (1736), Sir. M. Hale not only defended clearly the impunity of marital rape, but justified it by identifying the marriage promise as a contract from which the woman could not rescind. Three major justifications were usually cited over history for the marital exemption supported by Hale: first of all, the fact that the woman was seen as a chattel, being initially a property of the father and then, after marriage, of the husband; secondly, the fact that marriage was supposed to be a contract from which the woman could not retract, thus casting an irrevocable assent to sexual intercourse with her husband; and finally, the idea that through marriage the two spouses incorporated into one, and that one was the man[14].

In accordance with the Hale Doctrine, and in particular with the last justification to marital exemption, in 1765, Blackstone developed the "unities theory", based on the assumption according to which the man and the woman became one single entity when married and that "the legal existence of the wife is suspended during marriage"[15]. According to this line of thought, if the wife and the husband merged into one being, recognised in the figure of the man, it was paradoxical admitting the existence of marital rape as a man cannot rape himself.[16] This idea is linked to the evidence that the sexual act within a marital context could only be decided by the man, not only because of the social and stereotyped superiority of the male gender, but especially and indirectly, as it will be argued in the second section of the chapter, for the fact that the imposition of sexual actions involves most of the times physical force, that in men is, generally, *de facto* stronger than in women.

The Hale's statement set a precedent in English law that was carried over to the English colonies of North America, where it was officially accepted in the American

https://upload.wikimedia.org/wikipedia/commons/1/15/Matthew_Hale%2C_Historia_Placitorum_Coron%C3%A6_%281st_American_ed%2C_1847%2C_vol_1%29.pdf

[14] Pracher, M. (1981). The Marital Rape Exemption: A Violation of a Woman's Right of Privacy. *Golden gate University Law Rewiew*, *11(3)*, 42, PDF available at: https://digitalcommons.law.ggu.edu/ggulrev/vol11/iss3/1/

[15] Blackstone, W. (1765). *Commentaries on the laws of England: Of the rights of persons*, Vol. 1, 442, available at: https://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-1

[16] Ryder, L. S., Kuzmenka, S. A. (1991) Legal Rape: The Marital Rape Expemption, 24 *J. Marshall L. Rev*. 393, 399-400, PDF available at: https://repository.jmls.edu/lawreview/vol24/iss2/5/

legal system in 1857 under the *Commonwealth v. Fogarty* decision[17]. As a consequence, the conviction on marital rape exemption continued to outline legislative approaches to sexual violence during the following centuries.

In the "Treaties on the Law of Domestic Relations" (1870), a premeditated rejection of sexual intercourse and company was conceived as a violation of the marital duty that could subvert the ultimate purpose of marriage. According to this line of thought, the husband did not have a total ownership of his wife's body: the different scopes of the use pf physical force on the wife were completely differentiated and if, on the one hand, domestic violence, conceived as physical violence, was declared illegal, on the other hand, domestic violence, conceived as sexual violence, was not even taken into account. Indeed, the consent to have a sexual intercourse with one's own wife was assumed to be constant by marriage as the response to a duty established by law. However, the impunity of the husband did not regard any type of sexual actions: it only applied to actions that violated his wife's vagina. In other words, the husband did not have an absolute right on his wife's body, just on his wife's physical intimacy.[18]

The first critics to the law on marital rape began to emerge in the second half of the XIX century with the publication of the book "On liberty. Representative Government. The subjection of women, Three essays" (1869) by John Stuart Mill. According to Mill, the fact that the woman could be an instrument of an animalistic function against all her inclinations made the figure of the wife worse than the one of a slave, to whom at least the right to refuse his master her extreme intimacy was recognized. In conclusion, Mill claimed that marriage was the only real form of slavery legalized by the law.[19] Moreover, this analogy between slavery and the condition of the wife within marriage was really popular at the end of the XIX

[17] Martin, E. K., Taft, C. T., & Resick, P. A. (2007). A review of marital rape. *Aggression and Violent Behavior*, 12(3), 331, available at: doi:10.1016/j.avb.2006.10.003
See also, Massachusetts Supreme Judicial Court, decided on 1st Semptember 1857, *Commonwealth v. Fogerty*, available at: https://www.ravellaw.com/opinions/3c5978192db2252e60e56ccfcb2af4b8 (accessed June 16, 2020)
[18] Bourke, J. (2009). *Stupro: storia della violenza sessuale dal 1860 a oggi*. Roma, Laterza, 350
[19] Mill, J. S. (1912) *On liberty. Representative Government. The subjection of women, Three essays*. London, 463-522.

century among the first feminists. Victoria Woodhull, one of the most important American suffragists of the time, Elizabeth Candy Stanton and Susan B. Anthony proposed in their fight on the abolition of slavery the introduction of the right to divorce and "voluntary motherhood" as measures to free the wife from sexually violent husbands.[20]

Around the '70s of the XIX century, as a consequence of the changing context over marital rape conceptions promoted by the feminist movements, new positions were born, even if focused on protecting the interest of men and not the victimized women. In "Science of a New Life" (1869), John Crown linked rape to health problems that the man could face, like for example general weakening of the nervous system, of articulations, of the muscles system or a lack of physical strength.[21] Paradoxically, the focus of the issue moved toward the assumption according to which the rape of the wife harmed the well-being of the husband (and not of the woman), according to a new ideal of virility that was developing at that time. Indeed, the change in the societal context at the end of the XIX century, caused by the introduction of the industrial work that the second industrial revolution had brought, contributed to the idea of the home as a peaceful place, where the husband could escape from the intensity freneticism of the work environment. This type of ideal, mainly promoted by the bourgeoisie, changed completely the way through which the husband interacted with his wife and, even if the male authority was never been put into question, the marital relation moved from the principle of obedience to the one of companionship.[22] This explained also the paradoxical shift toward the well-being of the man in criticizing marital rape, as presented by Crown. Thus, the need to respect the other sex within the marriage was not focused on the achievement of the parity between the man and the woman, as wished by Mill, but it was based on the distinct nature of the consorts: the husband was expected to respect the integral sexuality of the woman not for humanity, but for the idea

[20]Bourke, Stupro: storia della violenza sessuale dal 1860 a oggi, 352
[21]Ibid., 350
[22] Ibid., 354

according to which marital rape would tear the husband's health itself, that was already suffering the factory work's rhythms.

From a legal perspective, the issue of marital rape was never put into question by a Court until 1888 in *Regina v. Clarence*, in UK. Even if the marital rape exemption was applied, two judges, Wills and Field, opposed to Hale's theory, by claiming that: " if intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority... I cannot understand why, as a general rule, if intercourse be an assault, it should not be rape"[23]. In addition, Field criticized the lack of authority on Hale's statement, noting that even if ""[t]he authority of Hale C.J. on such matter is undoubtedly as high as any can be but no other authority is cited by him for this proposition and I should hesitate before I adopt it."[24]

The changing attitude toward marital rape and the evolution of marital relations caused, indirectly, minor tolerance by the wife toward abuses by her man and new steps were taking in considering the wife as an independent subject. Indeed, in 1882 the English parliament adopted the Married Women's Property Acts to grant to married women rights regarding their property, such as the right to sue and to be sued, own and convey property, enter and enforce contracts and enjoy the rights of unmarried women.[25] Although marital rape was not considered, these legislative acts paved the way for releasing the wife from her husband, giving her a little space of autonomy.

At the end of the XIX century, another movement that influenced the evolution of the marital relations in the United States was the development of the American spiritualism, thanks to which the concept of man as a human being dominated by his sexual impulses gradually diminished. With the American spiritualism the contrast, already present in a stronger religious key in the Middle Ages, between passion and

[23] Ryder, Kuzmenka, Legal Rape: The Marital Rape Exemption, 396
[24] Ibid.
[25] Ibid., 400

carnal instinct and the superiority of the spirit came back to life. The American spiritualist movement was based on egalitarianism, rationalism and it was actively involved in social and political reforms. In "The genesis of ethics of conjugal love" (1874), Andrew Jackson Davis, one of the major exponents of the American spiritualism, claimed that the man had been created to overcome all body impulses and to uplift the spirit from the wild cravings of the body[26]. Francis William Newman also reiterated the fact that sexual impulses cannot justify marital rape: he stated that the well-being of a society could only be assured when both sexes were respected[27]. This line of thought, well-promoted by modern spiritualists both in US and in UK, shifted the base of the marriage from a simple contract founded on authority and superiority of the man to a contract born by marital love. This idea was also emphasized by Alice Mona Craid, in her book "The morality of marriage" (1897), by affirming that the worst tyranny was the one of the husband over the wife that pretended to get the power over the entire marital relation, basing his requests on the concept of love and devotion.[28]

Despite the changed attitude in the literature on marital rape at the end of the XIX century, at the legislative level the marital rape phenomenon was not taken properly into account. The first attempt in recognising the right of the women as equal to the one of the men within marriage was represented by the liberalization of the law on divorce in 1923 in UK. Indeed, before 1923 in UK, for the woman getting the divorce was possible only in case of adultery. Moreover, the economic aspect encumbered on the possibility to get it, being it extremely expensive to obtain. [29]

However, in spite of the law on divorce in 1923, in the '20s of the XX century, the interest on marital rape started to diminish mainly because of two reasons. First of all, there was a shift of the focus toward different feminist matters that were emerging strongly after the end of the first world war, such as the real control over births, equal wages or access to education. Secondly, the concept of privatization of

[26] Bourke, Stupro: storia della violenza sessuale dal 1860 a oggi, 355
[27] Ibid., 357
[28] Ibid., 362
[29] Ibid.

the house became more and more widespread at the societal level. The house was seen as a refugee from the degradation and the brutality of the war and, consequently, it was conceived as an intimate, closed and private place, gradually eliminating the public image of the rapist husband.[30]

Until the '70s there was silence over sexual violation within marriage as other issues got attention, but debates and discussion at the academic and legislative level continued, even if in a milder way and with difficulties in facing opposite positions. Indeed, the conviction on marital rape exemption was still rooted in the society during the first half of the XX century.[31] An article, published in 1954 in the Standford Law Review, "Rape and Battery between Husband and Wife" discussed to what extent the legitimate defense of the legal impunity of the husband with regard to marital rape could be invocated. Even if the writing recognized the injury to which the wife was submitted, the article presented different arguments to demonstrate that talking about rape within marriage was inappropriate. First of all, according to the author, it was obvious that marital rape provoked minor dangers to the woman than stranger rape, as marriage was supposed to be based on love or on the existence of a strong feeling and secondly, it argued that giving the possibility to the woman to invoke marital rape could allow her to abuse of this right to get her husband accused on subjected bases. Moreover, it was in the interest of society to get united couples, as family represented and still represents the prime unit on which the societal structure is based. From this point of view, it resulted that the survival of a relation was more important than the will of the wife.[32]

In the '70s, the issue over marital rape regained attention because of a shift in the feminist approach from the simple sexual abuse to the fact that marital rape cannot be reduced only to the sexual act, but it reflected a deeper asymmetry in the husband-wife relation. The feminism of the '70s claimed a gender equality that was not apparently recognized only by the absence of a concrete violation (sexual or physical violation), but that included at a conceptual level the fight against violence

[30] Ibid., 362
[31] Different cases stood for the marital rape exemption. See *R. v. Clarke* (1949): 2 All E.R. 448; *R. v. Miller* (1954): 2 All ER 529.
[32] Bourke, Stupro: storia della violenza sessuale dal 1860 a oggi, 362

against women in all its forms, even in the hidden ones (economic, psychological, verbal violence). The feminist movement gave rise to questions concerning the difficulties of the women to denounce their husbands, as for example given the economic dependency or the fear of not been able to see again their children.

These critics from the feminist movement were very influent and contributed to open the debate on marital rape exemption. On the one hand, it was still well-rooted the conviction that talking about marital rape was paradoxical and absurd. According to Glanville Williams, an international well-known professor of law, the recognition of marital rape through a legislative act could be a too powerful weapon in the hands of the women, as they could use it too easily. He stated that marital rape could not be seen as a crime, as having an intercourse was just the expression of the right of the husband: he just admitted that the only factors that could be invocated where the ways and the time of the husband request, but not the request itself. In Williams' thought, it lied the conviction according to which a possible marital rape and rape committed by a stranger were two completely different acts: he did not accept that they could have been treated in the same way.[33] That's why in his concern marital rape cannot be recognised, if not as "simple aggression or as non-sexual crimes": in this way the husband would not have been persecuted penally, but he would have just been obliged to pay a fine or to pre-trial detention. On the other hand, in the '80s and in the '90s several critics were moved toward this type of thoughts, showing evidences on the inconsistency of the Hale Doctrine as applied to the contemporary role of the woman. Moreover, the focus of the feminist critics concerned not only the marital rape exemption per se, but also the idea of it as less dangerous than "stranger rape": abolishing the impunity of marital rape would not undermine marriage as an institution, only marriage as an institution of rape.[34]

In 1976, on the wave of the feminist movements, in US, Nebraska was the first State abolishing the marital rape exemption and by 1993 all US States eliminated the impunity of the husband with reference to rape within marriage, even if not in all the circumstances. Indeed, in some States it was requested proof of the use of

[33] Ibid.
[34] Ibid., 373

violence by the husband over the wife or it was expected that the spouses were living separately.[35] An important contribution to the change of law on rape in the American context was given by Laura X, a feminist activist, who utilized her feminist institutional network, the Women's History Library (a library she founded in Berkeley, CA) and its project, the National Clearinghouse on Marital and Date Rape, in order to instigate legislative change in California in the late 1970s: her main goal was to remove marital rape exemption, through the introduction of the Marital Rape Bill in 1980.[36]

In UK, a case of great importance, that pinpointed a social and cultural development in terms of how the law treats women in the context of marriage, was *R v. R* (1992)[37]. The matrimonial exemption of rape was overturned: in Lord Keith words, it was stated that "it may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable"[38]. The first State that criminalized marital rape was Scotland and by 1992 all the United

[35] Ibid., 374

[36]Rocchino, L. (2019) "Not One's Wife:" Laura X and the 1979 California Marital Rape Bill. *PhD diss., History Honors Program,* 22, PDF available at: https://genderstudies.nd.edu/assets/319466/not_one_s_wife_laura_x_and_the_1979_california_marital_rape_bill_web.pdf

[37]*R v. R* (1992) 1 AC 599. Retrieved from https://www.lawteacher.net/cases/r-v-r-1992.php?vref=1 (accessed June 18, 2020)

[38] Ibid.

Kingdom abolished the marital rape exemption within its statutes, by affirming in the rapporteur of the English Law Commission, "Rape Within Marriage" (1992), that spousal and stranger rape were equally emotionally, psychologically and sexually destructive.

In conclusion, as history gives evidence, the conception of the marital relation has evolved over time from the "unities theory" approach toward an idea of marriage as a bond between two different, individual and autonomous spheres, entitled with rights: the one of the man and the one of the woman. Even if marital rape is still today a contested issue, some steps have been taken by western societies in recognising it as a crime and thus in confuting the Hale's doctrine that for centuries defended the impunity of the man in raping his wife.

Nowadays, three main arguments prove the inconsistency of a view allowing marital rape within marriage. First of all, the concept of the woman as chattel is no more conform to the modern society. In *Trammel v. United States* (1980), the Court decided that "[n]o where in the common-law world-[or] in any modern society-is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being"[39]. Thus, the concept of the woman as a property of the man is outdated and fails to support the marital rape exemption. Secondly, the "Unities Theory" proposed by Blackstone is no longer applicable in the light of changes in the legal status of the wife, which have already begun to be recognized at the end of the XIX century with the Married Women's Property Acts. Moreover, after the second world war, the idea that with marriage man and woman became one single entity was overcome by the new conception of marriage as an equitable partnership.[40] Finally, the main consistent critic to Lord Hale's contractual theory concerned the definition of marriage as a contract. Indeed, if it was a contract, it was quite unusual as a contract, as there were no conditions and penalty clauses not specified. In the article "Legal Rape: the marital rape exemption" (1991), it is stated that the marital vows cannot constitute a valid contract as all the structural elements of the contract are not present when

[39] Ryder, Kuzmenka, Legal Rape: The Marital Rape Exemption, 400
[40] Ibid., 401

formulating them: it is not a written contract, its penalties are unspecified and the terms of the contract are typically unknown to the contracting parties.[41] With reference to marriage as a contract, in *State v. Smith* (1981) the New Jersey Supreme Court stated that " this implied consent rationale, besides being offensive to our valued ideals of personal liberty is not sound where the marriage itself is not irrevocable. If a wife can exercise a legal right to separate from her husband and eventually terminate the marriage 'contract,' may she not also revoke a 'term' of that contract, namely, consent to intercourse? Just as a husband has no right to imprison his wife because of her marriage vow to him... he has no right to force sexual relations upon her against her will. If her refusals are a 'breach' of the marriage 'contract', his remedy is in a matrimonial court, not in violent or forceful self-help".[42] Thus, taking for granted consent to any sexual act was an assumption based solely on a cultural *forma mentis* of the dominant gender, the man. If such a clause, as the perpetual willingness to have an intercourse, had been written and, consequently, if the woman had been informed of the terms of the marriage, then the question would have evolved in a different way, because it would have involved a conscious choice of the woman in getting married. Moreover, also in this case, one could assert the inequal position of the woman in taking such a choice in comparison to the one of the man, given the historical disparity between the two genders.

The Anglo-Saxon world has achieved important goals in respecting women's rights, even if, for what regards marital rape, stronger actions in the legislative and political field still have to be implemented. Indeed, marital rape, as well as domestic violence, is a phenomenon that happens within a space that is difficult to access by the State, the family, and where gender and sexual discrimination can survive easily. As it will be argued in the second chapter, the main factor that differentiates marital rape from domestic violence is the notion of consent, that, while in domestic violence situations it is supposed to be absent, in sexual intercourses situations it is taken for granted.

[41] Ibid., 402
[42] Ibid., 403

1.2 Women and men over history: the role played by the concept of physical force in gender discrimination.

Violence against women is a phenomenon based on gender and sexual discrimination. After having described the evolution of the phenomenon of marital rape over history, the second section of the chapter will argue what is the main tool used to fuel such type of discrimination, beyond cultural, social and ideological reasons, identifying it with the different physical force that generally characterizes the woman and the man. The following paragraph will explain which interpretation of violence has been adopted in this research and then, by making a comparison between the role of violence in the evolution of the nation-State and its role in private relations between individuals, it will give evidence of the universality of violence in intersecting with power and dominium at different societal levels. Moreover, in analysing the relation violence-power-dominium, the paragraph will address the issue of violence against women by focusing on the primary instrument (and at the same time the last instance) that allows the discrimination and submission of women to develop: physical force.

The interpretation of violence adopted in this research is the one provided by Hannah Arendt: "neither violence nor power is a natural phenomenon, they belong to the political realm of human affairs whose essential quality is guaranteed by man's faculty of action, the ability to begin something new"[43]. The contribution of Hanna Arendt to the definition of violence consisted on eradicating the idea according to which violence must be understood as a human natural aspect, biologically justifiable. She sustained that violence was the most evident manifestation of power and that it depended on the faculty of man to choose if using it or not. She characterized violence as anthropogenic, by stressing the role of tools in human violence, which is thus instrumental.[44]

[43]Feder, H. (2016) *Ecocriticism and the idea of Culture. Biology and Bildungsroman.* New York: Routledge, 147

[44] De Vido, S. (2016) Donne, Violenza e Diritto Internazionale. *In Esperienze Filosofiche/Diritti umani e filosofia sociale*, Vol.1, Milano: Mimesis, 4

Violence is not a natural feature of the human being, it is a choice and, as such, it is the expression of power, which is the ability to exercise one's will over others.[45] This interpretation assumes the existence of human consciousness and awareness, that are expressions of the human faculty of deciding, choosing and being responsible for one's own actions.

The fact that violence is conceived as the expression of power is well supported in the studies of international relation politics as well as in gender studies, as it has always been a characteristic of human relations. In order to address the problem of violence against women, going beyond cultural and ideological superstructures, international relations studies can help in explaining the phenomenon at different levels of human interactions (the private, the national and the international) as it presents the same scheme within which it develops: power-dominium-violence. This relation is, thus, universal in nature: the expression of power and so the manifestation of the dominium of some States over their citizens or over other States is reflected in the power of some men over others and, in the last analysis, on the control of men over women.[46] The universal character of violence within the structure power-dominium-violence concerns also the final resort of its implementation, the physical force. This universalism presents the possibility to analyse violence against women, by comparing inter-personal relations to relations between both the State and its citizens and between States at the international level. This allows an interpretation of power unrooted from all the cultural and ideological concerns on the inferiority of the woman, through which normally gender differences are explained.

How many times has women's inferiority been justified by cultures, religions or ideologies? Moreover, why do cultures, religions and ideologies consider the woman as the weak sex? What is the primary cause that allowed such conception of women inferiority to develop? The concept of physical force is central in finding the main

[45] Definition of "power", available at: https://courses.lumenlearning.com/sociology/chapter/power-and-authority/#:~:text=Many%20scholars%20adopt%20the%20definition,over%20others%20(Weber%201922).&text=A%20dominant%20nation%2C%20for%20instance,control%20of%20other%20nation%20states. (accessed May 16, 2020)
[46] De Vido. Donne, Violenza e Diritto Internazionale, 4

cause of the submission of women. On one hand, it is assumed that violence is not natural and that it is instrumental in human behaviour; on the other hand, there is also evidence that biological differences between men, and thus also between men and women, are a fertile ground where exercising violence, whose final instance concerns, indeed, the use of physical force.

At the national level, the way the State itself has developed gives evidence of the importance of the role of physical violence in human relations, presenting a consistent parallelism with the role physical force plays in the private sphere between men and women. Indeed, it was in the studying of the evolution of the State that many scholars recognized the intrinsic connection between power and violence. According to Poggi, the manifestation of power itself was first of all recognisable in the structure of the State, conceived as a way to institutionalize the political power. Starting from Weber's definition of power, also Poggi identified political power with the capacity of obtaining obedience. He stated that power exists in the measure in which you exercise a will that contrasts with the one of others[47]. Power is contradictory in nature: on the one side it needs a contrasting will to exist, on the other side its aim is dominating the same contrasting will in order to survive. This contradiction links power to violence, as it lays on a conflictual ground. Coercion becomes in this way an essential element to exercise political power. As represented by Hobbes' figure of the Leviathan, the modern State was born from a social contract, through which men entrusted the State with the exercise of the physical force, giving evidence of the fundamental role played by the concept of force in the evolution of the State.[48] Moreover, the importance of the connection between power and violence is also highlighted by the difficulty of States to yield the exercise of force to supranational institutions, such as the United Nations or the European Union.

In analysing the evolution of the State over history, Poggi attributes three main features to violence within the national context: first of all, it is definitive, as it is necessary to implement law; secondly, it is absolute, as its final escalation ends with

[47] Poggi, G. (1992) *Lo Stato. Natura, sviluppo, prospettive*. Bologna: Il Mulino, 13-14
[48] See Hobbes, T. (1980). *Leviathan (1651).* Glasgow 1974.

death; and finally, it is unlimited, as it has become monopoly of the modern State, through the expropriation of military resources of citizens and the centralization of military resources in the hands of the State.[49] The statal monopoly of violence refers, in the final instance, to the monopoly of physical coercion. Even at the international level, violence is perceived first of all as armed violence: according to Venturini, humanitarian international law is defined as a set of customary international norms and treaties which have as their object the limitation of the warfare and the protection of war victims. Moreover, UN Resolutions also use the term "violence" to refer to episodes of armed force.[50] There is, thus, ground for belief that the physical impact of violence plays a fundamental role in managing relations within the State and among States and consequently also among men, and between men and women.

Generally speaking, the definitions of violence are most of the time linked to the concept of physical force: it is defined as a "behaviour involving physical force intended to hurt, damage, or kill someone or something"[51]. According to a definition provided by the World Report on Violence and Health, namely, violence is conceived as: "the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation."[52] Though, even if, as we will see in the following chapters, the concept of violence against women goes beyond the mere physical injury caused to a person (including economic, verbal, psychological violence), the physical feature of the phenomenon remains its final manifestation, that in many cases can end with the act of committing murder.

As at the international level it happens in case of wars, also at the private level it is the threat of provoking a material damage, and so the use of physical force, that facilitates the submission of certain persons to others. In the case of inter-personal relations this is very evident in the man-woman relation, with reference

[49] Poggi, Lo Stato. Natura, sviluppo, prospettive, 19-21
[50] De Vido, Donne, Violenza e Diritto Internazionale, 26
[51]Definition of "violence" available at: https://www.lexico.com/definition/violence (accessed May 10, 2020)
[52]Definition of "violence" available at: https://www.who.int/violenceprevention/approach/definition/en/ (accessed May 10, 2020)

to the concepts of gender and sex. Gender and sex are different sociological concepts, but a strong interdependence between them emerges when talking about violence against women. Gender is: "the state of being male or female as expressed by social or cultural distinctions and differences, rather than biological ones; the collective attributes or traits associated with a particular sex, or determined as a result of one's sex"[53]. Sex is: "either of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions"[54]. In sociology gender and sex do not coincide, being the first one a cultural construction and the second one a biological matter of fact, but with regard to violence toward women the two terms intersect frequently. Indeed, according to this research, as discussed previously in relation to the role played by the physical force both at the international, national and private levels, the inferiority of women at the cultural and ideological level finds a fertile ground in the different grade of male and female physical force, and thus in their different quotient of coercion and power they can use, given their biological features.

However, recognising as a matter of fact that men, generally speaking, own a stronger physical force than women does not justify the use of violence against women, insomuch, as stated by Hannah Arendt, violence is not a natural phenomenon: no kind of difference among men and women can, nowadays, be used as a discriminant toward any type of factor (sex, gender, religion, race,…). The human rights discourse developed as a spokesman of the importance of defending and protecting the human being as such, regardless of the differences that may exist between men and women. In this regard, the Universal Declaration on Human Rights (1948, UDHR) states: "1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of

[53]Definition of "gender" available at: https://www.oed.com/viewdictionaryentry/Entry/77468#:~:text=The%20state%20of%20being%20male,group%20characterized%20in%20this%20way. (accessed May 10, 2020)
[54]Definition of "sex" available at: https://www.oed.com/viewdictionaryentry/Entry/176989 (accessed May 10, 2020)

any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."[55]

According to this research, with reference toward violence against women, the different physical traits of the female sex have been interpreted as proof of women's inferiority, that, grounded on biological features, has evolved into ideologies and ways of thinking at the cultural level. The conception of the woman as an inferior human being is still reflected nowadays in different cultures across the globe and it is the result of the evolution of the dominant male-oriented culture, whose values, language and ways of behaving have been imposed at the societal level, being, historically speaking, the man the holder of mainly economic and political, and therefore coercive too, quotients of power. The physicality of violence creates fear and submission toward who exercises it and it is proved in the relations between men in the evolution of the national States, in the relations at the international level and, as we have seen, also in the relations between men and women.

The main difference between violence used at the State and international level and at the private one consists of legality. Arendt supported the idea that, being violence a manifestation of power, consequently, politics can be defined as the dominium of some men over others, based on the use of legal violence.[56] Thus, in a democratic modern State, when talking about the monopoly of violence in the hands of the State, we are talking about the use of legal violence. It is in this context that the law plays a fundamental role: the evolution of the modern State from the Natural Law perspective has seen the birth of the State starting from a social contract, through which men have entrusted the State with the monopoly

[55]UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 1

[56] De Vido, Donne, Violenza e Diritto Internazionale, 3

of violence and coercion according to the law, in order to guarantee men the enjoyment of the three main natural rights on liberty, life and propriety. At the national level, the use of violence lays on a system of weights and counterweights between coercion and the defense of human rights. Indeed, a fundamental characteristic of the democratic modern State is the fact that it is based on the rule of law: it is the law that prescribes and administrates the use of force. At the international level, even if the prohibition on the use of force has become established as a standard rule of customary international law[57], the use of violence is still a predominant concept within armed conflicts. The four Geneva Conventions on the *jus in bellum* (1949) outline the use of the force in wartime, attempting to delineate a sort of legal framework within which the use of force can be or not be permitted. On the contrary, at the private level, the use of force among men is forbidden. There are no laws prescribing the use of violence toward other men (or women), as the monopoly of coercion is legal only when exercised by the State, in accordance with the rule of law.

In conclusion, apart from the different areas of action of violence which can be legal at State level (in accordance with the law) and illegal at the interpersonal one, this paragraph has given evidence of the universal character of the use of force, by stating that the different biological physical force between men and women can be seen as a facilitator in the oppression of the female gender by the male one: indeed, even if violence exists in different forms and can be exercised in different ways, its ultimate instance consists always in the use of the physical force, ending in the act of slaying.

With regard to marital rape, the physicality of violence is central in relation to the power and the dominium exercised on the wife. "If rape is viewed more as an act of power then a sexual act, than we can examine marital rape by focusing on the power dynamics of the family. Goode (1971) has stated that all social systems depend on force or its threat, and that the family is no exception"[58].

[57]United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art. 2(4)
[58] Gelles, R. (1977). Power, Sex, and Violence: The Case of Marital Rape. *The Family Coordinator, 26*(4), 342., available at: doi:10.2307/581754.

Moreover, in relation to the link between power and violence, William J. Goode highlighted the fact that marital rape is more and more diffused in the lower classes and, globally speaking, in the poorer areas of the world. He noted that the more resources one has the more power he can exercise without using physical violence, while it is the lack of sufficient resources to hold the socially prescribed dominant role by the man that does not allow the threat of physical violence to be effective enough in submitting the woman: as a consequence, men use the physical force directly to compensate this lack of resources.[59]

[59] Ibid.

1.3 Past and contemporary stereotypes of the woman within the familiar context: the woman as the weak sex between traditions and religious justifications.

As reported in the previous paragraph, "the long-standing tradition in failing to recognize wife rape as a problem reflects cultural beliefs about men, women and sexuality that have interfered with the acknowledgment of and societal response to wife rape"[60]. Stereotypes on which marital rape is based include the conception of the woman's sexuality as a commodity, the definition of the intimate spousal relationship as a private matter (regardless of the ways and forms it could take), the idea that the man is entitled to sexual relations with his wife and that the wife should consensually engage in sex with her husband.

According to the OHCHR Commissioned Report, "Gender Stereotyping as a human rights violation", a stereotype is "a generalised view or preconception about attributes or characteristics that are or ought to be possessed by members of a particular social group or the roles that are or should be performed by, members of a particular social group"[61]. When talking about women, it is necessary to define also the term "gender stereotype": it is "a generalised view or preconception about attributes, or characteristics that are or ought to be possessed by women and men or the roles that are or should be performed by men and women. Gender stereotypes can be both positive and negative for example, 'women are nurturing' or 'women are weak'. Gender stereotyping is the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men"[62].

Historically, gender stereotypes have developed along cultural and religious ideologies, finding in such beliefs the justification for the conception of women as inferior beings. Religion, for example, is one of the primordial institutions used to

[60] Mahoney, P., & Williams, L. M. (1998). Sexual assault in marriage: Prevalence, consequences, and treatment of wife rape, in *Partner Violence: A 20-Year Literature Review and Synthesis*, 113, PDF available at: http://brockbaker.pbworks.com/f/PartnerViolence.pdf

[61] OHCHR commissioned report (2014) Gender stereotypes and Stereotyping and women's rights, PDF available at: https://www.ohchr.org/documents/issues/women/wrgs/onepagers/gender_stereotyping.pdf

[62] Ibid.

support women's inferiority as it is based on relations of power that do not need any rational justification, just faith. In particular, religion per se is not supposed to be necessarily gender discriminative, rather it is its concrete institutionalization in society that, as we will see, usually reflects asymmetric power relations, especially between men and women. As in the following paragraphs it will be argued with reference to the Manu Code in Hinduism and to the Koran in Islam, there is evidence that religion has been most of the times used as a tool to reinterpret the word of god in justifying women submission.

With reference to western societies, an example of the instrumentalization of religion for misogynous purposes has been Christianity. The Bible does not refer explicitly to women as inferior beings, even if it neither conceive them as the same as men, at least as equality is concerned nowadays: indeed, equality between men and women is affirmed in the Genesis 1:26-28.[63] With regard to the marital relation, the Christian view claims that: "**3** The husband should fulfil his marital duty to his wife, and likewise the wife to her husband. **4** The wife does not have authority over her own body but yields it to her husband. In the same way, the husband does not have authority over his own body but yields it to his wife. **5** Do not deprive each other except perhaps by mutual consent and for a time, so that you may devote yourselves to prayer. Then come together again so that Satan will not tempt you because of your lack of self-control"[64]. In this passage, differently from today's body integrity assumption, the idea of ownership on one's own body is foreseen within the marriage and the power over the wife's and husband's body is supposed to be equal. What differs in man and woman's positions is their role within the family and in the society, which, according to the Christian thought, is not supposed (even if it still is) to be gender discriminatory as man and woman are framed in a context of respect

[63] Genesis 1:26-28: "**26** Then God said, "Let us make mankind in our image, in our likeness, so that they may rule over the fish in the sea and the birds in the sky, over the livestock and all the wild animals, and over all the creatures that move along the ground." **27** So God created mankind in his own image, in the image of God he created them; male and female he created them. **28** God blessed them and said to them, "Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish in the sea and the birds in the sky and over every living creature that moves on the ground", available at: https://www.biblegateway.com/passage/?search=Genesis+1&version=NIV (accessed June 15, 2020)

[64] Corinthians 7:3-5. See also, Ephesians 5:21; 1 Peter 3:1–7; Genesis 21:12.

and love, based on service and gratuitousness towards one's neighbour. Thus, the husband's function as "head" (*kephale*) of the family is to be understood both as a reflection of power relations already existent before the birth of Christianity and as self-giving love and service within this relationship of mutual submission as well. Consequently, the Bible does not take into consideration the possible existence of marital rape. As the marital relation is supposed to be based on a conception of love in terms of respect and mutual submission toward one's neighbour, marital rape has never gained much attention in the Christian thought[65].

Nevertheless, the arduous way to achieve gender equality in the societal Christian context over the centuries gives evidence of how Christianity has been used to justify the use of power over the woman. The interpretation of the idea of Christian love by men over history has contributed to the development of gender inequalities within the familiar context. Evidence of this is given by the historical difficulties western societies have faced in recognising marital rape as a crime, starting to criminalise it only toward the end of the XX century. Moreover, also the "unities theory" of Blackstone are reflected in the Bible, inasmuch it calls sexual intimacy in marriage a privilege and a mystery by which a man and a woman become one[66].

However, in comparison to other religious frameworks, Christian societies have taken enormous steps in recognizing women's rights, even if a lot of work still has to be done. As the results of an analysis over the phenomenon of marital rape all over the world given by the Equality Now Report point out, a different outcome is the one concerning the Islamic and Hinduist areas, where many States do not explicitly address it or even expressively decriminalized it.[67]

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[65] Lynston, S. (2014) Marital Rape: A Blatant Attack On Christian Principles. *The Gleaner.* Available at http://jamaica-gleaner.com/article/news/20141110/marital-rape-blatant-attack-christian-principles-0 (accessed June 28, 2020)

[66] Ephesians 5:32. See also, Genesis 2:24

[67] Equality Now (2017) *The World's Shame. The Global Rape Epidemic. How Laws around the World are Failing to Protect Women and Girls from Sexual Violence*., 26, PDF available at: https://d3n8a8pro7vhmx.cloudfront.net/equalitynow/pages/308/attachments/original/1527599090/EqualityNowRapeLawReport2017_Single_Pages_0.pdf?1527599090

1.3.1 The "woman" as a personal propriety: the Manu Code and the exception 2 to section 375 of the Indian Penal Code.

After discussing the importance that the concept of physical force plays in power relations between men and women, the following sub-paragraph will analyse the main conception of the woman in relation to the specific case of India: the woman as a private property.

As we have already discussed, the use of violence toward someone (in particular physical violence) allows the person exercising it, in this case the man, to gain control over the woman and thus to claim a right of ownership over what he exercises control on. In the Indian society the concept of the woman as a chattel, as a man propriety is still well-rooted within Indian traditions and customs. Moreover, rape is an ongoing consistent problem in India: "one woman reported a rape every 15 minutes"[68] and in this regard, as it will be argued, marital rape is even more a problematic issue as it is not criminalized by law. Consequently, in order to understand the issue of marital rape in India in relation to the concept of the woman as a man's property, it is necessary, first of all, to take into account the cultural Indian context and the structure of the Indian society as the question of rape is strictly linked to women's status within society.

