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Abstract

The following chapter deals with the general and special part of criminal law from a gender perspective. It analyses, in particular, the provisions from the Council of Europe Convention on preventing and combating violence against women and domestic violence, the Istanbul Convention, from 2011. The Istanbul Convention is the most comprehensive international legal instrument that outlines binding obligations to states to prevent and combat violence against women and girls. Furthermore, the Istanbul Convention contains several institutes and behaviours that have to be criminalised in the respective national jurisdictions, covering and combining dogmatics and criminal policy issues with a foundation substantially based on gender. The chapter also explores gender issues in a more general way, interpreting criminal law and its challenges towards gender equality. The special part raises questions regarding criminal law and its compatibility with the Istanbul Convention and national laws.

13.1 Introduction

The first part of the chapter on gender competent criminal law will analyse relevant aspects and institutes of the general part of criminal law, while the second part will deal with particular criminal offences that are important and highly topical from a gender perspective—physical and psychological domestic violence, stalking, sexual violence, and violations of women’s integrity by forcing them to abortion, sterilisation, marriages, etc. This twofold structure reflects, on the one hand, the traditional and recognisable systematisation of criminal law dogmatics into a general part and a special part. On the other hand, it enables the deduction of certain punishable behaviour.

The bigger picture namely shows: even though the law in general enforces and justifies dominant relationships of power, criminal law mandates socially acceptable behaviour in the most direct manner.¹ One may add—not only mandates but also necessarily sanctions it. While this is common ground for the Theory of Criminal Law, it is a new momentum to include the gender perspective in dogmatic terms. It is also something that has been mainly overlooked by gender studies so far, as they focus on the context of crime. The focus has primarily been on either the results (i.e., as shown in statistics) or the social basis for this development (i.e., inequality, violence), but not specifically on the legal text, its wording, interpretation, examples from jurisdiction, etc. By adding the dogmatic component, it would complete the holistic approach to criminal law questions and gender. Of course, this will not be

¹Roberts (1994), p. 1.

possible extensively (meaning ubiquitously, finding flaws in each and every legal regulation), nor should it be. In fact, the precise identification and analysis of relevant gender-related and problematic aspects of a particular legislation would lead to well-founded, reasoned, solution-oriented proposals. And last but not least, it would do justice to the *ultima ratio* nature of Criminal Law.

Learning Goals

The learning goals for this chapter are

- Understanding the relationship and the interaction between criminal law and gender.
- Knowing the importance and content of the particular gender-related criminal provisions of the Istanbul Convention.
- Being able to understand current common problems of Gender and Criminal Law, as well as to become able to recognise and anticipate further developments; both positive and negative.

The Istanbul Convention

The Istanbul Convention (CETS No. 210) titled “Council of Europe Convention on preventing and combating violence against women and domestic violence” was enacted 7 May 2011. The first ten ratifications, including eight Member States, were done by 1 August 2014.² By 20 July 2021, 35 countries have signed the Treaty, of which eleven have not yet ratified it.³

“This new landmark treaty of the Council of Europe opens the path for creating a legal framework at a pan-European level to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence.”⁴

It covers eight specific areas: psychological violence, stalking, physical violence, sexual violence, rape, forced marriage, female genital mutilation, forced abortion, forced sterilisation, and sexual harassment.

As part of the Istanbul Convention, a specific monitoring system (Group of Experts on Action against Violence against Women and Domestic Violence - GREVIO) was put in place to evaluate if the Treaty’s implementation has been done by those who have signed it. For the Istanbul Convention to be effective, it

²The Treaty is open for signature by the Member States of the Council of Europe, the Non-Member States which have participated in its elaboration and by the European Union, and for accession by other Non-Member States. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?module=signatures-by-treaty&treatynum=210>, last accessed 20 July 2021.

³Full list (coe.int).

⁴Full list (coe.int).

must be followed up, and feedback of shortcomings needs to be presented to countries so they can be remedied.

Being the first internationally legally binding instrument that is establishing a comprehensive legal framework for the protection from all forms of violence⁵ that is basically gender-related, the Istanbul Convention will be of the most outstanding importance and will be the centre of the analysis. It contains introductory provisions on criminal law and gender, penalties and the perpetrator. The Istanbul Convention has been recognised as essential for gender competent criminal law, providing a new basis and enhancing the development regarding respective offences. This is because it entails provisions that go beyond the usual regulation of international documents, providing an entry into dogmatics of criminal law, yet from a gender point of view. In the Preamble of the Convention, this link is underlined by the acknowledgments of the structural nature of violence against women as gender-based violence; that women and girls are exposed to a higher risk of gender-based violence than men, but also that men may be victims of domestic violence as well.

13.2 General Part

13.2.1 Typicity

Typicity in criminal violations is a direct consequence of implementing the legality principle in criminal law within *civil law* systems. Further, this needs to be complemented with the case law interpretation limited by the prohibition of analogy *in malam partem*.⁶ Nevertheless, the enforcement of the legality principle in criminal law does not downplay the work developed by the case law, intended to interpret the facts and include them in the appropriate norm. Nevertheless, case law is the main vehicle for law creation in the *common law*⁷ systems. The differences in the source system are not an obstacle for countries to sign international conventions, by which they assume legal compromises regulating issues in a specific direction. Still, different countries have different challenges and would thereby come up with different solutions. This way, as time goes by, international conventions would

⁵ <https://www.coe.int/de/web/conventions/full-list/-/conventions/treaty/210/signatures?module=treaty-detail&treatynum=210>, last accessed 20 July 2021.

⁶ Donini (2017), p. 24.

⁷ From this point of view it is essential for our democratic societies to have legal operators trained to apprehend the presence of gender based violence in each case.

facilitate the standardisation of criminal laws from different countries and make both comparative legal research and education easier to conduct.⁸⁹

The ratification of the Istanbul Convention¹⁰ has opened up a reform process of different legal systems within the States parties.¹¹ Among these processes, the reform of the criminal code to contextualise the provisions made in the Istanbul Convention in the various national areas will be incorporated. Further, the specific indications made in the Istanbul Convention around the crimes that should be punished in the national legal systems will supposedly guarantee a standard orientation of the European criminal policy. However, if the States include elements that are vague, undefined, or difficult to determine when transposing the Istanbul Convention, the guarantee inherent to the legality principle could be violated.

Thus, the provisions made by the Istanbul Convention within the range of criminal typicity have a dual nature. On the one hand, Articles 33 et seq. set standards around the need for criminal punishment for specific behaviours in each State Party, such as psychological violence, stalking, physical violence, sexual violence, including rape, forced marriage, female genital mutilation, forced abortion and forced sterilisation and sexual harassment.¹² On the other hand, each of these behaviours has its peculiarities, but they also share some common features, which the theory of crime has traditionally solved.

Typicity is the dogmatic category of the crime, including the legal goods that are to be protected. It means a kind of conversation between the lawmaker and society, i.e., general prevention, where one can assume that man does not commit these forbidden behaviours. Further, typicity can be considered a public performance of

⁸Wilson describes the reasons that justified the approval in the United Kingdom of *Sexual Offences Act* in 1976, which recognizes types of sexual aggression that differs from vaginal intercourse, Wilson (2011), pp. 19–20. Armenta Deu makes a reference of the knead within the *civil law* system that the court judges and doesn't have to have "direct or indirect legislative facultations". Armenta Deu (2012), p. 25.

⁹So court preparation to deal with this task turns out as essential specifically when talking about crimes that in many cases go unnoticed, camouflage under non-violent daily life, invisibilized to reality if they are not interpreted from a gender-based legal point of view. See Chap. 3 in this textbook.

¹⁰That was assumed as its own by the European Union 11 May 2017. Recently the European Union in its "Gender equality strategy factsheet" given by the European Parliament 21 March 2021 "calls for preparatory actions to be started now in order to launch additional legally binding measures and an EU framework directive to prevent and combat all forms of gender based violence, addressing among other issues, female genital mutilation (CGM), forced abortion, sterilization and marriages, and for it to include sexual exploitation, trafficking, cyber violence, the publication of revenge porn and online hate speech against women with a strong intersectional approach what comes initially to stand in the areas of crime to encompass specific forms of gender based violence in accordance with Article 83(1) of the TFEU; recalls that these new legislative measures should be complementary to the ratification of the Istanbul Convention."

¹¹In this case, State parties are those states who have signed the Istanbul Convention.

¹²It is to be highlighted that there is no reference to human trafficking overall if we take under consideration that women are the priority victims as in the case of forced marriages, sexual exploitation or pornography). These provisions might be complemented with Council of Europe Convention 197 made in Varsovia, 16 May 2005.

the current criminal policy. Taking these under consideration, we can consider typicity as an educational preventive and democratic task because it protects the legal goods.

Indeed, the first task to be addressed within typicity should be identifying the legal goods that sustain the criminal behaviour. According to this, the Preamble of the Istanbul Convention establishes that those behaviours are

“a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men”, at that the time that it recognises that “women and girls are exposed to a higher risk of gender-based violence than men”

However, this is just a listing of political-criminal interests protected by the Istanbul Convention, not identifying common legal goods.¹³ Therefore, the importance of the Istanbul Convention is on the protection of life, health freedom, sexual freedom, and sexual and reproductive rights, which identify all the independent legal goods for each corresponding crime.

While identifying the protected interest for each crime, a study related to the holder’s consent should be done. There will not be a violation of sexual freedom or forced marriage, or sexual harassment if the victim agrees to these activities, making them available legal goods. Nevertheless, how the availability for such legal goods is defined is not a common consensus, such as life (homicide/euthanasia) or abortion. The consent needs to be given lawfully to be considered adequate. Regarding these essential elements, Art. 36 (2) of the Istanbul Convention establishes the requirement of consent for sexual crimes, pointing that

“consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances”¹⁴

¹³In the opposite direction the Inter-American convention on the prevention, punishment and eradication of violence against women convention, Convention of Belem do Para (July, 9, 1994) given by the Organization of American States identifies in its Article 6 the right of every woman “to be free from violence”, including rights to life, integrity, freedom, dignity, protection within the law and the courts, association, religious freedom and equality in the access to public function and participation in public issues. The different crimes regulated in the Criminal Codes should be read according to these superior right in order to understand that these crimes attack several legal interest for the purposes of Istanbul Convention is not possible to make visible.

¹⁴This provision is in the base of the reform that different criminal codes are suffering regarding sexual crimes, as for instance, *Fünfzigstes Gesetz zur Änderung des Strafgesetzbuches zur Verbesserung des Schutzes der Sexuellen Selbstbestimmung*, November 4, 2016; Law n° 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes; Article 375 in Belgium criminal code, from the reform made in February 2016; Sweden criminal code, after the reform in 2018. It has also meant that the Spanish parliament made a reform these crimes with the Organic Law draft on Integral Guarantee of Sexual Freedom, 3 May 2020.

In sum, only voluntary and free consent, “in the context of the surrounding circumstances”, which gives an absolute relativism to the main act of consenting, is legitimate to decriminalise a behaviour.

Moreover, the typical behaviour is an essential element since it’s the image within the criminal regulation of a code of values that allows punishing the most severe behaviours against the most essential legal goods. The decision made by the Istanbul Convention is related to a double judgement of proportionality, whereby it is stated that due to the importance of these legal goods, i.e., psychological violence, harassment, physical violence, sexual violence (including rape), forced marriages, female genital mutilations, abortion, forced sterilisation and sexual-harassment, the offences against them should be criminalised. These offences are the most severe ways of attacking women and girls for the protected legal goods.

Typicity also includes the characteristics of the perpetrator and the victim that are not included in the specific crimes definition given by the Istanbul Convention. Regardless, from a criminological point of view, these behaviours are mostly committed by male perpetrators towards female victims. Nevertheless, personal/relational(?) circumstances that amend the criminal liability are expressly stipulated so that the penalty would increase in such cases.

“the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority” (Art. 36 (a))

Further, within typicity, there is no provision determining the sex of the individuals, neither the perpetrator nor the victim, not even for the aggravation of the penalty. In such a manner that the decision to increase the penalty when the perpetrator and the victim are masculine or feminine, respectively, is related to criminal policy reasons that exceed what is established in the Istanbul Convention.¹⁵

Theory of crime points out that the objective elements¹⁶ should be covered by the wilful misconduct of the perpetrator, which is the case for offences included in the Istanbul Convention. On the other hand, there is no provision related to these behaviours committed due to negligence. This does not mean that these behaviours have to be punished according to international law but that they can be punished or not according to internal criminal law.

The subjective part of the offence description is not as simple as it seems. It has to be taken into consideration that it is the definition of “violence against women” (Art. 3 (a)), which characterises all of these behaviours as “ways of discrimination,” which in turn are used to name gender-based violence acts. This might suggest that

¹⁵This decision has been accepted by many Latin American countries which have signed the Convention of Belem do Pará so they have decided to punish the crime of *feminicidio*. Spain also took the decision with the organic law LO 1/2004. See Acale Sánchez (2006).

¹⁶Despite all the specific ones that the lawmaker could include in each crime regulation.

applying the term “violence against women” to all gender-based crimes would not be possible unless the definition was fulfilled.

Example

For example, harming several people against their physical integrity—men and women—with a car bomb couldn’t be considered “violence against women” because there might not be any factors to infer that this attack was gender-based. In the same meaning, a bomb that crashes into a population is not directed to kill both “men and women”. ◀

On these bases, it needs to be determined if these behaviours are suitable for an aggravation based on discrimination. This will depend on whether the national lawmaker establishes a specific reference to violence against women during the offence regulation or not. In case they do, it would be suitable to apply the criminal offense and the aggravation at the same time.