The Indian Constitution, adopted in 1949 after the declaration of independence by the Indian State (1947) from the English dominium, includes certain fundamental rights that guarantee women and men an apparent "equal status" such as equality under the law for men and women (article 14), prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (article 15), equal opportunity in matters of public employment (article 16), equal pay for equal work (art. 39).[69] In addition, different provisions have been adopted in order to guarantee these rights, such as the 1976 Equal Renumeration Act, the 1961 Maternity Benefit Act and the 1961 Dowry Prohibition Act.

[68] (2020) One woman reports a rape every 15 minutes in India. *Aljazeera*. Available at https://www.aljazeera.com/news/2020/01/woman-reports-rape-15-minutes-india-200110032323608.html (accessed June 28, 2020)
[69] The Constitution of India, 26 January 1950, art. 14, art. 15, art. 16, art. 29, PDF available at: https://www.refworld.org/docid/3ae6b5e20.html

However, as reported by Geetanjali Gangoli in "Controlling women's sexuality: rape laws in India" (2011), there is evidence that, despite the rights recognised in the constitution, women's position in India is highly variable as an important role is played by traditions and customs that, most of the times, conflict with the constitutional law. "Most women have limited control over various aspects of their lives" and "national data also reveals that domestic violence is endemic, as are dowry demands at marriage and son preference, leading to female infanticide, sex pre-selection and the abortion of female foetuses"[70]. Moreover, belonging to a particular class and caste within the society explains not only the gender gap between men and women but also within the woman's category itself.

Indeed, to analyse the issue of marital rape in the country, first of all it is necessary to understand the Indian societal structure. The main factor that, historically, has always had a strong influence in delineating the Indian society and thus the cast system and the patriarchy is Hinduism, the most diffused religion over the country. According to the Hindu thought men are divided into 4 castes: *Brāhmin*, *Kṣatrya*, *Vaiśya* and *Śūdra*, and each of them is expected to perform specific duties, necessary for a functioning society. Outside of this Hindu caste system there are the *Dalits* or the untouchables, the lower and poorer class. The caste system is based on a rigid hierarchical structure that for centuries defined the different roles a man and a woman could occupy in society.[71]

The main text of reference for the Hindu thought is the *Manusmriti* (or the Manu Code), widely regarded to be the most important and authoritative book on Hindu law and dating back to at least 1,000 years before Christ was born. Also known as *Manav Dharam Shastra*, it is the earliest metrical work on *Brahminical Dharma* in Hinduism and it is the word of *Brahma*[72], classified as the most authoritative statement on *Dharma* (religion). Still today, despite the secularised mask the

[70] Gangoli, G. (2011). Controlling women's sexuality: Rape law in India. In Gangoli G. & Westmarland N. (Eds.), *International approaches to rape*. Bristol, UK: Bristol University Press, 102, available at: doi:10.2307/j.ctt9qgkd6.9

[71] (2019) What is India's caste system?. *BBC News*. Available at: https://www.bbc.com/news/world-asia-india-35650616 (accessed June 29, 2020)

[72] In Hinduism, Brahma refers to the divinity predisposed to the emanation/creation of the material universe.

country tries to show, the laws of Manu are still considered to be a divine code and followed by many worshippers, in particular in the North of India[73].

With reference to women, the Manu code had a strong influence in the development of the conception of the woman as man's private propriety, according to which: "Girls are supposed to be in the custody of their father when they are children, women must be under the custody of their husband when married and under the custody of her son as widows. In no circumstances is she allowed to assert herself independently"[74]. This kind of control exercised by the man over the woman is justified in the Manu Code by the following assumptions on the nature of the woman: "it is the nature of women to seduce men in this world; for that reason, the wise are never unguarded in the company of females" [75]; "women, true to their class character, are capable of leading astray men in this world, not only a fool but even a learned and wise man. Both become slaves of desire" [76]; "wise people should avoid sitting alone with one's mother, daughter or sister. Since carnal desire is always strong, it can lead to temptation"[77]. The stereotyped idea of the woman as irrational, passionate, sin-inducing has to some extent been part of different cultures, and, with regard to India, it is still well-rooted. Moreover, according to the Manu Code, the woman has no independence, no autonomy: she is a chattel in the hands of different male figures of her life (the father, the husband, the son). This conception of the woman as a commodity, that passes from hand to hand between men in a family, plays a fundamental role in the analysis of the question of marital rape in India. It helps to explain the difficulty in recognising marital rape. Moreover, being an English colony, the evolution of the law on marital rape in India was influenced both by the traditional Hindu culture and by the Hale's doctrine.[78] Marriage is conceived a sacred and private matter, based on a relation between the

[73] Patwari, H. N. (2011) The Status Of Women As Depicted By Manu In The Manusmriti. Available at: http://nirmukta.com/2011/08/27/the-status-of-women-as-depicted-by-manu-in-the-manusmriti/ (accessed June 29, 2020)
[74] Bala, R. (2016) Women Empowerment And Hindu Literature, in New Delhi Publishers, 7(1), 38. See 5/151, Manu Code, PDF available at: http://ndpublisher.in/admin/issues/lcv7n1d.pdf
[75] 2/213, Manu Code, PDF available at: http://ndpublisher.in/admin/issues/lcv7n1d.pdf
[76] 2/214 Manu Code, PDF available at: http://ndpublisher.in/admin/issues/lcv7n1d.pdf
[77] 2/215 Manu Code, PDF available at: http://ndpublisher.in/admin/issues/lcv7n1d.pdf
[78] Kim, D. (2017) Marital rape immunity in India: historical anomaly or cultural defence?, *Crime, Law and Social Change*, 69(1), 91, available at: https://doi.org/10.1007/s10611-017-9705-3

husband and the wife that cannot be put into question by external authorities. The privacy of this institution is well evidenced by the exemption of marital rape in the Indian legislative system.

The Indian Penal Code was firstly adopted in 1860, after the enactment of the Charter Act (1833) by the British Parliament which initiated the process of codification in India, leading to the establishment of the first Law Commission under the chairmanship of Lord Macaulay. Clauses 359 and 360 of the Maculay's Draft Penal Code (1860) read respectively:

"359- A man is said to commit rape who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

First- Against her will.

Secondly- Without her consent while she is insensible.

Thirdly- With her consent, when her consent has been obtained by putting her in fear or death, or of hurt.

Fourthly- With her consent, when the man knows that her consent is given because she believes that he is a different man to whom she is, or believes herself, to be married.

Fifthly- With or without her consent, when she is under nine years of age.

Explanation- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception- Sexual intercourse by a man with his wife is in no case rape.

360- Whoever commits rape shall be punished with imprisonment or either description for a term which shall not be more than fourteen years and not be less than two years".[79]

[79] Vibhute, K. I. (2001). 'Rape'and the Indian Penal Code at the crossroads of the new millennium: between patriarchiast and gender neutralist approach. *Journal of the Indian Law Institute*, *43*(1), 27

The drafted clauses emerged in the final version in section 375 and 376 of the Indian Penal Code, introducing an important change regarding the exception of marital rape: "sexual intercourse by a man with his wife, the wife not being under ten years of age, is not rape"[80]. The exemption of marital rape presented by the Indian Penal Code coincided with the Hale Doctrine, based on the assumption according to which to a married woman was denied forever her right to refuse sexual intercourse with her husband, providing him with an unconditional and unqualified licence to force sex upon his wife. The exemption itself reflected the stereotype of the woman as a private object of the man, in this case the husband.

However, over history, the rape issue in India remained always a consistent societal problem influenced by traditions, cultures and religions that supported the idea of the woman as an inferior being. It was in the post-independence period that rape laws received greater attention, particularly on the wave of feminist movements, emerged at the turn of the late 1970s and early 1980s. The first issues addressed by the feminist movements regarded in particular three cases of rape in custody: the case of Rameeza Bee (1978), the case of Mathura (1972) and the one of Maya Tyagi (1980)[81].

In particular the case of Mathura led to a major nationwide campaign on the issue of custodial rape. Mathura, aged around 14-16 years, was a tribal agricultural labourer from Maharashtra. She used to go to the house of Nunshi for work and, during the course of her visits to that house, she came in contact with Ashok, who was the Nunshi's nephew. The contact developed into an intimacy so that Ashok and Mathura decided to get married. On 26 March 1972, her brother, Gama, complained to the local police that Mathura had beed kidnapped by Nushi and Ashok. The report was recorded by Head Constable Baburao, at whose instance all the three persons complained. After recording their statements, the complainants started to leave the police station. However, Mathura was asked to wait at the police station, while her companions were allowed to move out. She was raped by the constable Ganpat and by the head constable Tukaram, who attempted to rape her but could not because

[80] Ibid.
[81] Gangoli, Controlling women's sexuality: Rape law in India., 105

he was in a highly intoxicated condition. Consequently, a complaint on what happened was lodged. The Sessions Court acquitted the accused, concluding that she had sexual intercourse while at the police station, but that rape had not been proved and that she was habituated to sexual intercourse, given the medical examination report. On the contrary, the High Court reversed the judgement and accused Ganpat and Tukaram of rape, through a deep analysis of the situation in which rape was committed, by taking into consideration also the role played by fear and threats.[82]

When the case reached the Supreme Court, the sentence was overturned again and it was claimed that the intercourse in question was not proved to amount rape as there were no injuries shown in the medical report. Moreover, it was added that, since she has had previous sexual relations, she was of "loose morals" and may have encouraged the officers to engage in intercourse with her, by supporting the officers reasoning that she did not raised an alarm. In conclusion, the intercourse was supposed to be a peaceful affair, not being evidence of the "fear of death or hurt" that could vitiate consent for sexual intercourse as stated in section 375. [83]

Even if the case of Mathura (*Tukaram v. State of Maharashtra)* did not regard marital rape, it gave evidence of the numerous stereotypes and prejudices toward the figure of the woman in the Indian society. Moreover, it opened the debate on different aspects concerning section 375 of the Indian Penal Code. In an open letter to the Chief justice of Indian, written in September 1979, four law teachers – Upendra Baxi, Lotika Sarkar, Vasudha Dhagamwar and Raghunath Kelkar- denounced the Mathura case as "an extra ordinary decision sacrificing human rights of women under the law and the constitution"[84].

In 1983, following the protests that occurred as the result of the Indian Supreme Court's judgement on the case, the Criminal Law Amendment Act was adopted, adding different protections toward rape victims. This first amendment introduced several measures setting rape in the context of abuse of power. Indeed, it was added

[82] *Tukaram v. State of Maharashtra*, the Bombay High Court judgment December 12th/13th in Criminal Appeal No. 193/74 : AIR 1979 SC 185
[83] Gangoli, Controlling women's sexuality: Rape law in India., 106
[84] Ibid., 106

the category of custodial rape that penalized the abuse of power by public servants in their official capacities, by superintendents or managers of jails and by hospital staff and management and it was recognized the tampering of evidence allowed by the position of power of the accused, thus shifting the burden of proof from the victim to the rapist. With reference to marital rape, it was introduced a provision criminalizing marital rape in the case of separation of the spouses.[85]

In 2013, a new wave of protests emerged after the Delhi gang-rape on 16 December 2012[86]. A 23 years old woman, called Nibhaya, was the victim of the crime. She was a physiotherapy intern returning home from a movie with a friend, when she was beaten, brutalized, and raped repeatedly on the bus by six men. She was violated and penetrated multiple times with a metal rod, that cause her terrible infections in the intestine. Less than two weeks later, she died at a hospital in Singapore. Nationwide protests erupted and the former Chief Justice of India, Late J.S. Verma, established a committee to amend and enhance laws against rape and sexual assault. In relation to marital rape, the committee suggested that marital rape should be recognized as a crime in all cases, as it originates from the notions of women being the property of their husbands.[87]

The second criminal law amendment act resulted in the following version of section 375 of the Indian penal code:

"A man is said to commit "rape" if he

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

[85] Patel, K. (2019) The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change. *Fordham International Law Journal* 42(5), 1522

[86] *Mukesh & Anr. v. State for NCT of Delhi & Ors,* Supreme Court of India, judgement of the 5th May 2017, Criminal Appeal Nos. 607-608: (2017) 6 SCC 1

[87] Patel, The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change,1523

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

First- Against her will.

Secondly- Without her consent.

Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly- With or without her consent, when she is under eighteen years of age.

Seventhly- When she is unable to communicate consent.

Explanation 1- For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1- A medical procedure or intervention shall not constitute rape.

Exception 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape"[88].

Several changes have been made: first of all, the definition of rape itself has been broadened to include various forms of penetration of any of the woman or girl's body parts; secondly, it clarified the provision that lack of physical resistance does not amount to consent; thirdly, it changed the age of consent from sixteen to eighteen and finally, under section 376, several acts of violation were included in the definition of rape such as rape by the armed forces, by a relative, guardian, teacher, person in position of trust or authority, on a person incapable of giving consent, by a person in a position of control or dominance, on a person suffering from mental or physical disability, rape which causes grievous harm or disfiguring or maiming or endangering the life of the person, and persistent rape committed against the same woman.[89]

However, section 375 of the Indian Penal Code as amended in 2013, still does not abolish the marital rape exemption and it neither resolves the constitutionality of exemption 2, as it explicitly violates article 14, 15 and 21 of the Indian Constitution. Article 14 of the Indian Constitution ensures that "[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".[90] Although the Indian Constitution recognises the right to equality to all, section 375 discriminates against women raped by their own husband, by denying them equal protection from rape and sexual harassment, as it did not even recognize the crime of marital rape. Section 375 violates also article 15 on the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, as marital rape exemption safeguards the man, without guaranteeing the woman any type of protection[91]. Finally, the criminal law's section falls in contradiction with article 21 too, according to which "no person shall be deprived of his life or personal liberty except according to procedure established by law"[92]. In

[88] Section 375, Indian Penal Code (1960), amended by the Criminal Law Amendment, 2013
[89]Ibid., Section 376
[90] The Constitution of India (1949), art. 14
[91] Ibid., art. 15
[92] Ibid., art. 21

State of Karnataka v. Krishnappa (2000)[93] and in *Suchita Srivastava v. Chandigarh Administration* (2009)[94], the Supreme Court has interpreted this clause linking rape with the protection of different other rights such as the rights to health, privacy, dignity, safe living conditions, and safe environment.[95]

The partial protection against marital rape exemption is given only by the age limit of fifteen years old, under which no exemption is allowed. This takes into account, in particular, the cases of child brides in India, regulated by the Prohibition of Child Marriage Act (2006). According to the definition provided by the act a "child means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age"[96]. The act claims "child marriages to be voidable at the option of contracting party being a child"[97], but despite attempts to administer the practice of child marriage, child bride phenomenon is still widely present in India[98].

In relation to marital rape, the prohibition of child marriage provision regarding the age contradicts what is prescribed by the section 375 of the Indian Penal Code. On the one hand, as stated previously, to be a child means to be under 18 years of age, on the other hand, marital rape exemption should not be applied to cases where the wife is under 15 years old. On the issue, a recent case, *Independent Thought vs. Union of India* in October 2017, was filed by the nongovernmental organization, Independent Thought, to protect child brides from marital rape and opened a debate on the juridical situation of those wives, aged between 15 and 18 years old[99]. The argument consisted on the fact that paradoxically the law on the prohibition of child marriage considered generally girls aged between 15 and 18 years

[93] *State of Karnataka v. Krishnappa*, Supreme Court of India judgement of the 30th March 2000, Criminal Appeal No. 846 Of 1996: AIR 2000 SC 1470
[94] *Suchita Srivastava v. Chandigarh Administration*, Supreme Court of India judgement of the 28th August 2009, Civil Appeal No. 5845: (2009) 14 SCR 989
[95] Makkar, S. (2019) Marital Rape: A Non-criminalized Crime in India*. Harvard Human Rights Journal.* Available at: https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/ (accessed July 4, 2020)
[96] Prohibition of Child Marriage Act (2006), 2
[97] Ibid.
[98] UNICEF, End Child Marriage Program. Available at https://www.unicef.org/india/what-we-do/end-child-marriage (accessed July 4, 2020)
[99] Patel, The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change, 1525

uncapable to give their consent to sexual intercourse and that the same girls, if married, are capable of doing so, under exemption 2 of section 375 of the Indian Penal Code.

Thus, the question was: how could marriage justify such a kind of discrimination among girls of the same group of age? In sentencing on the case, the Court held that exception 2 creates an arbitrary and discriminatory distinction between a married girl child and an unmarried girl child, proposing to change the exception from "under fifteen years of age" to "under eighteen years of age." The arguments defended by the Court on its decision stipulated that the distinction between the married girl child and the unmarried girl child is contrary to the spirit of the Constitution of India, in particular to article 15, article 14 and Article 21. Similarly, the Court identified that allowing a man to engage in forced sexual intercourse with his child bride would be a violation of rights of liberty and dignity, as prescribed by the Constitution, by the Protection of Human Rights Act (1993), by Section 3 of the Protection of Women from Domestic Violence Act (2005) and by international obligations under the Convention on the Elimination of All Forms of Discrimination Against Women(1979). Moreover, the Supreme Court also emphasized the importance of a woman's autonomy over her own body, her right to bodily integrity, and her right to privacy, attempting to focus the question over marital rape toward a "bodily integrity" crime definition. Furthermore, in the final judgment it was pointed out the inconsistencies that arise from the fact that, given the exemption from the crime of rape in the marital context, husbands can be charged with lesser sexual crimes such as intent to outrage her modesty, sexual harassment, assault or use of criminal force against woman with the intent to disrobe, voyeurism, and stalking. It claimed that there are no marital exception clauses associated with any of these crimes.[100]

Independent Thought vs. Union of India has been a milestone in addressing the issue of marital rape and the incoherency and lack of a linear and logic approach toward the respect of different rights in the Indian law system. Moreover, it linked

[100] *Independent Thought v. Union of India*, Supreme Court of India judgement of the 11th October 2017, Writ petition (civil) no. 382 of 2013: (2017) 10 SCC 800

such crimes to other human rights questions the Indian systems violates, allowing the marital exemption to survive, such as the problem of child brides as well as rape of children and children and girls' rights.

As analysed in the present paragraph, marital rape is still a serious unrecognized issue in India. Several steps have still to be taken in order to address it and guarantee a coherent conception of the law in accordance with the Indian Constitution itself and with international obligations and treaties on human rights to which India is part (CEDAW, for example). Indeed, in the Indian contradictory context the question of marital rape reflects also broader issues that are debated at the national and international level on the nature and the consistency of human rights. On one hand international instruments and the Indian Constitution conceive human rights in accordance with the interpretation generally accepted by the United Nation: "Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination".[101] On the other hand, discrimination is an intrinsic feature of the Indian society as evidence is provided by the still ongoing existence of the casts and by the same exemption of marital rape. Thus, at this point the question widens: the stereotypes of the woman in the Indian society as a property, as an inferior being, seem not to share the same conception on the figure of the woman itself within the constitutional and international system. This opens a debate both at the international and national level questioning the universalism of human rights and opening the debate on the extent to which cultural multiculturalism can influence the emancipation of women's rights.

[101] UN, "Human Rights" definition, available at https://www.un.org/en/sections/issues-depth/human-rights/ (accessed July 7, 2020)

1.3.2 The Islamic religious justification of the woman as the "weak" sex: when religion becomes law in Iran.

Gender stereotypes are explicitly expressed in the Iranian patriarchal society. As in the previous case on India, in patriarchal societies gender roles are taught through formal and informal education and contribute to outlining the structures and roles on which society is based in order to ensure continuity and stability to power relations.[102] The following sub-paragraph will present an analysis of marital rape in the Islamic context, with reference to the case of Iran. First of all, it will provide a general presentation on the Iranian political system based on a fusion of religion and law. Secondly, it will address the conception of marriage provided by the Islamic *Shari'à* law and finally it will focus on the issue of marital rape in Iranian society. Differently from the Indian case, where Hidu conceptions on the figure of the woman clash with the same conception of the woman in the Constitution, in Iran, the Constitution and the Islamic religion are overlapped, blurring the line between public and private.

The Islamic sacred texts of reference for Muslim societies are the Koran and the *Sunna*, on which the *Shi'a* is based. In particular, in the Koran gender roles are explicitly evident and design the different functions men and women have within society and within the family. Anyway, as hinted previously with reference to Christianity, also in the Islamic culture, besides different gender roles, the principle of love and equality of rights and duties within marriage is present, even if in a more ambiguous way. Indeed, the Koran states "… and they (the women) have rights similar to those (of men) over them in equity; but men have a rank over them, And Allah is Mighty, Wise".[103] Although, initially, equality is affirmed in this statement, the second phrase clarifies the superiority of men over women.

After the 1979 Islamic Revolution, religious authority found its way into public and private policy, declaring the *Shi'a* law as the foundation of the Islamic State.

[102] Naghavi, A., Amani, S., Bagheri, M., & De Mol, J. (2019). A Critical Analysis of Intimate Partner Sexual Violence in Iran. *Frontiers in psychology*, Vol.10, Article 2729, available at: https://doi.org/10.3389/fpsyg.2019.02729

[103] Ahmad, M. S. M. (1988) Islam on marital Rights. *Islam International Publications,* 8, PDF available at: https://www.alislam.org/library/books/Islam-on-Marital-Rights.pdf

Differently from western societies, in Islamic countries the dichotomy public-private fades away. Indeed, the fusion of the religion with the law allows the State to enter the private spheres of individuals administrating their familiar lives both from a legal and moral point of view. In the Iranian context, religion is no more a private matter, but it is identified with the national law as well as with consuetudinary norms, customs and moral traditions of the society.

In order to understand the discrimination toward women in the name of religious dogmas, it is necessary to provide first of all a general political framework of the law in Iran. The basic principle of the law system is the principle of *valàyat-I faqìh* (the rule of the Islamic jurist) that makes of the judiciary power the leading power within the political system. A specific feature of the Iranian political system is indeed the subordination of the parliament to the arbitrariness and the sovereignty of the judges and the existence of a ruling body, the Council of Guardians, whose function is to approve all the Bills passed by the parliament and to veto them if considered inconsistent with the Islamic Law and the Constitution (art. 72). [104]

The Iranian revolution was, thus, a turning point in the creation of the actual law system as, through the introduction of the *Shari 'a* as fundamental principle, many pre-revolutionary laws and policies were abolished because in contradiction with Islamic criteria. Moreover, for what concerns the position of the woman in society, gender became quite significant.[105] The conception of women was well-provided by the Motahari's theory, according to which given psychological and physiological differences, men and women were expected to play different roles in society. Indeed,

[104] Aghatie, N. (2011) Breaking the silence: rape law in Iran and controlling women's sexuality. *International approaches to rape*, 121, PDF available at: https://www.jstor.org/stable/pdf/j.ctt9qgkd6.10.pdf.
Article 72 of the Constitution of the Republic of Iran states: ": The Islamic Consultative Assembly cannot legislate laws that contradict the canons and principles of the official religion of the country or the constitution. The Guardian Council is responsible for the evaluation of this matter, in accordance with Article 96".
Moreover, the superior role of the judiciary is given also by the power the judiciary can exercise in sentencing crimes. Article 12 of the Iranian Penal Code identifies five kinds of punishments that deal with various crimes: *Hadd, Qasas, Diyeh, Tazir* and prohibitive punishments. *Tazir,* which is a punishment whose characteristic are not defined by the Shari'a law, is at the judge's discretion.
[105] Ibid.

contrary to men, who are rational and thoughtful beings, women rely more on their instinct, on their emotions and are more susceptible to men's deceptions and tricks. This assumption partly explains the obligation of the "good wife" to stay at home, take care of her husband and her children and cover herself when going out. In particular, with reference to the wearing of hijab, in the book "La Question du Hijab" (1969), Motahari highlighted the evidence of the submission of women represented by the veil, not only in relation to the female more vulnerable nature, but to the conception of the woman as the man's private property.[106]

Following the revolution, the Family Protection Law of 1969 was annulled and replaced by the New Law on marriage in 1975. The institution of marriage was reinterpreted according to Islamic principles by Muhaqqiq Al-Hillì, one of the most prominent of traditional *Shi'a* jurists. Marriage is seen in the Iranian Islamic culture as a means of legitimizing sexual relations and determining paternity, as a religious obligation and as a means of preserving morals. Muhaqqiq Al-Hillì defined marriage as "a contract whose object is domination over the vagina, without the rights of its possession"[107].

Moreover, with reference to the legal status of women, Iran's laws permit systematic discrimination on the basis of gender and religion, in contradiction with numerous international obligations foreseen by international treaties on the respect of women rights, to which Iran is part[108]. This clash between national and international law is well evident, for instance, in relation to child brides. Indeed, the Iranian Civil Code claims that contracting marriage before puberty is invalid unless it is authorized by a natural guardian, like the father or paternal grandfather. When marriage is authorized before puberty the minimum age is nine[109], permitting sex with a child to be legal and thus violating international conventions, such as the

[106] Motahari, M. (ed. 2015), *La Question du Hijab* (1969), Createspace Independent Publishing Platform 66-67
[107] McGlinn, S. (2001) Family Law in Iran. *Islamic Family Law paper*, University of Leiden, 24, PDF available at: https://unstats.un.org/unsd/vitalstatkb/KnowledgebaseArticle50547.aspx
[108] Universal Declaration on Human Rights, the Convention of the Rights of the Child, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Abolition of Slavery. It is important noting that Iran is not part of the Convention on the Elimination of All forms of Discrimination Against Women.
[109] McGlinn, Family Law in Iran., 34

Convention on the Rights of the Child and the Universal Declaration of Human Rights[110]. Moreover, the marriage guardianship, according to which marrying a virgin girl requires the permission of the father or the paternal grandfather[111], gives evidence not only of the consistency of Muhaqqiq Al-Hillì's definition of marriage, but also of the idea of the woman as a chattel in the hands of men.

The submission of the woman within the familiar context is well explained by the three fundamental notions on which the marital relation is based: *tamkin* (submission), *nafaqa* (maintenance) and *nushuz* (disobedience). In this regard, an exhaustive explanation of the marriage contract in the Shi'a is provided by Ziba Mir-Hosseini, a famous anthropologist specialized in Islamic law: "with the marriage contract, a woman comes under her husband's *isma* (authority, dominion and protection), entailing a set of defined rights and obligations for each party; some have a moral sanction and others have legal force. Although the boundaries between the legal and the moral are hazy . . . those sanctions with legal force revolve around the twin themes of sexual access and compensation, embodied in the concept of *tamkin* and *nafaqa. Tamkin* (submission, defined as unhampered sexual access) is a man's right and thus a woman's duty; whereas *nafaqa* (maintenance, defined as shelter, food and clothing) is a woman's right and a man's duty. A woman becomes entitled to *nafaqa* only after the consummation of marriage, and she loses her claim if she is in a state of *nushuz* (disobedience), (while she has the right to refuse sexual access until she receives it in full)". [112]

The lawful discrimination of the figure of the woman in the Iranian context is a central point in analysing the issue of marital rape. According to the Islamic perspective, sexual intercourse is sacred and it has two main functions: recreation,

[110] According to the Convention on the Rights of the Child, article 1 defines a child as a person under 18 years of age and it is underlined the state responsibility in protecting children from any type of exploitation, including the sexual one (art. 34). The universal Declaration of Human Rights states: "Marriage should be entered into only with the free and full consent of the intending spouses" (art. 16)

[111] Moghadam, V. M. Women in the Islamic Republic of Iran: Legal Status, Social Positions, and Collective Action, Legal status, social positions, and collective action. *In conference for the Woodrow Wilson International Center for Scholars,"Iran After,* Vol. 25, 5, PDF available at: http://www.sssup.it/UploadDocs/7320_7_R_Women_in_the_Islamic_Republic_of_Iran_Moghadam_07.pdf

[112] Ibid., 7

as it is supposed to be based on mutual love and affection, and reproduction.[113] The rule of *Shari'a* considers legal (*halal*) only sexual intercourse conducted by husband and wife, identifying three cases in which it could be illegal (*haram*): when conducting during fasting Ramadhan, during the menstruation period and during pregnancy[114].

Rape falls under the category of illegal sexual intercourse outside marriage (*zena*) and more specifically it is included in article 82 of the Iranian Penal Code in relation to the crime of adultery.[115] Anyway, the term rape does not find any specific reference within the Islamic Iranian context: it is generally identified with *Zena-e ba onf va ekrah*, meaning forced sexual intercourse with a woman to whom the rapist is not married. With reference to marital rape, the issue of provoking a sexual abuse to a woman within marriage is unknown in Islam and consequently it is not foreseen by the Iranian law. Indeed, marriage in Islam is based on a set of duties and rights of both the spouses and, with regard to the woman's sexual intimacy, it is the wife's obligation to granted submission to her husband's sexual pleasure: the concept of property over the woman is thus reflected in the husband's right to have control over her intimacy, too.[116] As a consequence, being the marriage a contract that should be based on mutual love and affection as supported by the Coran, how can marital rape exist? Such argument on the inexistence of marital rape assumes that in this case the man behaves always according to the Islamic principle. However, it is inconsistent as the same reasoning is not adopted in other situations, where illegal behaviours are foreseen: it is just a reflection of asymmetric power relations between men and women that are given for granted, justified by religious concerns.

In comparison with the Indian context, the Iranian legislative framework over marital rape is more incomplete and harmful. It does not take into consideration the issue of marital rape, as it is not conceived as possible by Islam, nor does it address

[113] Ahmad, Islam on marital Rights., 6-7
[114] Susila, M. E. (2015). Islamic perspective on marital rape. *Media Hukum*, 20(2), 325
[115] Iran: Islamic Penal Code, 20 November 1991, art. 82, available at: https://www.refworld.org/docid/518a19404.html (accessed June 27, 2020)
[116] Susila, Islamic perspective on marital rape, 327

rape in regard to child brides, which is a phenomenon still classified as legal in the country.

CHAPTER 2 - Marriage, consensus and the use of physical force: defining marital rape.

Once presented a general framework over women's subordination in power relations and, specifically, in the phenomenon of marital rape, the second chapter aims at providing some definitions on the issue of violence against women and rape.

An important aspect to take into account is the absence of the definition of "violence" in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the main international juridical instrument on violence against women. A definition of "violence against women" has been provided by the Declaration on the Elimination of Violence Against Women (1993) that defines it as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life"[117]. The notion of "violence against women" is, thus, strictly connected with the one of "gender". As provided by the CEDAW Committee in the General Recommendation No. 19, gender consists of "traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision."[118]

On the basis of the definitions of "violence against women" and "gender", the tendency at the international level is to identify the category of women with the one of gender, risking to link exclusively gender to sex, without taking into consideration a broader notion of "gender" which includes also LGBTI genders[119]. Indeed, from a sociological perspective, gender and sex are two different concepts: sex is linked to the binomial nature/body and gender to the one culture/mind[120]. Gender is

[117]UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, art. 1
[118]UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992, A/47/38, para. 11.
[119] De Vido, Donne, Violenza e Diritto Internazionale, 32. LGBTI stands for lesbian, gay, bisexual, transgender.
[120] Ibid., 33

therefore created as a cultural product. However, as already mentioned in the first chapter, the strong interconnection between gender and sex is prominent in the phenomenon of violence against women, given evidence of the role played by the physical force factor. Consequently, as history has proved, such male dominium over the woman has been legitimated and circumscribed within the "excess cultural baggage associated with biological sex"[121]. Violence against women would then arise from the dualism between male and female, from what is culturally created, but perceived as natural, on biological differences[122]. Thus, generally speaking, from a juridical approach, gender is not defined in the international instruments, as they are based on the equation women=gender[123]. Besides the Istanbul Convention, that, as it will be explained in the third chapter, presents the more complete analysis on the term, the first international framework of a neutral notion of "gender", not identified only with the female one, was the International Criminal Court (ICC, 1998).[124]

Despite of the fact that, in defining violence against women, this research stands for the assumption that violence against women is one of the different forms of gender-based violence and not the only one, there is evidence of a strong correlation between gender and sex, when talking about gender discrimination against women in particular: in the general comment to article 1 of the General Recommendation No. 19, "gender-based violence" is conceived as "violence that is directed against a woman because she is a woman or that affects women disproportionately"[125].

Furthermore, as foreseen by article 2 of the General Assembly (GA) Declaration on the Elimination of Violence against Women, such link between gender and women is well-pronounced in three contexts, regarding both the public and the

[121] Charlesworth, H., Chinkin, C. (2000) *The Boundaries of International Law. A Feminist Analysis*. Manchester: Manchester University Press, 3.
[122] De Vido. Donne, Violenza e Diritto Internazionale, 33
[123] Ibid., 36
[124] UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, art. 7(3): "For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above". However, such definition is still limited to the role played by the two sexes (male and female) in defining such cultural representation, failing to include LGBT categories.
[125] CEDAW, General Recommendation No. 19, A/47/38, para. 6.

private sphere: the family, the community and the State[126]. In "Inequalities between the Sexes in Different Cultural Contexts" (1995), Susan Okin finds the main causes of women subordination and of the violence exorbitated against women within the familiar context, identifying the prime reason on the unpaid housework of women in the family[127]. With reference to the familiar dimension, the most striking example of violence against women is domestic violence, that can take different forms and involve different actors: "there are many types of domestic violence. Young girls and children are often victims of sexual assault within the family. Elderly family members and the infirm may also be subject to ill-treatment. Female domestic servants are another category which is often at the receiving end of violence. In extended families, mothers-in-law are often violent towards their daughters-in-law. Though there are many incidents of assault directed against the husband, studies show that they are not so frequent and rarely result in serious injury. Despite all those different types of domestic violence, the most prevalent is the violence of the husband against the wife"[128]. In the community dimension, violence is related to rape and sexual assault (in broader terms), perpetuated by a man outside the familiar context. Moreover, such framework includes also violence in the workplace[129], against migrant workers, prostitution and women trafficking[130].

[126] A/RES/48/104 (1993), art. 2: "Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs".

[127] Okin, S., (1995) "Inequalities between Sexes in Different Cultural contexts" In C.M. Naussbaum, J. Glover (eds.) *Women, Culture and Development: A sStudy of Human Capabilities*, 275-295. Oxford: OUP.

See also, Federici, S. (1974). *Wages against housework.*pdf. PDF, available at: https://warwick.ac.uk/fac/arts/english/currentstudents/postgraduate/masters/modules/femlit/04-federici.pdf

[128] UN Commission for Human Rights (HRC) *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and its consequences*, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution 1994/45, E/CN.4/1995/42, para. 118

[129] CEDAW, General Recommendation No. 19, A/47/38, para. 17.

[130] E/CN.4/1995/42, para. 142

Finally, the last dimension, the statal one, concerns mainly violence committed by State officials, such as for example in detention places or during armed conflicts.[131]

Recently, in 2006, the Special Rapporteur on violence against women, Yakin Ertürk, has introduced also another dimension, the transnationalist one, by affirming that, given the fact that violence against women acts beyond and within national territories, there is evidence that the different contexts, where violence against women can take place, are not isolated[132]. Indeed, they can overlap, such as in the case of rape, which is a crime that can belong to all the traditional contexts taken into consideration, depending on the identity of the perpetuator of violence: if a State official, a stranger person or the husband. The setting of the crime of rape in the familiar context provides the prime framework where analysing the marital rape crime, involving indirectly also the other two dimensions (the State and the community). Indeed, marital rape, even if belonging to the private sphere, reflects asymmetries of power that are well-rooted in the community's values, principles, attitudes and practices and involves positive actions by the State in facing the phenomenon, both at the national, international and transnational level.

The following chapter is divided into three sections. In the first paragraph, a definition of rape will be provided, by taking into consideration the notion of "consent" and of "physical force" as structural elements. Secondly, it will address the concept of marital rape in relation to its intersection with different forms of domestic violence, such as physical, psychological, sexual and economic. Finally, in the last paragraph, the chapter will address the question of the seriousness and harmfulness of marital rape compared to rape committed by a stranger, trying to identify the reasons why it is more difficult to recognize the former.

[131] De Vido. Donne, Violenza e Diritto Internazionale, 39
[132] UN Commission for Human Rights (2005), *Report of the Special Rapporteur on Violence Against Women, its Cayses and Consequence*, Yakin Ertürk, in accordance with Commission on Human Rights Resolution 2005/41, E/CN.4/2006/61, paras. 94-99

2.1 Consent and the use of force: to what extent these structural elements define marital rape?

In order to collocate rape within the category of crimes, the following paragraph will adopt an approach going from the general to the particular. First of all, it will present the broader framework conceiving the definition of sexual rights, sexual autonomy and sexual violence. Secondly, it will shift the focus on rape as a specific type of sexual violence, and finally it will analyse the intrinsic nature of rape, taking into consideration to what extent consent and the use of force define the crime of marital rape.

Historically, "sexual rights" have never gained much attention as they were linked exclusively to the protection of women and girls from sexual harm and from extreme abuse and killing. Following human rights' evolution, in the last few years many scholars, NGO advocates and some UN experts have highlighted the importance of taking into consideration the term "sexual rights" in dealing with ad hoc issues, such as violence against women, sexual and reproductive health, HIV/AIDS, children's rights and LGBT's rights[133].