13.2.2 Unlawfulness (Defenses, Justification)

Unlawfulness, in the continental European legal system usually the third element of crime,¹⁷ can be found at two points when considering gender. On the one hand, it can be seen at general justification grounds. Those classic or common justification grounds are known in basically all legal orders. They are usually regulated by law and/or developed and complemented by doctrine and jurisprudence. Analysing the gender component can be done from both the perpetrator’s and the victim’s perspectives.

On the other hand, specific defences appear in this context as well. They are basically applicable to a particular gender as they derive from its specific state or situation. Furthermore, the provision from Art. 42 on unacceptable justifications for crimes from the Istanbul Convention is to be highlighted. It excludes certain traditions, cultural and religious patterns as justifications in the internationally most important document on protecting women from violence.

It should be noted that the notion of defences includes grounds for eliminating not only unlawfulness but also guilt as a (fourth) element of crime. This joint approach is the consequence of the impact of the Anglo-American doctrine and jurisprudence. This is important to annotate, as gender theory originates from the USA and is dominated by it.

Legal history and precedents have formulated many of the common criminal defences to account solely for male crimes.¹⁸ At the same time, certain defences can be described as exclusively female, like neonaticide/infanticide (often also

¹⁷See Marković (2015), pp. 285–300.

¹⁸See Yeo (1993), pp. 104–116.

formulated as specific crime),¹⁹ marital coercion, premenstrual syndrome and battered woman syndrome.²⁰

Also, when it comes to elements that concern guilt, some of the novel defences that are brought into the courtroom include Amnesia, Post-Traumatic Stress Disorder (PTSD), Battered Women Syndrome (BWS), Multiple Personality Disorder (MPD), and Postpartum Depression (PPD). Many of them are more relevant to women than men, especially BWS and PPD.²¹ There is a tendency to regard women as psychiatrically disordered.²² Women are more likely than men to be found not guilty by reason of insanity (although it concerns a small number as such), to succeed in a plea of diminished responsibility (as in the case of BWS, which is medically accepted as a mental disease) and, if found guilty, to receive psychiatric disposal.²³ Problems in this regard are the stigma that goes with mental health issues and the potentially longer incarcerations. This “medicalisation” of women was (is) viewed as patronising and offensive but can be of significant benefit to women homicide defendants.²⁴ Different sentencing patterns based on gender, above all in cases of domestic homicide, were determined in a study which put 29 male and 29 female perpetrators in comparison before the Supreme Court of Victoria (Australia) in the period from 1985 until 1991.²⁵ The behaviour of female offenders was more often explained by psychiatric grounds. On the one hand, the acts of women, their mental state, ability to reason and criminal intent have been evaluated through the lens of femininity and domesticity. On the other hand, the treatment of women as “passive recipients of crime”, that are submissive and in need for protection,²⁶ has resulted in milder sentences. Women have been treated with more sympathy and were sentenced to less strict or even non-custodial sentences compared to male offenders, it has been argued.²⁷ It seems unlikely that a woman can commit a crime out of less excusable motives, like gain or simply pleasure. The medicalisation of female offenders is thus based on the perception of female criminality as being the result of victimisation (which is often, but not always the case); of them being physically weaker, more emotional and in more need to be protected.²⁸ The outcome of this stereotype is that women are patronised, but also that they are, due to the assumption of their inferior situation, treated milder than men. Finally, and in general terms, it has to be noted that female offenders make up only a very small percentage of

¹⁹See Marković (2012a), pp. 77–95. See also Chap. 2.

²⁰Nicolson (2000), p. 160.

²¹Forsythe and Miller (2014), p. 66.

²²McColgan (2000), p. 138.

²³On the issue of different assumptions on male and female criminal behaviour, with regard to *mens rea*, see Allen (1987).

²⁴McColgan (2000), p. 140.

²⁵Armstrong (1999), pp. 67–77.

²⁶Ibid., pp. 68, 74.

²⁷For a list of literature see Armstrong (1999), p. 67.

²⁸Ibid., p. 76.

perpetrators.²⁹ This means that the medicalisation of female defendants does exist and that it is premised on gender stereotypes; while at the same time, it has a limited impact in the overall context of crime and sentencing.

Speaking about general terms, the classic justification grounds from a gender perspective can roughly be divided into (1) gender-specific, (2) gender-dominant, (3) gender-variant, and (4) gender-cultural.³⁰

When it comes to defending before the Court, two defences that women in substantial numbers employ are provocation and diminished responsibility. What should be more often used, as doctrine suggests, is justifiable force.³¹ By this, the division of “sudden and temporary loss of control” as premised on masculinity and “slow burn anger” as a specific characteristic for women³² would diminish and hence put the issue of proportionality into a new perspective.³³

As mentioned before, a particularity is that Art. 42 of the Istanbul Convention regulates unacceptable justifications for crimes, including crimes committed in the name of so-called “honour”.³⁴

Chapter V of the Istanbul Convention is dedicated to substantive law; in Articles 33–48 explicitly to criminal matters. The scientific and practical focus was on the eight specifically regulated intentional conducts that are to be criminalized in the respective jurisdictions. Yet, institutions from the general part are also present, albeit only three of them. Besides aiding or abetting and attempt (Art. 41), justifications are the subject of Art. 42—“unacceptable justifications for crimes, including crimes committed in the name of so-called “honour”.

In the first paragraph of Art. 42, it is regulated that

“parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called “honour” shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour”

The second paragraph states that

“parties shall take the necessary legislative or other measures to ensure that incitement by any person of a child to commit any of the acts referred to in paragraph 1 shall not diminish the criminal liability of that person for the acts committed”

²⁹McColgan (2000), p. 138.

³⁰Denno (1994), p. 84.

³¹McColgan (2000), p. 137.

³²Ibid., p. 145.

³³Ibid., p. 146.

³⁴See Nicolson and Bibbings (2000). See also Chap. 7.

The Article is completing and specifying the provisions of Article 12, namely that

“parties shall 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 (1) and that they shall ensure that culture, custom, religion, tradition or so-called “honour” shall not be considered as justification for any acts of violence covered by the scope of this Convention (5)”

In other words, Art. 42 rules out, expresses what cannot constitute a justification ground. Bearing in mind the sheer number of possible justifications, their normative regulations, and understandings in different jurisdictions, the legislative formulation chosen in the Istanbul Convention is a good compromise to satisfy the primary goals envisaged by the Convention.

Furthermore, focusing on justifications to the conducts prohibited in the Istanbul Convention, the Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (CoE Report), a valuable instrument for the authentic interpretation of the Convention, confirms that³⁵.

As a conclusion to the question of unlawfulness, it can be said that women are more often treated as “medicalised” (4th element: guilt), which can be viewed as patronising behaviour. On the other hand, this could also mean less strict convictions or acquittals and could be regarded as a positive aspect. Other justification grounds, such as provocation, are rarely confirmed in cases involving women. What is undisputed is that so-called honour killings³⁶ primarily affect women and girls and must be seen as an unacceptable “justification ground”, originating in culture and religion.

13.2.3 Guilt

Committing an act—knowingly or by negligence—considered by the law as a crime without any existing complete justification grounds is not enough to impose a penalty because the guilt must be both established and analysed. Guilt individualises the legal system reaction for the individual who has committed the unlawful act that brings to light that they cannot (cases of inculpability) or do not want to assume the

³⁵CoE Report, 2011, ch. 216.

³⁶In the Oxford Handbook of Gender, Sex, and Crime, honour killings are described as “an extreme type of gendered domestic violence, with peculiar characteristics related to the social and cultural traditions of tribal, patriarchal societies. The killings are motivated by the goal to restore a family’s collective reputation that has been damaged by the victim’s violation of very strict norms regulating female sexuality, and are viewed by the assailants as a legitimate punishment, often condoned by local communities and tolerated by state agencies.” Oberwittler and Kasselt (2014), p. 652.

valuing content of the criminal rule. This means that an alleged perpetrator who does not plead guilty to the crime committed does not participate externally in the importance of legal goods protected by the criminal system. Further, violence against women is a crime category that examines issues that differ in scope from those examined in typicity and unlawfulness.

The Istanbul Convention does not make any specific provision in this sense, so this decision has to be made by national criminal law. Thus, special attention should be made to the intervention of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), which must ensure the proper enforcement of the Istanbul Convention and detect violations, direct or indirect, made, executive or judgmental, by the States enforcement politics.³⁷

So, the FRA Report *Violence against women*:³⁸ *an EU-wide survey* made in 2014 concludes that there is a “relationship between a woman’s partner’s heavy alcohol use and increased violence.”

In view of this evidence, this report states that “heavy alcohol use needs to be highlighted and addressed as a factor contributing to men’s violence against women in intimate relationships. National violence prevention measures should consider addressing heavy alcohol use.” Despite this criminological data, it is not enough to verify alcohol abuse as the cause for criminal purposes such as intimate partner violence. It is necessary to pinpoint that alcohol abuse affects the capacity to understand the reality of the acts committed under the influence and that the perpetrator acts accordingly to this understanding in order for the alcohol abuse to reflect the judgement of guilt adequately.

Individual issues related to how the perpetrator could have determined the commission of the crime by not knowing, understanding, the prohibition of the behaviour, or wrongly thinking that there was a justification ground are also analysed within guilt. The treatment of mistake on prohibition has similar regulations within European Criminal codes, which are exempt from criminal liability if the mistake was invincible and to attenuate the penalty if beatable. There is no specific provision in the Istanbul Convention about the mistake of the (elements of the crime or prohibition) as it only establishes that the justification of these actions in the name of honour is unacceptable. Erasing these justifications, in general, does not prevent that for specific cases, prohibition could be invoked based on nonconforming beliefs from ethnic minorities or cultural groups that do not share the egalitarian respect of human rights for men and women in European culture.³⁹ Problems arising from the criminal law are important to examine further since it affects all internal legal systems that develop the positive general prevention task

³⁷ As an example see GREVIO’s (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): Spain, 25 November 2020 (www.coe.int/conventionviolence).

³⁸ European Union Agency of Fundamental Rights. The survey can be found at https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf.

³⁹ Sumalla and María (2005), p. 805.

with respect to human rights for every person. This would be the solution to erase the possibility of invoking nonconforming beliefs to exempt or attenuate the penalty in these cases. It is not enough that criminal codes punish genital mutilation: the important thing is that all the legal systems ensure that women have a healthy sex life.

13.2.4 Sentencing

The theory of crime offers important elements to specify the criminal liability that even though not belonging to typicity, unlawfulness, or guilt, still determines the penalty: the Istanbul Convention refers to them.

13.2.4.1 Aggravating Circumstances

Article 46 of the Istanbul Convention establishes a list of aggravating circumstances. Still, it does not provide a list of attenuating ones, so this would be a task for the Member States' criminal codes. However, the Istanbul Convention states risk factors for intimate partner violence. In the theory of crime, these circumstances modify the perpetrator's criminal liability as an extra to the committed crime that justifies the aggravation of the penalty. This extra could be related to the same legal goods protected by the crime in particular or related to other crimes of a different nature.

Circumstances in Art. 46 could be organised into three groups.

The first group can be explicitly related to the victim. The offence was committed

(a) "against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority;" (c) "against a person made vulnerable by particular circumstances" (d) "against or in the presence of a child"

However, only under point (c) specifically mentions the victim's vulnerability, even though according to point (a) it considers that these family ties facilitate the commission of these kinds of crimes. This makes the victims particularly vulnerable when they are being subdued to a victimisation process by those who share or have to share with them. If there is an increased knowledge of these victim vulnerability factors in the criminal justice system, the penalties can be harsher since these are aggravating factors for the crime committed.

The second group is related to perpetrator characteristics. The commission of the crime, or crimes, were committed:

(b) "repeatedly", (e) "by two or more people acting together", (i) "the perpetrator had previously been convicted of offences of a similar nature"

As it can be seen, these risk factors are focused on recidivism, having more than one perpetrator. Although one perpetrator commits most intimate partner violent crimes, the Istanbul Convention also intends to prevent crimes committed in a collective perspective, such as so-called honour-based violence. As for the commission in the group, the Istanbul Convention highlights the greater ease for the commission of the crime, placing the victim in a transitory situation of extraordinary abandonment.

The third group would be those circumstances that take into consideration the way the crime has been committed, where the offence

(f) “was preceded or accompanied by extreme levels of violence”, (g) “was committed with the use or threat of a weapon”, (h) “resulted in severe physical or psychological harm for the victim”

As it can be seen, the fact that the violent act has been preceded or accompanied by “extreme levels of violence”⁴⁰ or has resulted in severe physical or psychological harm is taking into consideration the extension of the harm committed to the protected legal goods. For its part, the use of weapons in the commission of the crime entails a greater endangerment of the legal assets involved than when they are not present at the crime scene.

13.2.4.2 Aiding or Abetting and Attempt

The prescriptions of the Istanbul Convention are not limited to the punishment but also to what is established in Art. 41 related to aiding or abetting

“parties shall take the necessary legislative or other measures to establish as an offence, when committed intentionally, aiding or abetting the commission of the offences established in accordance with Articles 33, 34, 35, 36, 37, 38.a and 39 of this Convention”

All crimes included in the eight areas of the Istanbul Convention are regulated within these articles, except genital mutilation in letters b) and c) from Art. 38 and sexual harassment from Art. 40. There are no established reasons explaining what has led the Istanbul Convention creators to make this decision.