In 2004, Paul Hunt, the then UN Special Rapporteur on the right to health, claimed that "…no doubt that the correct understanding of fundamental human rights principles, as well as existing human rights norms, leads ineluctably to the recognition of sexual rights as human rights. Sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference…. The contents of sexual rights, the right to sexual health and the right to reproductive health need further attention, as do the relationships between them"[134]. Such statement underlined the need to include "sexual rights" in the human rights framework: indeed, being entitled with sexual rights assures individual's sexual

[133] International Council of Human Rights Policy ICHRP (2009) *Sexuality and Human Rights*, Discussion paper, 7 PDF, available at: file:///C:/Users/HUAWEI/Downloads/SSRN-id1551221.pdf
[134] UN Commission for Human Rights (2004), *Report of the Special Rapporteur on the Right to Health*, Paul Hunt, UN Doc. E/CN.4/2004/49. Paras. 54-55

autonomy and, consequently, physical and sexual integrity, which are the core of human rights value protected by the criminalisation of sexual violence.

The main definition of reference of "sexual rights", as a category of human rights protecting sexual autonomy, is the one provided by the World Health Organization (WHO, 1948), according to which they are "human rights that are already recognized in international and regional human rights documents and other consensus documents and in national laws. Rights critical to the realization of sexual health include: the rights to equality and non-discrimination, the right to be free from torture or to cruel, inhuman or degrading treatment or punishment, the right to privacy, the rights to the highest attainable standard of health (including sexual health) and social security, the right to marry and to found a family and enter into marriage with the free and full consent of the intending spouses, and to equality in and at the dissolution of marriage, the right to decide the number and spacing of one's children, the rights to information, as well as education, the rights to freedom of opinion and expression, and the right to an effective remedy for violations of fundamental rights. The responsible exercise of human rights requires that all persons respect the rights of others. The application of existing human rights to sexuality and sexual health constitute sexual rights. Sexual rights protect all people's rights to fulfil and express their sexuality and enjoy sexual health, with due regard for the rights of others and within a framework of protection against discrimination"[135].

Furthermore, the belonging of sexual rights to the category of human rights is supported by the fact that "sexual rights make a strong claim to universality, since they relate to an element of the self which is common to all humans: their sexuality"[136]. Such rights contribute to designate the sphere within which they must be respected and protected: sexual autonomy. The term "autonomy" is a basic concept in the human right doctrine, as it is the "empirical assumption that persons *as such* have a range of capacities that enables them to develop, and act

[135] World Health Organization (WHO), definition of "sexual rights", available at: https://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/ (accessed July 13, 2020)
[136] ICHRP, Sexuality and Human Rights, 8

upon plans of action that take as their object one's life and the way it is lived"[137]. Human beings are, thus, conceived as capable of making independent decisions on their life and of calling their life their own. Being autonomous and independent, though, requires that individuals are entitled to equal concern and respect, as persons. Indeed, effective autonomy, identified in the freedom of a person to decide for its own life, may be easily abused or may easily violate someone else's sphere of autonomy: that's why in human right doctrine the concept of autonomy, and thus of sexual autonomy, does not comes from the effective actual autonomy of a person, but from equal concern and respect for the capacity of autonomy. Indeed, if the principles of equal concern and respect were not implied in defining the individual sphere of autonomy, the concepts of autonomy and independence would fall in a cycle of unlimited violations. With reference to sexual autonomy, any violation of it implies a violation of sexual rights, coming from the phenomenon of sexual violence.

In order to design the crime of rape, it is necessary to define first of all the notion of sexual violence, within which rape itself is set. According to the ICC jurisprudence, sexual violence occurs when "the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent"[138]. According to the ICC, the aspects of coercion and violation are common to rape and sexual violence: in the ICC view, rape is

[137] Richards, D. A. (1979) Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in the Human Rights and the Unwritten Constitution, *Hastings Law Journal* 30(2), 965, PDF, available at: https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2600&context=hastings_law_journal

[138] ICC, Element 1 of Article 7(1)(g)-6; Element 1 of Article 8(2)(b)(xxii)-6; Element 1 of Article 8(2)(e)(vi)-6 of the Elements of Crimes.

conceived as a particular kind of sexual violence, consisting of the specific act of penetration of the body[139].

Rape is defined in the ICC through gender-neutral lens[140] as the result of the combination of the elements of crime used in International Criminal Tribunal for the former Yugoslavia[141] (ICTY, 1993) and International Criminal Tribunal for Rwanda[142] (ICTR, 1994) case law.[143] The approach outlined in the Elements of Crimes defines rape as a crime of genocide, a crime against humanity and a war crime. In all cases, the definition of the crime is the same (the only difference concerns the legal context of reference) and it is defined as follows: "1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent"[144]. According to the definition, the essential and basic elements to take into account are the fact that rape results in an act of penetration of "any part of the body" and the conditions in which it is conceived as such, referring to the concepts of force, coercion and genuine consent.

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[139] Amnesty International (2011). *Rape and Sexual Violence. Human Rights Law and Standard in the International criminal Court.* United Kingdom: Amnesty International Publications, 11, Pdf available at: https://www.amnesty.org/download/Documents/32000/ior530012011en.pdf

[140] Maier, N. B. (2011) The Crime of Rape Under the Rome Statute of the ICC: With a Special Emphasis on the Jurisprudence of the Ad Hoc Criminal Tribunals, *Amsterdam Law Forum 3(2),* 147, PDF available at. http://130.37.92.72/article/viewFile/209/397

[141] The ICTY lasted from 1993 to 2017.

[142] The ICTR delivered its last trial judgement on 20 December 2012. The Tribunal's remaining judicial work now rests solely with the Appeals Chamber.

[143] Case ICTR-96-4-T, Jean-Paul AKAYESU, Judgment of 2 Sept. 1998; Case IT-95-17/1-T, Anto FURUNDZIJA, Judgement of 10 Dec. 1998; Case IT-96-23 and IT-96-23/1, Dragoljub KURNARAC, Radomir KOVAC and Zoran VUKOVIC Judgement of 22 Feb. 2001; Case IT-95-17/1-T, Anton FURUNDZIJA, Judgement of 10 Dec. 1998

[144] ICC, Element 1 and 2 of Article 7(1)(g)-1; Element 1 of Article 8(2)(b)(xxii)-1; Element 1 of Article 8(2)(e)(vi)-1 of the Elements of Crimes.

The ambiguity of the definition of rape provided by the ICC concerns in particular the notion of "consent". Indeed, while "force" and "the threat of force and coercion" are explicitly recognizable situations, with reference to "consent" the question is more delicate and, as it will be given evidence in the third chapter, States enjoy a margin of appreciation in determining if it has been given or not by the victim, because no international or regional human rights instruments or standards provide a clear definition of the term[145]. However, some guidelines have been provided in Rule 70 of the Rules of procedure and Evidence of the ICC, stating that: "(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness"[146].

On the element of consent, the feminist doctrine has exerted considerable influence. In particular, in US, until the '70s, the crime of rape was based exclusively on the notion of force, in terms of the traditional male notion of "fight"[147]. The concept of force itself was put into question: as Susan Estrich noted referring to the US context, "when the force is more of the variety considered 'incidental' to sex, or when the situation is threatening but no explicit threat of harm is communicated, 'force' as defined and required by the criminal law may not be present at all"[148]. Indeed, since the past, the definition of rape has always been more focused on the

[145] In this regard, the third and fourth chapters will address the issue of marital rape within the Istanbul Convention framework, which, despite the lack of a clear definition of consent, is at the forefront in promoting a consent-based definition of rape.
[146]ICC, *Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (2000), Rule 70
[147]Estrich, S. (1996). Rape. In Weisberg D. (Ed.), *Applications Of Feminist Legal Theory*. Temple University Press, 441.
[148] Ibid, 438

factor of the use or threat of force to establish under which conditions a sexual intercourse could be considered rape.

On what basis should force be considered prohibited rather than incidental? As highlighted by the US Supreme Court in *Mill v. United States* (1897)[149] and in *State v. Alston* (1984)[150], being force a structural element of the crime of rape, it must be conceived within sexual intercourse when it is used to overcome female non consent: thus the prohibition of force was defined in terms of "utmost resistance"[151] and the burden of proof was on the victim in order to demonstrate she used the maximum amount of resistance to defend herself. Such concept of "consent" in terms of woman's resistance is the most evident example of the ongoing conception of the law through a male perspective. It denies the existence of the *mens rea* behind the crime of rape, without taking into consideration the intentionality of the rapist. Indeed, the definition of "utmost resistance" functions as a substitute for *mens rea* to ensure that the man has noticed the lack of consent by the woman. Furthermore, in *Goldberg v. State*, the Court underlined the concept, differentiating between verbal and physical resistance and claiming that "it is true that she *told* the appellant she 'didn't want to do that [stuff]'. But the resistance that must be shown involves not merely verbal but *physical* resistance "to the extent of her ability at the time"[152].

To refuse to inquire into *mens rea* shifts the focus of the crime of rape from the defendant (is he a rapist?) to the victim (was she really raped? Did she consent?), giving the rapist the possibility to misunderstand if the victim consented or not, even if he is aware he is mistaking in interpreting the victim's will. Estrich writes "I

[149] Peckham, R. W. & Supreme Court Of The United States. (1896) *U.S. Reports: Mills v. United States, 164 U.S. 644*. [Periodical] Retrieved from the Library of Congress, available at: https://www.loc.gov/item/usrep164644/.
[150] *State v. Alston*, judgment of 6 March 1984, US Supreme Court of North Carolina: 310 N.C. 399, 312 S.E.2d 470,1984 N.C. 1585
[151] See also *Brown v. State*, judgement of 30 January 1906, US Supreme Court of Wisconsin: 106 N.W. 536, 127 Wis. 193. The Court affirmed that "not only must be entire absence of mental of consent or assent, but there must be the most vehement exercise of every physical mean or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consumed".
[152] *Goldberg v. State,* judgement of 10 January 1979, Court of Special Appeals of Maryland: 395 A.2d 1213, 41 Md. App. 58

understand that some men in our society have honestly believed in a different reality of sexual relations and that many may honestly view such situations differently than women. But it is precisely because men and women may perceive these situations differently, and because the injury to women stemming from different male perception may be grave, that it is necessary and appropriate for the law to impose a duty upon men to act with reason, and to punish them when they violate that duty"[153]. Moreover, the insufficiency of verbal resistance supports the philosophy of "no means yes", promoting gender discrimination on the basis of stereotypes that celebrate male aggressiveness and woman passivity, without recognising the implication of the use of physical force and other factors (such as economic, psychological, emotional factors) involved and denying the evidence that, because of minor physical strength, a woman is, generally, disadvantaged in resisting or "fighting" against a man.

Notwithstanding in Rule 70(c) the concept of "utmost resistance" does not find space within the ICC conception of consent, according to the definition of rape in the Elements of Crime, there is evidence of the attitude of the ICC to be focused on the coerciveness of the actions of the perpetrator which affect the victim's capability to exercise free consent.[154] Solely the words "against a person incapable of giving genuine consent" designate a situation where force is not taken for granted. Indeed, incapacity is conceived as natural (e.g mental incapacity), induced (e.g. caused by the use of drugs and alcohol) or age-related incapacity (e.g. the competence of children to give free and informed agreement to sexual activity).[155] However, even if force is not supposed to be directly exercised in such situations, also with

[153] Estrich, Rape, 437

[154] The Amnesty International Report on "Rape and Sexual Violence" (see supra note 22) presents the four main conditions under which a violation of sexual autonomy can occurs, within the ICC framework: the use or threat of force, the use of coercion, taking advantage of a victim in coercive circumstances and natural incapacity or reduced capacity that affect the ability to give genuine consent. In particular coercion is seen as an essential element of the crime of rape, including five main forms of coercive circumstances such as fear of violence, detention, duress, psychological oppression and abuse of power.

[155] Amnesty International, Rape and Sexual Violence. Human Rights Law and Standards in the International Criminal Court, 27

reference, for instance, to age-related incapacity, rape is always generally linked to the notion of "coercion" more than to the one of "consent".[156]

Thus, with reference to the crime of rape as an international crime, the ICC definition is based on the assumption according to which in cases of situations involving the use of force, threat of force or coercion, there should no additional element on consent, as it is not supposed to exist in such conditions. Indeed, in ruling the crime of rape, the ICC refers mainly to the commitment of a crime in armed conflicts, in situations of war or in genocides (all coercive situations)[157]. However, outside such circumstances, the issue of consent becomes more problematic. In particular, with reference to marital rape, to what extent does consent become a structural element in a context such as the one of marriage, which is supposed to be based on a consensual contract?

In *Vertigo v. The Philippines* (2010), the CEDAW Committee affirmed the need to enact a definition of sexual assault based on the existence of "unequivocal and voluntary agreement" and on the "proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting" or the presence of "coercive circumstances". [158] Such statement provides for two models of the definition of rape taken into consideration by the CEDAW: the consent-based definition and the force-based definition. If on one hand, the ICC privileges the last one, the European Court of Human Rights (ECtHR) is a supporter of the former definition, as it will be analysed in the last chapter. Indeed, in a statement of the ECtHR in the case of *M.C. v Bulgaria* (2003), it is affirmed that "women do not walk around in a state of constant consent to sexual activity unless and until they say 'no', or offer resistance to anyone who targets them for sexual activity. The right to physical and sexual autonomy

[156] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, art. 34

[157] Furthermore, the ICC sets rape also within the crimes against humanity, referring to the fact that the conduct was "committed as part of a widespread or systematic attack directed against a civilian population". In other circumstances rape constitutes a crime under domestic law. With regard to rape as a crime against humanity, the ICC takes into consideration the intent (*mens rea*) and the knowledge in committing the crime, though foreseeing the creation of a coercive situation driven by the will of committing the crime.

[158] *Karen Tayag Vertido v the Philippines*, 1 September 2010, CEDAW Communication No. 18/2008, UN Doc CEDAW/C/46/D/18/2008, para. 8.9(b)(iii)

means that they have to affirmatively consent to sexual activity."[159] The Court also clarified that "any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy"[160].

With regard to marital rape, the familial context, thus, influences the definition of rape based on the concept of force or of consent. In particular, the intrinsic nature of marriage as an institution based on mutual affection and love takes for granted the consensus to having a sexual intercourse with one's own spouse. As exposed in the first chapter, such consensus has been historically attributed to the woman, supported by the still ongoing existence of stereotypes and myths around sexual violence.

According to this thesis, since rape is a broad phenomenon that is not limited to coercive situations, the introduction of consent as an exhaustive element covers all subspecies of rape (as a war crime, as a crime of genocide, as a crime occurring in the conjugal sphere). Differently, from the force-based model, based on the assumption that the use or threat of the force is crucial in establishing the lack of consent, the consent-based definition underlines the fact that the lack of violence does not mean consent. A shift from the notion of rape from force to consent is, thus, necessary in addressing the issue of marital rape, presuming the marriage to be a non-coercive context. When there is coercion, there is lack of consent; but where coercion is not supposed to be, should consent be taken for granted? Is consent always "genuine consent" in a non-coercive situation?

The consent-based model provided by the CEDAW[161] and, as it will be discussed, developed in the European framework, is based on the assumption according to which consent as the central element in defining the crime of rape protects "women's choice and women's autonomy in sexual relations"[162]. It is a tool to afford

[159] *M.C. v Bulgaria*, application 39272/98, judgment of 4 December 2003, European Court of Human Rights, Eur. Ct. H.R., 39272/98 (2003), para. 12
[160] Ibid., para. 166
[161] *Karen Tayag Vertido v the Philippines*, CEDAW
[162] Estrich, Rape, 444

women their deserved freedom to engage in a sexual intercourse. Such model is based on the "yes means yes"[163] model, empowering women in affirming their own choice. However, some critics have been moved in relation to the consent-based definition too. Part of the feminist movement argued that "yes" as a sign of true consent is misguided.[164] Indeed, given evidence of the still existent unequal position of the woman in the society, and in the family, how can "yes" really mean "yes"?

Notwithstanding the notion of "consent" needs to be conceived as the main structural element of rape, such concept is vulnerable when adopted in an unequal society where gender unjustified differences are still-well rooted. Along with the consent-based definition, thus, it is necessary to address the issue of marital rape (and rape in general) setting it in the wider framework of gender discrimination and inequality. This approach creates a strong connection between the crime of rape, its punishment and the positive actions that must be undertaken by the State in order to prevent it, protect the victims and promote effective equality between men and women.

In conclusion, according to this thesis, the element of consent is the primary element that must be taken into account when talking about rape. First of all, it covers all types of rape that can occur in different situations, that can be coercive situations (such as wars or stranger rape) or non-coercive situations (such as acquaintance rape or marital rape). Secondly, it shifts the focus on the victim's autonomy and independency: it allows the victim to be able to express her own consent to have a sexual intercourse. Even if, the feminist critic to the "yes means yes" model can be understandable when talking about the capability of women to be free in the contemporary unequal society, such model is preferable to the assumption according to which if there is abstentionism (and so lack of consent), though, it is not rape. Indeed, supporting the idea that the lack of consent is not determinant in rape crimes is gender-discriminative toward the victim: it assumes abstentionism to be sufficient to take for granted the consent of the victim, without

[163] (2020), *Spain plans 'only yes means yes' rape law*, BBC News, available at https://www.bbc.com/news/world-europe-51718397 (accessed July 13, 2020)
[164] Estrich, Rape, 448

taking into account other forms of violence (psychological or physical violence for example) that act as facilitators for rape. Thirdly, the consent-based definition denies the possibility of bringing such a crime within the category of crimes against "honour" or "morality", but puts it within the category of human rights violations. Indeed, as it will be analysed in the fourth chapter, interpreting rape as a crime against "honour" and "morality" not only is based on the assumption of the woman as a man's property and on the conception of female sexuality as an object of the public morality and decency, but it denies the numerous violations of human rights of the individual that such a crime entails[165]. Finally, the concept of "consent" addresses the crime of rape in accordance with the human rights standards, as a violation against bodily integrity and sexual autonomy, despite the different forms it could take. As a consequence, it paves the way for a discussion of the crime of marital rape also in the international arena, linking the issue to different other human rights violations (such as forced marriages, child bride phenomenon, violations to the right to health or the discussion on the extent to which culture and religion can affect a person's life). Addressing marital rape at the international level can also contribute to promote a greater attention to it at the national level and to promote the respect of the human right of equality and non-discrimination in the enjoyment of physical and metal integrity[166], guaranteeing women an equal position on which making free choices.

[165] De Vido. Donne, Violenza e Diritto Internazionale, 126. The fourth chapter of the paper will discuss the conception of the crime of marital rape as a crime against "honour" and "morality" in relation to the European context. The third chapter will address the different rights violated by the crime of marital rape, analysing the crime as a human rights violation.
[166] CEDAW, General Recommendation No. 19, A/47/38, para. 7

2.2 Marital rape as an intersection of different forms of violence against women.

The following paragraph applies the concept of "intersectionality" to the issue of marital rape. Firstly, it will explain the original meaning of the concept, taking into account not only sex and gender as determinant factors in violence against women, but also the role played by the categories of class and race: it will be given evidence of the fact that such categories can affect women in denouncing the violation. Secondly, it will apply the notion of "intersectionality" to the term of violence itself to explain how different forms of violence intersect in committing rape against one's own wife.

The term "intersectionality" [167] was introduced by Kimberle Crenshaw in her article "Mapping the margins: Intersectionality, Identity Politics and Violence against Women of Color". It is defined as a concept used "to explore the various ways in which race and gender intersect in shaping structural and political aspects of violence against women of colour"[168] in the US context. According to the article, the problem within the African-American communities on the suppression of domestic violence can be explained by two main reasons. First of all, according to Crenshaw's view, there is an intense resistance from the community itself in recognizing such a type of violence, by privileging other rights, such as the fact that saving the honour of the family from shame has the priority over the violation toward the woman. Moreover, most of the time violence is not denounced for the will of the minority community not to disrupt the integrity of the community and not to be stereotyped as a violent community. Indeed, there is a general tendency within antiracist discourse to regard the problem of violence against women of color as just another manifestation of racism. Secondly, according to a field study of battered and raped women's shelters located in minority communities in Los Angeles, the refusal to denounce battering or rape comes from women themselves: they are considered to

[167] Crenshaw, K. (1990). Mapping the margins: Intersectionality, identity politics, and violence against women of color. *Standford Law Review.*, *43(6)*, 1241.
[168] Ibid., 1244

be more reluctant to call the police and the authorities as there is a generalized community ethic against public intervention. [169]

These behaviours and attitudes toward violence are the result of past policies toward black men and women: they are the consequence of what was born as segregation during the Jim Crow period into what is seen today as congregation, based on the idea of the black community as a "safe place". Indeed, American racism favoured the development of black communities as closed communities, where all black people could find a safe shelter from the intervention of the State. Nowadays, this sense of belonging and inclusiveness is still present and strong.[170] As Crenshaw writes, this mentality and approach toward an ongoing changing world are limiting the evolvement itself of those communities that, first of all, need to see their rights to be recognized by public authorities. Isolating themselves contributes to the adoption of the identity-politics approach by the State. In particular, this approach limits the category of black women that are not fairly taken into account in policies provided by the States.

In Crenshaw's analysis, the concept of "identity politics" is based on the identification of groups following specific targets, such as black or white, man or woman, middle-class person or worker: she noted that it risks falling in stereotypes that crystallize the identity of a person reducing it to a mere single category, failing to address the crime of violence against women properly. Furthermore, to gender and race factors, she adds other factors that influence the position of the woman in the family and in society and that are not adequately taken into account by public authorities: class and the immigrant status. Indeed, in her article "Mapping the margins", Crenshaw gives evidence of different factors that burden the woman: as provided by studies on battered and raped women, also class plays an important role, since there is a strong correlation of being a woman of color with poverty, unemployment or unskilled jobs. The immigrant status also is relevant in analysing the phenomenon of marital rape: under the Fraud Amendments to the 1986 Immigration Act, "an alien who *married* before proceedings begin *was* entitled to

[169] Ibid., 1257-1258
[170] Ibid.

prove the validity of his or her marriage to qualify for conditional status. If conditional status *was* granted, the alien *was* permitted to stay in the United States. Two years later, the alien *qualified* for permanent resident status if the marriage *was* deemed valid"[171]. Being wives obliged to choose between abuses by their husbands and deportations to their countries of origin, the following Immigration Act of 1990 introduced a provision to amend the marriage fraud rules "to allow for an explicit waiver for hardship caused by domestic violence"[172].

Though, "intersectionality" refers to what can be called "multiple identities", concerning how different dimensions can affect different grounds of one's identity. With regard to the women's category, she applied the concept in order to explain female subordination as the result of different identity's features that affect women's position: she affirms that in the case of black women, gender, class and race affect particularly their role in the societal and familiar context.

Once analysed the concept of "intersectionality" as presented by Kimberle Crenshaw, this paragraph proposes a reinterpretation of the concept in a broad sense to view it in a different dimension: it shifts the focus of the notion from the woman as a subject (adopted in the analysis of Crenshaw) to the notion of violence as the means. If, on one hand, the condition of woman subordination is explained by the different categories to which a woman is part, on the other hand the same reasoning can be applied to the concept of violence, identifying in it the intersection of different forms of abuse. With reference to marital rape, the concept of "intersectionality" is used in analysing the nature of the crime, as the result of the intersection of different aspects of violence against women: it means that marital rape cannot be reduced solely to sexual violence.

Article 1 of GA Declaration on the Elimination of Violence against Women (1993) identifies three main forms of violence that are included in the notion of

[171] Lynskey, E. P. (1987) Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part, *University of Miami Law Review* 41(5), 1089 (amended italics)
[172] Crenshaw, Mapping the margins: Intersectionality, identity politics, and violence against women of color, 1247

"violence against women": physical violence, psychological[173] violence, sexual violence. A fourth dimension of the phenomenon has been introduced further by the General Assembly Resolution No. 58/147 (2004)[174], by the Maputo Protocol[175] (2005) and by the Convention of Istanbul[176] (2011): economic violence.

The European Institute for Gender Equality defines them as follows:

- Physical violence is "any act which causes physical harm as a result of unlawful physical force. Physical violence can take the form of, among others, serious and minor assault, deprivation of liberty and manslaughter"[177];
- Psychological violence is "any intentional conduct that seriously impairs another person's psychological integrity through coercion or threats"[178];
- Sexual violence is "any sexual act performed on the victim without consent", that can take the form of rape or sex assault[179];
- Economic violence is "any act or behaviour which causes economic harm to an individual. Economic violence can take the form of, for example, property damage, restricting access to financial resources, education or the labour market, or not complying with economic responsibilities, such as alimony"[180].

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[173] De Vido. Donne, Violenza e Diritto Internazionale, 40: in the category of psychological violence, also verbal and emotional violence are included.
[174] UN General Assembly Resolution*, Elimination of domestic violence against women*, 19 February 2004, A/RES/58/147, para. 1(e)
[175]African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003 (hereinafter Maputo Protocol), art. 1
[176]Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011 (hereinafter Istanbul Convention), art. 3(a)
[177] European Institute for Gender Equality EIGE (2017) Glossary of definitions of rape, femicide and intimate partner violence. *Luxembourg. Publication Office of the European Union* available at https://eige.europa.eu/thesaurus/terms/1318 (accessed July 14, 2020)
[178] Ibid., available at https://eige.europa.eu/thesaurus/terms/1334 (accessed July 14, 2020)
[179] Ibid., available at https://eige.europa.eu/thesaurus/terms/1384 (accessed July 14, 2020).
The difference between rape and sex assault is given by the type of offence. "Rape is when a person intentionally penetrates another's vagina, anus or mouth with a penis, without the other person's consent. Assault by penetration is when a person penetrates another person's vagina or anus with any part of the body other than a penis, or by using an object, without the person's consent", available at https://www.met.police.uk/advice/advice-and-information/rsa/rape-and-sexual-assault/what-is-rape-and-sexual-assault/ (accessed July 14, 2020)
[180] Ibid., available at https://eige.europa.eu/thesaurus/search?ts=economic%20violence (accessed July 14, 2020)

Intersectionality allows to understand to what extent the four types of violence can be considered as inherent aspects of marital rape. Generally speaking, marital rape can include two categories: non-physical sexual coercion and threatened or forced sex.[181]Non-physical sexual coercion is strictly linked with the notion of "consent". It can be of two kinds: social or normative coercion and interpersonal coercion. Social coercion is the result of cultural expectations or social conventions on the wife's role: it implies the "wife's duty" to satisfy her husband. It is based on the intersection between psychological and sexual violence, perpetuated both by the husband and by socially accepted conceptions and ideologies on the marital relations widespread at the community level and institutionalized in national culture, especially where marital rape is not considered to be a crime. Moreover, in relation to psychological violence the acceptance of having an unwanted sexual intercourse can derive also from the fear of the repercussions of resisting.[182] Interpersonal coercion consists of the use of threats and quotients of power, that are not violent in nature, to force the wife to have a sexual intercourse. For example, threats can consist of demanding to have sexual intercourse by the husband after he has spent money on his wife, though, through exercising economic, psychological and sexual violence.[183]

On the other hand, threated and physical rape include the use of force in the sexual intercourse. In this regard, the intersection of all the forms of violence, cited above, is well-evident: indeed, the threat or the use of physical force in achieving the goal, allows the man to abuse psychologically, economically and sexually in obliging the wife to have sexual intercourse. In "License to rape: Sexual abuse of wives" (1988), Finkelhor and Yllo identifies three uncovered types within the category of threatened or forced sex: battering rape, force-only rape and obsessive rape. First of all, battering rape is characterized by physical and verbal abuse, as well as psychological one too. Indeed, it employs expressive violence in causing women pain and injury: it does not concern exclusively the achievement of sexual pleasure, but it is intended to harm the woman physically. It is called also "anger rape".

[181] Martin et al., A Review of Marital Rape, 334
[182] Ibid., 333
[183] Ibid.

Secondly, force-only rape is based on the minimal use of the force by the man in order to achieve the sexual desired act and it is defined also as "power rape", inasmuch rape is used as a tool to exercise control and dominium over the victim. Finally, the last kind of threatened or forced rape is "obsessive rape", where perpetuators experience sexual satisfaction from perverse acts or pain inflicted on the victim. Such type of rape is called also "sadistic rape".[184]

Conceiving marital rape as an intersection among different dimensions of violence against women gives evidence of the different shapes that violence itself can take. "Violence" is a broader concept that cannot be reduced to one form of coercion or of power. Thus, the same reasoning in applying the notion of intersectionality to marital rape can be applied also with regard to the notion of violence against women as such. Indeed, the definition of violence against women, rather than a crime in itself, is a definition-container of crimes related to it.[185] Marital rape is a specific type of violence against women, whose peculiarity is given by the act of penetration of the body and by the context in which it occurs.

In conclusion, being violence against women a broad concept, intersectionality allows to analyse the phenomenon of marital rape without reducing it to a single form of violence, such as sexual violence. As explained in the paragraph, the notion of "intersectionality" is central in taking into consideration different aspects that are involved in the marital relation when talking about violence against women. Moreover, as it will be addressed in the following paragraph, the institution of marriage itself constraints the phenomenon of rape under other forms of violence, that are not directly taken into question, such as psychological and economic violence.

[184] Finkelhor, D., Yllo, K. (1985) *Licence to rape: Sexual Abuse of wives.* New York: The Free press, 37-38
[185] De Vido. Donne, Violenza e Diritto Internazionale, 50

2.3 The role of "marriage" as a social institution: why is it more difficult to recognize marital rape?

"All rape is an exercise in power, but some rapists have an edge that is more than physical. They operate within an institutionalized setting that works to their advantage and in which a victim has little chance to redress her grievances. Rape in slavery and rape in wartime are two such examples. But rapists may also operate within an emotional setting or within a dependent relationship that provides a hierarchical, authoritarian structure of its own that weakens a victim's resistance, distorts her perspective and confounds her will" (Brownmiller, S.)[186].

This paragraph proposes an analysis on the comparison between the different perceptions on the degree of seriousness of stranger and marital rape. Nevertheless, even if it will not be addressed in this research, it is necessary to underline that rape can involve different kind of relationships and of contexts, not only the stranger or the familiar one, such as for example rape by an acquaintance, or occurring in the place of work or rape in the hospital. However, this research will focus on the study of the two extreme frameworks in which rape can occur: the stranger one, where the rapist is not known by the victim, and the marital one, where the victim and the perpetrator live the closest type of relationship, the marriage.

Studies have consistently found that rape by a stranger is perceived to be a serious crime than rape by one's own husband.[187] In understanding the different degree of seriousness surrounding stranger versus marital rape, a fundamental role in literature is played by the sex role socialization theory[188]. According to this theory, within institutionalized context (like the marital one), both men and women develop certain expectations on acceptable behaviour in sexual interactions: as a

[186] Brownmiller, S. (1975). *Against Our Will*. New York: Fawcett Columbine, 256
[187] See Monson, C. M. et al. (2000) Does "No" really mean "No" after you say "Yes"?, *Journal of Interpersonal Violence* 15(11) , 1156-1174, PDF available at: file:///C:/Users/HUAWEI/Downloads/2000-Monsonetal-DoesNoReallyMeanNo.pdf
See Bennice, J. A., Resick, P. A. (2003) Marital Rape: History, Research and Practice. *Trauma Violence and Abuse* 4(3), 228-246, PDF available at: https://www.jstor.org/stable/pdf/26636357.pdf?refreqid=excelsior%3A23f0bfb38b2c770fbf14ab0937cc1914
[188] Burt, M. R. (1980) Cultural myths and supports for rape. *Journal of Personality and Social Psychology* 38, 217-230

consequence, marital rape is viewed as an extreme extension of traditional male-female sexual interactions and such perspective is historically proved by the legal invalidation of marital rape that has survived until recently.

Moreover, there are some constitutional aspects of marital rape that contribute to view such crime as a less serious and harmful psychological and physical act. Indeed, some justifications, that have been exposed in defending the marital rape exemption over history, still play an important role in promoting it as a minor crime, when recognized[189].

First of all, rape is difficult to prove and the debate at the international level on the consent-based definition of the crime, as mentioned in the first paragraph, gives evidence of the difficulty to demonstrate the element of consent in non-coercive conditions, mainly concerning marital rape. A favourable argument to such assumption concerns the idea according to which "if the victim assents then there is no rape"[190] and the fact that "to assume a lack of consent *a priori* not only eases the later procedure in the court and the burden of proof, but also the victim's situation of not being interrogated and questioned regarding her disagreement on the actions taken by the offender and there-by re-living and remembering painful experiences"[191]. Such statement is not only gender discriminative, but it denies the victim the possibility to be considered as person in law, to whom the right of defence must be recognised and guaranteed.

In addition, an important element distinguishes rape by a stranger to marital rape is the time factor. Indeed, the fact that marriage is based on the continuum of relationship between the victim and the perpetrator makes it more difficult to prove the existence itself of rape. In particular, with regard to marital rape the prior consensual intercourse history between the victim and the perpetrator minimize the seriousness of the crime, reducing it to a "bedroom quarrel"[192]. Such argument is inconsistent with the factual reality: different studies have given evidence of the

[189] Ryder, Kuzmenka, Legal Rape: The Marital Rape Exemption, 405
[190] Maier, The Crime of Rape Under the Rome Statute of the ICC: With a Special Emphasis on the Jurisprudence of the Ad Hoc Criminal Tribunals, 149
[191] Ibid, 149
[192] Ibid, 410.

more diffused issue of rape within the familiar context[193]. Moreover, the bound of marriage and the different issues related to it (children, economic familiar affairs, etc…) make it more difficult for a wife to denounce the crime and this allows the man to use his power to commit the act again and again.

Secondly, differently from stranger rape, marital rape is protected by the intrusion of the State into the familial affairs by the marital right to privacy. As recognized in *Griswold v. Connecticut*, the marital right to privacy recognizes the "freedom of married persons" to make choices about their married life without State intrusion[194]. Contrary to marital rape, in stranger rape the right to privacy is directly applicable to the individual's freedom to decide for its own life, concerning thus the victim's bodily integrity. This second argument presents a clash between two aspect of the right to privacy: the familiar and the individual one, overriding the former. Such argument is not only inconsistent with the contemporary concept of the marriage itself (no more based on the "unities theories" of Blackstone), but it is a violation of the right to bodily integrity of the person as a fundamental principle of *jus cogens* rights[195]. Furthermore, in *Eisenstadt v. Baird*, indeed, the US Supreme Court stated "the marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup", thus reinforcing the individual right to privacy over the marital right to privacy and affirming that allowing marital rape crime to occur denies the woman with her right to make "fundamental decision about her bodily integrity, separate and distinct from any marital or familiar relationship".[196] Such clash between the right to marital privacy and the individual right to privacy has been resolved by the overcoming of the traditional distinction public/private: the GA Resolution on domestic violence (2003), "stresses that States have an obligation to exercise due diligence to prevent, investigate and punish the perpetrators of domestic violence against women and to provide protection to the victims, and also

[193] See Bennice, Resick, Marital Rape: History, Research and Practice, 228-246
[194] Ryder, Kuzmenka, Legal Rape: The Marital Rape Exemption, 406
[195] Such as for example the right to life, the right to health or the prohibition of torture.
[196] Ryder, Kuzmenka, Legal Rape: The Marital Rape Exemption, 407

stresses that not to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms"[197].

Thirdly, marital rape is considered to be a less serious crime than stranger rape to prevent wives from fabricating false accusation as revenge toward their husband. Indeed, differently from spousal rape, in stranger rape such kind of possibility is not taken into consideration, as the rapist is considered to be a stranger or someone with whom the woman does not share anything. However, such assumption loses its consistence, since it is a clear expression of gender discrimination in criminalizing rape. Indeed, in *People v. Liberta* (1984) the New York Court of Appeals stated that "if the possibility of fabricated complaints were a basis for not criminalizing behaviour which would otherwise be sanctioned, virtually all crimes other than homicides would go unpunished"[198]. Why, thus, should such "fabricated complaints" be applied to the case of marital rape with reference to the woman? Moreover, the Liberta Court affirmed that married women are not more likely to fabricate false rape complaints, given the fact that "overall, it is not in the woman's best interest to fabricate rape charges against her husband, since the law allows her to charge him with many other crimes which are easier to prove"[199](such as assault, battery, larceny and fraud).