Further, usually, there is one individual perpetrator in crimes of domestic violence. However, it is possible to ask for liability of other family members in specific situations due to their omissive behaviour. This will be the case for the mother who, although unable to do so, does not hinder the father from exercising violence (physical, psychological or sexual) against their child. The discussion is nevertheless open to the possibility to regulate that in every criminal code, the perpetrator can also be the person who uses omissive behaviours. For the given example, if the act omitted by the mother is determining the violent situation to continue, she could be

⁴⁰This element is completely undetermined, so the courts would have to give it substance.

considered as co-perpetrator in commission by omission for the crimes of bodily injury, threat, or sexual aggression that has been committed actively by the other perpetrator. Another issue that is open for debate is how national courts can enforce this if regulations change.

This article also establishes specific provisions about the punishment of attempt:

“parties shall take the necessary legislative or other measures to establish as offences, when committed intentionally, attempts to commit the offences established in accordance with Articles 35, 36, 37, 38.a and 39 of this Convention”

This provision does not affect all perpetrators; those who use psychological violence (Art. 33), harassment (Art. 34), and sexual harassment (Art. 40) are not included, again without any hint on the reasons for doing so. It would be necessary to pay attention to the punishment of the attempt in the Member States’ criminal codes and check if it is required to carry out some legal foresight or if it is related to the appreciation by the courts. However, problems that could arise that should be considered are if an attempted homicide also could be considered a crime of completed actual bodily harm. In this sense, the highest penalty for each crime would have to be taken into account when choosing what crime to charge the perpetrator for in court, considering that this would be the preferential rule.

13.2.4.3 Reporting

The Istanbul Convention leaves an open door to the possibility that a third person could report these incidents because of the understanding that the victims are not capable of it in many cases. This is a way of counteracting the regulation that had been ruling in many countries during many times. The victims should initiate the criminal process in cases that violate sexual freedom or involve mistreatment. At the same time, the forgiveness of the offended would be admitted as an exemption of penalty (as it has been for years in the area of sexual crimes). Both requirements mean a procedural corraling for the victim. If the victim did not report the crimes or once reported and the perpetrator was condemned, they forgave the perpetrator. At the end of the whole process, the victim and the perpetrator would then return to their family environment. This would create a situation for the perpetrator, not just to repeat violent abuse but also to increase its intensity. The official statistics show that victims reporting the incident are one of the reasons that amplify the mistreatment not just in absolute numbers but also in weight.⁴¹

⁴¹ Nevertheless, crimes against sexual freedom need and a specific mention as they are fairly likely to include a re-victimization process, preventing the victim to start a de-victimization process because of the public opinion or the justice administration proceedings. This is why until it can be assured that this re-victimization process is not going to exist, the general requirement is that the victim is the one to report the crime so she could evaluate the pros and cons of this reporting. See Acale Sánchez (2019), p. 9.

Many countries have erased these procedural disadvantages, which has enabled other people to intervene just to stop these violent situations. In many cases, family members are aware of the reality that victims are living with. Together with people in the neighbourhood, they can be essential witnesses of these criminal acts that usually take place within the family environment. Friends are a stronghold for victims until the perpetrator gets to break the links between them and are the ones that can help victims by reporting these violent acts. These violent acts have then moved from the private to the public scene.

All these provisions have been considered by the Istanbul Convention. Art. 27 encourages the Member States to take measures to make “any person witness” report to organisations and competent authorities the violent acts that could be considered violence against women or domestic violence. This way, the victim’s report is not the only way to initiate the criminal process, leaving a possibility for third persons or the public ministry to do it. Moreover, this could be considered a positive change, not a negative change that includes violating the privacy of victims who do not want to report. Nevertheless, this is an existing risk in every kind of crime. For example, see crimes against life for crimes against freedom of movement. Therefore, it should not be considered more important for gender-based violence.⁴²

Likewise, Art. 28 makes specific provisions on reports made by professional staff submitted to confidentiality rights “under appropriate conditions, of their reporting to the competent organisations or authorities if they have reasonable grounds to believe that a serious act of violence covered by the scope of this Convention, has been committed and further serious acts of violence are to be expected.” Although this pursues a good goal, the practice could raise questions concerning victims who choose not to go to official control institutions, increasing their risk for further violent victimisation. For instance, a new violent action generated as a consequence of a new accusation.

13.2.5 Penalties

The Istanbul Convention goes beyond defining behaviours that should be punished as crimes in national criminal codes. It also makes specific provisions on penalties. These penalty regulations highlight the Istanbul Convention’s interest in punishing the perpetrator, preventing the victim from suffering collateral damages from the imposition or implementation of the penalty itself.⁴³

⁴² Acale Sánchez (2013), p. 218.

⁴³ It should also be avoided the secondary victimization process where the victims suffer collateral harms that are different from the ones generated by the crime itself. But the 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, does it. It raises the struggle against this phenomenon because from a pragmatic point of view, the reporting process may be seen as discouraging.

These punishments do not only have to be out from a criminal law perspective since civil consequences also follow from a crime. There are two provisions in this sense within the Istanbul Convention. On the one hand, Art. 30 refers to the victim's right to receive compensation by the perpetrator, enshrining the State's subsidiary civil liability in case of insolvency with the right to subsequently ask the perpetrator for the refund of the amount⁴⁴ On the other hand, in the case of forced marriages, Art. 32 establishes that they are considered void or dissolved, without meaning excessive economic or administrative burdens for the victim. void or dissolved, without meaning excessive economic or administrative burdens for the victim.

In terms of criminal consequences from committing a crime within the Convention, Art. 45 establishes that the Member States would implement legal or other measures that may be necessary to punish the described behaviours with "effective, proportionate and dissuasive sanctions, taking into account their seriousness".

This specific framework for punishment expressly mentions imprisonment that allowed extradition and other measures like "monitoring or supervision of convicted persons" or "withdrawal of parental rights, if the best interests of the child, which may include the safety of the victim, cannot be guaranteed in any other way" (Art. 45).

This does not prevent the Istanbul Convention from including another kind of penalty. Art. 45 (2) establishes the possibility of "monitoring or supervision of convicted persons". This penalty has demonstrated a potential control capability over the convicted person, warranting, at the same time, the integrity without using the pricey and stigmatising imprisonment. And indeed, penalties that involve limitations in the convicted person's movement have to consider that its implementation affects at least two persons, the perpetrator and the victim. Further, due to the commission of the crime, "both are condemned not to get close to each other". But if the victim consents to what the law is forbidding, the approaching, the critical distancing turns into a penalty for both. In a sense, if the victim decides that after the violence, they want to carry on with the relationship, this critical distancing will mean a penalty for both of them due to a crime one of them committed.⁴⁵

The Istanbul Convention does not ignore the economic dependency that could exist between victims and others. Hence, paragraph two in Art. 48 establishes that "to ensure that if the payment of a fine is ordered, due account shall be taken of the ability of the perpetrator to assume his or her financial obligations towards the victim".