Finally, an evident difference between stranger rape and marital rape is the context in which the crime occurs: the marriage. The marriage includes two other important issues that induce to consider marital rape as less serious than stranger rape: the fact that it is supposed to be based on a consensual act agreed by the parties and the function it plays as a social institution. First of all, under international law forced marriages, as well as child and early marriages, are prohibited. In the report "Preventing and eliminating child, early and forced marriage", "forced marriage" refers to "any marriage which occurs without the full and free consent of one or both of the parties and/or where one or both of the parties is/are unable to end or leave the marriage, including as a result of duress or intense

[197] A/RES/58/147, para. 5
[198] *People v. Liberta*, judgment of 20 December 1984, Court of Appeals of the State of New York: 64 N.Y.2d 152 (1984)
[199] Ibid.

social or family pressure"[200]. The prohibition of forced marriages under international law is supported by different international and regional instruments and entities[201]. Article 16 of the Universal Declaration of Human Rights states that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution"[202] and it adds that "marriage shall be entered into only with the free and full consent of the intending spouses"[203]. Such provision is provided also by the International Covenant on Civil and Political Rights (ICCPR, 1966)[204] and by the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)[205]. The Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriages (1962) adds that this consent must be expressed by both parties in person and in the presence of a competent authority[206]. Furthermore, positive obligations by States under international law are required in order to guarantee equality to men and women to the right to freely choose a spouse and to enter into marriage only with their free and full consent[207]. There is evidence of the central role played by the notion of consent in establishing a marital relationship.

Furthermore, as provided by the American Legal Information Institute, in addition to the consensual element, also the contractual one is a specific feature of marriage, defined as: "the legal union of a couple as spouses. The basic elements of a marriage are: the parties' legal ability to marry each other, mutual consent of the

[200] UN Human Rights Council, *Preventing and eliminating child, early and forced marriage: Report of the Office of the United Nations High Commissioner for Human Rights*, 2 April 2014, A/HRC/26/22, para. 6
[201] Maputo Protocol (2003), art. 6(a); South African Development Community (SADC) Protocol on Gender and Development (2008), art. 8, para. 2(b); Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (2012), art.19; American Convention on Human Rights (1969), art. 17(3).
[202] UN General Assembly, UDHR, art. 16(1)
[203] Ibid., art. 16(2)
[204] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art. 23(3)
[205] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, art. 10(1)
[206] UN General Assembly, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962, art. 1
[207]UN General Assembly, CEDAW, art. 16

parties, and a marriage contract as required by law"[208]. The question is: which is the relation between consent and the contractual nature of marriage? Being the marriage based on the consent of both parties, to what extent can the notion of consent itself be addressed to the marital relationship with regard to sexual autonomy and independency? Does the consensual act, conceived as the base of marital contract, prevail on the respect of human rights such as bodily integrity, dignity and sexual autonomy?

In this regard, this thesis, first of all, welcomes the critique moved by the New Jersey Supreme Court in *State v. Smith* (1981) according to which "if a wife can exercise a legal right to separate from her husband and eventually terminate the marriage 'contract,' may she not also revoke a 'term' of that contract, namely, consent to intercourse?"[209]. Secondly, in analysing the role played by consent with reference to human rights, this paper supports the idea that the human rights standards must be respected: the notion of consent must reflect the individual will of a person, that can of course be limited by the marital contract, but that cannot be overcome when the contractual nature of marriage violates basic human rights such as bodily integrity and sexual autonomy of a person.

The second point raised with regard to the weight that marriage has in determining the severity of marital rape, concerns the function it has within the societal structure. Indeed, the institution of marriage can, firstly, regulate sexual behaviour, providing rights and duties to men and women that make them responsible for their own choices and actions (such as the one of having a child); secondly, it fulfils the economic needs of the spouses, by providing the framework within which people's needs are met (shelter, food, clothing, safety) and by making people know for whom they are economically and socially responsible; thirdly, it has a central function in heritance and in determining the lineage of a family; and finally, it acts as the primary context where gender roles are developed and are

[208] Legal information Institute, definition of "marriage" in Cornell law School, available at https://www.law.cornell.edu/wex/category/marriage?page=8 (accessed July 11, 2020)
[209] Ryder, Kuzmenka, Legal Rape: The Marital Rape Exemption, 403.

learnt by children, guaranteeing a sort of stability in the determination of gender roles on which society is based.[210]

In conclusion, there is evidence that the intrinsic nature of marriage as a consensual contract based on mutual love and affection masks issues such as marital rape. In comparison to stranger rape, even if the context in which rape occurs is different, the final result is the same: humiliation, shame, loss of dignity, violation of one's own body afflict the woman, causing lasting consequences. Moreover, if on the one hand it seems more difficult to recognize marital rape, on the other hand it is necessary to note the greater physical and psychological damage to the woman, given, not only its possible repetitiveness over time if not criminalized, but also the fact that other issues could be involved in denunciating it (such as the presence of children for example).

[210] See *Functions of marriage* in Cultural Antropology. Lumen learning, available at https://courses.lumenlearning.com/culturalanthropology/chapter/functions-of-marriage/
See The Editors of Encyclopaedia Britannica (2020) *Marriage*, article in Encyclopaedia Britannica website, available at https://www.britannica.com/topic/marriage (accessed July 17, 2020)

CHAPTER 3 - Marital rape as a human rights violation.

In the previous chapters, it has been given evidence of the fact that marital rape is not only the reflection of the historical patriarchal thought on which contemporary societies are still based, but that its exemption is also the reinforcement of the women's subordinate status both in the private and in the public context. Nowadays, such subordinate role of the woman is not accepted anymore by international law. Indeed, it violates fundamental principles such as equality, human dignity, autonomy and physical integrity that define international human rights.

In the following chapter, the extent to which marital rape is considered a violation of human rights will be analysed. In the first part, the chapter will address the criminalization of marital rape in different international legal systems: the UN system, the Organization of American States (OAS) system, the African Union (AU) system, the European system, the League of Arab States system and the ASEAN system. In the second part, the crime of marital rape will be set within the human rights context: firstly, in relation to the violation of human rights core principles (dignity, autonomy and bodily integrity), and, secondly, in relations to specific human rights explicitly violated by such crime. Finally, the specific obligations States have to deal with violence against women will be taken into account, in accordance with international law, focusing on the due diligence duty.

3.1 International and regional instruments and agreements requiring the criminalization of marital rape.

As already discussed in the first chapter, the marital rape exemption has a long and varied social and legal history. It reflects the well-rooted patriarchal societal conception of female subordination at large as well as within the marital context, specifically.

Historically speaking, the marital rape exemption has always been based on justifications that were far from the *raison d'être* of human rights as conceived nowadays. The conception of the woman as a male private propriety, the "unities theories" of Blackstone, the predominance of the privacy rights over the household than over the individual, the conception of rape in relation to the protection of men's honour and the attribution of shame to the woman were, and in some cases still are, justifications based on gender stereotypes that do not provide a logic, rational and reasonable explanation for the claimed idea of women's inferiority. Only in the last decades, the marital rape exemption has started to be criminalized because of its collision with the concepts of dignity, autonomy, equality, and freedom that were recognized by the Universal Declaration of Human Rights (1948, UDHR). Indeed, as it will be analysed in the next paragraphs of this chapter, there has been evidence that, being such concepts conceived to be universal and inherent to all human beings, the existence of marital rape exemption would deny the consistency of each of them.

Nowadays, the recognition of human dignity, autonomy, equality and freedom is not based on social status anymore, as it was in the past, or on the basis of arbitrary decisions supported by traditional ideologies and convictions on the different nature of men and women. The identification of these core human rights concepts as native characteristics of human beings as such promotes the interpretation of the crime of marital rape as a violation of international human rights norms and in particular as a crime against "bodily integrity", without making any distinction between men and women: it does not matter if she is a wife or not, if she is a woman or a girl, she is a human being. Though, the international law approach to marital rape is aimed at criminalising the conduct: "the existence of a criminal remedy for

sexual assault in marriage is a crucial form of States condemnation of and protection from gendered based violence"[211], given the key-role played by criminal law in expressing fundamental social norms, shifting them toward equality and condemning illegal behaviours and actions. Indeed, the criminalisation of violence in general, and of violence against women and wives in the specific case of marital rape, represents not only a rejection of traditional patriarchal ideas, but allows women to seek State protection against such kind of harm.

Moreover, at the international level, the multiple reports, conventions, resolutions and directives requiring States to criminalize marital rape, contribute in promoting a reinterpretation of the public/private division that plagued the international human rights law and that was, historically, focused only on violations by State actors. There is, thus, a shift in the public/private dichotomy toward inter-individual relations, concerning as private only that sphere of personal autonomy of the individual in relation to the respect of human rights[212]. With regard to marital rape, this approach is fundamental in overcoming the clash between the marital right to privacy and the individual right of privacy, already discussed in the third paragraph of the second chapter.

In the international and regional arenas, a number of legal instruments support the criminalization of marital rape inducing States to respect the due diligence obligations they have under international law. The following subparagraph will present the main international instruments requiring the criminalization of marital rape with reference to the UN system and to regional systems, such as the American, the European, the African, the Arab and the Asian ones.

[211]Randall, M., Venkatesh, V. (2015) The Right to No: State Obligations to Criminalize Marital Rape and international Human Rights Law*, in Brooklyn journal of international law,* 42, PDF available at: file:///C:/Users/HUAWEI/Downloads/9781782258605_TheRighttoSayNo03%20(3).pdf
[212] Ibid., 41

3.1.1 The UN framework: the CEDAW, the General Recommendation No. 19, the DEVAW and the Beijing Declaration and Platform for Action.

Within the UN framework, the first body that was created with the aim of monitoring, studying and analysing gender issues at the international level was the Commission on the Status of the Woman (CSW), established by ECOSOC Resolution 11(II) in 1946. Its functions were subsequently expanded by the ECOSOC Resolution 1996/6, that assigned to the CSW the function of monitoring the implementation of the Beijing Platform of Action (1995).

Consequently, in the second half of the XX century, following the 1948 UDHR and the 1946 UN Charter, which were the first international legal instruments to make explicit the principle of non-discrimination as the foundation of the international community[213], the gender issue, and in particular the issue of violence against women, began to be considered as a global issue. However, the road to the recognition of women's rights as human rights was not simple and straightforward and still today it cannot be considered a resolved matter.

Four main conference have played a fundamental role in promoting a dialogue, at least, in formally claiming women's rights at the international level. These international meetings took place in Mexico City in 1975, Copenhagen in 1980, Nairobi in 1985 and Beijing in 1995 (with the adoption of the Beijing Declaration and Platform for Action). In particular, as it will argued, the last one made a great contribution to the international agenda on gender equality.

The main turning point in international women's rights law came with the signature of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the General Assembly in 1979 and come into force in 1981. By claiming the equality in rights of men and women and the importance of the UDHR and the two International Covenants on Human Rights (the International Covenant on Civil and political Rights-ICCPR and the International Covenant on Economic, Social and Cultural Rights-ICESCR) as instruments of reference, it is the first international instrument addressing women's rights as

[213]See UN General Assembly, UDHR, art. 2; UN Charter, preamble.

human rights and promoting the implementation of national actions to end such type of discrimination. In particular with reference to the conjugal sphere, article 1 of the CEDAW Convention states that "for the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, *irrespective of their marital status*, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field"[214]. However, it is important to point out the focus of the Convention on the concept of "discrimination against women" without mentioning any type of violence, such as rape, domestic violence, sexual abuse or battery.

As there is no explicit definition of violence in the CEDAW, two UN documents were integrated lately in order to provide a more comprehensive understanding of the Convention. In 1992, the CEDAW Committee adopted the General Recommendation No. 19 and the UN Commission on the Status of Women began to draft a non-binding declaration including the definition of violence, which resulted in the Declaration on the Elimination of Violence against Women (DEVAW) in 1993. Such documents are fundamental in the understanding of the CEDAW for two main reasons: first of all, they introduce the concept of violence within the broader context of discrimination against women; secondly, they require States to respect their obligations as foreseen by the Convention. The major difference between the DEVAW and the General Recommendation No. 19 lays on the not-binding nature of the former. However, besides the non-binding character, the DEVAW's contribution in addressing the phenomenon of violence against women is relevant: it concerns the fact that, by "affirming that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms"[215], it explicitly spotlights gendered-base violence as an international human rights issue. Moreover, as already pointed out in the introduction to the second chapter, a definition of violence against women has also

[214] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, art. 1 (italics added)
[215] UN General Assembly, DEVAW, A/RES/48/104, preamble

been introduced by the DEVAW, according to which violence against women is conceived as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life"[216].

The General Recommendation No. 19 underlines the concept of violence as integral to the definition of discrimination provided by article 1 of the CEDAW Convention and it addresses gender-based violence as a kind of violence that is "directed against a woman because she is a woman or that affects women disproportionately"[217].

With regard to discrimination within the marital sphere, broadly speaking, the CEDAW addresses the issue in article 16. It takes into consideration equality between men and women with reference to the same right to enter into marriage, the same right to freely choose a spouse and to get married with free and full consent (condemning the phenomenon of forced marriages), the same rights and responsibilities as parents and in matters relating children and the same rights as husband and wife. The specific issue of marital rape is introduced as a crime covered by the CEDAW Convention in the DEVAW and the General Recommendation No. 19.

Article 2 of the DEVAW elucidates on the phenomenon of violence within the family, mentioning the crime of marital rape. It states that "violence against women shall be understood to encompass, but not be limited to, the following: (a)Physical, sexual and psychological violence *occurring in the family,* including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b)Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

[216] UN General Assembly, DEVAW, A/RES/48/104, art. 1
[217] CEDAW, General Recommendation No. 19, A/47/38, para. 6

(c)Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs"[218].

General recommendation n. 19 also includes the crime of marital rape, by recognizing that, being family violence one of the most insidious forms of violence against women which is prevalent in all societies, "*within family relationships* women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence"[219].

An important contribution, that all the three documents have made in order to address the crime of marital rape, consists of shifting from a human rights approach based on the State-individual relations to the inter-individual relations. The three international UN documents, thus, challenge the classical distinction between private and public life that set the marriage between the former sphere of life, making difficult for the law to interfere. Indeed, until the recognition of marital rape crime, the only discriminant in violence, when perpetuated by a public official or by a private, concerned the context of the criminal act and, in the past especially, this made it difficult for the public power to interfere with a violation of rights when the private sphere was involved.[220]

Another important UN document updating the General Recommendation No. 19 was adopted on the 26 July 2017: the General Recommendation No. 35. In order to provide States parties to the CEDAW with further guidance aimed at accelerating the elimination of gender-based violence against women, it reiterates gender-based violence as a phenomenon occurring in all spheres of life and explicitly provides as consent-based definition of marital rape, requiring States to ensure "that the definition of sexual crimes, including marital and acquaintance or date rape, is based on the lack of freely given consent and takes into account coercive circumstances"[221].

[218] UN General Assembly, DEVAW, A/RES/48/104, art. 2 (italics added)
[219] CEDAW, General Recommendation No.19, A/47/38, para. 23 (italics added)
[220] Randall, Venkatesh, The Right to No: State Obligations to Criminalize Marital Rape and International Human Rights Law, 80
[221] UN Committee on the Elimination of Racial Discrimination (CERD), *General recommendation No. 35: Combating racist hate speech*, 26 September 2013, CERD/C/GC/35, para. 20 & 29(e)

Indeed, being human rights universal and inviolable, the criminal act concerning them shall be addressed as such and not in relation to the context where the violation occurs, because in such a way the same rights violated would lose their universal character.[222] In this regard, article 2 of the CEDAW requires States to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise" and "to ensure that public authorities and institutions should act in conformity with this obligation"[223]. The General Recommendation No. 19 underlines the obligation by the States in prosecuting violence against women when perpetuated by public authorities[224], highlighting the fact that discrimination in the CEDAW is not reduced to the only action by or on behalf of Governments[225]. Also, the DEVAW confirms such statement affirming the duty of States in exercising "due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons"[226].

The interpretation of the public/private dichotomy provided by the UN on women's rights contributed to promote a criminalization of violence as such, regardless the context in which it happens. With reference to gender violence, the three documents thus promote the conception of marital rape as a matter of international concern.

Another fundamental legal initiative to end gendered violence, that was adopted by 189 UN member States, was the already mentioned Beijing Declaration and Platform for Action. It is a visionary agenda covering twelve main areas of concerns: poverty, education and training, health, violence, armed conflict, economy, power and decision-making, institutional mechanisms, human rights, media, environment and the girl child. The Beijing Declaration provides for each critical area of concern a set of strategic objectives States are required to implement.

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[222] In this regard, article 18 of the Vienna Declaration and Programme for Action (1993) states: "The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights".
[223] UN General Assembly, CEDAW, art. 2(e) & 2(d)
[224] CEDAW, General Recommendation No. 19, A/47/38, para. 8
[225] Ibid., para. 9
[226] UN General Assembly, DEVAW, A/RES/48/104, art. 4(c)

By affirming the fact that women's rights are human rights[227] and the principle of equality between men and women[228], the Beijing Declaration addresses the issue of violence against women reiterating its role in impairing or nullifying the enjoyment by women of their human rights and fundamental freedoms.[229] Referring to the DEVAW, the Beijing Declaration articulates the phenomenon of violence against women on three main levels: the family, the community and the State mentioning the crime of marital rape as a violation of women's rights occurring in the familiar context.[230]

The contribution of the Beijing Declaration in dealing with violence against women in the familiar context was given in particular by the role played by numerous women's rights advocates and by the civil society in promoting the issue as a global concern[231]. Moreover, recognizing that "in many cases violence against women occurs in the family or within the home" and that such violations go often unreported and are thus difficult to detect by States, the Beijing Declaration condemns any form of violence, including marital rape, considering it a "manifestation of the historically unequal power relations between men and women"[232]. It requires States to criminalize the crime with respect to the international human rights instruments on which the international community is based (the UDHR, the International Covenants, the CAT and the CEDAW)[233].

Following the Beijing Declaration, at the beginning of the XXI century, UN actions in addressing the phenomenon of violence against women focused on enforcing what established in the previously mentioned UN documents, stressing the necessity to adopt efficient measures to contrast it. In 2000, the Human Rights Committee reiterated the principle of legal equality between men and women in the

[227] United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, A/CONF.177/20, para. 114
[228] Ibid., para. 113
[229] Ibid., para. 112
[230] Ibid., para. 113(a)
[231] Randall, Venkatesh, The Right to No: State Obligations to Criminalize Marital Rape and International Human Rights Law, 81
[232] UN, Beijing Declaration and Platform for Action, A/CONF.177/20, para. 118
[233] Ibid., para. 124

General Comment No. 28, with reference also to article 3 of the ICCPR[234]. The next year, in 2004, the GA Resolution 58/147 recognized domestic violence as "one of the most common and least visible forms of violence against women and that its consequences affect many areas of the lives of victims"[235], presenting it as an intersection of different forms of violence, including physical, psychological and sexual violence and it is conceived as a matter of public concern[236]. Lately, in 2006, the UN established the Task Force on Violence Against Women and, according to a study released by the Secretary General, intimate partner violence was considered the most common form of violence experienced by women globally[237]. It reiterates the Beijing Platform's exhortation in the criminalisation of all forms of violence against women, explaining why criminalisation is an important and essential response: "the State plays a key part in the construction and maintenance of gender roles and power relations. State inaction leaves in place discriminatory laws and policies that undermine women's human rights and disempowers women. It shifts responsibility for preventive and remedial measures to NGOs and other groups in civil society. It also functions as approval of the subordination of women that sustains violence and acquiescence in the violence itself. State inaction with regard to the proper functioning of the criminal justice system has particularly corrosive effects as impunity for acts of violence against women encourages further violence and reinforces women's subordination. Such inaction by the State to address the causes of violence against women constitutes lack of compliance with human rights obligations"[238].

[234] UN Human Rights Committee (HRC), CCPR *General Comment No. 28: Article 3 on The Equality of Rights Between Men and Women*, 29 March 2000, CCPR/C/21/Rev.1/Add.10
[235] A/RES/58/147, para. 1(b)
[236] Ibid., paras. 1(c) & 1(d)
[237] UN Women and Secretary General study (2006) *Ending Violence against Women. From Words to Actions*, PDF available at: https://www.unwomen.org/en/digital-library/publications/2006/1/ending-violence-against-women-from-words-to-action-study-of-the-secretary-general
[238] Ibid., 36-37

3.1.2 The American framework: the Convention of Belém do Parà.

The American framework on women's rights is set within the context of the Organization of American States (OAS), that was established in 1948 with the signing of the Charter of the OAS in Bogotà, Columbia. According to article 1 of the Charter, the organization's aim is to achieve "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence"[239]. The organization function is based on the development, protection and implementation of four main pillars: democracy, human rights, security, and development.

It is in this context that women's rights have found voice at the American regional level. Within the OAS framework, rape means "sexual penetration without valid consent or with consent as a result of intimidation, force, fraud, coercion, threat, deception, use of drugs or alcohol, abuse of power or of a position of vulnerability, or the giving or receiving of benefits"[240]. Different forms of rape are considered: rape with force, defined as "sexual penetration without valid consent inflicted upon a person with force"; rape without force, defined as "sexual penetration without valid consent inflicted upon a person without force"; statutory rape, defined as "sexual penetration with or without consent with a person below the age of consent, or with a person incapable of consent for reason of law"; and "other rape", defined as "rape not described or classified in categories" just mentioned.[241]

In June 1994, in the 24th regular period of sessions in Belém do Parà, in Brazil, the OAS adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Bélem do Parà) as a regional instrument in order to define in detail the phenomenon of violence against women and to support States parties to take measures to face the issue. The Convention of Belém do Parà recognises all gendered-based violence as an abuse of human rights

[239] Organization of American States (OAS), *Charter of the Organisation of American States*, 30 April 1948, art. 1,
[240] Inter-American Security Observatory, "Rape" database, available at: http://www.oas.org/IOS/glossarydetails.aspx?lang=en&type=0&id=28 (accessed August 7, 2020)
[241] Ibid.

and fudamental freedoms[242], and it provides a list of specific rights all women are entitled to, including the concepts of inherent human dignity and physical, mental and moral integrity as basilar in the respect of such rights. Mentioned rigths are: the right to have their life respected, the right to have their physical, mental and moral integrity respected, the right to personal liberty and security, the right not to be subjected to torture, the rights to have the inherent dignity of a person respected and her family protected, the right to equal protection before the law and of the law, the right to simple and prompt recourse to a competent court for protection against acts that violates her rights, the right to associate freely, the rights of freedom to profess her religion and beliefs within the law, and the right to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision making. [243]

The very definition of violence against women is provided by article 1 of the Convention of Belém do Parà as "any acy or conduct, based on gender, which causes death of physical, sexual or psychological harm or suffering to women, whether in the public or private sphere"[244]. Moreover, by affirming the univerality of the phenomenon, it considers three main contexts of violence, in accordance with the DEVAW (the familiar sphere, the community and the State) and, in particular, it sets rape in art. 2(a) and 2 (b) in relation to the contexts of the family life (including thus marital rape) and of the community.

In the last decade, in order to reassert a firmer position of the OAS in criminalizing gender-based violence, in 2011, in the " Access to Justice for Women Victims of Sexual Violence in Mesoamerica" report, the inter-American Commission of human rights has reiterated the need of adopting "criminal, civil and administrative laws to prevent, punish and eradicate violence against women"[245] by States as well as the need not to make distinctions based on the marital status of the victim or the perpetrator[246], in accordance also with the CEDAW. The report also

[242] OAS, Convention of Belém do Parà, preamble
[243] Ibid., art. 4
[244] Ibid., art. 1
[245] Inter-American Commission on Human Rights (IACHR), *Access to Justice For Women Victims of Sexual Violence in Mesoamerica*, 9 December 2011, OEA/Ser.L/V/II. Doc. 63, at xi, para. 8
[246] Ibid., para. 9

points out another important question: it addresses marital rape as a crime against bodily integrity and sexual-determination, by affirming that the historical honour that was at the core interests of sexual-violence related crimes is no longer condoned in many States[247].

3.1.3 The African framework: the Maputo Protocol.

In 1995, the Assembly of Heads of State and Government of the organization of African Unity endorsed by Resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and People's Rights in order to elaborated a protocol on women's rights in Africa. In accordance with article 66 of the African Charter on Human and People's Rights, in 2003, the African Union adopted the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, better-known as the Maputo Protocol.

The Maputo Protocol is the main binding instrument of reference with regard to women's rights in the African framework. In the preamble, it reiterates the principle of non-discrimination "on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status"[248], already declared in article 2 of the African Charter on Human and People's Rights, and in particular, it underlines the duty of States parties "to eliminate every discrimination against women"[249] as requested by article 18 of the African Charter. Thus, by stressing the principle of non-discrimination and by recalling the recognition of international instruments (UDHR, ICCPR, ICESCR, CEDAW) as instruments of reference in defining women rights as human rights, in the preamble the Maputo Protocol designs the context within which setting women's rights as fundamental in guaranteeing not only the effective recognition of women as equal to men, but the essential role women have in the development of

[247] Ibid., para. 48
[248] African Union, Maputo Protocol, preamble
[249] Ibid.

society and of the mankind, emphasising not only civil and political rights but also second generation rights, such as economic, social and cultural rights.[250]

In order to analyse the crime of marital rape within the African framework, the Maputo Protocol first of all provides with some basic definitions concerning the wide phenomenon of violence against women. In particular, in article 1 it defines "discrimination against women" as "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects comprise or destroy the recognition, enjoyment or the exercise by women, *regardless of their marital status*, of human rights and fundamental freedoms in all spheres of life"[251], and "Violence against women" is defined as " all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions or on deprivation of fundamental freedoms *in private or public life* in peace time and during situations of armed conflicts or of war"[252].

Both the definitions exposed in the Maputo Protocol do not differentiate the context within which women's human rights can be violated. Indeed, the African document addresses violations against women "regardless of their marital status" and "in private and public life", overcoming the traditional dichotomy public/private, that historically had hindered the protection of human rights where the State was not recognized the right to interfere: the family.

Consequently, the criminalization of marital rape finds voice in relation to the right to life, integrity and security of the person, and so to a right to which the individual is entitled as such, regardless the presence of other factors. In this regard, article 4 affirms the duty of States in taking appropriate and effective measures to "enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public".[253]

[250] The active role recognised to women in the development of society is also affirmed by the UN Security Council's Resolution 1325 (2000) on *the role of Women in promoting peace and security*, S/RES/1325 (2000)
[251] African Union, Maputo Protocol Art. 1(f) (italics added)
[252] Ibid., art. 1(j) (italics added)
[253] Ibid., art. 4.2(a)

Moreover, linking rape and sexual violations to the concept of integrity of a person, the Maputo Protocol sets, indirectly, the crime of rape within the wider concepts of "harmful practices" defined as "all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their rights to life, health, dignity, education and physical integrity"[254].

The crime of marital rape is not completely analysed in terms of consent as it is limited to the act of unwanted or forced sex. However, the notion of consent is included in the elimination of forced marriages and child marriages. Article 6 claims that "no marriage shall take place without the free and full consent of both parties" and that "the minimum age for women shall be 18 years"[255]. The protocol, thus, stands for the consent-based definition of marriage, but it is silent on the question of the nature of consent in marriage: whether it should always be assumed after the marriage act or not, in particular in relation to marital rape. In addition, with reference to the broader notion of rape, in the Maputo Protocol, the crime is, addressed also in relation to armed conflicts[256] and in relations to health and reproductive rights[257].

The Maputo Protocol is the main frame of reference with regard to women's rights, but there are also other sub-regional instruments criminalizing explicitly the crime of marital rape as an expression of violence against women. In particular, the 1997 Southern African Development Community (SADC)'s Declaration on Gender and Development and the 1998 Addendum on the Prevention and Eradication of Violence against Women and Children mention marital rape as an expression of violence against women as well as a violation of human rights, recognizing that violence against women includes "physical and sexual violence, as well as economic, psychological and emotional abuse; (a) occurring in the family, in such forms as threats, intimidation, battery, sexual abuse of children, economic deprivation,

[254] Ibid., art. 1(g)
[255] Ibid., art. 6(a) and art 6(b)
[256] Ibid., art. 11(3)
[257] Ibid., art 13(2)(c). In particular, rape as a violation to the right to health and well-being will be deeply analysed in the second paragraph of the chapter in relation to specific rights violated by the crime of marital rape.

marital rape, feminicide, female genital mutilation, and traditional practices harmful to women" [258].

3.1.4 The European framework: the Istanbul Convention.

Within the European framework, the main instrument on women's rights and in particular on violence against women is the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, namely the Istanbul Convention (2011). Until 2011 Europe lacked a regional binding instrument addressing specifically the phenomenon of violence against women.

In 2002, the Recommendation No. 5 of the Council of Ministers provided a first definition of violence against women setting it in the familiar context, in the community, in the State and in armed conflict situations. According to the Recommendation, "violence against women" is defined as "as any act of gender-based violence, which results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life. This includes, but is not limited to, the following: (a)violence occurring in the family or domestic unit, including, *inter alia*, physical and mental aggression, emotional and psychological abuse, rape and sexual abuse, incest, rape between spouses, regular or occasional partners and cohabitants, crimes committed in the name of honour, female genital and sexual mutilation and other traditional practices harmful to women, such as forced marriages; (b) violence occurring within the general community, including, inter alia, rape, sexual abuse, sexual harassment and intimidation at work, in institutions or elsewhere trafficking in women for the purposes of sexual exploitation and economic exploitation and sex tourism; (c) violence perpetrated or condoned by the state or its officials; (d) violation of the human rights of women in situations of armed conflict, in particular the taking of hostages, forced displacement, systematic rape, sexual slavery, forced pregnancy,

[258]African Commission on Human and people's Rights (2011) Addendum on the Prevention and Eradication of Violence against Women and Children, art. 5(1), available at: https://www.achpr.org/legalinstruments/detail?id=16

and trafficking for the purposes of sexual exploitation and economic exploitation"[259]. It is important to notice the similarity that this definition presents with the DEVAW definition of violence against women. Moreover, the Recommendation No. 5 anticipated the intention of the Council of Europe of criminalizing the specific crime of marital rape, recognizing it as one of the forms of violence that can occur inside the familiar context.

In 2007, the Assembly of the Council of Europe (CoE) also invited States to adopt a set of measures in order to combat the phenomenon of violence against women and in particular, it emphasized the priority to criminalize domestic violence against women, including marital rape in its Resolution No. 1582[260].

It was only in 2008 that the ad hoc Committee for Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) was created with the aim of preparing a draft for a European Convention on violence against women. Initially, the Convention had to focus on the issue of domestic violence primarily, including specific forms of violence against women.

The development of the Convention changed direction as the focus shifted, firstly, to the issue of violence against women and secondly to its domestic aspect, taking into consideration the possibility to include other categories that could be object to domestic violence such as children or elderly people. [261] The reason of this shift toward a kind of violence specifically directed toward women is explained in the 2009 CAHVIO Report No. 5. By recognising that "most types of violence listed in this paper (the draft of the Istanbul Convention) may be perpetrated by and against members of both sexes (…), the statistical reality – in as far as it is known – reveals that the vast majority of these violent acts are carried out by men against women and girls. This violence is both a cause and a consequence of the inequality between

[259] CoE Committee of Ministers, *Recommendation No. 5 on the protection of violence against women*, 30 April 2002, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2612 , para. 1

[260] CoE Parliamentary Assembly, *Resolution No. 1582 "Parliaments United in Combating Domestic Violence against Women: Mid-Term Assessment of the Campaign*", 5 October 2007, available at: http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17594&lang=en, para 6.1.1

[261] De Vido. Donne, Violenza e Diritto Internazionale, 101-102

women and men"[262]. With regard to domestic violence and to marital rape, the report adds that "intimate-partner abuse may be perpetrated by women and men in both, heterosexual and homosexual relationships. However, male violence against female partners is a continuation of the historically unequal relationship between women and men, which has traditionally allowed husbands to exercise power and control over their wives. This structural nature of domestic violence against women needs to be taken into consideration when addressing intimate-partner violence in all its manifestations"[263].

Thus, in the preparatory works on the creation of the Istanbul Convention, the term "gender" was conceived differently from the term "sex", and subsequently it would be defined in the Istanbul Convention as "the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men", without identifying it with one specific sex, as it happens in other international instruments such as the CEDAW (based on the equation gender=women). Indeed, the CAHVIO report does not deny the possibility to take into account other kinds of genders (such as LGBT) through additional protocols[264].

The Istanbul Convention was finally adopted in 2011 and it is deemed one of the most advanced instruments addressing violence against women at the international level. In particular, two specific strengths characterize the Convention: the openness of the Convention, which allows non-member States of the Council of Europe or of the EU to become parties to the Convention, and the fact that, being a binding regional instrument with an efficient monitoring mechanism[265], it can further boost the respect of women's rights at the national level.

The pillars of the Istanbul Conventions are some key-concepts well-defined in article 3, such as "violence against women", "domestic violence" and "gender-based

[262] CAHVIO (2009) Report No.5, *Report of the First Meeting of CAVHIO*, 4 May 2009, PDF available at: https://rm.coe.int/16805938a2, para. 43
[263] Ibid., para. 45.
[264] Ibid., 2
[265] The Istanbul Convention monitoring mechanism is the GREVIO (Group of Experts on Action against Violence against Women and Domestic Violence). However, as it will be explained in the second paragraph of this chapter, being set within the CoE human rights framework, many of the rights violated in the Istanbul Convention can be brought as a violation of the European Convention of Human Rights (ECHR) before the Court.

violence against women". "Violence against women" is conceived as "a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring *in public or in private life*"[266]. Secondly, "domestic violence" means "all acts of physical, sexual, psychological or economic violence that *occur within the family or domestic unit or between former or current spouses or partners*, whether or not the perpetrator shares or has shared the same residence of the victim"[267]. Finally, "gender-based violence against women" refers to violence that "is directed against a woman because she is a woman or that affects women disproportionately"[268]. This last concept is fundamental in addressing the phenomenon of violence against women, as it presents the unacceptable "justification" of violence against women as based exclusively on sex, and so, in this case, on being a woman.

These three definitions are important to collocate the crime of marital rape within the wider conception of violence, criminalized by the Istanbul Convention. First of all, the Istanbul Convention concerns violence against women as the expression of specific forms of violence, such as physical (art. 35), psychological (art. 33), sexual (art. 36) and economic (art. 3). Thus, it gives evidence of the intersectional structure of the phenomenon of violence as already discussed in chapter two. Secondly, it addresses the issue both in the private and in the public sphere, including the familiar unit in relation to domestic violence.

In this context, the crime of marital rape finds explicit criminalization in article 36 identified with a form of sexual violence. Article 36 requires States to take "the necessary legislative or other measures" to criminalize any conducts "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; engaging in other non-consensual

[266] CoE, Istanbul Convention, art. 3(a) (italics added)
[267] Ibid., art. 3(b) (Italics added)
[268] Ibid., art. 3(d)

acts of a sexual nature with a person; causing another person to engage in non-consensual acts of a sexual nature with a third person"[269].

The innovative element, the Istanbul convention has introduced in criminalizing rape consists in the element of consent. Article 36(2), indeed, states that "consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances"[270]. According to this approach, the absence of consent is not sufficient in determining it is not rape. Moreover, as it will be argued deeply in the last chapter, the element of consent itself contributes to consider the crime of rape not only as resulting from an act of force, though opening different scenarios that, generally, have never been considered, and where such crime can occur: the marriage. In addressing the crime of marital rape, thus, the Istanbul Convention firstly set the wider crime of rape within the crimes criminalized by the Convention itself and secondly it links such crime to the element of consent, requiring the criminalization of rape also in situations where the use of the force is not supposed to be present. Furthermore, article 36(3) explicitly states that "parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed *against former or current spouses or partners* as recognized by internal law"[271], thus including expressively the crime of rape within the marital context.

3.1.4.1 A European insight: the EU Charter of Fundamental Rights and the Resolutions of the European Parliament.

The European system of human rights is based on the European Convention of Human Rights adopted by the Council of Europe and, with regard to women's rights, it is regulated by the Istanbul Convention, adopted within the Council of Europe context as well. The Council of Europe is, thus, the main framework concerning the protection of human rights, and specifically women's rights, in Europe.

[269] Ibid., art. 36(1)
[270] Ibid., art. 36(2)
[271] Ibid., art. 36(3) (italics added)

Within the European context, another regional organization, mainly of economic and political nature, plays a fundamental role in guaranteeing the respect and implementation of human rights: the European Union (EU), whose 27 member States all part of the Council of Europe. However, even though the EU (as an international organization) is not a member of the Council of Europe yet, the two institutions perform different, yet complementary roles, sharing the same values and principles: human rights, democracy, and the rule of law[272].

Regarding women's rights and the issue of violence against women, the cooperation between the two institutions is going to be intensified through the EU ratification of the Istanbul Convention, as foreseen by art. 75 of the Convention itself.[273] As the EU Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) pointed out in 2020, the ratification of the Istanbul Convention by the European Union would "create a coherent EU level framework for combating violence against women, improve prevention for all women and afford better protection and support for women and children who are victims of violence and specific groups of women"[274] .

Violence against women in the EU context is not included either in the founding treaties of the organization (the Treaty on European Union- TEU, and the Treaty on the Functioning of the European Union- TFEU) or in the Charter of Fundamental Rights of the European Union. These treaties do not deal with the issue of violence against women, but they address the core human rights principles that are violated by crimes of gender-based violence, such as the concept of equality and non-discrimination. Indeed, the concept of equality is conceived at the same time as a

[272] See Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, preamble, PDF available at: https://www.echr.coe.int/Documents/Convention_Eng.pdf ; European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, preamble, PDF available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN

[273] Art. 75(1), Istanbul convention: "This Convention shall be open for signature by the member States of the Council of Europe, the non-member States which have participated in its elaboration and the European Union."

[274] LIBE Committee, *EU accession to the Council of Europe Convention on Preventing and Combating Violence against Women ('Istanbul Convention')* / 2016-3, PDF available at: file:///C:/Users/HUAWEI/Downloads/civil-liberties-justice-and-home-affairs-libe_eu-accession-to-the-istanbul-convention_2020-08-01.pdf

core value (art. 2, TEU) and as a goal of the Union (art. 3, TEU). Moreover, article 8 of the TFEU reiterates that "in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women"[275]. Furthermore, the Charter of Fundamental Rights of the European Union (2000), which entered into force as a legally binding instrument in 2007 through the ratification of the Treaty of Lisbon, addresses some specific rights, that are violated by the phenomenon of violence in general: the rights to life (art.2), the rights to the integrity of the person (art. 3), the prohibition of torture an inhuman or degrading treatment or punishment (art. 4) and the rights to liberty and security (art. 6). The Charter deals also with some core concepts such as human dignity (art.1) and the principle of non-discrimination: article 21 states that "any discrimination based on any ground such as sex, race, colour, ethnic or social origin (…) shall be prohibited"[276]. Discrimination on the base of sex is also addressed by article 23, which reiterates the equality between men and women, by affirming that "equality between men and women must be ensured in all areas, including employment, work and pay"[277].

The only reference to violence against women can be found in the Declaration 19 annexed to the final act of the Intergovernmental Conference which adopted the Treaty of Lisbon (2007) in relation to article 8 of the TFEU: "the Conference agrees that, in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence."[278]

However, despite the lack of a single instrument criminalizing violence against women, the European Parliament has always targeted violence against women as an important issue through soft law instruments in order to solicitate States to adopt measures to face the phenomenon. In particular, the EU has expressively called for

[275]EU, TFEU, art. 8
[276]EU, Charter of the Fundamental Rights of the European union, art. 21
[277] Ibid., art. 23
[278] EU, *Declaration No. 19* annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon on article 8 or the Treaty on the Functioning of the European Union, 13 December 2007, *Official Journal of the European Union*, C 326/337, para. 19, PDF available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_5&format=PDF

the criminalization of marital rape for several decades, starting with the European Parliament's Resolution on Violence against Women of 1986. In article 10, the European parliament "calls for the legal recognition, in those countries where such is not yet the case, of *rape within the marriage*, and further calls for the same treatment by the law of forced sexual acts, within and without marriage"[279]. In article 11, it is expressively considered sexual violence as "a crime for which proceedings may be brought *in all cases*, not only by the injured party, but also by the public authorities: and further calls for women's associations and movements to be allowed to bring civil actions for damages in proceedings for sexual violence, if the injured party so requests"[280].

In 2009, the European Parliament's Resolution on the Elimination of Violence against Women points out a list of specific rights violated by the phenomenon of violence against women, such as "the right to life, the right to safety, the right to dignity, the right to physical and mental integrity, and the right to sexual and reproductive choice and health"[281]. In paragraph 24, the European Parliament addresses explicitly marital rape, affirming the urgency for member States in recognizing "sexual violence and rape against women, including *within marriage* and intimate informal relationships and/or where committed by male relatives, as a crime in cases where the victim did not give consent, and to ensure that such offences result in automatic prosecution and reject any reference to cultural, traditional or religious practices or traditions as a mitigating factor in cases of violence against women, including so-called 'crimes of honour' and female genital mutilation"[282]. It is important to notice in this paragraph how the element of consent was already present within the European Union approach to the crime of rape before the creation of the Istanbul Convention and the relevance that is given to the rejection of any kind of justification based on tradition, culture, religion or honour

[279] EU Parliament, *Resolution on Violence against Women*, 14 July 1986, Doc. A2-44/86, art.10 (Italics added)
[280] Ibid., art. 11 (Italics added)
[281] EU Parliament Resolution *on the Elimination of Violence against Women*, 26 November 2009, Doc. P7_TA(2009)0098, para. E, available at: https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0098+0+DOC+XML+V0//EN
[282] Ibid., para. 24 (Italics added)

and, consequently, to the conception of such crime as a crime against bodily integrity, individual autonomy, human dignity and human rights.[283] However, Resolutions by the European Parliament, being instruments of soft law, are not legally binding.

In 2012, the EU enacted Directive 2012/29/EU to establish minimum standards and safeguards[284] to protect victims of crime and explicitly recognize intimate partner violence and its consequences in article 18, claiming that "where violence is committed in a close relationship, it is committed by a person who is *a current or former spouse, or partner* or other family member of the victim, whether or not the offender shares or has shared the same household with the victim. Such violence could cover physical, sexual, psychological or economic violence and could result in physical, mental or emotional harm or economic loss. Violence in close relationships is a serious and often hidden social problem which could cause systematic psychological and physical trauma with severe consequences because the offender is a person whom the victim should be able to trust"[285]. Differently from Resolutions, directives call for the effective imposition of criminal sanctions and have to be implemented within two years of their enactment. Moreover, they require that member States demonstrate to the Commission the actions taken in respect of the directive within three years.

There is evidence that the EU has criminalized the crime of marital rape through the adoption of soft law and hard law instruments, but it still lacks a unitarian and comprehensive framework addressing specifically violence against women. This is the reason why a roadmap of the Commission was launched in 2015. In March 2016, the EU commissioner, Věra Jourovà, confirmed the EU's future ratification of the

[283] The question concerning the justification to the crime of rape based on the concept of "honour" and "morality" will be argued in the last paragraph of the fourth chapter in relation to specific European cases.
[284]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, art.11, (Italics added), PDF available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=en
[285] Ibid., art. 18

Istanbul Convention as "a step forward both for our fight against violence and in guaranteeing gender equality"[286].

3.1.5 The Asian and the Arab frameworks: the inconsistency of the ASEAN Declaration and the lack of legal instruments protecting the woman in the context of the League of Arab States.

There is evidence that the American, African and European regional contexts have developed a human rights system that has greatly influenced the law at the national level. The Convention of Belém do Parà, the Maputo Protocol and the Istanbul Convention are all legally-binding treaties, that have created a comprehensive legal framework and approach to combat violence against women.

Differently, the Asian and the Arab systems are not as developed in terms of human rights, and to an even lesser extent in relation to women's rights. The Asian region lacks an effective regional system of human rights. The main instrument of reference concerning human rights in Asia, the ASEAN Declaration, was adopted by the Heads of State/Government of the Member States of the Association of Southeast Asian Nations (ASEAN) in 2012. Being a declaration an instrument of soft law, the ASEAN Declaration is not legally binding: it represents the dynamic of the development of international and regional legal norms and reflects the commitment of States to move in certain directions, abiding by certain principles. Indeed, despite not directly addressing the crime of marital rape, this instrument reaffirms the supremacy of human rights at the regional level, recognizing the UDHR, the UN Charter and the Vienna Declaration and Programme of Action as main instruments of reference in the international human rights system[287].

In the ASEAN Declaration are enounced different rights and principles violated by the crime of marital rape, such as the principles of non-discrimination (art. 2), of equality and dignity (art.1), the rights to life (art.11), to liberty and security (art. 12) and not to be subjected to torture (art. 14). With regard to women's rights, the

[286] De Vido. Donne, Violenza e Diritto Internazionale, 193.
[287] Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012, preamble

ASEAN declaration reaffirms the importance of ASEAN's efforts in promoting human rights, including the Declaration on the Advancement of Women (1988) and the Declaration on the Elimination of Violence against Women in the ASEAN region (2012). In particular, the Declaration on the Elimination of Violence against Women addresses the gender-issue linking it to societal attitudes and behaviours widespread throughout the Asian world[288], proposing a set of positive actions that States should implement in order to combat the phenomenon.

Besides the lack of an effective women's rights mechanism of protection and the absence of the criminalization of marital rape at the regional level, an important document that has been created in order to effectively direct States and regional efforts towards the fight against violence against women is the ASEAN Regional Plan of Action on the Elimination of Violence against Women (ASEAN RPA on EVAW). By recalling the importance of promoting and implementing the Beijing Declaration and the fundamental role of the CEDAW (to whom all ASEAN member States are party) in fighting violence against women, the ASEAN RPA on EVAW recognizes violence against women as "a violation of human rights which is a form of discrimination against women. It is a manifestation of historically and structurally unequal power relations and inequalities between women and men, which prevail in all countries and which impacts all aspects of the victim's private and public life. VAW violates human rights and fundamental freedoms of women limits their access to control over and ownership of resources, and impedes the full development of their potential"[289]. The ASEAN RPA works as an instrument to give a frame to the development of ASEAN system of women's rights, even if it does not concern the creation of a more effective and legally-binding regional mechanism.

[288] ASEAN, *Declaration on the Elimination of Violence against Women*, 12 October 2012, para 1.2, available at: https://asean.org/?static_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4

[289] ASEAN, *Regional Plan of Action on Violence against Women*, 21 November 2015, 3, PDF available at: https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/political_declarations/east_asia_and_pacific/asean_regional_plan_of_action_on_elimination_of_violence_against_children.pdf

Another human rights system that lacks of an efficient mechanism of protection of human rights is the Arab one. The Arab framework of human rights is set within the League of Arab States context. The Arab League is a regional organization of Arab States, whose main proposes are the creation of a closer relations among its members, the promotion of the collaboration among them, the protection of their independence and sovereignty, and the implementation of a common way for the affairs and interests of the Arab countries.

The instrument of reference with regard to the Arab world is the Arab Charter on Human Rights adopted in 2004 by the League of Arab States. Reaffirming the principles of the Charter of the United Nations, the International bill of Human Rights and the Cairo Declaration on Human Rights in Islam, the Arab Charter of Human Rights reiterates the principle of non-discrimination (art.2) and lists a set of human rights all human beings are entitled to, such as the rights to life, to security and liberty of a person (art.5), the right to equality before law(art. 9) or the right not to be subjected to physical or mental torture or cruel, inhuman or degrading treatment (art.13). However, despite the binding character of the Arab Charter on Human Rights, women's rights as human rights are not explicitly addressed: the regional instrument just underlines the principle of non-discrimination based on gender and sex (art.2), presenting a consistent lack for what concerns forms of gendered-based violations toward women.

Moreover, there is evidence of the influence the Islamic religion has on the formulation of human rights in the Arab system. Indeed, as already stated in the previous lines, in the preamble is recalled the Cairo Declaration on Human Rights (1990) in Islam as a frame of reference for the Charter, that identifies in article 25 "the Islamic *shari'a* as the only source of reference for the explanation or clarification of any of the articles of the declaration"[290]. Thus, the Arab Charter itself in addressing human rights presents a sort of contradiction adopting two different contrasting approaches in interpreting human rights: on the one hand it affirms the importance of the International Bill of Human Rights based on a secular universal

[290] Organization of the Islamic Conference (OIC), *Cairo Declaration on Human Rights in Islam*, 5 August 1990, art. 25

conception of the concepts of human dignity and equality of all human beings, on the other hand it includes in this frame of reference the Cairo Declaration that interprets human rights through religious lens according to the Islamic principles of the *shari'a*.

With regard to women's rights, the Arab system lacks of an effective instrument criminalizing violence against women, and consequently marital rape. In 2017, within the UN Women context, the League of Arab states adopted the Cairo Declaration for Arab Women and the Strategic Plan of Action for the Development of Women in the Arab Region 2030 (2014) during the 28th Arab Summit in Jordan. Despite not being a binding instrument, it includes different strategies in order to promote the respect of women's rights in the Arab world. In particular, with reference to physical and sexual violence, rape is set within the violence that can happened in the working environment [291] or it is addressed in its wider conception as a kind of violence affecting the woman health, without explicit reference to the private context in which it can occur.

Moreover, it is necessary to underline the importance the right to privacy, and in particular privacy to familiar life, enjoys in the Arab framework. The Arab Charter as well as the Cairo Declaration of Human Rights reiterate this right as inviolable. Article 17 of the Arab Charter states that "privacy shall be inviolable and any infringement thereof shall constitute an offence. This privacy includes private family affairs, the inviolability of the home and the confidentiality of correspondence and other private means of communications".[292] Art. 18(b) of the Cairo Declaration on Human Rights claims that "everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference"[293]. It adds that "a private residence is inviolable in all cases. It will not

[291] League of Arab States, *Cairo Declaration for Arab Women and the Strategic Plan of Action for the Development of Women in the Arab Region 2030*, 23 February 2014, 40, PDF available at: https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/children_on_the_move/cairo_declaration_for_arab_women_e_1.pdf
[292] League of Arab States, Arab Charter of Human Rights, art. 17
[293] OIC, Cairo Declaration on Human Rights, art.18(b)

be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dweller evicted"[294]. In a context such as the one of the Arab world, where religion and private life play such an important role in addressing human rights, it is not surprising thus the difficulties women's rights violations have to overcome in order to be recognized, even within the house walls.

In conclusion, in spite of the recent efforts the Arab system of human rights is making in recognizing women's rights as human rights, violence against women is not explicitly addressed by any kind of regional instrument, apart the 2014 Cairo Declaration, and marital rape is not even mentioned as a violation of human rights.

[294] Ibid., art.18 (c)

3.2 International human rights law and the rights violated by marital rape.

3.2.1 Marital rape as a crime against bodily integrity: the concepts of dignity and autonomy within the UDHR, the ICCPR and the ICESCR.

As discussed in the second chapter, marital rape is a crime that cannot be reduced to a single form of violence, such as the sexual one: it is based on the intersection of different forms of violations against women that impede them to achieve equality in relation to men in all spheres of life. This point of view has been adopted also at the international level within the UN framework and in particular by the UN Women agency, according to which "violence against women and girls is a grave violation of human rights. Its impact ranges from immediate to long-term multiple physical, sexual and mental consequences for women and girls, including death. It negatively affects women's general well-being and prevents women from fully participating in society."[295] The UN Security Council Resolution 1325 reiterated the concept reaffirming "the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security".[296] Moreover, the issue of violence against women (including the one of marital rape) has been targeted as one of the Sustainable Development Goals, in particular goal number 5.[297]

In order to address the crime of marital rape as an explicit violation of human rights, this paragraph will take into account its relation with human rights principles and concepts, namely human dignity and personal and sexual autonomy in defining it as a crime against bodily integrity, in accordance with the International Bill of Human Rights[298]. The international human rights system traces its origins to the

[295] UN Women, Ending Violence against Women, available at: https://www.unwomen.org/en/what-we-do/ending-violence-against-women (accessed August 10, 2020)
[296] UN Security Council, *Security Council resolution 1325 (2000) [on women and peace and security]*, 31 October 2000, S/RES/1325 (2000), preamble
[297] Transforming Our World: The 2030 Agenda for Sustainable Development (2015), Goal 5, available at: https://www.un.org/sustainabledevelopment/gender-equality/ (accessed August 10, 2020)
[298] The UDHR, ICCPR and ICESCR are considered to constitute the International Bill of Human Rights https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf

adoption of the Universal Declaration of Human Rights (UDHR) by the UN General Assembly in 1948. Although it is not a legally binding instrument, the UDHR was adopted with the purpose of defining the "human rights" and the "fundamental freedoms" referenced in article 55(c) of the UN Charter.[299] The UDHR has proved to have had a strong impact both on the development of the human rights system at the international and regional levels and on the development of national constitutional laws that have incorporated the Declaration's rights and principles in their Constitutions, creating a stronger national commitment toward the respect and implementation of the international law.

With reference to the international system, the UDHR laid the foundations for the creation of nine UN international human rights core treaties[300], two of which play a fundamental role in addressing human rights: the International Covenant on Civil and Political Rights (ICCPR,1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).The UDHR, the ICCPR and the ICESCR, consisting in the International Bill of Human Rights, constitute the primary framework to be analysed in the studying of marital rape as a human rights violation. Indeed, being gender-based violence itself a manifestation of human rights violation of discrimination based on sex, "the pervasiveness of sexual violence impedes or deprives women and girls of the ability to exercise their: 1) civil and political rights; 2) economic, social and cultural rights; and, 3) third generation rights such as the right to peace and development"[301].The non-discrimination principle is the cornerstone for the respect of the human rights established in the

[299] UN Charter, art. 55(c) states that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

[300]UN international treaties include: International Convention on the Elimination of All Forms of Racial Discrimination (1965), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), International Convention for the Protection of All Persons from Enforced Disappearance (2006), Convention on the Rights of Persons with Disabilities (2006).

[301]Sellers, P., V. (2008). The prosecution of sexual violence in conflict: the importance of human rights as means of interpretation, *Women's Human Rights and Gender Unit (WRGU)*, 4, PDF available at: https://www.peacewomen.org/assets/file/Resources/Academic/paperprosecution_sexualviolence.pdf

UDHR, that is conceived as the instrument setting "a common standard of achievement for all people and nations"[302].

With regard to sexual discrimination, article 2 of UDHR states: "everyone is entitled to all rights and freedom set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[303]. The non-discrimination principle is recognized also in all the other human rights treaties such as in art 2(1) of the ICCPR and in art 2(2) of the ICESCR.

A violation of the principle of non-discrimination denies the validity of essential concepts in the enjoyment of human rights, such as the notions of human dignity and personal autonomy. Such notions are fundamental in analysing marital rape as a violation of human rights, insomuch they lay the basis for a conception of rape as a crime against the bodily integrity of the person, regardless his or her social status or the circumstances in which the crime of rape occurs, and thus including rape as directly directed against one's spouse.

First of all, the concept of "human dignity" refers to the belief that "all people hold a special value that's tied solely to their humanity"[304]. Article 1 of the UDHR states that "all human beings are born free and equal in dignity and rights"[305]. Moreover, it is invoked in the second preambular paragraphs of both the ICCPR and ICESCR that "…these rights derive from the inherent dignity of the human person"[306]. The introduction of the concept of "human dignity" within the framework of human rights principles promoted by the UDHR has been conceived a revolutionary turning point in the creation of the human right system as we concern it today: article 1 means that dignity is not acquired, it is an inherent characteristic

[302] UN general Assembly, UDHR, preamble. The Universal Declaration of Human Rights is explicitly considered as the common standard of human rights in all the UN treaties on the subject. With reference to the ICCPR and the ICESCR, both treaties recognize in their preamble the duty to take the UDHR as reference in dealing with human rights.
[303] Ibid., art. 2.
[304] Human Rights Careers, What is Human Dignity? Common Definitions, available at: https://www.humanrightscareers.com/issues/definitions-what-is-human-dignity/ (accessed August 11, 2020)
[305] UN General assembly, UDHR, art.1
[306] UN General Assembly, ICCPR & ICESCR, preamble

of all human beings as such[307]. There is evidence thus that being inherent to all human beings as such, the concept of dignity is universal in its scope, equal in its extent and free in its character.[308] Universality, equality and freedom set the conditions of the respect of human rights and create that sort of net on which the same concept of human dignity is based. Universality, equality and freedom define the concept of "human dignity" as well as the one of "personal (and sexual) autonomy".

The notion of "autonomy" is well-explained in a paper written by Rhoda Howard-Hassmann, entitled "Universal Women's Rights Since 1970: The Centrality of Autonomy and Agency". "Autonomy" is defined by the author as "the individual's legal and practical capacity to make and act upon her own choices. Autonomy implies that the individual has her own sense of self, enjoys moral and ethical equality with others and has the rights to participate in moral and ethical decisions regarding not only her own private life but also the life of the community and country. (…) Autonomy also means that women have the legal, moral, and personal capacity to make decisions as to where their interests lie, what social roles they value, which of their various identity they choose to emphasize, and which beliefs they hold or principles they emphasize".[309]

As Sara De Vido underlined in "Violence against women's health in international law" (2020) the meaning of autonomy can be identified with the concept of self-determination.[310] Autonomy means thus self-government or self-direction: it means acting on motives, reasons, or values that are one's own. At the international level, such concept has been claimed in several legal documents. In its general Comment No. 22, the Committee on Economic, Social and Cultural Rights (ESCR Committee) reiterated the principle of autonomy as the expression of the right to make

[307] Weinrib, J. (2019) Dignity and Autonomy, in *Max Planck Encyclopedia of Comparative Constitutional Law*, 1, PDF available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3336984
[308] Ibid.
[309] Howard-Hassmann, R., E. (2011) Universal Women's Rights Since 1970: The Centrality of Autonomy and Agency, *Journal of Human Rights*, 10(4), 433-434, PDF available at: https://www.tandfonline.com/doi/pdf/10.1080/14754835.2011.619398
[310] De Vido, S. (2020) *Violence against women's health in international law*, Manchester university Press, 154.

meaningful decisions about one's own life[311], and in the CEDAW General Recommendation No. 35 it is highlighted the duty of States in "acknowledging women as right holders and promoting their agency and autonomy, including the evolving capacity of girls, from childhood to adolescence"[312].

However, as already anticipated in the second chapter, autonomy does not refer to absolute freedom on one's own choices, but it is rather understood in the terms of relative autonomy. Indeed, any autonomous individual is not isolated, but lives in the societal context with other individuals, entitled with the same rights. It is in the coexistence of the different spheres of individual autonomies that the conflicting societal feature emerges, since human rights can be violated by other individuals and by external factors, such as norms or social and cultural values facilitating such violations. Furthermore, in raising the question on what can be considered authentic autonomy in a situation such as the one of marital rape, this problem can be summed up as follows: to what extent is individual autonomy freed from the oppression that norms, cultures and social practices exert on the individual?

It is in relation to this social structural conflict among the different spheres of autonomy that the category of women is the one that suffers most. As Susan Sherwin discussed, autonomy cannot be conceived as an abstract and isolated conditions, but it is rather understood as relational autonomy, based on the considerations of how forces of oppression interfere with the individual capacity to make free choices.[313] This perspective, summed up in the relational theories, opens the debate on the dangerous effects that internalized oppressions (such as the concept of the woman as inferior to man) can have over individual autonomy.

As it has been given evidence in the previous chapters, internalized oppression is well-evident within the familiar context, where violations, such as marital rape, are not still criminalized and are justified by the traditional, internalized assumption

[311]ESCR Committee (2016) *General comment no. 22 on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 2 May 2016, E/C.12/GC/22, para. 25:
[312] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, 14 July 2017, CEDAW/C/GC/35, para. 28
[313] De Vido, Violence against women's health in international law, 154

of the marriage as based on love, affection and as a consensual act. Thus, in particular with reference to the marital relationship, relations (and the idea we have of them) play a fundamental role in addressing the violation of individual women's autonomy as a violation of women's rights. Indeed, relational autonomy helps in explaining why consent in marital rape has been presumed, "precisely because the relation between husband and wife is supposed to imply consent"[314]. Denying the criminalization of marital rape and rape in general as based on the lack of consent means denying autonomy to the victim, and thus violating all the human rights originating from this concept.

Moreover, with reference to the specific case of rape and domestic violence, the issue of individual autonomy becomes more difficult to address as involving behaviours and choices made by women that are not supposed to be rationally and socially acceptable, given the kind of relationship that links the victim of the crime to the perpetrator (the husband). As pointed out in "Violence against women's health in international law", an analysis provided by Marilyn Friedman on the degree of autonomy of the decisions of women victims of domestic violence to remain with their husband-rapist-perpetrator, after having denunciated the event, raises the question: shall this autonomy be considered effectively free? In order to address the problem, Friedman shifted the focus of the issue of violence against women not on the figure of the woman but on the one of the man, asking "why do men abuse of women?".[315] Such argument raises an important issue, as it elevates the violation committed in the private sphere to the public level in terms of a negation of autonomy in the long run as well as a new future violation against the integrity of the person as a human being by the public authorities, in failing to prosecute the abuser.[316]

Human dignity and autonomy are fundamental in defining the crime of martial rape (and rape in general) as a violation of the right to bodily integrity. According to the Child Rights International Network, the right to bodily integrity "sums up the

[314] Ibid., 157-158
[315] Ibid., 157
[316] Ibid., 157

right of each human being, (…), to autonomy and self-determination over their own body. It considers an unconsented physical intrusion as a human rights violation"[317]: being rape an unconsented physical intrusion of one's own body, it is a crime against bodily integrity. Though, there is evidence that at the international level, the approach adopted toward the crime of rape have reiterated it as a crime against bodily integrity and sexual autonomy as opposed to crimes against morality, public decency, honour of the family and society. The General Recommendation No. 19 states that "the Committee on the Elimination of Discrimination against Women recommends that: (…) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity"[318], and the General recommendation No. 35 reiterates the priority that shall be given to "the agency, wishes, decisions, safety, dignity and integrity of victims/survivors"[319] in providing reparations to victims of gendered-based violence. The Beijing Declaration also stresses the universality of the right to bodily integrity recalling the principle of equality and respect and claiming that "equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences"[320].

As stated by the African Commission of Human Rights and People's Rights in *Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Federal Republic of Ethiopia*: "by rape, the victim is treated as a mere object of sexual gratification against his or her will and conscience. The victim is treated without regard for the personal autonomy and control over what happens to his or her

[317] "Bodily Integrity" (2020) *CRIN: Child Right International Network*, available at: https://archive.crin.org/en/home/what-we-do/policy/bodily-integrity.html (accessed August 15, 2020)
[318] CEDAW, General Recommendation No.19, A/47/38, para. 24(b)
[319] CEDAW, General Recommendation 35, CEDAW/C/GC/35, para. 33.
See also, *Vertido v The Philippines*, UN Doc CEDAW/C/46/D/18/2008, para 8.9(b)(ii); UN Women (2012) Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women, 24, PDF available at: https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2012/12/unw_legislation-handbook%20pdf.pdf?la=en&vs=1502
[320] UN, Beijing Declaration and Platform for Action, A/CONF.177/20, para. 96

body. By rape, the personal volition of the victim is gravely subverted and disregarded, and the victim is reduced from being a human being who has innate worth, value, significance and personal volition, to a mere object by which the perpetrator can meet his or her sadistic sexual urges. (…) rape is one of the most repugnant affronts to human dignity and the range of dignity-related rights, such as security of the person and integrity of the person"[321].

3.2.2 The right not to be subjected to torture or to Cruel, Inhuman or Degrading Treatment or Punishment.

According to the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), "torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"[322].

The right not to be subjected to torture or to Cruel, Inhuman or Degrading Treatment or Punishment is a norm of *jus cogens* established by article 4(2) of the ICCPR and by article 2 of the CAT. It is thus a non-derogable right, that cannot be justified in any circumstance. At the international level of human rights, the right in question is well-established by article 5 of UDHR and by article 7 of the ICCPR. Moreover, it finds recognition also within the regional systems of human rights and in particular in article 5(2) of the Interamerican Convention on Human Rights, in article 5 of the African Charter on Human and People's Rights, in article 3 of the ECHR, in article 4 of the Charter of the Fundamental Rights of the European Union,

[321] Communication 341/2007, Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia, African Commission on Human and people's Rights, para. 120.
[322] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, art. 1

in article 14 of the ASEAN Declaration and in article 13(a) of the Arab Charter on Human Rights.

The CAT Committee approach toward the definition of torture has evolved over time. Initially, the CAT identified torture in relation to acts effectuated by the State or by State officials. In 2008, the Special Rapporteur on Torture, Manfred Nowak, underlined in "What's in a name? The Prohibitions on Torture and Ill Treatment Today" that the traditional State-centred understanding of the crime of torture and cruel, inhuman or degrading treatment, in cases of violence committed by private individuals, results in the failure by the State of due diligence and prosecution of the crime.[323]

Nowak's approach was adopted also by the CAT Committee in its General Comment No. 2. First of all, General Comment No. 2 supported Nowak interpretation of the right not to be subjected to torture, extending it also to acts committed by private actors. Secondly, it linked torture to violence against women and specifically to rape, reiterating also the due diligence principle in preventing the crime to occur.[324] With reference to the positive actions that must be taken by the State, the CAT Committee evidenced the need of "protection of certain minority or marginalized individuals or populations especially at risk of torture" as "a part of the obligation to prevent torture or ill-treatment"[325]. Moreover, it placed the category of women within the broader category of vulnerable groups that could be subjected to torture, given the intersection of gender with other factors such as race, colour, nationality, religion, age, immigrant status, etc. In this regard, the Committee recognized as risky environment also the home among other potentially dangerous-classified contexts.[326]

Being rape identified as a crime of torture, the CAT is categorical in criminalizing it by stating that "State parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of

[323] De Vido, Donne, Violenza e Diritto Internazionale, 69
[324] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para 18
[325] Ibid., para. 21
[326] Ibid., para. 22

torture as defined in article 1 of the Convention, and the requirements of article 4"[327].According to the CAT approach, thus, there is evidence that the crime of rape, included marital rape, satisfies all the elements of an act of torture as defined by article 1 of the CAT as it is "intentionally inflicted" and it can impose "severe pain and suffering", both physical and mental. Moreover, in paragraph 10 of General Comment No. 2, the CAT Committee defines the difference between ill-treatment and torture depending on the severity of the pain and suffering and on the fact that ill-treatment does not require proof of impermissible purposes, affirming that it would be "a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present"[328] (in the case of marital rape, intentionality). However, as pointed out in "Donne, Violenza e Diritto internazionale", the degree of the severity of suffering, caused by the criminal act in order to be classified as an act of torture, is relevant as unquantifiable, insomuch measuring human suffering has unsurmountable difficulties.[329]

With reference to the international women's rights framework, the CEDAW does not take into account the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, which is, instead, included in the General Recommendation No. 19 among those rights violated by gender-violence.[330] Also at the regional level of women's rights, the identification of the crime of rape with the one of torture is not taken for granted. In this respect, while the link between torture and gender violence is not addresses by the Maputo protocol, the connection between violence against women and torture is recognised by the Interamerican and by the European Courts of Human Rights. However, even if both systems of human rights connect the crime of torture to violence against women when the act is committed by the States (thus applying directly the CAT definition of torture as defined in article 1)[331], the regional approaches differ.

[327] Ibid., para. 8
[328] Ibid., para 10
[329] De Vido, Donne, Violenza e Diritto Internazionale, 68
[330] CEDAW, General Recommendation No. 19, A/47/38, art. 7(b)
[331] See *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-American Commission on Human Rights (IACHR), 1 March 1996; *Ana, Beatriz and Celia Gonzàles Pérez v. Mexico,* Case 11.565, IACHR, 19

The Convention of Belém do Parà set the crime of torture among those crimes involving violence against women in the community[332] as well as the rights protected by the Convention in article 4. With reference to the familiar sphere and domestic violence cases, the Interamerican Commission has never led the situation of the victims to torture, inhuman or degrading treatment. In *Maria da Pehna Maia Fernandes v. Brazil*, the Commission reported violations of articles 8 (the right to a fair trial) and 25 (the right to judicial protection) of the Interamerican Convention on Human Rights and the violation of the due diligence principle established in article 7 of the Convention of Belém do Parà. Similarly, also in *Lenahan (Gonzales) v. United States*, the violation of article 7 was reported by the Interamerican Commission, that, by the way, had not reconducted the violations exercised by the husband on his wife to acts of torture.

Differently to the American approach, the European one recognises domestic violence as torture. The right not to be subjected to torture belongs to those fundamental rights protected by the ECHR, being such right a norm of *jus cogens* as well as being established by article 3 of the ECHR. In particular, the European Court of human Rights, claiming the necessity of a "minimum level of severity" in order to classify criminal acts as torture, affirms that such level cannot be quantifiable, but that it depends on several factors: the duration of the violation, the physical and mental consequences on the victim, the age, the health status of the victim, the manner and method of the execution, the escalation of violence and the vulnerability of the victim.[333]

In relation to domestic violence, in *Opuz v. Turkey* (2009) and *Valiuliene v. Lituania* (2013), the European Court of human Rights reiterated the responsibility of the State for acts of torture committed by privates and linked the phenomenon of domestic violence against women to the crime of torture. Regarding the second case just mentioned, *Valiuliene v. Lituania*, an important contribution to the conciliation of domestic violence with torture was provided by judge De Albuquerque. He

November 1999; *Aydin v. Turkey*, 57/1996/676/866, judgment of 25 September 1997, European Court of Human Rights, Eur. Ct. H.R., 23178/94 (1997)

[332] OAS, Convention of Belém do Parà, art.2(b)

[333] De Vido, Donne, Violenza e Diritto Internazionale, 68

proposed the identification of domestic violence against women with torture in all cases on the bases on the intent, regardless of the minimum level of severity, affirming that "it is self-evident that the very act of domestic violence has an inherent humiliating and debasing character for the victim, which is exactly what the offender aims at. Physical pain is but one of the intended effects. (…) It is precisely this intrinsic element of humiliation that attracts the applicability of Article 3 of the Convention"[334]. Though, reducing the identification of domestic violence as torture to the intentionality of the perpetuator and considering physical and psychological violence caused by husbands or ex partners sufficiently serious, the European Court approach is in line with the opinion proposed by De Albuquerque[335]. De Albuquerque's thesis is supported also by Manfred Novak's thesis, according to which the crime of torture should be understood in terms of the "the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted"[336].

Though, the scope is to carry out the act for a reason based on gender discrimination and the aspect of impotency is, thus, structural in defining the crime of torture. In domestic violence cases, such powerless condition of the woman is evident in the consequences domestic violence causes at the physical, but above all at the psychological level, linking impotency to the ongoing status of fear to which victims are subjected. Moreover, as pointed out in the "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development : report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", both in domestic violence (included marital rape) and in cases of torture, violence can escalate and cause "the

[334] De Vido, Donne, Violenza e Diritto Internazionale, 73
[335] See *Rumor v. Italy*, application 72964/10, judgment of 27 May 2014, European Court of Human Rights
[336] UN Commission on Human Rights, *Civil and Political Rights, Including The Questions of Torture And Detention Torture and other cruel, inhuman or degrading treatment Report of the Special Rapporteur on the question of torture, Manfred Nowak*, 23 December 2005, E/CN.4/2006/6, para. 39

same intense symptoms that comprise the post-traumatic stress disorder identified in victims of official torture"[337].

3.2.3 The Right to Life.

Violence in its ultimate instance ends up with death. Violence against women in the family, and in particular intimate partner violence, has been recognized as one of the main causes of death of women around the world.[338] The violation consisting of arbitrary deprivation of life is a violation to the right to life.[339] The right to life is enunciated in all the instruments regarding human rights at the international level and at the regional one and it is conceived as a peremptory norm of general international law (*jus cogens*), and thus a non-derogable norm, as established by article 4(2) of ICCPR.

At the UN level, article 3 of the UDHR and article 6 of the ICCPR affirms the everyone's inherent right to life. Furthermore, the CEDAW General Recommendation No. 19 deals with gender-based violence as a violation of a set of rights, included the right to life[340]. At the regional level, the right to life is included within regional Conventions regarding human rights, such as the Inter-American Convention on Human Rights (art.4), the African Charter (art. 4), article 2 of the European Convention on Human Rights (ECHR), the Charter of Fundamental Rights of the European Union (art. 2), the ASEAN Declaration (art. 11) and the Arab Charter on Human Rights (art. 5). These regional instruments on human rights set the framework within which Conventions on women's rights are based.

Indeed, with regard to the previously mentioned conventions on violence against women, the right to life is generally included in the broader groups of human

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[337] UN Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak*, 15 January 2008, A/HRC/7/3, para. 45

[338] Randall, V., Venkatesh, V. (2015) The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*, in Brooklyn journal of international law 41(1)*, 184

[339] See Aprea, G. (2019) "L'eutanasia e il suicidio assistito: esiste un diritto alla 'morte dignitosa'?", in *diritto.it*, PDF available in https://www.diritto.it/leutanasia-e-il-suicidio-assistito-esiste-un-diritto-alla-morte-dignitosa/

[340] CEDAW, General Recommendation No.19, A/47/38, para. 7(a)

rights violated by the phenomenon of violence, and in particular by the crime of marital rape. The Convention of Belém do Parà explicitly identifies violence against women as a violation of the right to life in article 4(a) as well as the Maputo Protocol states in article 4(1) that "every woman shall be entitled to respect for her life and the integrity and security of her person"[341]. The Istanbul Convention, instead, collocates the right to life within the group of fundamental rights of women's in article 4, focalising explicitly on the principle of non-discrimination and equality as pillars of women's rights[342]. Indeed, the Istanbul Convention does not address specifically every right violated by the phenomenon of violence against women, rather it deals with the different types of violence and crimes. The human rights violated are indeed conceived as rights to which every human being is entitled (without emphasising if the subject is a woman or not): in the European perspective, the gender dimension concerns the violation rather than the right itself.