The Istanbul Convention also refers to preventive intervention and treatment programs that are not just geared towards preventing domestic violence perpetrators so they can adopt a non-violent behaviour in their interpersonal relationships to

⁴⁴Number three of Article 30 makes a provision of the utmost importance course concerning the need to ensure the right to compensation within a "reasonable term", so the big team could receive it at times as close as possible to when the crime was committed. Because this is the moment when the victim is going to need every kind of support: including the economic one.

⁴⁵Acale Sánchez (2006), p. 330.

prevent new violence and change the violent behaviour patterns, but also prevent recidivism making particular reference to sexual violence (Art. 16). Then plantation of these programs is related to the need to ensure

“the safety of, support for and the human rights of victims are of primary concern and that, where appropriate, these programmes are set up and implemented in close coordination with specialist support services for victims”

The integration of victims in the implementation of treatment programs for abusers will be only if victims agree and where assessed appropriately, according to Art. 48 Member States should take legal measures

“to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention” (Art. 48).

The efficacy of some programs has been proved effective, although not all. In a sense, perpetrators who followed these kinds of programs “were more likely to leave violence during a one-year follow-up period and to refuse their controlling and intimidating acts”. But also their partners’ statements have proved that “the range of these acts had been reduced and happened less frequently”.⁴⁶ As Echeburúa states, mistreatment acts and recidivism have been reduced at least in one-third of the cases. Also victims and abusers have improved their wellness.⁴⁷

Even though these programs’ efficacy relies on their design, from a material point of view, its content, dosage, and implementation should be conducted by human behaviour experts, who can consider the specific needs of the case and design the implementation plan according to this. It would be useless to apply standard programs that don’t consider the different features of these convicted perpetrators.

13.3 Special Part

The Istanbul Convention constitutes eight specific areas; psychological violence, stalking, physical violence, sexual violence, rape, forced marriage, female genital mutilation, forced abortion, forced sterilisation, and sexual harassment. Countries in Europe already have laws against violent crimes such as murder and assault. Some countries also have specific laws targeting violent men abusing women. In this special part of the chapter, laws explicitly targeting men’s violence towards women will be highlighted.

⁴⁶Dobash and Dobash (2005), p. 147.

⁴⁷Echeburúa et al. (2001), pp. 25 ff.

13.3.1 Psychological and Physical Violence

Intimate partner violence towards women is defined as

► **Definition** “any acts of physical (including sexual), psychological, or economic violence committed by a current or former male partner”,⁴⁸

where every third woman in the world is estimated to be victimised.⁴⁹ It is a global public health problem found in all countries and occurs across all socioeconomic, religious, and cultural groups. Violence can be conducted in various ways, although it shares several core characteristics. Further, legislation to combat such violence differs worldwide, to some degree driven by patriarchal structures where women are traditionally subordinate to family structures, and gender equality is low. Subsequently, violence towards women is more accepted within such structures since it is more accepted for men to control women, and thereby such acts are not seen as crimes.⁵⁰

Psychological violence is a severe form of domestic violence and can be as damaging to the victim as physical violence. It is defined according to Art. 33 as

► **Definition** “the intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats”.

This includes the perpetrator insulting, belittling, humiliating, harassing, intimidating or threatening the victim with any type of violence. Further, controlling behaviours such as isolating the victim from friends and family, denying them the right to work, or seeking medical help are examples of psychological violence. As part of the isolation, the victim becomes dependent on the perpetrator, and thereby it will be much harder to leave the abusive relationship.

Further Art. 33 states the importance of criminalising these behaviours. However, it can be somewhat difficult to gather evidence for psychological violence, since the intent to harm a person’s integrity is not explicitly defined. For example, it will be specifically hard to gather evidence to strengthen the case if the victim has agreed to live with the perpetrator. One could argue that the holder of the legal goods thereby gives consent, and there would then not be a violation of the law. However, such consent cannot be seen as voluntary according to the intent of the Istanbul Convention. Legislators thereby have to be very explicit in creating the law to ensure the implementation of Art. 33 in their jurisdiction. The national legislations have primarily focused on either harassment or threats to combat psychological violence. However, that doesn’t capture the psychological violence as described within the Istanbul Convention. As an attempt to combat psychological violence, The UK

⁴⁸European Institute for Gender Equality [EIGE], 2021.

⁴⁹Devries et al. (2013).

⁵⁰Tran et al. (2016).

enacted the law on controlling and coercive control as an attempt to identify and combat psychological violence.

Example

“The Law on Controlling and Coercive Control in the U.K, Section 76 of the Serious Crime Act 2015 - Controlling or Coercive Behaviour in an Intimate or Family Relationship”. The law defines the criminalised behaviours as “repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive” ◀

Physical violence is defined in Art. 35 as

► **Definition** “the intentional conduct of committing acts of physical violence against another person”.

This includes all types of physical violence regardless of its severity. It ranges from pushes, kicks, grabbing the victim’s hair to aggravated assault and lethal violence.

Women subjected to repeated and systematic intimate partner violence redefine their understanding of violence as it progresses and becomes normalised.⁵¹ This means that victims of intimate partner violence gradually accept the less severe actions as the violence escalates into more severe physical violence. To some extent, the perpetrator controls the victim in every aspect; how she should behave, what she may say, think, feel, and whom she meets. Further, victims believe that they are the cause of the violence due to the perpetrator imposes that they are misbehaving, not pleasing them, or conforming to their desires. Therefore, he has to punish them for that. The victims’ self-confidence and self-appraisal fade away and the abuser has total control over the victim. Moreover, due to this normalisation, neither the victim nor the perpetrator identifies themselves as abused or an abuser. They have both been normalised to the situation, and therefore only the most severe forms of violence might be defined as violent. When the violence turns into more severe forms, victims start reporting the violence to the police. Therefore, when examining what type of crimes are being reported, charged, and convicted, most are severe, and thereby the less severe violence such as psychological violence are seen as parts of the physical violence, although they are violent acts in themselves. The purpose of the Istanbul convention is that this type of intimate partner violence will be recognised regardless of severity and as stipulated in Art. 1 (a), the purpose is to

“protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence”

⁵¹Lundgren (2012) and Pornari et al. (2013).

National legislations have gender-neutral laws targeting violent acts committed towards both men and women by both men and women. However, this is not enough to combat men's violence against women, since the laws are too general and don't pick up on the different forms of violence in intimate partner relationships. Therefore, new legislation specifically targeting these issues is necessary. One good example of legislation combating both psychological violence and physical violence is the Swedish law explicitly targeting men's violence against women, which is in line with the definition of Art. 33 and Art. 35.