Traditionally, the right to life has always been interpreted as a civil and political right, imposing a negative duty on the State not to interfere with a person's right to life. Recently, a wider interpretation to the right to life has been supported by several judgements of the Interamerican Court of Human Rights which has expanded the scope of the right to life even when the violation does not result in death. In *Indigenous Community Yakye Axa Case*, the Interamerican Court affirmed that "owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence" [343]. Thus, the right to life comes to encompass the right to live a "*vida digna*" or a "dignified life", including in the concept of the right to life also aspect on the quality of life. This is a fundamental aspect of the right to life: firstly, it is the explicit expression of the concept of human dignity; and secondly, it widens the interpretation of such right also in positive terms, concerning it as belonging to

[341]African Union, Maputo Protocol, art. 4(1)
[342]CoE, Istanbul Convention, art.4
[343] See *Indigenous Community Yakye Axa Case (Paraguay)*, Interamerican Court of Human Rights (ser.C) No. 125, at 162-4 (June 17, 2005), para. 26

social, economic and cultural rights, requiring thus positive action by the State in order to guarantee it. By adopting the Interamerican approach, with regard to marital rape, even in the cases where such act does not end up with the escalation of violence in the marital killing, the fear of domestic violence and physical harm can force women to have unwanted sexual intercourse, affecting the wives' right to live a dignified life.

In order to prevent and protect women from a violation to their rights to life, already in 1997, the due diligence principles was made explicit: in the Concluding observations on Columbia and on Perù, the UN Human Rights Committee noted that violence against women remains a major threat to their (women's) rights to life[344] and reiterates the duty of States to provide effective protection and take necessary measures to combat against violence against women, in particular against rape and sexual assault.[345] Furthermore, in relation to marital rape, the HR Committee expressed itself several times, demanding the criminalization of the crime[346]. The due diligence principle is reaffirmed also in the Human Rights Committee General Comment No. 28 on the equality of rights between men and women, stating that "States parties should also report on measures to protect women from practices that violate their right to life"[347]. In particular, as provided by Courts' judgements on cases of domestic violence, in general violence against women within the family has found to implicate the right to life in cases of non-fulfilment of the State due diligence obligation in preventing it[348].

In conclusion, given the fact that rape is included in those forms of violence against women, being though recognized as a violation of the right to life and to the right to a dignified life, also marital rape is conceived as violating the right to life,

[344] UN Human Rights Committee (1997) *Concluding Observations on Columbia*, UN Doc A/52/40, para. 287
[345] UN Human Rights Committee (1997) *Concluding observations on Peru*, UN Doc. A/52/40, para. 167
[346] See UN Committee (2003) *Concluding Observations on Siri Lanka*, UN Doc. CCPR/CO/79/LKA, para. 20
[347] HRC, General Comment No. 28, CCPR/C/21/Rev.1/Add.10, para. 10
[348] See *Opuz v. Turkey*, Application no. 33401/02, Council of Europe: European Court of Human Rights, 9 June 2009; *Talpis v. Italy*, Application no. 41237/14, Council of Europe: European Court of Human Rights, 2 March 2017; *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, IACHR, 16 April 2001.

since its criminalization its required both at the international level and at the regional one.

3.2.4 The Right to Liberty and to Security of the Person.

The right to liberty and security of the person is established in article 3 and 9 of the Universal Declaration of Human Rights as well as in article 9 of the ICCPR.

Historically, article 9 of the ICCPR has had always been limited to State action in the area of criminal detention. In this regard, the Human Rights Committee underlined in its General Comment No. 35 (2014) the need to reinterpret the applicability of the article to a wider range of cases. It stated that "the right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained" and, in relation to violence against women, it explicitly addresses the phenomenon of domestic violence, affirming that "States parties must respond appropriately to patterns of violence against categories of victims such as intimidation of human rights defenders and journalists, retaliation against witnesses, violence against women, including domestic violence, the hazing of conscripts in the armed forces, violence against children, violence against persons on the basis of their sexual orientation or gender identity, and violence against persons with disabilities"[349].

With reference to international instruments on women's rights, the General Recommendation No. 19 identifies the right to liberty and security of person within that list of rights that are violated by gender-based violence.[350] Moreover, in *AT v. Hungary*, the CEDAW Committee stated that State's inadequate response to domestic violence constituted "a violation of the author's human rights and fundamental freedoms, particularly her right to security of person"[351]. With reference to the mentioned case, the Committee recalled also the observations

[349] UN Human Rights Committee (HRC), *General comment No. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, para. 9
[350] CEDAW, General Recommendation No. 19, A/47/38, para. 7(d)
[351] *AT v. Hungary,* 26 January 2005, CEDAW *Communication No. 2/2003*, UN Doc. CEDAW/C/32/D/2/2003, para 9.3

directed to Hungary in the 2002 Report, where it pointed out the need to treat sexual crimes as violations of women's rights to bodily security, rather than decency, and recommended Hungary to reform its law to define sexual crimes, including rape within marriage, as crimes involving violations of women's rights to bodily security.[352]

At the regional level, such right is recognized as a human rights in the Interamerican Convention on Human Rights (art.7), in the African Charter on Human and People's Rights (art. 6), in the ECHR (art. 5), in the Charter of Fundamental Rights of the European Union (art. 6), in the ASEAN Declaration (art. 12) and in the Arab Charter on Human Rights (art. 5). It is also enunciated in regional instruments on women's rights such as in article 4 of the Maputo Protocol, in article 4(c) of the Convention of Belém do Parà, in article 4 of the Istanbul Convention as included in the category of fundaments rights provided by the general framework of human rights of the European Convention on Human Rights.

In addition to the specific articles mentioned, the recognition of marital rape as a crime against the right to security and liberty of the person can be explained on the basis of the act itself and in particular on the context in which it occurs. Indeed, two factors support such a crime as violating the security and liberty of a person: the familiar sphere of life and its repetitiveness over time. First of all, in the case of spousal rape, being the act done by the husband, the familiar context itself becomes a sort of jail for the woman, who is deprived of the enjoyment of the right to liberty and security within her home. Secondly, such deprivation of security and liberty provoked by marital rape continue over time as other factors involved in the marriage could affect the situation, such as the economic dependency of the wife on her husband or such as the fact that the perpetrator could be the father of her children.

[352] Ibid., para 9.4

3.2.5 The Right to Be Free from Discrimination.

The right to be free from discrimination (or the "principle of non-discrimination") is a *jus cogens* right[353] as well as the *raison d'etre* of the legal protection of human rights, encompassing all categories of human rights, regardless their first, second or third generation nature[354]. It is enunciated in the preamble of all international conventions on human rights as well as in specific articles, such as in article 2 of the UDHR, in article 2(1) of the ICCPR, in article 2(2) of the ICESCR.

At the regional level, the non-discrimination principle finds voice within regional conventions on human rights: in article 1 of the Interamerican Convention on Human Rights, in article 2 of the African Charter on Human and People's Rights, in article 14 of the ECHR, in article 21 of the Charter of Fundamental Rights of the European Union, in article 2 of the ASEAN Declaration and in article 2 of the Arab Charter on Human Rights.

With regard to violence against women, its violation has been identified as the most blatant expression of discrimination against women. According to the Human Rights Committee, the gender-specific nature of domestic violence classifies it as a violation to the human right to equality.[355] In particular, article 1 of the CEDAW provides a definition of the concept of "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural,

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[353] See *ADVISORY OPINION OC-18/03, "Juridical Condition and Rights of Undocumented Migrants"*, OC-18/03, Inter-American Court of Human Rights (IACrtHR), 17 September 2003, para. 97-101

[354] See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4. In this regard, ESCR Committee affirmed the importance to recognise the principle of non-discrimination de jure and the facto. "De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience". UN Doc. E/C.12/2005/4, para. 7.

[355] HRC, General Comment No. 28, CCPR/C/21/Rev.1/Add.10, para. 4

civil or any other field"[356]. The link between the principle of non-discrimination and violence against women is well accepted also in the General Recommendation No. 19 in paragraph 6, reiterating the inherent discriminative nature of violence against women directed toward women because they are women, affecting them disproportionately. Moreover, it addresses the phenomenon of gender-based violence as "a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men"[357].

The principle of non-discrimination is relevant also in relation to the due diligence of States: the UN Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, underlined the connection between the non-discrimination principle and the States' obligations requiring States to condemn violence against women as they do with regard to other forms of violence.[358] Further, it stressed the duty of the State in overcoming the public-private dichotomy at the light of this principle, claiming that "the due diligence standard has helped to challenge the liberal doctrine of State responsibility with regard to violation in the 'private sphere'. This means that the State, by failing to respond to intimate/domestic violence, can be held responsible for not fulfilling its obligation to protect and punish in a non-discriminatory way and can be charged as an accomplice to private violations"[359].

At the regional level, regarding women's rights, such principle is well-established in all the regional treaties mentioned in this thesis. It was reiterated in *Maria da Pehna v. Brazil*, where the Interamerican Court of Human Rights found that, by non-intervening in the prevention and prosecution of the act, Brazil not only was complicit in the crime, but that its failure to respond to domestic violence was an explicit violation to the right to be free from discrimination based on gender, as foreseen by article 6 of the Convention of Belém do Parà. Within the European context, several cases on violence against women provided a violation of the

[356] UN General Assembly, CEDAW, art. 1
[357] CEDAW, General Recommendation No. 19, A/47/38, para. 1
[358] E/CN.4/2006/61, para. 35
[359] Ibid., para. 61

principle of non-discrimination[360]. In particular, the Istanbul Convention set such principle as a funding principle of the Convention itself in article 4(3). Finally, in the Maputo Protocol the non-discrimination principle is recognized several times in the preamble and in particular in article 1(f), in relation to the concept of "discrimination against women" and in article 2 with reference to specific duties States have in preventing the violation of such right.

Regarding marital rape, thus, there is evidence that the non-criminalization of the crime implies discriminatory treatment in two ways: first of all, it would mean a discrimination between violence against women and other types of violence, and, secondly, it would discriminate between violence experienced by women in the private and in the public sphere. As a consequence, the same concept of violence would lose its inherent universal meaning and would be differentiated and justified depending on the circumstances.

3.2.6 The Right to Equality in the Family.

The right to equality in the family is strictly linked to the principle of non-discrimination as well as to the concept of gender-equality. With reference to the wider framework of human rights, at the international level the concept of equality is enacted in the preamble of the UDHR as well as in article 3 of the ICCPR and the ICESCR[361].

At the regional level, the right to equality in the family is recognized in article 17(4) of the Interamerican Convention on Human Rights, in the African Charter on Human and People's Rights (art. 18(3)-19), in the ECHR (art. 14 in relation to the prohibition of non-discrimination), in the Charter of Fundamental Rights of the

[360] See *Opuz v. Turkey*, application no. 33401/02, judgment of 9 June 2009, European Court of Human Rights; *Talpis v. Italy*, application no. 41237/14, Judgment of 2 March 2017, European Court of Human Rights; *Bălsan v. Romania,* application no. 49645/09, judgment of 23 May 2017, European Court of Human Rights

[361] Art. 3 of ICCPR states: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant". Art. 3 of ICESCR states: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".

European Union(art. 23), in the ASEAN Declaration (art. 19) and in the Arab Charter on Human Rights (art 33(2)).

The right to equality in the family is also reiterated in the international instruments on women's rights. In particular, the General Recommendation No. 19 identified explicitly the right to equality in the family as a right violated by gender-based violence in article 7(f). The CEDAW, also, addresses indirectly this right in its preamble and calls for the need to make a change in the traditional role of men as well as the role of women in society and in the family to achieve effective equality between men and women[362]. The concept of "equality" between men and women is reiterated several times in the CEDAW Convention and in particular in article 1 it is underlined as concerning every man and woman, "irrespective of their marital status"[363]. Moreover, article 5 of the Convention links the violation of such right to the existence of social and cultural patterns contributing in creating gender inequality and it requires States to take positive action to modify or eliminate such "prejudices and customary and all other practices which are based on the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women"[364].

Another international instrument stressing inequality within the family is the Beijing Declaration and Platform for Action, which defines it as the reflection of "historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women's full advancement"[365] and calls for the necessity of developing an holistic approach to "the challenging task of promoting families, communities and States that are free of violence against women (…). Equality, partnership between women and men and respect for human dignity must permeate all stages of the socialization process"[366].

[362] CEDAW, General Recommendation No. 19, A/47/38, preamble
[363] UN general Assembly, CEDAW, art. 1
[364] Ibid., art.5(a)
[365]UN, Beijing Declaration and Platform for Action, A/CONF.177/20, para. 118
[366] Ibid., para. 119

With regard to the issue of violence against women, the violation of the right to equality in the family facilitates the violation of a subsequent series of women's rights outside the familiar context. Indeed, it is important to remember that the act of violence against women is not only about the act itself, but it is a matter of power. The UDHR affirms that "the family is the natural and fundamental group unit of society and is entitled to protection by society and by the State"[367], but when inequality within the family goes unaddressed, women's decision making on her life and on her future is inevitably limited. Moreover, if violence, in its various forms (from sexual to economic violence) is involved, it is even more difficult for the woman to gain equality.

The impunity of marital rape is, thus, the expression of well-rooted stereotypes on the figure of the woman within society and, first of all, within the family, reflecting asymmetric power relations between the two sexes. Assuming that marriage necessary implies the wife's ongoing consent to have a sexual intercourse with her own husband is the extension of the conception of the woman as a man's property, denying her the right to personal autonomy and integrity and thus the right to choose whether to consent or not. The inequality that marital rape represents in the family is thus strictly linked also to the notions on non-discrimination and gender equality provided by the societal context.

At the women's rights regional level, the correlation of the right to equality in the family with the concept of "equality" and the principle of non-discrimination is well-evident. In the Maputo Protocol the term "equality" appears several times in the preamble, in art. 2(a) in relation the elimination of discrimination against women, in art. 8(d) in relation to equality before law[368] and in art. 13(a) in relation to economic and welfare rights. In the Convention of Belém do Parà, the link of violence and equality in the familiar sphere is underlined in article 2 and 3, and in article 6 it is reiterated the need to address dangerous traditional and social

[367] UN General Assembly, UDHR, art. 16.3

[368] Also the Human Rights Committee has underlined in its general Comment No.28 on the equality of rights between men and women that "States parties should inform the Committee whether there are legal provisions preventing women from direct and autonomous access to the courts (…) whether measures are taken to ensure women equal access to legal aid, in particular in family matters", CCPR/C/21/Rev.1/Add.10

stereotypes that affects the role of the woman. In the Istanbul Convention, the right in question is included in article 4 and in article 12(1) the Convention requires States to "take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men"[369].

There is evidence that the right to equality in the family is not always explicitly enunciated in international conventions as it is mostly included in the concept of "equality" and "non-discrimination" in general. However, such thesis supports the idea that, being the family recognised as the fundamental unit on which society is based, an explicit recognition of such right, specially by conventions on women's rights, could contribute in achieving gender equality at the community and societal level, by addressing it as a goal within the familiar context. An explicit recognition of such right reflects the strong impact States' policies can have in transporting new social values within households, addressing private violence through the education of society to equal values.

3.2.7 The Right to Health and Well-Being.

According to the definition provided by the World Health Organization (WHO), the term "health" refers to "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"[370]. In the preamble of the WHO Constitution is also affirmed that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition"[371].The right to health is, thus, conceived as a fundamental human right as well as a right encompassing the

[369] CoE, Istanbul Convention, art 12(1)
[370] World Health Organization (WHO) Constitution of the World Health Organization, in *American Journal of Public Health and the Nations Health*, Vol. 36, 1315, PDF available at: https://ajph.aphapublications.org/doi/pdfplus/10.2105/AJPH.36.11.1315
[371] Ibid.

well-being of the person in its broader dimension, involving the physical, mental and social aspect.

Differently from the previously mentioned rights violated by the crime of marital rape focused on the concept of negative freedom[372], the right to health and well-being of a person is set within the second-generation category of rights, included in the ICESCR. It is focused on the concept of equality and on the positive actions that must be taken by the State in order to guarantee it.

At the international level such right is recognized in article 25 of the UDHR and in article 12 of the ICESCR, which states that "the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"[373].

At the regional level, only the African Charter on Human and People's Rights recognizes directly the right to health (art. 16), and this is explained by the greater emphasis is given to the second-generation rights in the African region, differently from the American and the European contexts. Indeed, in the latter ones the right to health is included within additional protocols to the regional conventions on human rights, ruling on social and economic rights: in the Interamerican context, the right to health is enunciated in article 10 of the Protocol of San Salvador to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, while in the European framework, the right to health is established in part I (art.11) of the European Social Charter.

As the WHO pointed out, the right to health is an inclusive right, that consists in the intersection of several specific rights as indispensable conditions for the right to health in the broad sense of the term, such as the right to safe water and food, the right to adequate housing, the right to healthy working conditions, etc.[374] In addition, despite of being a social right, the right to health has some fundamental

[372] The principles of equality and non-discrimination are included both in the ICCPR and in the ICESCR, differently from all the other rights mentioned only in the ICCPR.
[373] UN general Assembly, ICESCR, art. 12(1)
[374] UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 31, The Right to Health*, June 2008, No. 31, PDF available at:
https://www.ohchr.org/Documents/Publications/Factsheet31.pdf

key-features that links it to the category of the rights of first-generation, especially when regarding inter-individual violations.

By adopting a gender perspective, the emergence of the right to health as a first-generation right is well evident. The CESCR General Comment No. 14, in paragraph 21, specifically deals with the broadest definition of such right through a gender perspective, including domestic violence as a violation.[375] With regard to violence against women and, in particular to rape, the right to the enjoyment of the highest attainable standard of physical and mental health includes also the right not to be subjected to violence (and not to be raped), being such act a violation of the right of physical and mental integrity and thus of the physical and mental health of women. There is evidence of the double face of the right to health: on the one hand it requires State actions to be granted, on the other hand (in particular with reference to inter-individual violations) it consists of the non-interference with someone's own physical and mental well-being, through the negative concept of freedom.

With regard to violence against women, such right is recognized as a violated right in several international instruments on the issue. Even if not mentioning the concept of violence, the CEDAW recognise the right to health in article 11(f) (in relation to the right to work). With explicit reference to the notion of violence (rather than the one of discrimination), the right to health is introduced in the CEDAW framework by the General Recommendation No. 19 in paragraph 7, which recognises it as a human right violated by violence against women. Such recognition is also reiterated by the General Recommendation No. 35 in paragraph 15, affirming that "women's right to a life free from gender-based violence is indivisible from and interdependent on other human rights, including the rights to life, health, liberty and security of the person, equality and equal protection within the family, …"[376]. Consequently, marital rape represents a violation of the right to the highest standard attainable of physical and mental health. In addition to the psychological trauma that can led to anxiety, shock, fear, depression, post-traumatic stress disorder and event

[375] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, para. 21 and para. 36
[376] CEDAW, General Recommendation No. 35, CEDAW/C/GC/35, para. 15

to suicidal behaviours, marital rape can provoke gynaecological complications, such as vaginal bleeding or infection, fibroids, decreased sexual desire, genital irritation, pain during intercourse, chronic pelvic pain and urinary tract infections, unintended pregnancy and sexually transmitted diseases, such as the HIV.[377]

At the regional level, only the Maputo Protocol specifically deals with health and reproductive rights of women in article 14. Within the OAS and the European framework, the crime of rape as a violation to the right to health is mainly addressed when such crime is committed by the organs of the State[378] or when committed by non-state actors[379]. The violation to the right to health in relation to episodes of violence against women within the family has been pointed out mostly in cases of domestic violence, such as in *Opuz v. Turkey* or in *Jessica Gonzàles (Lenahan) v. United States.* Indeed, as stressed in "Violence against women's health in international law", "while domestic violence is acknowledged to be a violation of human rights, the specifically sexual component of violence against women in intimate relationships, including rape in marriage, is drastically under-recognized"[380] (at the substantial level). Indeed, in *CR v. United Kingdom* and in *S.W. v. United Kingdom*[381], the European jurisprudence did not make reference to the impact of marital rape on women's health.

In order to highlight the connection of marital rape as a violation to the health and well-being of the woman, domestic jurisprudence is relevant as well, insomuch it refers consistently to international law in its application[382]. An example is the judgement of the Court of Nepal (2002) on *the Forum for Women, Law and*

[377] Krug, E., G., et. Al. (2002) World Report on Violence against Women and health, WHO, 162-163, PDF available at: https://apps.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf;jsessionid=4BE294A26010E9234960C4F975980A22?sequence=1

[378] See *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-American Commission on Human Rights (IACHR), 1 March 1996; *Aydin v. Turkey*, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997

[379] See *M.C. v. Bulgaria*, Appl. No. 39272/98, Council of Europe: European Court of Human Rights, 3 December 2003

[380] De Vido, Violence against women's health in international law, 39

[381] *CR v. United Kingdom*, application No. 20190/92, judgment of 22 November 1995, European Court of Human Rights; *SW v. United Kingdom*, application No. 20166/92, Judgment of 22 November 1995, European Court of Human Rights

[382] De Vido, Violence against women's health in international law, 39

Development, Thapathali, ward No. 11 of Kathmandu Municipal Corporation and on her own, Advocate Meera Dhungana, 33 v. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs. The Court affirmed that "where a wife is treated as an object or property or a means of entertainment and exploitation, her personal health and her needs are ignored in an irrational and inhuman manner and in that situation, an unnatural and brutal act of rape of wife is committed" [383]. Such case was a milestone in Nepal jurisprudence: addressing the crime of marital rape as a violation of several human rights (included the right to health), it eliminated the marital rape exemption. The Court affirmed that "a marriage does not mean women to turn into slaves. Thus, women do not lose human rights because of marriage. So long as a person lives as a human being, he/she is entitled to exercise those in-born and natural human rights. (…) To forcibly compel women to use an organ of her body against her will is serious violation of her right to live with dignity, right to self-determination and it is an abuse of her human rights"[384]. Moreover, by stressing the international instruments requiring the criminalization of marital rape (to which Nepal is part), the judges stated that "therefore, in the light of those international instruments on human rights, it cannot be said that marital rape is permissible"[385].

[383] Supreme Court Special Bench of Nepal, Order Writ No. 55 of the year 2058 BS (2001–2), *on behalf of the Forum for Women, Law and Development, Thapathali, ward No. 11 of Kathmandu Municipal Corporation and on her own, Advocate Meera Dhungana, 33 v. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs*, the House of Representatives, The National Assembly, PDF available at: https://www.globalhealthrights.org/wp-content/uploads/2013/10/The-Forum-for-Women-Law-and-Development-Nepal-2002.pdf
[384] Ibid.
[385] Ibid.

3.3 The due diligence standard requirement under international law and regional law.

The previous paragraphs of the chapter have addressed the crime of marital rape as a violation of human rights, identifying those international instruments requiring its criminalization. Criminalization is, thus, necessary in achieving the respect, the protection and the fulfilment of those rights violated by marital rape. Indeed, it "both codifies rights and creates a potential source of power for victims to get access to legal remedies when those rights are violated. In this way, the law's power is both symbolic and practical. Criminalization of sexual assault in marriage can and should operate on both level"[386].

However, under international law, the prosecution of the crime of marital rape is not reduced only to criminalize the act: international and regional instruments, indeed, expressively affirm the duty of due diligence of the State in being proactive and preventing the development of the violation. According to Julie Goldscheid, with regard to marital rape, "international human rights laws' due diligence framework requires a range of responses that include the obligation to prevent, protect and provide redress, along with the obligation to prosecute and punish. Explicitly framing States' obligations in terms of that more comprehensive approach would reach broadly to address the cultural and social barriers that allow marital rape to continue without sanction"[387].

"Due diligence" is a general principle of international law and it is defined in the General Comment No. 31 of the Human Rights Committee as the duty "to prevent, punish, investigate or redress the harm"[388]. It consists, thus, in a positive obligation on the part of States. It is a procedural obligation that arises from another legal duty or obligation in order to give effect and to measure the State's compliance with that duty or obligation. The due diligence duty is a duty of conduct, not result, as it aims

[386] Randall, Venkatesh, The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law, 170

[387] Goldsheid, J. (2015) "Considering the Role of State: Comment on 'Criminalizing Sexual Violence against Women in Intimate Relationships'" *109 AJIL Unbound,* 202, available al: doi:10.1017/S2398772300001446

[388] UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 8

not only to protect but specially to prevent. Moreover, being a duty of conduct, it operates over time and, thus, it is a continuing obligation that shall be implemented even when the crime does not occur.

With respect to the issue of marital rape, the previously mentioned international instruments requiring its criminalization underline also the duty of due diligence States have in dealing with the phenomenon. Moreover, the UN Special Rapporteur stressed the duty of States "to use the same level of commitment in relation to prevention, investigation, punishment and provision of remedies for violence against women as they do with regards to the other forms of violence"[389].

At the UN level, the CEDAW addresses the need by States to take all "appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men"[390]. Even if the duty of due diligence is not explicitly cited in the UN Convention on the Elimination of All Forms of Violence against Women, in 1997, the Human Rights Committee reiterated that member States have dutifully accepted the obligations imposed by the CEDAW, given the fact that by ratifying it they also accept the jurisdiction of the treaty body (the CEDAW Committee) to monitor the compliance and to provide States with general comments and recommendations on the nature of their obligations.[391]

The due diligence duty has explicitly been introduced in the CEDAW framework by the DEVAW and the General Recommendation No. 19. In article 4, the DEVAW reiterates the duty to exercise due diligence "to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons"[392]. The General Recommendation No. 19 emphasised the fact that "under general international law and specific human rights covenants, States may also be

[389] E/CN.4/2006/61, para. 35
[390] UN General Assembly, CEDAW, art. 3
[391] UN Human Rights Committee, UN Doc A/52/40, para. 287
[392] UN General Assembly, DEVAW, A/RES/48/104, art. 4(c)

responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation"[393]. Moreover, in paragraph 24 the document set a list of necessary measures to overcome family violence, such as criminalization, legislation, creation of services to ensure safety and security of victims, development of rehabilitation programmes and support programmes for families where a violation has occurred.[394] Also the Beijing Declaration and Platform for Action reiterated the due diligence standard affirming the duty of States in refraining "from engaging in violence against women and *exercising* due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private actors"[395].

In 2006, the Annual Report of the UN Human Rights Council's Special Rapporteur on violence against women stated that "there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence"[396]. The report defines the due diligence standard as a tool for the effective implementation of women's human rights, in particular right to live a life free from violence. It addresses the due diligence obligation in relation to the phenomenon of violence against women, underling the duty of States "to transform the societal values and institutions that sustain gender inequality while at the same time effectively respond to violence against women when it occurs, and examine the shared responsibilities of State and non-State actors with respect to preventing and responding to violence and other violations of women's human rights"[397].

At the regional level, the three main systems of human rights (the American, the African and the European one) deal with the duty of due diligence of States within the instruments previously mentioned on marital rape and violence against women.

[393] CEDAW, General Recommendation No.19, A/47/38, para. 9
[394] Ibid., para. 24(r). See also para. 24(t): With regard to the crime of rape, paragraph 24 claims the necessity to provide "adequate protection to all women" at the light of gender-based violations such as family violence, abuse, rape or assault. However, there is no definition of "adequate protection" nor is it clear if criminalization of marital rape is a necessary component of adequate protection.
[395] UN, Beijing Declaration and Platform for Action, A/CONF.177/20, para. 124(b) (italics modified)
[396] E/CN.4/2006/61, para. 29
[397] Ibid., para. 17

Within the OAS framework, the Convention of Belém do Parà reiterates the duty of due diligence in article 7, affirming that "the States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: (…) apply due diligence to prevent, investigate and impose penalties for violence against women"[398]. In article 8, the Convention requires parties to take specific measures, proposing a list of actions that shall be implemented by States, such as the promotion of awareness and observance of women's rights, the promotion of the modification and cultural patterns of conduct between men and women, the provision of specialized services for women subjected to violence and of research and statistics to gain relevant information on the causes, the consequences and the frequency of the phenomenon.[399]

The principle of due diligence was reiterated also within the jurisdiction of the Intern-American Commission of Human Rights in relation to the *Maria da Penha Maia Fernandes v. Brazil*. The Commission stated that the State had violated the rights of Mrs. Fernandes and "failed to carry out its duty assumed under Article 7 of the Convention of Belém do Pará and Articles 8 and 25 of the American Convention; both in relation to Article 1(1) of the Convention, as a result of its own failure to act and tolerance of the violence inflicted"[400]. Moreover, in the *Lenahan (Gonzales) v. United States*, the Commission observed "that there is a broad international consensus over the use of the due diligence principle to interpret the content of State legal obligations towards the problem of violence against women; a consensus that extends to the problem of domestic violence. This consensus is a reflection of the international community's growing recognition of violence against women as a human rights problem requiring State action"[401].

With regard to the Maputo Protocol, the principle of due diligence can be individuated in the preamble and in particular in article 2. Requiring States to take

[398] OAS, Convention of Belém do Parà, art.7 (b).
[399] Ibid., art. 8
[400] *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, IACHR, 16 April 2001, para. 60(4) available at: http://hrlibrary.umn.edu/cases/54-01.html (accessed August 22, 2020)
[401] *Lenahan (Gonzales) v. United States*, Case 12.626, Report No. 80/11, IACHR, 21 July 2011, para. 123

concrete positive actions to give greater attention to women's human rights, article 2 affirms that "States parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measure"[402]. Furthermore, it lists a set of measures that shall be taken at the national level in order to prevent the phenomenon, including legislative measures and social measures to take corrective action in achieving the elimination of "harmful cultural and traditional practices (…) based on (…) stereotyped roles for women and men"[403]. The 2018 Report of the State of African Women provides a wide range of harmful practices that discriminate disproportionally women and girls, such as widow inheritance (levirate), sororate[404], breast ironing, force-feeding of women and girls, son preference, girls' as well as boys' initiation rites, child abduction, lips plates, *trokosi*[405], widowhood rites, acid attacks, stoning, honour killings, witchcraft rituals and virginity tests.[406] In particular, child marriage and female genital mutilation are considered to be the most popular in the African continent and it is especially in relation to child marriage as well as forced or early marriage that the concept of marital rape can be included in the wider notion of "harmful practice", being an inevitable consequence of the act of marring a child.

The Istanbul Convention also presents duties of due diligence in relation to violence against women. However, as De Vido points out, the criminalization of the crime of marital rape is not identified as a due diligence obligation in the Istanbul Convention, insomuch criminalization consists of an obligation of result and not of conduct.[407] Article 5 of the Convention explicitly reiterates the principle of due diligence, affirming that "parties shall take the necessary legislative and other measure to exercise due diligence to prevent, investigate punish and provide

[402] African Union, Maputo Protocol, art. 2
[403] Ibid.
[404] Sororate is a marriage in which a husband engages in sexual relations or marriage with the sister of his wife, usually after her death or her being infertile.
[405] *Trokosi* is a practice in which virgin girls are sent to shrines to serve as slaves to the gods and the priest, in order to pay for the crimes committed by a relative. *Trokosi* is practised in Benin, Ghana and Togo.
[406]KIT Royal tropical institute (2018) *The State of African Women Report*, PDF available at https://www.ippfar.org/sites/ippfar/files/2018-09/SOAW-Report-FULL%20VERSION.pdf
[407] De Vido, Donne, Violenza e Diritto Internazionale, 151

reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors"[408].

In "Donne, Violenza e Diritto Internazionale" (2016), De Vido examines the due diligence duty as provided by the Istanbul Convention, articulating it into the four "p": prevention (art. 12), protection (art. 18), prosecution (chapter V) and policies (art. 7).[409] According to article 12 of the Istanbul Convention, in order to prevent violence against women, States are required to promote changes in social-cultural behaviours and to eradicate social gender-stereotypes based on the inferiority of the woman.[410] The duty to prevent is a key concept in eliminating the phenomenon of violence against women and must be implemented at different levels: at the societal, at the institutional, at the familiar and at the individual one.

Protection is established by article 18 of the Istanbul Convention and it foresees different actions States have to take such as legal and psychological support services to the victims, financial assistance or guaranty of access to health care (art.20). Furthermore, from article 21 to article 28, specific duties are required to States, such as the assistance in the filing of individual or collective complaints or such as the existence of free telephone lines, operating 24 hours a day seven days a week, to furnish aid and support to victims in anonymously. With reference to domestic violence, article 52 refers to specific urgent measures imposed by the judge to the perpetrator of domestic violence.

With regard to protection measure, it is important to point out also the advanced European Union victim protection system based on the principle of the mutual recognition. In particular, Directive 99/2011/EU of the European parliament and of the Council on the European protection order and the regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters provide a complete civil and criminal frame of protections for victims subjected to violence. However, such legal acts merely guarantee mutual

[408] CoE, Istanbul Convention, art. 5
[409] De Vido, Donne, Violenza e Diritto Internazionale, 151
[410] CoE, Istanbul Convention, art. 12

recognition, but they do not provide a comprehensive and unitarian harmonization of EU policies on the matter.

The third "p" taken into account is the one regarding prosecution, as established by chapter V of the Istanbul convention. In particular, with regard to the prosecution of domestic violence, article 46 underlines the aspect of repetitiveness of violence within the familiar context, considering the possibility to apply more severe penalties to such cases (art. 47).

Finally, the last due diligence duty enshrined in the Istanbul convention concerns "Policies" (chapter II of the Istanbul Convention). Article 7 states "parties shall take the necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention and offer a holistic response to violence against women"[411].

Within the European framework, several cases have brought to light the principle of due diligence of States. In particular, in 1998, in *Osman v. United Kingdom*, the European Court of Human Rights[412] developed the criterium of the "Osman test", that provides that, in order to avoid an excessive burden on the authorities, the positive obligation to protect the right to life requires that the authorities "knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk"[413]. The Osman test was, subsequently, revisited in relation to another case of domestic violence, *Valiuliene v. Lithuania*. Judge De Albuquerque pointed out that in cases of domestic violence, which caused to the victim minor bodily injuries, the stage of

[411] CoE, Istanbul Convention, art. 7

[412] The European Court of Human right is the monitoring body of the ECHR and not of the Istanbul convention. However, both international instruments are set within the Council of Europe context and are based on the same rights and principle. Thus, with reference to women's rights, a violation of the Istanbul Convention implies directly a violation of rights enunciated also in the ECHR.

[413] *Osman v. United Kingdom*, application No. 23452/94, Case No. 87/1997/871/1083, 28 October 1998, European Court of Human Rights, para. 116, PDF available at: file:///C:/Users/HUAWEI/Downloads/001-58257%20(1).pdf

"immediate risk" for a victim might be too late for the State to intervene, and that «a more rigorous standard of diligence is especially necessary» in societies where the problem of domestic violence is widespread.[414] In *Valiuliene v. Lithuania,* he claimed that "if a State knows or ought to know that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations. The constructive anticipated duty to prevent and protect is the reverse side of the context of widespread abuse and violence already known to the State authorities"[415]. The contribution of judge De Albuquerque in imposing a stricter due diligence standard in cases of domestic violence has been fundamental in revisiting some forms of violence, such as domestic violence and marital rape, taking into consideration the private context in which they occur and their repetitiveness over time as factors resulting in a greater level of seriousness of the crime.

[414] See De Vido (2017) The ECtHR Talpis v. Italy Judgment. Challenging the Osman Test through the Council of Europe Istanbul Convention? in *Ricerche giuridiche* Vol.6(2), PDF available at: https://edizionicafoscari.unive.it/media/pdf/article/ricerche-giuridiche/2017/2/art-10.14277-Rg-2281-6100-2017-02-001_soQ2GOC.pdf

[415] *Valiuliene v. Lithuania,* application no. 33234/07, 26 march 2013, European Court of Human Rights, 30, PDF available at: file:///C:/Users/HUAWEI/Downloads/CASE%20OF%20VALIULIENE%20v.%20LITHUANIA%20(2).pdf

CHAPTER 4 – The incoherence of European national laws in the application of the Istanbul Convention.

After analysing the phenomenon of violence against women and of marital rape at the international and regional level from a juridical point of view, the next chapter aims at providing a more comprehensive framework on the European system of protection of women's rights, established by the Istanbul Convention. In order to analyse European laws in contradiction with the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, first of all, this brief introduction will collocate women's rights protected by the Istanbul Convention in the wider framework of the Council of Europe.

The Istanbul Convention was adopted by the Council of Europe in 2011.[416] The Council of Europe main treaty of reference is the European Convention on Human Rights (ECHR), adopted in 1950 and setting the framework for the European system of human rights. The ECHR is guaranteed by the functioning of the European Court of Human Rights (ECtHR). Setting the Istanbul Convention into the wider framework of the Council of Europe is necessary to understand the strengths and limitations of the Istanbul Convention itself. The Istanbul Convention is, indeed, double faced: on the one hand it represents a turning point in the recognition of women's rights as well as in the adoption of gender-sensitive approach toward human rights at the light of the ongoing discrimination against women in society; on the other hand, despite being a legally binding treaty, it is limited in its functions in terms of control and monitoring.

As foreseen by chapter IX of the Istanbul Convention, articles 66 and 67 establish two mechanisms of control: the Group of Experts on Action against Violence against

[416] In Europe, violence against women found effective recognition within a legal instrument, the Istanbul Convention, with a considerable delay compared to other systems of protection of human rights, such as the Interamerican system with the Convention of Belém di Parà in 1994 and the African System with the adoption of the Maputo protocol in 2003.

Women and Domestic Violence (GREVIO) and the Committee of the Parties[417]. The GREVIO examines the reports on legislative measures giving effect to the provisions of the Istanbul Convention submitted by the Parties on the basis of a specific questionnaires. In carrying out its assessments of each individual report, GREVIO constantly dialogues with the State involved and finally adopts a document containing its conclusions on the measures taken by the State in question. On the basis on the GREVIO's conclusions, the Committee of the Parties can decide to adopt comments and recommendations.[418]

Being the periodical reports not legally-binding, the strength of the procedure of control is based on the publicity of the documents as the main means of pressure on States' actions, both at the regional level and at the international one, giving the ongoing parallelism of functions between the GREVIO and the UN CEDAW Committee. The main difference between the two mechanisms of control (GREVIO and CEDAW Committee) consists of the possibility to receive individual complaints.[419] Indeed, the GREVIO is entitled only with providing recommendations to States, but it has not authority on individual complaints.[420] Moreover, also the mechanism of periodical reports presents a limited efficiency as the GREVIO has no direct control over the information provided by States that are the very authors of the reports. Though, the Istanbul Convention lays on the responsibility of the States parties in implementing the Convention provisions as well as in prosecuting the crimes against women as established by the Convention, without directly foreseeing the ability to judge individual cases on a regional level.

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[417] The GREVIO is composed of independent experts, from a minimum of 10 to a maximum of 15 (gender and geographically balanced) and the Committee of the Parties consists of the representatives of the State Parties to the Convention.

[418] CoE, Istanbul convention, art. 68

[419] Although the CEDAW Committee was not originally authorised with such a procedure, the possibility to file an individual complaint to the Committee was introduced with the adoption of the Option protocol to CEDAW in article 2, adopted by the UN General Assembly on 6 October 1999.

[420] With regard to the possibility to file individual complaints, the GREVIO differs also from the Interamerican system and from the African system. Article 12 of the Convention of Belém, indeed, establishes that individuals and non-governative organizations can file complaints to the Interamerican Commission of Human Rights, creating a direct link between the Convention of Belém do Parà and the main system of reference of human rights in the OAS context identified in the Interamerican Convention on Human Rights. With regard to the Maputo Protocol, being the document a supplementation to the African Charter on Human and People's Rights, it falls under the competence of the African Commission of Human and People's Rights (see art. 27 and art. 32).

It is in this regard that it is necessary to understand the Istanbul Convention in relation to the wider context of the ECHR. Indeed, as anticipated, the Istanbul Convention does not provide with a list of specific women's rights violated by the phenomenon of violence, but in article 4 it just recognises women's human rights as belonging to the category of fundamental rights addressed through a gender-neutral approach: it means that human rights are always considered in their broader sense as belonging to every human being without distinction of sex and gender. What is addresses through a gender-specific perspective are the crimes directed against the woman "because she is a woman or that affects women disproportionately"[421]. The Convention is mainly aimed at requiring States to modify or elaborate national laws in order to address the phenomenon of violence, imposing duties of *facere*.

Thus, recalling human rights in their broader sense in relation to the specific phenomenon of violence against women, within the European framework there is an overlapping of rights violated. Indeed, for what concerns States parties to the Istanbul Convention that are also part to the ECHR, there is the possibility for citizens to file individual complaints to the ECtHR with reference to violations of rights of the ECHR, which are the same fundamental human rights taken into account by article 4 of the Istanbul Convention. Moreover, despite the lack of a direct link between the competence of the ECtHR on judging on violation of the Istanbul Convention, the European Court has always taken into account other regional and international legal developments in judging on violations of human rights. Indeed, by adhering to the ECHR principle of "living instrument", the Court has made reference to the Istanbul Convention in several cases, presenting it as a guideline in the determination of the State responsibilities in domestic violence cases.[422]

The question concerning individual complaints is different for those States that are part of the Istanbul Convention, but not of the ECHR. Indeed, the Istanbul Convention is an open instrument, as it can be ratified by third parties that have

[421] CoE, Istanbul Convention, art. 3(d)
[422] See *Bălsan v. Romania,* Application no. 49645/09, Council of Europe: European Court of Human Rights, 23 May 2017, para. 79; *Talpis v. Italy*, Application no. 41237/14, Council of Europe: European Court of Human Rights, 2 March 2017, para. 129

taken part to the initial drafting (such as Canada, Japan, Mexico and United States, the Holy See and the EU) or by other States parties, given the unanimous consensus of the CoE member States. In this case, only the GREVIO mechanism can act in order to promote the protection of women's rights, as being part of the Istanbul Convention does not mean being part of the Council of Europe and thus being subjected to the jurisdiction of the ECtHR.

4.1 Definition of consent in law.

After this introduction on the context where to set the Istanbul Convention in Europe, this thesis will address the specific issue of marital rape in the Istanbul Convention, presenting some European laws still in contradiction with the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. As it will be analysed in the following subparagraphs, the European definition of rape is based on the lack of consent, meaning that if the woman has not consented to having a sexual intercourse, freely and voluntary, it is rape.[423]Out of the 47 member States of the Council of Europe, only 9 have adopted a consent-based definition of rape in accordance with the Istanbul Convention[424]: United Kingdom[425], Ireland, Belgium, Cyprus, Luxemburg, Iceland, Germany, Malta and Sweden.

In UK, the Sexual Offences Act (2003) states that "a person (A) commits an offence if: (a)he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b)*B does not consent* to the penetration, and (c)A does not reasonably believe that B consents"[426]. With reference to marital rape, there is no explicit law condemning it. However, being UK based on a common law system[427], the 1991 House of Lords decision in *R v. R* recognized the possibility for a man to rape his wife under UK law and ruled that, even within marriage, any non-consensual sexual activity is rape.[428]

[423] CoE, Istanbul Convention, art. 36
[424]Burnet, S. (2018) "Is non-consensual sex rape? Most European countries say 'no'", in euronews, available at: https://www.euronews.com/2018/05/02/is-non-consensual-sex-rape-most-european-countries-say-no- (accessed September 4, 2020)
[425] UK has only signed the Istanbul convention, but it has not ratified it yet.
[426] The United Kingdom of Great Britain, Sexual offences Act (c. 42), 20 November 2003, part I (section 1) (italics added)
[427] Common law is a body of unwritten laws based on legal precedents established by the courts. Common law influences the decision-making process in unusual cases where the outcome cannot be determined based on existing statutes or written rules of law. See https://www.investopedia.com/terms/c/common-law.asp#:~:text=Common%20law%20is%20a%20body,or%20written%20rules%20of%20law. (accessed August 29, 2020)
[428] *R. v. R* (1991) UKHL 12 (23 October 1991), available at: http://www.bailii.org/uk/cases/UKHL/1991/12.html (accessed 29 August, 2020)

Under Irish Criminal Law Act (1981), a man is accused of committing rape if " (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse *does not consent* to it, and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it, and references to rape in this Act and any other enactment shall be construed accordingly"[429]. The abolition of the marital rape exemption was officially established by Criminal Law Amendment Act (1990) in section 5, stating that "any rule of law by virtue of which a husband cannot be guilty of the rape of his wife is hereby abolished"[430].

In Belgium, rape is ruled by article 375 of the Criminal Code (L. 04-07-1989, art. 1, 1°), according to which it is "any act of sexual penetration, regardless of its nature and by whatever means, committed against a *non-consenting person* (…). *Consent* is not considered to have been given, if the crime is committed by violence, coercion or deceit, or is made possible by the infirmity or physical or mental impairment of the victim"[431]. Marital rape is forbidden and condemned by the law as it represents an aggravating circumstance in cases of rape[432].

In Cyprus, the consent-based definition of rape is provided by section 144 of the Criminal Code, that claims: " any person who has unlawful carnal knowledge of a female, *without her consent*, or with the consent, if the consent is obtained by force or fear of bodily harm, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape"[433]. The abolition of marital rape is stated in article 5 of Law 212(I)/2004 on the Prevention of Violence in the Family and Protection of Victims[434].

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[429] Republic of Ireland, Irish Criminal Law Amendment Act (No.10), 6 May 1981, section 2
[430] Republic of Ireland, Irish Criminal Law Amendment Act (No. 32), 18 December 1990, section 5
[431]The kingdom of Belgium, Belgium Criminal Code, 8 June 1867 (amended in 2018), Chapter V, art. 375 (L. 04-07-1989, art. 1, 1°) (Italics added), PDF available at: https://www.legislationline.org/download/id/8240/file/Belgium_CC_1867_am2018_fr.pdf
[432] See https://eige.europa.eu/gender-based-violence/regulatory-and-legal-framework/legal-definitions-in-the-eu/belgium-rape (accessed August 30, 2020)
[433]The Republic of Cyprus, Criminal Code, 1959, chapter 154, Section 144 (italics added)
[434] The Republic of Cyprus, Law 212(I)/2004 on the Prevention of Violence in the Family and Protection of Victims, 1 March 2005, Part II, art. 5, PDF available at: http://www.familyviolence.gov.cy/upload/legislation/laws_2000_and_2004_en.pdf

In Luxemburg, the crime of rape is ruled in article 375 (L. 10 août 1992) of the Criminal Code, that defines rape as "any act of sexual penetration, of whatever nature, by any means whatsoever, committed on a person who *does not consent*, including using violence or serious threats by ruse or artifice, or abusing a person incapable of giving consent or free to oppose resistance, constitutes rape and shall be punished by imprisonment of five to ten years"[435]. With regard to marital rape, the crime is recognized in article 377(5) of the Criminal Code (L. 8 septembre 2003)[436].

A consent-based definition of rape is provided also by Iceland's legislative framework, which defines rape in article 194 of the Criminal Code *(*Lög nr. 16 5. apríl 2018), as occurring when *"*any person who has sexual intercourse or other sexual relations with a person without his or *her consent* (…). *Consent* is considered to have been given if it is freely stated. Consent is not considered to have been given if violence, threats or other forms of unlawful coercion are employed. 'Violence' here includes deprivation of freedom of action by means of confinement, drugs or other comparable means".[437] Marital rape is criminalized in article 70, which states that "if the action was directed against a man, woman or child closely related to the perpetrator, and the relationship between them is considered as having aggravated the seriousness of the offence, this shall normally be considered as aggravating the punishment"[438].

With reference to the German law on rape, which will be discussed in the next subparagraph, the crime is criminalized under section 177 of the German Criminal

[435]The Grand Duchy of Luxembourg, Criminal Code, 16 June 1879 (amended 2018), Title VII, Chapter V, art. 375 (L. 10 août 1992) (Italics added) PDF available at : https://sherloc.unodc.org/res/cld/document/lux/2014/criminal_code_of_luxembourg_html/cp_L2T07.pdf

[436] Ibid., art 377(5) (L. 8 septembre 2003)

[437] The Republic of Iceland, the General Penal Code (Act No. 19) (amended 2018), 12 February 1940, Chapter XXII, art. 194, (L. 16/2018, took effect 13 Apr. 2018) (Italics added), PDF available at: https://www.government.is/lisalib/getfile.aspx?itemid=dd8240cc-c8d5-11e9-9449-005056bc530c

[438] Ibid., art. 70 (L. 27/2006, 1. gr.)

Code (part 6)[439] and with regard to the marital rape, in 1997, Law 33 abolished the husband's exemption of raping his wife[440].

In Malta, the definition of rape was modified according to the Istanbul Convention in 2018: article 198 of the criminal Code states that "whosoever shall engage in *non-consensual* carnal connection, that is to say, vaginal or anal penetration of a sexual nature with any bodily part, and, or, any object, or oral penetration with any sexual organ of the body of another person shall, on conviction, be liable to imprisonment for a term from six to twelve years" (L. XIII.2018.24).[441] In 2005, the Law To Make Special Provisions For Domestic Violence introduced article 202(h) to the Criminal Code, including in the aggravating circumstances rape provoked by the current or former spouse[442].

Finally, Sweden adopted a consent-based definition of rape on 1 July 2018. The new provision of the Criminal Code defines rape as an act committed by "[o]ne who, with a person who is not participating freely, engages in intercourse or in another sexual act [that is comparable to unwanted intercourse because the violation of the victim is so severe] is guilty of rape and subject to imprisonment for no less than two years and no more than six years. In determining whether participation is voluntary or not, special consideration should be given to whether *the voluntariness* has been expressed through words or actions or in another way"[443]. Marital rape was criminalized in 1962[444].

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[439] The Federal Republic of Germany, Criminal Code, 13 November 1998 (amended 2019), Chapter 13, section 177, PDF available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1659

[440] 33rd Criminal Law Amendment Act - §§ 177 to 179 StGB (33rd StrÄndG), 5 July 1997, available at: https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl197s1607.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl197s1607.pdf%27%5D__1600786668056

[441] The Republic of Malta, Criminal Code, 10 June 1854 (amended 2018), Chapter 9, Title VII, Sub-title II, art. 198, (L. XIII.2018.24) (italics added) PDF available at: https://www.legislationline.org/download/id/8555/file/Malta_Criminal_Code_amDec2019_en.pdf

[442] Ibid., art. 202(h) (Act No. XX of 2005)

[443]The kingdom of Sweden, Criminal Code, 1 January 1965, Part II, Chapter 6, Section 1 (amended in 2018) (Italics added) PDF available at: https://www.government.se/49f780/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf

[444] Randall, Venkatesh, The Right to No: State Obligations to Criminalize Marital Rape and International Human Rights Law, 69

4.1.1 Should marital rape be a consent-based definition or a forced-based definition? A European overview.

According to a study by the Trauma Intervention Programs[445], reactions to sexual assault and rape cannot be classified in one single form of behaviour, identified with physical resistance by the victim. Indeed, there is evidence that the concept of "utmost resistance" as an essential proof the victim has to provide in order to demonstrate she has been rape cannot be considered a reasonable and assumed element. Indeed, according to this study, the imposition of physical force or even of intimidation to have a sexual intercourse does not imply directly the use of physical resistance by the victim.

In the first chapter, this thesis argued how the concept of physical force can play a fundamental role in submitting the weaker (physically speaking) sex and how this often happens in male-female relations given their different biological features. The Trauma Intervention Programs research underlined how the use or the threat of physical force, or even the hypothesis that it can be used if the victim does not obey to the perpetrator, makes the victim feel powerless and helpless. During a sexual assault, "sensing that her survival is at stake, she submits, hoping to avoid several physical injury or death"[446] by not resisting. Thus, even when force is not used the fear the victims have of the violation to end in an act of severe physical injury or death makes them "accept" the sexual assault.

A definition of rape based on the presence of force denies the *mens rea* itself of the crime, considering the result of the action (namely the use of force) to be the main structural element. It overshadows the initial intention in committing the act, which is the cause of the violation. There is evidence, though, that the definition of rape cannot be precluded to the presence of physical force (by the perpetrator or by the victim in terms of "utmost resistance"): on one hand with the analysis of marital rape, this thesis has given evidence that not all kinds of rape are supposed to involve the use of force; on the other hand, the reactions of the victim cannot be stereotyped

[445] See Trauma interventions Programs, *Rape: reactions of the victim*, PDF available at: http://www.tipnational.org/pdf/tRape_Reactions_of_the_Victim.pdf
[446] Ibid., 1

in the use of physical resistance, as they can be of different types given the presence of different factors involved, such as shock or fear.

In the second-half of the XX century, though, such debate on how defining the crime of rape opened up at the international level. Paladin of the consensus-based definition, in this context, has been the Council of Europe. As already anticipated in the second chapter, the approach adopted in the Istanbul Convention toward the definition of rape considers the element of consent as predominant in determining if the crime consists of rape or not.

Article 36 of the Conventions rules on sexual violence, including rape, and states that:

"1. parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

(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.

2. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances;

3. Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law"[447].

As provided by article 36, the first paragraph covers all forms of sexual assault against another person, committed intentionally. It is important to point out the relevance of the aspect of the intentionality of the conduct in committing rape: as already discussed previously in chapter two, indeed, denying the *mens rea* (and thus the intention of the perpetrator, giving the surrounding circumstances) behind

[447] CoE, Istanbul Convention, art. 36

the crime of rape would deny the crime itself. The violence exercised on the woman cannot be proved by the refuse of the woman to engage in a sexual act or by the concept of "utmost resistance", but it originates in the intention of the rapist to discriminate and violate the woman, because she is a woman. Thus, the violation of the principle of non-discrimination that lays as the base of any type of gender-based offence must be searched first of all in the intentionality of the accused, given the surrounding circumstances. Moreover, not recognizing to the perpetrator the intentionality of his conduct would deny him the right to personal autonomy as the capacity to decide and to be responsible for one's own actions, even if in this case with negative consequences obviously. However, the interpretation of the word "intentionally" depends on the margin of appreciation States have according to the Istanbul Convention[448], taking into consideration also the competency to stand trial of the accused.

With regard to the element of consent, a landmark judgment establishing that lack of violence does not mean consent was provided in *M.C. v. Bulgaria* (2004). The case concerned a Bulgarian adolescent who filed a complaint to the European Court of Human Rights. She alleged two episodes of rape by two different men on 31 July and on 1 August 1995, when she was 14 years old. After the girls reported the rapes to the police on 11 August, on 14 November 1995 a public prosecutor opened a criminal investigation into the case and referred the case to an investigator. In her interview, the girl affirmed that she had not the strength to resist violently and that she had only begged the man to stop, in contradiction with the accused men's position that argued that the girl had engaged in the sexual intercourse freely and consensually.

"On 17 march 1997, the prosecutor ordered the closure of the criminal investigation because the force or threats against M.C. had not been established

[448]Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Explanatory Report, 7 April 2011, para 189 (hereinafter Explanatory report of the Istanbul Convention), PDF avaible at: https://eige.europa.eu/resources/Explanatory%20report.pdf

beyond reasonable doubt. (…) In particular, no resistance on the applicant's part or attempts to seek help from others had been established".[449]

After exhausting all remedies at the national level, the girl submitted the case to the ECtHR. With reference to the element of intentionality, the European Court affirmed that "it appears that the prosecutors did not exclude the possibility that the applicant might not have consented, but adopted the view that in any event, in the absence of proof of resistance, it could not be concluded that the perpetrators had understood that the applicant had not consented. (…) The prosecutors forwent the possibility of proving the perpetrators' *mens rea* by assessing all the surrounding circumstances, such as evidence that they had deliberately misled the applicant in order to take her to a deserted area, thus creating an environment of coercion"[450]. The Court added that "while in practice it may sometimes be difficult to prove lack of consent in the absence of 'direct' proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent"[451]. Indeed, according to the ECtHR, the approach was particularly restrictive, considering "resistance" as a defining element of the offence. The Court reiterated that "any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 *(prohibition of degrading treatment)* and 8 *(right to respect for private and family life)* of the Convention (ECHR) must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim"[452].

[449] *M.C. v Bulgaria*, application 39272/98, judgment of 4 December 2003, European Court of Human Rights, Eur. Ct. H.R., 39272/98 (2003), para. 61
[450] Ibid., para. 180
[451] Ibid., para. 181
[452] Ibid, para. 166 (Italics added)

MC v. Bulgaria, thus, was the first case linking the crime of rape to the absence of consent and not to the presence of force and coercion. Moreover, as underlined by the Explanatory Report to the Istanbul Convention, "prosecution of this offence will require a context-sensitive assessment of the evidence in order to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed"[453]. It means that in addressing the crime of rape the approach should be opened to recognise a wider range of behavioural responses to sexual violence that cannot be strictly categorized and stereotyped.

With reference to the element of consent as a structural element in determining the crime of rape, paragraph 2 of article 36 only specifies that it must be given voluntarily as the result of the person's free will, as assessed in the context of the surrounding circumstances, leaving a margin of appreciation to the States "to decide on the specific wording of the legislation and the factors that they consider to preclude freely given consent"[454]. Regarding this last point, even if it is given relevance to the element of consent, according to this thesis the margin of appreciation States have in defining freely and genuine consent could discriminate the human rights violated by the crime of rape, depending on the national legislation. It would be appropriate, according to this thesis, for a single definition of consensus to be adopted at European level in order to guarantee protection and justice for all victims of rape under the Istanbul Convention and, thus, guaranteeing the universality of the rights violated, regardless of the national interpretation of the notion of "consent".

Finally, the last paragraph of article 36 takes into consideration the crime of marital rape, requiring States to adopt a consent-based definition in order to criminalize all non-consensual sexual acts, irrespective of the relationship between the perpetrator and the victim. Such provision is established also in article 43 of the Istanbul convention toward any type of criminal offence. Moreover, the Explanatory report of the Istanbul Convention explicates that, being a large number of the offences established in this Convention typically committed by family members,

[453] CoE, Explanatory report Istanbul Convention, para. 192
[454] Ibid., para. 193

intimate partners or others in the immediate social environment of the victim, whose most prominent example is rape within marriage, "it necessary to establish the principle that the type of relationship between victim and perpetrator shall not preclude the application of any of the offences established in this Convention"[455].

As already argued at the end of the first paragraph of the second chapter, the consent-based definition of rape is thus expressed in the phrase "yes means yes", meaning that to prove it is not rape, the woman has to express explicitly her consent: she has to say "yes" as an expression of her personal autonomy. Consequently, according to this view, the absence of consent cannot be considered a valid element in affirming it is not rape. However, it is important to reiterate the feminist critic already discussed in the second chapter toward the "yes means yes" model, because as it could be argued that abstentionism from saying "yes" or "no" could be the result of different types of violence (such as psychological or verbal violence), also in the case of saying "yes", there is no certainty that that "yes" is free from any form of coercion on the woman and thus is the expression of effective genuine consent. Nevertheless, a difference between abstentionism and explicit consent is evident: saying "yes" means expressing one's own will, one's own individual and personal autonomy, and thus it makes the subject feeling more responsible for her decision (even if in coercive circumstances). This explains why it is more difficult to consent to an unwanted sexual act and why abstentionism prevails in such situations.

Such criticism raises the issue of defining "consent" in law as it collocates the notions of consent and martial rape in a wider framework that cannot be leave apart: society. In order to address the crime of rape in its various forms, the notion of consent is fundamental as well as it is equally important to create the conditions for such a concept to be genuine and free. It means combating discrimination against women not only in terms of violence within the home, but in a broader sense by challenging societal stereotypes and myths developed over history and which for too long have destined the female gender to submission on the basis of unproven ideas.

[455]Ibid., paras. 219-220.

4.1.2 Consent and the problem of "no means no" model: the German law.

After giving evidence of the necessity of defining rape in terms of consent, two models have developed: the "no means no" model and the "yes means yes" model. The following subparagraph will address the former one in relation to the German case, conceived as an intermediary legislative step toward the "yes means yes" model. Indeed, the "no means no" model does not perfectly reflect the Istanbul Convention definition of consent as it is based of affirming, not the willingness, but the unwillingness of a person in engaging in sexual acts, given for granted the constant consent to have a sexual intercourse.

In Germany, the key event, that gave rise to a strong wave of protests in the second-half of 2010s, was the dozens of sex assaults that took place in Cologne during the New Year Eve, in 2015. It was a shocking event in Germany that gave rise to protest all over the country, as the problem did not concern an occasional event but it was widespread at the national level (in particular also in Hamburg and in Stuttgart). Moreover, what disconcerted the protestants were the final verdicts regarding the sexual assaults in Cologne, of which only few women resulted to be raped as, according to the German Law then in force, "physical resistance" by the victim had to be proven.[456]

Until 2016, under the German Law, the crime of rape or sexual coercion was defined in the following way in Section 177 of the old version of the German Criminal Code, that claimed: "(1)who coerces another person (1)by force, (2)by threat of imminent danger to life or limb, or (3)by exploiting a situation in which the victim is unprotected and at the mercy of the offender, to suffer sexual acts by the offender or a third person or to engage in sexual activity with the offender or a third person, will be punished with imprisonment of not less than one year"[457]. Rape was classified within the category of especially serious crimes, occurring if "(1)the

[456] BCC (2016) "Germany shocked by Cologne New Year gang assaults on women", available at: https://www.bbc.com/news/world-europe-35231046 (accessed September 5, 2020)
[457]Tatjana Hörnle (2017) "The New German Law on Sexual Assault and Sexual Harassment", in *German Law Journal*, 18(6), 1310, PDF available at: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/C8FAD908DD7B6ECC28C6CF36BD9603BE/S2071832200022355a.pdf/new_german_law_on_sexual_assault_and_sexual_harassment.pdf

offender performs sexual intercourse with the victim or performs similar sexual acts with the victim or makes the victim perform acts with him that degrade the victim, particularly if they entail penetration of the body (rape), or 2. the offense is committed jointly by more than one person"[458]. Despite being amended several times (for example, with the introduction of marital rape in 1997), the foundations of the law were never revisited and rape continued to be conceived as an act resulting from the use of force.

As reported by Tatjana Hörnle in her article "The new German law on Sexual Assault and Sexual Harassment", on 29 January 2015, the Federal Court of Justice judgement demonstrated the loopholes in the old Criminal Code. The case was not the one concerning the Cologne Sexual Assault, but regarded a manager at the State's employment agency who abused of a young female client during an appointment to his office. She had oral sex on him, even if she had refused previously. Her reaction to the act committed by the man did not resulted in physical resistance, but she just remained sitting on the visitor's chair, so that he did not need to use force on her. After that, he masturbated standing next to her. The Court accused him of exhibitionism and for masturbation, but did not sentenced him for rape, as penetration was not considered a criminal offence since none of the circumstances of section 177 (1) were present.[459] Express refusal was not considered to be enough.

In November 2016, the German Law was changed following both the consequences of the ongoing protests born in the Cologne gang assaults as well as the pressure exorbitated at the international and regional level in order to modify the national law of rape according to the consent-based definition. Indeed, already in 2012, UN had highly recommended States to "remove any requirement that sexual assault be committed by force or violence (…) by enacting a definition of sexual assault that either: requires the existence of 'unequivocal and voluntary

[458] Ibid., 1311
[459] Ibid., 1313

agreement' and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; …"[460].

With the adoption of the new German definition of law on 7 July 2016, the requirement for the victim to physically resist in order to prove rape was repealed. The definition of rape is provided in Section 177 of the German Criminal Code, amended in 2016 and entitled "Sexual Assault, Sexual Coercion, Rape", and it states: " (1)whoever, against a person's discernible will, performs sexual acts on that person or has that person perform sexual acts on them, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person incurs a penalty of imprisonment for a term of between six months and five years."[461].

Thus, according to the first paragraph of section 177, the introduction of recognizable will introduced the concept of consent in the definition of rape, sexual assault and sexual coercion, even if expressed in the negative consent by the person in engaging in a sexual act. Indeed, the German model is based on the "no means no" model, according to which the adverse will of the victim to take part to a sexual intercourse must be expressed: in this case, no is enough. Then, paragraph 2 presents a set of situations where the victim could not have the possibility to express an adverse will, including situations of loss of consciousness through anaesthesia, sleep, coma, drugs, alcohol or of severe mental handicap. Such circumstances are the following: if "(1)the offender exploits the fact that the person is not able to form or express a contrary will, (2) the offender exploits the fact that the person is significantly impaired in respect of the ability to form or express a will due to said person's physical or mental condition, unless the offender has obtained the consent of that person, (3) the offender exploits an element of surprise, (4) the offender exploits a situation in which the victim is threatened with serious harm in case of

[460] UN Women(2012) "Handbook for Legislation of Violence against Women", 24, PDF available at: https://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women

[461] The Federal Republic of Germany, Criminal Code, 13 November 1998, Chapter 13, section 177 (amended in 2019), PDF available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1659

offering resistance or (2) the offender has coerced the person to perform or acquiesce to the sexual acts by threatening serious harm" [462].

According to this thesis, in line with the Istanbul Convention, the "no means no" model presents two critical aspects. First of all, despite taking into account specific cases in point in which it is not possible to say "no" (such as those provided in paragraph 2 of section 177 of the German Penal Code), it is difficult for the law to cover all possible circumstances or adopt a coherent line of interpretation when analysing the victim's inability to refuse the sexual act. Indeed, not only States of unconsciousness, alcohol, drugs, mental or physical inability make a person unable to consent. As provided by the previously argued Trauma Intervention Programs' study, also fear, anxiety, shock, intimidation, power relations, academic evaluations, among other reasons, are situations that restrict the "no" of a victim or even nullify it. The affirmation of "yes", on the other hand, would, in general, provide for the existence of an actual will on the part of the victim: "no" is a passive affirmation, as a response to an act performed by others; "yes" is an active affirmation, as it expresses the will of the woman herself. Secondly, the "no means no" model implies that the absence of non-consent coincides with the will of the victim to have sexual intercourse, thus denying the concept of rape provided for by the Istanbul Convention.

Though, as already anticipated at the beginning of the paragraph, achieving the "no means no" model in law could be seen as an intermediate step toward the more complete "yes means yes" model. Such model developed in the United States, within the academic context, and was firstly recognized in California in 2014, followed by the State of New York in 2015 under a different (even if with the same meaning) slogan: "Enough is Enough".[463]

[462] Ibid.
[463] Vidu, A., Martínez, G., T. (2019) "The Affirmative "Yes". Sexual Offense Based on Consent", in *Masculinities and Social Change,* 8(1), 99, PDF available at: https://hipatiapress.com/hpjournals/index.php/mcs/article/view/3779/pdf

4.1.3 Consent and force: "*La Manada*" case in Spain.

The same year of the Cologne sexual assaults in Germany, in 2016 in Spain another judgment caused protests to arise all over the country. It concerned the so-called "*La Manada*" Spanish case, whose final judgment has only recently been overturned by the Spanish Supreme Court.

The case concerned the rape of a young girl by five boys, during the bull-running festival in Pamplona. On 7 July 2016, the accused were in plaza del Castillo in Pamplona, where they met the victim, a 18 years old girl, who was at the festival with a friend, even if at that moment she was alone. It was 2.50 a.m. and at a point the girl pointed out to them that she was retiring to sleep in the vehicle with which she had come to Pamplona. The accused told her that they would accompany her.

According to the prosecution the boys had already worked out the idea of intentionally abusing the girl. In fact, on the way to the car the boys had looked for a free room in a hotel, unsuccessfully. As they could not find a room, they continued walking together and when they reached the confluence of Paulino Caballero and Roncesvalles streets, one of them realised that a woman was going to enter a building, so he approached her and pretended that he was staying in one of the houses, which made it easier for him to go through his companions alone. Two of them grabbed the girl by the arms and put her in the doorway, threatening her not to scream, and in a small space, surrounded her, pulled her down, stripped her and forced her to perform different sexual acts (including vaginal and anal penetration) with each of them. Their physical and numerical superiority that did not allow the girl to exercise even the slightest resistance and, in order to increase her vulnerability, two of them filmed the scene. At 3.30 a.m., when they went away, they left the girl alone without her mobile phone. The girl was founded by a couple of citizens outside the door of a bank and she was brought to the hospital, where she was found to have an erythematous lesion in the vaginal area. The same day the girl denounced the violation to the police and the boys were arrested. The defendant declared themselves innocent, affirming the girl's consent in taking part to those sexual acts.

The first judgement was decided on 20 March 2018 and it declared the crime committed by the gang to be a sexual abuse, being absent the presence of violence in inducing the girl in engaging in sexual acts. Indeed, in Spain, sexual offences are ruled in chapter I and chapter II of Title VIII of the Criminal Code, and are divided into two categories: sexual abuse[464] and sexual aggression or assault[465], which differs from the former as involving the use of violence or intimidation.

As stated in the sentence, "*las acusaciones no han probado el empleo de un medio físico para doblegar la voluntad de la denunciante , que con arreglo a la doctrina jurisprudencial implica una agresión real más o menos violenta, o por medio de golpes, empujones, desgarros; es decir, fuerza eficaz y suficiente para vencer la voluntad de la denunciante y obligarle a realizar actos de naturaleza sexual , integrando de este modo la violencia como elemento normativo del tipo de agresión sexual*"[466]. Though, according to the Secciòn Segunda de la Audiencia Provincial de Navarra, in spite of the recognition of the non-given consent to have a sexual intercourse by the girl, the crime could not be judged as rape, as there was no sign of the use of force nor intimidation. Moreover, the attitude of the girl was described as "passive suffering", without giving evidence of any act or threats designed to intimidate her. The perpetrators were condemned to 9 years of prison.[467]

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[464] The Kingdom of Spain, Criminal Code (Organic Act 10/1995), 23 November 1995 (amended 2013), Book II, Title VIII, Chapter II bis, art. 181(1) on sexual abuse: "whoever, without violence or intimidation and without there being consent, perpetrates acts against the sexual freedom or indemnity of another person, shall be convicted of sexual abuse, with a sentence of imprisonment from one to three years or a fine of eighteen to twenty-four months", PDF available at: https://www.legislationline.org/download/id/6443/file/Spain_CC_am2013_en.pdf

[465] Ibid., art. 178-179. Sexual aggression is ruled in articles 178 and 179 in the forms of sexual assault and rape, which differs from the former one as it results in the act of penetration. Article 178 claims that "whoever offends against the sexual freedom of another person, using violence or intimidation, shall be punished for sexual assault with a sentence of imprisonment from one to five years"; article 179 states: "when sexual assault consists of vaginal, anal or oral penetration, or inserting body parts or objects into either of the former two orifices, the offender shall be convicted of rape with a sentence of imprisonment from six to twelve years", PDF available at: https://www.legislationline.org/download/id/6443/file/Spain_CC_am2013_en.pdf

[466] La "Manada" case, judgment Nº 000038/2018, Sección Segunda De La Audiencia Provincial De Navarra, 20 March 2018, p. 96, PDF available at: https://www.elplural.com/sociedad/documento-lee-aqui-la-sentencia-completa-de-la-manada_126896102

[467] BBC (2018) "Spain 'wolf pack' sex attack gang not rapists, say judges", available at: https://www.bbc.com/news/world-europe-46452894 (accessed September 6, 2020)

Following the judgment, "*La Manada*" case originated a series of protests all over Spain: indeed, despite being the sentence much lower than the one requested by the prosecutor (which consisted of 22 to 26 years in prison), the non-recognition of the crime of rape revealed the unacceptability of the legal definition of rape as an act resulting from the imposition of physical force at the civil society level. Indeed, the judgement of 20 march 2018 on "*La Manada*" case, that accused the five boys of the crime of sexual abuse, was, first of all, discriminative toward the woman, refusing to take into account the shocking situation, in which the girl found herself, as an aggravating factor[468], that did not make the use of force explicitly necessary. Secondly, it reduced the degree of seriousness and dangerousness of the intentionality of the rapists in committing the crime, since they had not exerted physical violence on the victim.

On 5 December 2018, the Court confirmed the sentence of March 2018: this signed the increase in the wave of protests that had started the previous year as well as attracted even more the attention of international and regional institutions, that had already urged Spain to change its rape law in the months following the first judgment. Indeed, on 7 May 2018, Purna Sen, the UN Women's Executive Coordinator and Spokesperson on Sexual Harassment and Other Forms of Discrimination claimed in a statement: "impunity for human rights violations permeate rape culture, blame and judge victims for wrongs done to them, and cannot be allowed to continue—including in criminal justice systems. The light sentencing of 'the wolf pack' attackers in Spain diminishes the severity of the violation and undermines clear obligations to uphold the rights of women. Justice must be known by women".[469] Also the European Parliament pronounced on the

[468]See La "Manada" case, judgment Nº 000038/2018, Sección Segunda De La Audiencia Provincial De Navarra, 20 March 2018, p. 42, PDF available at: https://www.elplural.com/sociedad/documento-lee-aqui-la-sentencia-completa-de-la-manada_126896102

[469] Statement from Purna Sen, UN Women's Executive Coordinator and Spokesperson on Sexual Harassment and Other Forms of Discrimination, 7 May 2018, available at: https://www.unwomen.org/en/news/stories/2018/5/statement-purna-sen-sexual-harassment-and-discrimination

judgment in an extraordinary debated held on 2 May 2018, reiterating the duty of States to modify their law according to the Istanbul Convention.