Example

Sweden has enacted unique legislation explicitly aimed at combating men's repeated (defined as occurring on more than one occasion) violence towards women with the offense of Gross Violation of a Woman's Integrity (in Swedish *Grov kvinnofridskränkning*), which was enacted in the Swedish Penal Code in 1998⁵². ◀

The offense is overarching and is applied when a woman's self-confidence is severely damaged by her current or former partner's repeated and systematic abuse. The purpose of the law was to recognise the repeated and systematic nature of violence against women in intimate relationships and the impact of such abuse according to the normalisation. In doing so, it is necessary to appropriately punish the perpetrator.⁵³ One of the advantages of this law is that it combines crimes standing by themselves and is considered less severe in line with the legislation. Still, when adding them into one, the law stipulates that committing several less severe crimes, such as threatening, harassing, damaging property, etc., becomes a severe crime. This is aggravating, and in line with the Istanbul Convention, these crimes should therefore be punished harder. The Swedish law was enacted in 1998, which was almost a decade before the Istanbul Convention was enacted. It should be seen as an example of how legislators can stipulate laws to target men's violence towards women, including all forms of violence.

13.3.2 Stalking

Stalking is addressed as a specific area of the Istanbul Convention. The lifetime prevalence of stalking, as defined by Art. 34

▶ **Definition** “the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety”,

⁵²Further, perpetrators of IPV can be of either gender and a separate offense, Gross Violation of a Person's Integrity, exists which includes male victims of IPV and children as victims of family violence.

⁵³Burman (2010).

have been found to be about 9.0–19.3% including both men and women in Europe, although most victims are women.⁵⁴ Although criminalised in the USA, U.K, and Australia since the mid-1990s, most European nations implemented anti-stalking laws later. Notably, due to the absence of stalking laws over the years, relatively little is known about the prevalence of stalking in Europe, the nature and impact of victimisation, police knowledge, and practice in European jurisdictions.

Stalking includes unwanted communication such as phone calls, SMS, and text messages in different forms of social media, but also leaving notes and sending letters is part of the communication. Furthermore, attempts to contact victims, such as approaching victims outside their workplace, home, favourite gym, etc., are also common. The stalking escalates from attempts to communicate to more approaching behaviours, which can result in violent acts.⁵⁵

Stalking laws in Europe have mainly been enacted from 2000 to 2011. The national laws are primarily described as overarching offences, as stipulated in many laws. It includes repeated acts that individually can be defined and charged as an offence. Assault, threats, harassment, breaching restraining orders and similar offences are crimes that constitute the stalking offence for which the prosecutor may lay charges.

Moreover, this makes the definition of stalking behaviour somewhat different from the laws of stalking, depending on how the law in each nation is defined. The laws include fewer behaviours than the broader definition of stalking as established by the Istanbul Convention. To a large part, it is the psychological violence that is difficult to prove as a crime. The harassment can continue since it is not illegal to park outside the store where victims are shopping, or showing up outside their work to do an errand in a place nearby, although it is not a coincidence that they appear at the same site. The stalker has planned it this way. Yet, it cannot be proven as harassment in a court of law. However, the victim will be subjected to psychological violence, knowing that they have nowhere to go to escape the stalker.

Stalking is a highly gendered crime where most stalkers are men (82%) stalking women.⁵⁶ In community samples, about one-third of stalkers are ex-partners, acquaintances and strangers, respectively. However, in police samples, most of the stalkers reported are ex-partners. This could, to some extent, be explained by ex-partners having been violent towards their partner during the relationship as well, of which some have been reported. This may have lowered the threshold for reporting stalking when that occurred. The criminal justice system has more experience and knowledge on how to handle intimate partner violence than stalking, which might indicate that there is a routine in place for how to handle victims of intimate

⁵⁴BRÅ (2006), Dressing et al. (2007), Finney (2006) and Stieger et al. (2008).

⁵⁵McEwan et al. (2009) and Strand and McEwan (2012).

⁵⁶ABS (2006), Baum et al. (2009), Belfrage and Strand (2009), BRÅ (2006), Dressing et al. (2005), Finney (2006), Logan (2020), Maran and Varetto (2017), McEwan and Strand (2013), Mullen et al. (1999), Stieger et al. (2008) and Strand and McEwan (2011); Tjaden and Thoennes (1998).

partner violence, regardless if it includes stalking or not. Victims of non-ex-intimate stalking are more challenging to handle due to less knowledge on that form of stalking.

Moreover, a relatively large body of research has accumulated over the years examining what people recognise as stalking and what factors influence judgments about the severity of stalking situations.⁵⁷ Stalking by strangers is judged to be more severe and more fearful than stalking by former intimate partners; male stalkers are perceived to be more harmful than females; stalking is unlikely to be recognised if it does not involve overt aggression. These misperceptions have been identified and exist even though there is empirical evidence showing that ex-intimate partners are more likely to be violent; that male and female stalkers are equally violent, and that stalking causes psychological and social harm to victims regardless of the victim's gender and whether or not the stalking involves violence.⁵⁸ Fear of the stalker is closely linked to these misperceptions, leading to the victim misjudging the seriousness of the stalking situation and consequently not reporting to the police. However, few victims of stalking report crimes to the police, of which only a few perpetrators will be charged, prosecuted, convicted and sentenced for their crime, specifically in rural areas.⁵⁹ The legislation needs to keep up with such crimes where psychological violence stands for most crimes and is a risk factor for escalation and more severe physical violence.

To conclude, for the criminal justice system to work, crimes need to be reported. Since stalking is defined as a behaviour including criminal offences, there must be effective stalking laws enacted to combat stalking. The Istanbul Convention specifically addresses stalking as an area to combat men's violence against women, but there is still more work to be done in order for legislation to be effective.

13.3.3 Sexual Violence, Including Rape and Sexual Harassment

Sexual violence is one of the main subject matters of criminal law in general and marks critical areas of society and behaviour that are to be put under special scrutiny of the legislator. It is, of course, of particular interest for the gender perspective.

The broad field of sexual violence, including rape is brought together in Article 36:

Article 36 Istanbul Convention

⁵⁷Mullen et al. (2009).

⁵⁸Strand and McEwan (2011), Purcell et al. (2005) and Weller et al. (2013).

⁵⁹Logan and Walker (2017) and Maran and Varetto (2017).

- (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.

Paragraph 1 of the Article covers all forms of sexual acts (penetration/other non-consensual sexual acts) that are performed on another person without her or his consent and which are committed intentionally. What "intentional" means in this context is to be interpreted by domestic law.⁶⁰ Penetration can be vaginal, anal or oral with any bodily part or object (lit. a). It has to be of a "sexual nature". This means that acts that lack sexual connotation or undertones are not included,⁶¹ which can be seen as a restricting or redundant element of the offense when penetration is included. What does not fall under the first case group is covered by other acts of sexual nature (lit. b). Beside the direct perpetrator ship, other forms of participation (lit. c) are included as well if it

"causes another person to engage in non-consensual acts of a sexual nature with a third person."