On 21 June 2019, the judgment was overturned, after the case was submitted to the Supreme Court of Navarra. The Supreme Court declared the crime committed to amount to rape, stating that "*los hechos probados (…) no pueden constituir un delito de abuso sexual, sino un delito de violaciòn, sinedo incorrecta port tanto la calificaciòn jurìdica de los mismos, y ello porque el relato factico describe un autentico scenario intimidatorio, e nel que la vìctima en nigùn momento consiente a los actos sexuales llevados a cabo por los acusados. Situaciòn intimidante que hizo que la misma adoptara una actitud de sometimiento, hiciendo lo que los autores le decìan que hiciera, ante la angustia e intense agobio que la situaciòn le produjo por el lugr recòndito, angosto y sin salida en el que fue introducida a la fuerza, y las circumstancias personales de la vìctima y de los acusado, lo que fue aprovechado por ellos para realizar los actos contra la libertad de aquella, al menos, diez agresiones sexuales con penetraciones bucales, vaginales y anales*"[470].

As consequence to the wave of protests arisen by "*La Manada*" case, in Spain the draft on a new law redefining the crime of rape was introduced to the parliament, with the aim of adopting a consent-based definition of the crime in line with the approach adopted by the Istanbul Convention[471].

[470] See "*La Manada*" case, judgment Nº 98/2020, Navarra Supreme Court, 21 June 2019, PDF available at: https://www.20minutos.es/noticia/3679147/0/sentencia-final-la-manada/
[471] (2020) "Spain approves draft law to strengthen rape convictions", *The Guardian*, available at: https://www.theguardian.com/world/2020/mar/03/spain-approves-draft-law-to-strengthen-convictions (accessed September 7, 2020)

4.2 Marriage as a settlement: the Turkish case.

The following paragraph will focus on another approach contrary to the Istanbul Convention, provided by the proposal of the bill "Marry-your-rapist" by the Erdoğan Turkish government on 16 January 2020.Turkey became the thirteenth member State of the Council of Europe on 13 April 1950. It ratified the ECHR on 18 May 1954 and the Istanbul Convention on 14 March 2012. Moreover, in order to analyse the Turkish situation with reference to the phenomenon of rape within marriage, it is fundamental to point out other two conventions Turkey is part of: the CEDAW, ratified on 20 December 1985 and the Convention on the Rights of the Child (CRC), ratified on 4 April 1995.

Turkish Criminal and Civil Law tradition was born in 1926 with the adoption of the first Turkish Criminal and Civil Codes. Although the Codes ruled the laws of the new nation of Turkey, the historical ottoman culture of the Turkish society was not totally left apart. Indeed, besides important amendments to the Civil Code, especially in the area of family law[472], the first Turkish legislation (civil and criminal) was gender discriminatory toward women, both in the family as well as in the society. Many patriarchal values, rooted in the Islamic tradition, remained intact: the husband was considered to be the head of the family (art. 152) and his last name became the family name (153). He represented the family union (art. 154) and was responsible for the wife (155). Discrimination within the family had its repercussion also outside the familiar context: indeed, wife's right to work outside the home was subject to the husband's permission, unless the wife asked for such permission to the courts (art. 159).[473] The Islamic influence was also present by the use of specific terms in addressing gender-violence not as such, but with reference to other types of crime: for example, the Islamic term *zina*, meaning illicit sex, referred to adultery, rather than to rape.[474]

[472] Examples were the modification of the minimum age for marriage from nine for girls and eleven for boys (according to the Islamic law) to respectively 15 and 17, the abrogation of polygamy, or the equal entitlement to divorce.
[473] The Republic of Turkey, Civil Code, 17 February 1926
[474] Yildirim, S. (2005) *"Aftermath of a Revolution: A Case Study of Turkish Family Law"*, in Pace international Law Review 347, 17(2), 360, PDF available at: https://core.ac.uk/download/pdf/46711739.pdf

The new 2001 Civil Code was more based on gender-equality, even if didn't resolve completely the issue of discrimination against women. Important amendments were introduced, in particular with reference to the familiar context, such as the denial of supremacy of men in marriage, the establishment full equality of men and women in the family; the modification of the minimum age for marriage to 17 for both women and men (previously 17 for men and 15 for women); the settlement of the equal division of property acquired during marriage as a default property regime; the possibility for single parents to adopt children and giving equal inheritance rights to children without distinguishing if born outside or within marriage; the amendment of article 41 of the Constitution, affirming that "family is the foundation of the Turkish society and based on the equality between the spouses"[475].[476]

In 2004 new fundamental amendments were introduced in relation to criminal law, following an intensive campaign of the women's movement, the Campaign on the Reform of the Turkish Penal Code from a Gender Perspective. First of all, all forms of sexual violence, that were previously regulated as "crimes against society, public and morality" and were defined in terms of patriarchal constructs such as chastity, morality, shame, public customs, or decency, were subsequently included in the chapter of "offences against the person" under the section "offences against sexual integrity", Another fundamental change introduced in article 102 was the abolition of marital rape, affirming that "If the act is committed against the offender's spouse, conducting an investigation and prosecution shall be subject to a complaint by the victim"[477].

Thus, with reference to violence against women, under Turkish criminal law, the crime of rape is set within chapter II as an offence against the person, and in particular in part 6 within the category of crimes against sexual integrity. Crimes

[475] The Republic of Turkey, Constitution of the Republic of Turkey, 7 November 1982 (amended on July 23, 1995; Act No. 4121), art. 41 (Paragraph added on October 3, 2001; Act No. 4709), PDF available at: https://global.tbmm.gov.tr/docs/constitution_en.pdf
[476] Yildirim, Aftermath of a Revolution: A Case Study of Turkish Family Law, 365
[477] The Republic of Turkey, Criminal Code, January 2001 (amended in 2016), art. 102(2), PDF available at:
https://www.legislationline.org/download/id/6453/file/Turkey_CC_2004_am2016_en.pdf

against sexual integrity includes: sexual assault (art.102), sexual exploitation of children and children molestation (art. 103), sexual intercourse between/with persons not attained to the lawful age[478] (art. 104) and sexual harassment (art. 105). The crime of rape belongs to the category of sexual assault crimes (art.102.2), according to which: "(1) Any person who violates the physical integrity of another person, by means of sexual conduct, shall be sentenced to a penalty of imprisonment for a term of two to ten years, upon the complaint of the victim. If the said sexual behaviour cases at the level of sexual importunity, the term of imprisonment shall be from two years to five years. (2) Where the act is committed by means of inserting is committed by means of inserting an organ, or other object, into the body, the offender shall be punished with a term of imprisonment no less than twelve years. If the act is committed against the offender's spouse, conducting an investigation and the prosecution shall be subject to a complaint by the victim. (3) Where the offence is committed: a) against a person who is physically or mentally incapable of defending themselves; b) by misusing the influence derived from a position in public office or a private working relationship; c) against a person with whom he has third degree bool relation or kindship, or by stepfather, stepmother, half-sibling, adopter or adopted child; d) by using weapons or together with the cooperation of more than one person; e) by using the advantage of the environment where people have to live together collectively, the punishments imposed according to above paragraphs are increased by one half. (4) When greater force than is necessary to suppress the resistance of the victim is used during the commission of the offence the offender shall also be sentenced to a penalty for intentional injury in addition. (5) Where, as a result of the offence, the victim enters a vegetative state, or dies, a penalty of aggravated life imprisonment shall be imposed"[479].

In paragraph 2, the crime of rape is not explicitly mentioned. Being part to the broader definition of sexual assault, it is conceived as a violation to the personal integrity of the person. The provision includes also the case of marital rape, if the complaint by one of the spouses is filed to the Court. Furthermore, what lacks in the

[478] Ibid., art. 6(a)
[479] Ibid., art. 102

definition of the crime is the concept of consent as provided by the Istanbul Convention. Indeed, article 102 is not very clear in providing the structural elements for which an act is supposed to be rape (except for the act of penetration): in paragraph 3, it addresses situations aggravating the penalty for the crime, and in paragraph 4 it deals with the concept of force, affirming that where the offender uses more force than the necessary to commit the act, the sentence shall be more serious given the evidence of the intentionality in provoking injuries, but there is no explicit reference to the notion of consent as primordial element in defining rape.[480]

Although with the adoption of the new Civil and Criminal Codes, women's rights in Turkey have gained greater recognition in terms of gender equality (at least formally), gender discrimination is still well rooted at the cultural level. The most striking example was provided by the Turkish government's "Marry- your-rapist" bill in 2020. According to the bill, the age difference between the victim and the perpetrator should not be more than 15, the perpetrator should not be married and the victim should not file a complaint after the sexual assault in order for the perpetrator to avoid sentence.[481] "Marry you rapist" law concerns marriage as a settlement for criminal acts such as rape: it allows the perpetrator to avoid punishment if he marries his victim. Such bill was not new to the Turkish parliament as it had already been proposed in 2016 and ultimately withdrawn, following widespread international and national protests.[482]

Regardless of all the possible reasons that the Turkish government could have in supporting this bill[483], "marry-your-rapist" is the most striking example of

[480] Moreover, it is important to point out that intentionality is not provided by the degree of force used on the victim. Indeed, according to such approach the *mens rea* would be provided only by a forced-definition of rape.

[481](2020) "Turkish government's 'marry-your-rapist' draft law causes uproar on social media", in duvar.english, available at: https://www.duvarenglish.com/human-rights/2020/04/14/turkish-governments-marry-your-rapist-draft-law-causes-uproar-on-social-media/ (accessed September 13, 2020)

[482] Dannies, K. (2020) "Turkey's 'marry your rapist' bill is part of a disturbing global pattern", in *The Washington Post*, available at: https://www.washingtonpost.com/opinions/2020/01/29/turkeys-marry-your-rapist-bill-is-part-disturbing-global-pattern/ (accessed September 13, 2020)

[483]Ibid. Turkey has a history of introducing legislation designed to promote population growth. Over the past two decades, the Turkish state has slashed social welfare benefits, introducing policies designed to lessen state spending on care while promoting the family as a social safety net. The proposed "marry your rapist" legislation would support these aims by converting imprisoned perpetrators from dependents of the State to husbands and providers. Resistance to raising legal

all the violations resulting from the act of rape analysed in this thesis. First of all, it denies the inherent criminal nature of the crime itself as well as the character of inviolability of all those rights violated[484]. Indeed, guaranteeing the impunity of the act through marrying the victim denies the universality of the concepts of bodily integrity and sexual autonomy as well as the nature itself of *jus cogens* norms, such as the right to life or the right not to be subjected to torture or cruel, inhuman or degrading treatments, that are violated. It would mean that if a person is raped, without marry her prosecutor, her rights have been violated; but if the victim marries her perpetrator, thus, her rights are no more considered to be violated. Universalism of human rights loses its real meaning. Furthermore, the element of intentionality would also be discredited. The *mens rea* would no more be taken into account: if the result of the act goes unpunished, it does not matter if the rapist was aware or not that he was committing a violation, abolishing the intentionality of the rapist in committing the act.

Secondly, the proposed bill contradicts the meaning of the marriage as resulting from the free, voluntary and equal choice of the man and the woman. Indeed, even if the Turkish Constitution and the Civil Code does not provide for a clear definition of marriage, Turkey has international obligations to comply with, being part to the CEDAW[485], to the ICCPR[486] and to the UDHR[487], which claim for the free and full consent of the intending spouses to engage.

Thirdly, "Marry your rapist" makes the marital rape exemption to revive, providing a fertile ground for future assaults. Indeed, if by marrying the victim, the crime of rape can be cancelled, how will it be addressed after marriage?

"Marry-your-rapist" is not only an illegal bill, violating both the actual Turkish law and international laws on rape: it is the expression of the still well-rooted perception of the woman as the second-category sex. It reflects all the

marriage ages has arisen from similar anxieties about welfare spending, population growth and out-of-wedlock births.

[484] See chapter 3, paragraph 2.

[485] UN General Assembly, CEDAW, art. 16(a) (b)

[486] UN General Assembly, ICCPR, art. 23(3)

[487] UN General Assembly, UDHR, art. 16(2)

contradictions among societal traditions, culture, morals and ideologies, from which the law itself has taken form. The moral dimension, in its broader sense, includes different facets, some in line with the development the gender-equality culture of the contemporary society; others, based on cultural and religious dogmas and convictions, in contradiction with the moral standard of the "reasonable man" adopted in defining the inviolability of human rights.

Even at the international level, this bill had already attracted the attention of international institutions, when was firstly proposed in 2016. In the CEDAW Concluding observations on the 7th periodic report of Turkey, the Committee expressed its preoccupation for the diffusion and enforcement of patriarchal values as well as gender-discriminatory approaches toward women in the Turkish society, noting with concern that high-level representatives of the Government had, on several occasions, made discriminatory and demeaning statements about women who do not adhere to traditional roles. It, though, recommended the State party to adopt a comprehensive strategy to eliminate patriarchal attitudes and stereotypes on women through education and the creation of awareness on the issue in society, in conformity with the provisions of the CEDAW.[488]

With reference to the Istanbul Convention, also the GREVIO expressed its view on the Turkish situation in 2018. According to the 2018 GREVIO Report on Turkey, the Istanbul Convention Committee recommended the country to take measures in order to adopt completely rape laws to the provisions of the Istanbul Convention. Recommendations concerned the modification of the definition of rape in terms of consent (according to art. 36 of the Istanbul Convention) and the amendment of article 102(2) for what concerns marital rape: indeed, the Turkish Criminal Code criminalizes rape in marriage, depending in the complaint of the victim in contradiction with art.55 of the Istanbul Convention, which states that "parties shall ensure that investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 of this Convention shall not be

[488] UN CEDAW Committee (2016) *Concluding observations on the seventh periodic report of Turkey*, CEDAW/C/TUR/7, paras. 28-29, PDF available at: file:///C:/Users/HUAWEI/Downloads/CEDAW_C_TUR_CO_7-EN.pdf

wholly dependent upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings mat continue if the victim withdraws her or his statement or complaint"[489]. [490]

[489] CoE, Istanbul Convention, art. 55(1)
[490] GREVIO (2018) *Baseline Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention),* GREVIO/Inf(2018)6, 77-78, PDF available at: https://rm.coe.int/eng-grevio-report-turquie/16808e5283

4.3 The moral dimension of marital rape: a crime against "morality" in Belgium, Netherlands Luxemburg, Cyprus and Poland and the Albanian case.

The previous paragraphs have given evidence that, despite the ratification (or in some cases only the signature) of the Istanbul Convention, many European States still have not modified their law in relation to the crime of rape on a consent-based definition. The element of consent is not only necessary because it reflects the notion of individual autonomy, but also because it could solve the difficulty in recognizing marital rape through a forced based definition. Indeed, generally speaking, how can you prove violence in a relationship that should be based on love and affection, where there are no consistent proofs of the use of physical force? It is more difficult to demonstrate when rape occurs between spouses, while it is easier to address where it occurs in other kinds of situations (where love and affection are not assumed).

Even if some States have started to take action in order to respect their international duties in amending their legislation on a consent-based definition of rape, the social and moral dimension of the crime in question still weighs on the formal and (where already formally recognized) substantial recognition of rape. As already affirmed by the UN Security Council Resolution 1325, indeed, the criminalization of violence against women in law is not is isolated from the social context in which the law itself operates: a social context composed of a net of different values, ideologies, cultures and traditions not always in accordance with what is morally accepted by law[491]. Even in countries where rape is formally recognized as a crime (despite not according to the Istanbul Convention), the previous paragraphs have reported blatant examples of a misogynist conception of the act of rape, in relation to "*La Manada*" and to the Turkish government bill on "marry your rapist". However, such sexist and patriarchal approach is not an inherent feature of the man as such, rather it is rooted in the moral dimension from which law has been created.

[491] Supra note 296, UN Security Council, *Security Council resolution 1325 (2000) [on women and peace and security]*, 31 October 2000, S/RES/1325 (2000), preamble

According to the Oxford Dictionary, "morality" is defined in relation to "a character or disposition, considered as good or bad, virtuous or vicious; or pertaining to the distinction between right and wrong, or good and evil, in relation to the actions, volitions, or character of responsible beings"[492]. Law and morality are intimately related to each other, insomuch laws are generally based on the moral principles of society and they both aim at regulating the conduct of the individual.

According to Arthur Scheller, the relation between law and morality articulates in different forms. First of all, laws are necessary in society, because they are the means to attain the goal of the States, consisting in preserving the "common good", in other words "peace" [493]. In this regard, law is strictly linked to morality in setting forth those virtues that guarantee the survival of society itself. Secondly, law is related to morality as originating from moral principles (such as natural moral law). Thirdly, law is related to morality insomuch the basic concept of justice, on which law is based, is a moral concept and would be meaningless outside the area of morality.[494]

However, morality does not play a fundamental role for what regards the application of positive law, but it is rather considered for what regards the creation, interpretation and modification of the rights that, consequently, shall find expression in the law. It is in this regard, that the category of human rights is related to the concept of morality. Human rights have, indeed, been subjected to various forms of criticism in relation to their "moral dimension". Being the conception of right and law based on moral principles, how can human rights belong to human beings as such, thus free from any social, cultural and moral context? Does a concept of "moral universalism" really exist or is morality the specific result of a specific society?

This argument is infinitely broad and it is not the purpose of this thesis to deal with it. This thesis defends the universalist idea of human rights as belonging to

[492]Definition of "morality", available at: https://www.oed.com/oed2/00151262
[493]Scheller Jr., A. (1953) "Law and Morality", in *Marquette Law Review 319*, 36(3), 322-323, PDF available at:
https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=3196&context=mulr
[494] Ibid.

human beings as such, thus supporting the idea of a universal morality common to all men. Indeed, if the ultimate goal of all societies is the survival of society itself, there is a single original moral principle that will allow the State to pursue this goal through law.[495] As reiterated in "Public Morality and the Criminal Law" (1961), "society has a rights to pass moral judgments because the very notion of society implies a community of ideas, and, therefore, a common morality founded upon general agreement as to what is good and what is evil; and the individual must submit to the bondage of this common morality as part of the price which he must pay for the society which he needs. It follows that society has the right to legislate against anything that constitutes a breach of the common morality and, therefore, a threat to the common good"[496].

Though, for the scope of this thesis, the concept of morality is limited it to those values and principles rooted in society that circumscribe the category of human rights, but of which they are not part, and thus identifying it with the morality that reflects traditions, religions, cultures, ideologies that could contradict universally recognized human rights.

In addressing the crime of rape, the moral dimension plays a consistent role. Indeed, in many countries, rape and sexuality are expression of what belongs to public morality, honour, the family or public decency, rather than to the concept of integrity and autonomy of the person. As provided by Amnesty International, different European countries frame rape and sexual violence laws in terms of crimes related to "morality"[497].

In the Netherlands, the Criminal Code provides for a forced-definition of rape, according to which "any person who by an act of violence or any other act or by threat of violence or threat of any other act compels a person to submit to acts

[495] An example is the universal recognition of the right to life.
[496] Bailey, D., S. (1961) "Public Morality and the Criminal Law", in *The Eugenics Review*, 52(4), 201, PDF available at: https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC2973023&blobtype=pdf
[497] Amnesty International (2018). *Right to be free from rape: overview of legislation and state of play in Europe and international human rights standards.* United Kingdom: Amnesty International Publications, 14, PDF available at: https://www.amnesty.org/download/Documents/EUR0194522018ENGLISH.PDF

comprising or including sexual penetration of the body shall be guilty of rape and shall be liable to a term of imprisonment not exceeding twelve years or a fine of the fifth category"[498]. Moreover, rape falls under part XIV of the Criminal Code, entitled "serious offences against public morals".

Even in Poland the forced based definition of rape is set within chapter XXV on "offences against sexual liberties and decency", where the crime is stated in article l97 as "§ 1. whoever, by force, illegal threat or deceit subjects another person to sexual intercourse shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years. § 2. If the perpetrator, in the manner specified in § 1, makes another person submit to other sexual act or to perform such an act, he shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years. § 3. If the perpetrator commits the rape specified in § 1 or 2, with particular cruelty, or commits it in common with other person, he shall be subject to the penalty of the deprivation of liberty for a term of between 2 and 12 years"[499].

The concepts of decency and public morals in law are identified by the standard of moral judgment of the "reasonable man", even if there is no widely-accepted clear definition of such concept at the societal world level[500]. The notion of morality in terms of relative morality is thus affected by the cultures and traditions typical of a specific country and it explains the different interpretation of law given to the same crime (rape) as a crime against the person or against morality and decency, depending on the context of reference.

Even in countries providing with a consent-based definition of rape, the identification of the crime within the category of crimes against morality is present: examples are Belgium, Cyprus and Luxemburg. Moreover, with reference to such cases, the contradiction that the definition of rape presents is even more evident.

[498] The Kingdom of Netherlands, Criminal Code, 3 March 1881 (amended on 1 January 2012), Part XIV, art. 242, PDF available at: https://www.legislationline.org/download/id/6415/file/Netherlands_CC_am2012_en.pdf
[499] The Republic of Poland, Criminal Code, 6 June 1997, Chapter XXV, art. 197, PDF available at: https://www.legislationline.org/download/id/7354/file/Poland_CC_1997_en.pdf
[500] Bailey, Public Morality and the Criminal Law,

Indeed, on one hand rape is defined on consensual basis, thus explicitly recognising the right to a person of physical integrity and sexual and individual autonomy; on the other, it is set within "offences against morality" in Cyprus[501] or within "*des crimes et des délits contre l'ordre de familles et contre la moralité publique*" in Belgium[502] and Luxemburg[503], thus denying it primarily as a violation of individual autonomy and integrity.

However, limiting morality to that set of values that are not part to the human rights category does not mean that everything that is moral is in contradiction with what human rights: the two different areas of concern can overlap, but when this happens the human rights morality shall predominate on the "relative" morality of the country or group of individuals of reference. Indeed, the relations between morality and law becomes difficult to resolve when such hierarchical structure of values is not considered in addressing the rights of human beings, in particular women's rights. Such contrasting situations happens, because the existence of a kind of morality in contradiction with human rights and formal law is deeply rooted in the culture and morality of the society. Evidence is provided even by national legislations that, despite setting the crime of rape within the category of crimes against the person, are deeply affected by the moral and cultural framework in their interpretation. An example is the particular case of the North of Albania.

Albania is part both to the CEDAW and to the Istanbul Convention, as well as to the Council of Europe. In Albanian Criminal Code, the crime of rape is ruled in section VI of chapter II, entitled "criminal offences against the person". Sexual assault (and rape) is defined in article 102, as following: "engagement in sexual activity by use of force with adult females or between spouses or cohabitants, without the consent of either of them, shall be punishable by three to ten years imprisonment. When the engagement in sexual activity is done by use of force and with accomplices, more than once, or when the victim had serious health consequences; this is punishable by imprisonment from five to fifteen years. When

[501] The Republic of Cyprus, Criminal Code, 1959, Chapter 154, Part IV.
[502] The kingdom of Belgium, Belgium Criminal Code, 8 June 1867 (amended in 2018), Titre VII.
[503] The Grand Duchy of Luxembourg, Criminal Code, 16 June 1879 (amended in 2018), Title VII

the act has caused the death or suicide of the victim, it is punished with imprisonment for a term of from ten to twenty years"[504].

Despite the criminalization of rape, women's rights are still violated because of the strong influence exercised by the Kanun Code, especially in the Northern areas of Albania, mainly villages and rural areas. [505]The Kanun of Lekë Dukagjini is the most famous and comprehensive compilation of Albanian customary law. It is considered to be rationalised by the despot Lek III Dukagjin (1410- 1481) and until the XX century it was passed down from generation to generation orally. Only at the end of the XIX century, after a preliminary study by the Catholic folklorist Shtjefën Gjecov, the Code was published as late as 1933. It consists of set of norms, traditions, values historically considered as the pillars of the Albanian society and providing a complete moral and legal framework for social interaction. It is a patriarchal normative instrument based on the concepts of "*Burrnija*" (man), "*Besa*" (oath) and "*Nder*"(honour) and it is divided in 12 sections, ruling on different aspects of everyday life: "The Church", "The Family", "Marriage", "The house, Cattle, and Property", "Work", "Loans", "Pledge", "Honour", "Damages", "The Kanun against Harm", "The Kanun of Judgement", "Exemption and Exceptions". [506]

With reference to women's rights, the Kanun Code is an evident example of a still-respected ancient gender-discriminative code. The figure of the woman as described by the Kanun laws is deprived of all those rights that the female sex has managed to have recognised over time. Different aspects of life such as for instance marriage, the role of the woman in the house, inheritance and property are ruled in contradiction with international laws and with the same Albanian official law. Marriages, defined as "the means to form a household, adding another family to the

[504] The Republic of Albania, Criminal Code, Chapter II, Section VI, art. 102 (amended 2013, with the criminalization of marital rape), PDF available at: http://rai-see.org/wp-content/uploads/2015/08/Criminal-Code-11-06-2015-EN.pdf

[505] (2018) "The kanun of Lekë Dukagjini- set of traditional Albanian laws", in *Beat Sexism*, available at: https://beatsexism.com/2018/01/27/the-kanun-of-leke-dukagjini-set-of-traditional-albanian-laws/#:~:text=As%20I%20mentioned%2C%20Albanian%20culture,take%20care%20of%20the%20home.&text=Lek%C3%AB%20Dukagjini%20was%20allegedly%20the,Kanun%E2%80%9D%20in%20the%2015th%20century (accessed September 17, 2020)

[506] Mangalakova, T. (2004) "The Kanun in present-day. Albania, Kosovo, and Montenegro", in *International Centre for Minority Studies and Intercultural Relations*, 2, PDF available at: https://core.ac.uk/download/pdf/11870995.pdf

household, for the purpose of adding to the work force and increasing the number of children" (article 20, Kanun Code) are arranged and forced by the parents' decisions; women have no right to education, to inheritance and to property. According to article 24 of the Kanun Code, women's conception within the family is defined as "a sack made to endure". Even the concept of women's honour is set under the umbrella of the honour of the man, according to which the man is "dishonoured" if "his wife is insulted or if she runs off with someone" (article 130, Kanun Code).[507]

According to 2006 Amnesty International report, "Violence against women in the family: 'It's not her shame'", the moral conception of the woman, as presented in the consuetudinary law of Albania, is widespread at all levels of society, given evidence of the high levels of violence against women in the family as well as the difficult women have in starting judicial proceedings to get their rights recognized and the suffered violations punished. In particular, Amnesty International Report pointed out the preoccupation for the revival of such values, that took place in the 1990s. Indeed, even if in the communist period the Kanun Code was declared illegal (and it still is today), the resurgence of these norms can be credibly explained as "a response to the breakdown of the rule of law in the period of transition, combined with a lack of trust in the state's judicial system to guarantee justice, and as a response to political and social change, a reclaiming of traditions prohibited under communism".[508]

Also, in 1999, the UN Special Rapporteur on violence against women asked to the Albanian government to "to take steps to develop a systematic plan to address domestic violence and combat traditional beliefs, in particular those based on the 'Kanun Code of Lek Dukagjini', that contribute to domestic violence"[509].

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[507]Zherka, E. (2011) "Excluded from Power. Historical Gender Inequalities in Customary Law in Kosovo and Northern Albania", PDF available at: https://jsis.washington.edu/ellisoncenter/wp-content/uploads/sites/13/2016/08/pdf-zherka.pdf

[508] Amnesty International (2006). *Violence against women in the family: 'It's not her shame'.* United Kingdom: Amnesty International Publications, 16, Pdf available at: https://www.amnesty.org/download/Documents/76000/eur110022006en.pdf

[509]UN Commission for Human Rights (1999) *Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, E/CN.4/1999/68, para. 189

More recently, in 2016, the CEDAW Committee reiterated its preoccupation for what concerned "the persistence of such harmful practices as child marriage, families choosing husbands and the payment of a bride price or dowry, which remain prevalent in rural and remote areas and among minority communities", noting also with concern "the re-emergence of concepts of justice (kanun) and codes of conduct that condone killings of women and girls in the name of so-called 'honour'".[510]

There is evidence that the moral dimension plays a fundamental role in delineating the law and in interpreting it over time. Moreover, as morality is not unique but articulates in different variations depending on the cultural and historical development of a country, it is important to individuate that "universal common morality" at the base of every societal structure and at the base of human rights doctrine, regardless of all cultural values, traditions and dogmas (always part of morality in its broader sense) that could threat and clash with human rights.

This approach shall be applied to the issue of rape (and marital rape) in order to define it as a crime against the integrity and autonomy of a person as such on the basis of that human "common morality" and to detach it from any kind of moral supra-structure based on stereotypes and unjustified conviction on the figure of the woman, generally provided by traditions, religions, ideologies without any rationale and reasonable justification.

[510] CEDAW Committee (2016) *Concluding observations on the fourth periodic report of Albania*, CEDAW/C/ALB/CO/4, para. 20

CONCLUSION

The work presented in this thesis on the issue of marital rape has given evidence of the broad dimension of the phenomenon of violence against women, that could manifest in different contexts (the private scene, the community, the State and even at the transnational level) and in different forms (psychological, economic, physical and sexual). Marital rape, in particular, is one, if not the most, insidious and hidden kinds of violence against women. It has a double dimension: with reference to the context, it is a particular type of violence occurring in the private familiar sphere; with reference to its nature and form, it consists in the expression of the broader phenomenon of violence against women in its general sense, enclosed within the marital relationship. Indeed, marital rape is strictly linked to all forms or violence foreseen by international law. Recalling the concept of "intersectionality" analysed by Kimberle Crenshaw in relations to the multiple forms of discrimination to whom a single woman can be subjected[511], the same concept has been adopted to redefining the notion of violence against women and analysing it in relation to its different variations: psychological, sexual, physical and economic. The second chapter of this thesis has given evidence of the strong intersection of such forms of violence in the act of marital rape, given the presence of other two fundamental factors: the nature of the relationship between the perpetrator and the victim (marriage, supposed to be based on love and affection) and the time-factor, that makes this crime easier to commit again and again.

In analysing marital rape as the intersection of different types of violence, thus, family as the fundamental unit of society can be seen as a micro-society within the house walls, where gender-discriminatory behaviours are indeed more difficult to detect. In this regard, the recognition of marital rape challenges the traditional public/private dichotomy on which contemporary society developed. Being a violation of several human rights (as discussed in the third chapter), it questions the real universalism of human rights, discussing to what extent human rights are truly

[511] Crenshaw, indeed, applies the concept of intersectionality to women's identity in order to understand how discrimination is exercised toward the woman: for example, she affirms that a black woman is not only discriminated on the basis of sex, but that other factors (part of her identity) are implied, such as her social and economic condition, race, her immigrant status, etc.

universal and inviolable, taking into consideration the context of the violations. But are human rights the same within the private and the public sphere? Are they entitled with equal protection?

In addressing these questions, marriage plays a fundamental role. First of all, marriage is supposed to be based on vulnerable and irrational human features, such as emotions and feelings like love and affection, whose truthfulness difficultly can be judged. As a consequence, in relation to rape, considering a marital sexual intercourse as such is still difficult to detect nowadays. Secondly, being the basic unit on which society is based, the marital legal institution has always found protection under the law. Indeed, since XVI century, under the Natural Law Doctrine, that marked the development of the contemporary State, the family and private sphere have always received protection, as contexts of individual freedom not subjected to State authority. Finally, even when it does not result in the voluntary and free will of the spouses (thus in contradiction with international law), marriage plays an important role to guarantee stability in social power relations between men and women. In this regard, as underlined in the first chapter, the role of physical force is fundamental: as its final instance is death, even the threat or the intimidation of physical force is an efficient tool to get the subordination of someone (in this case the woman). It is on the wave of the use of physical force in social relations, that the figure of the man has come to dominate that of the woman: the woman became the "weak sex" and such conception developed over history within cultures, ideologies and stereotypes that still today permeate contemporary societies. Examples are the Indian case and the Iranian case discussed in the first chapter, where it is clear the importance of the moral, cultural and religious dimension in interpreting and creating law.

Even in Europe, where violations to women's rights have been recognized nationally and regionally by the Istanbul Conventions, the moral dimension, that has always permeated the law, in different cases comes out of the morality on which human rights were born, which this thesis labels as a "common morality". Indeed, according to the Istanbul Convention, the crime of rape shall be based on a consent-based definition, affirming that if the woman does not consent, it is rape and

delineating it as a crime against the person. In particular, such approach is fundamental in addressing all kinds of rape, even those within the marital relationship where normally forced is not supposed to be used (as most of the times, other forms of violence can be applied such as psychological or economic violence).

Furthermore, the European perspective overcomes the line of though followed over history on the conception of rape as an act resulting from the use of force. According to this thesis, considering rape on a forced-based definition, not only does not take into account all the possible circumstances in which a woman can find herself (shock, anxiety, fear, …), but it is the reflection of a gender-discriminatory conception of the crime that tends to protect the rapist. Indeed, the forced-based definition of rape would deny the existence of the *mens rea*, even in cases force is not used or if the "utmost resistance" has not been proven. Indeed, the commission of a crime does not arise, firstly, from the act carried out, nor from the victim's reaction. The crime is committed because behind the result there is a cause and this cause must be searched in the intentionality of the perpetrator: it is from the intentionality that the crime takes form and it is in the intentionality that resides the moral according to which to perform the act. Not taking in consideration this fundamental element would mean, first of all, the refusal to investigate the causes of the act within that moral dimension, which still presides over society today and allows gender inequality to survive. Secondly, it would mean denying the perpetrator of the right to individual autonomy, in terms of responsibility and awareness for one's own decisions and actions, even if such actions result in illegal behaviour.

The Istanbul Convention, thus, requires States to modify their legislations in order to adopt the definition of the crime of rape to article 36 of the Convention on a consent-based definition. Criminalization of rape, including marital rape has been achieved also at the international level, within the CEDAW, and in other regional contexts, such as the Interamerican and the African one.

Nowadays, the element of consent has gained more and more attention and it is discussed not only at the legal level, but even at the civil society one. In the recent decades, different social global movements on women's rights (such as #MeToo,

#NiUnaMenos) have focused their campaign on the element of consent. In Europe, such movements have proposed a model based on the slogan “no means no”, such as in the German case; in America, the “yes means yes” model had more voice. Both models are aimed at defending the willingness of the woman, but, as already argued in the last chapter with reference to the German case, according to this thesis, the model that should be applied in interpreting the notion of consent is the “yes means yes” model. Saying “yes” is not a passive response to someone else act: it is affirming one’s own will and thus it is expressing one’s own individual autonomy to decide for one’s own life. Saying “yes” deprives the man of the “historically assumed” superior position in relation to the woman and it allows the woman to be the active part when taking decision for herself (in this case for he own sexuality), at least once. Even if this model does not solve all the contradictions that the consent-based definition presents (such as the one regarding what should be conceived as genuine and free consent in a still gender-discriminatory society), the “yes means yes” model is the most suitable approach to obtain an almost full recognition of women's rights violated by rape.

As argued in this thesis, criminalization of rape (and of marital rape) on the consent-based definition is not enough. Criminalization is necessary in codifying rights and creating a potential source of power for victims to get access to legal remedies when those rights are violated, in order to attribute to law both a symbolic and a practical power. However, what needs to change, apart from law, is the wider moral dimension on which law has born, which is a multifaceted dimension that includes both values that can be in accordance with human rights or not.

Since human rights as conceived today are quite recent, there is evidence that the “common moral dimension” on which they are based is not as strong as those “moralities” rooted in society since the ancient time and based on gender-inequality that is still present today. In line with criminalization, thus, it is important to point out the principle of due diligence of the States, in order to make States active actors, not only in the protection and respect of human rights, but specially in the promotion and creation of cultures based on equality, dignity and non-discrimination among human beings.

"For all the violence imposed on her.

For all the humiliation she has suffered.

For the body that you exploited.

For the intelligence that you have condemned her for.

For the ignorance that made you leave her.

For the freedom that you have denied her.

For the mouth you shut, and the wings you clipped.

Stand, Gentlemen, now in front of a Woman".

(William Shakespeare)

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