All of the above-mentioned acts have to be non-consensual. Paragraph 2 specifies that consent must be the result of free will (voluntarily) and assessed in the context of the surrounding circumstances. This context-sensitive assessment of the evidence is highly significant, as sexual violence usually takes place in environments without witnesses and often between persons that know each other, that are personally engaged or even married or divorced. The personal connection is recognised as (ir)relevant and regulated by Paragraph 3 (the provisions apply also when acts are committed against former or current spouses or partners). The sexual act has to be evaluated with regard to the absence of consent; regardless of the respective relationship between the perpetrator and the victim. Acknowledging that sexual violence is a common form of the exercise and abuse of power,⁶² it is pivotal to exclude any possible exceptions to criminalisation and prosecution of those perpetrators of sexual offences against current or former spouses. Not everything is covered by this

⁶⁰Explanatory Report, para. 189.

⁶¹Ibid., para. 190.

⁶²Ibid., para. 194.

regulation, as the connected issue of the existence of “marry your rapist” laws shows.⁶³

Furthermore, the assessment of evidence and by this, the evaluation of all circumstances, has to be done case-by-case, taking into consideration that the behavioural responses to rape and other forms of sexual violence differ and cannot be formed into a set of typical reactions.⁶⁴ The Explanatory Report of the Convention is very explicit about that, stating that “it is equally important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality.”⁶⁵

This approach is expected to widen the understanding of non-consensual acts, to change the notion of consent by the State Parties. One particular case of the European Court of Human Rights (ECtHR) is often recalled.

Example

In *M.C. v Bulgaria*, the applicant alleged that she had been raped by two men on 31 July and 1 August 1995, when she was 14 years and 10 months old. The ensuing investigation came to the conclusion that there was insufficient proof of the applicant having been compelled to have sex. ◀

The investigation was closed. The summary of the rule of law in this case was that the termination of an investigation in a rape case that is based on the premise that insufficient proof of physical force, but without taking into account if the victim was subjected to forceful circumstances, means that the Member State “in the case fell short of the requirements inherent in the States’ positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.”⁶⁶

The following statement from the Courts’ assessment is to be highlighted with regard to the gender context, without mentioning the term gender:

“the Court is persuaded 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 and 8 of the Convention must be seen as requiring the penalisation and

⁶³“Marry your rapist” laws shield from prosecution or exempt rapists and similar perpetrators (of sexual assault, abduction, etc.) from punishment if they marry their victims.

⁶⁴In this regard also: *ibid.*, para. 192.

⁶⁵*Ibid.*

⁶⁶Case of *M.C. v Bulgaria*, Application no. 39272/98, Judgment from 4 December 2003, para. 185.

effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.”⁶⁷

What is explicitly mentioned is the context-sensitive assessment:

“Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms (“coercion”, “violence”, “duress”, “threat”, “ruse”, “surprise” or others) and through a context-sensitive assessment of the evidence.”⁶⁸

The ECtHR has taken the gender of the victim and her non-physical defence to rape into account. However, the Istanbul Convention gives the state parties room for specific wording of their domestic laws and the factors they will consider when excluding voluntarily given consent.⁶⁹

The criminalisation of sexual violence, including rape, is completed by the obligation to establish aiding or abetting, as well as attempt as offences (Art. 41).

The range and normative intensity of regulation changes when it comes to sexual harassment, provided in Article 40:

“Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.”

First of all, the consequence of the offence of sexual harassment could be a criminal or “other legal sanction”. The drafters of the Convention have left it to the State Parties to decide where to become active in order to tackle and sanction this behaviour, as long as the measures that are undertaken are effective. Background to this is that some members have expressed concern about the criminalisation of this offence,⁷⁰ as it is often committed at work and regulated by labour law. The Explanatory Report refers to that: “While generally considering it preferable to place the conduct dealt with by this article under criminal law, the drafters acknowledged that many national legal systems consider sexual harassment under civil or

⁶⁷ *Ibid.*, para. 166.

⁶⁸ *Ibid.*, para. 161.

⁶⁹ Explanatory note, para. 192.

⁷⁰ Sosa (2020), p. 38.

labour law. Consequently, Parties may choose to deal with sexual harassment either by their criminal law or by administrative or other legal sanctions, while ensuring that the law deals with sexual harassment.”⁷¹

However, the CoE acknowledged in a Resolution from 2017 the need to hinder sexual harassment in the public sphere.⁷² Of course, with the intensified digitalisation, sexual harassment online (on social media, digital platforms, etc.), becomes more and more an issue to solve. Contrary to the “usual” sexual harassment at the workplace, where the victim and perpetrator know each other, stand in hierarchy to one other (harassment committed in the context of abuse of power, promise of reward or threat of reprisal)⁷³ and have a discriminatory context that goes beyond sexual connotation, the relationship in digital sexual harassment is often simply non-existent. The perpetrator and victim do not know each other personally (“live”) and the perpetrator has fewer obstacles to overcome, due to anonymity provided by the world wide web is harder to be identified, etc.

Furthermore, the obligation to introduce measures against sexual harassment is not limited to the work and education context, as done so in the Gender Equality Directive of the EU.⁷⁴

The types of conduct that are covered by Article 40 are summed up in three principal forms of behaviour: verbal, non-verbal and physical conduct. They have to be of sexual nature and unwanted by the victim. “Unwanted” and “non-consensual” (like in Article 36) are albeit very similar, from a dogmatic point of view not necessarily identical. While “non-consensual” has at least been specified in the rest of the provision, “unwanted” is a less sharp term. If it means “imposed by perpetrator”, as suggested in the Explanatory Report (para. 208), then it should be re-formulated or even erased, as logically speaking, some kind of “wanted” sexual harassment contradicts itself and the rest of the provision. The second part of the provision, namely, specifies the effects of this behaviour as

“violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”.

As the Explanatory Report admits, the context is of high importance, as it reflects “a pattern of behaviour whose individual elements, if taken on their own, may not necessarily result in a sanction.”⁷⁵

⁷¹ Explanatory Report, para. 207.

⁷² See Parliamentary Assembly, Resolution 2177 (2017), Putting an end to sexual violence and harassment of women in public sphere, available at <https://pace.coe.int/en/files/23771>.

⁷³ Explanatory Report, para. 209.

⁷⁴ Gender Equality Directive (Dir 2006/54/EU), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0054>. See also Niemi and Sanmartin (2020), p. 88.

⁷⁵ Explanatory Report, para. 208.

13.3.4 Forced Marriage and Female Genital Mutilation

Honour-based violence and oppression are considered a global public health problem and are highlighted by several international health organisations.⁷⁶ The United Nations Population Fund (UNFPA) estimated that around 5000 girls and women are murdered each year due to honour-based killings. Further, the UN states that globally there are 765 million child marriages, which annually affects about 12 million girls. About 200 million, annually 3.9 million girls and women are genitally mutilated.

In the Preamble of the Istanbul Convention, it states that the Member States should:

“Recognising, with grave concern, that women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called “honour” and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men”

However, there is no further definition of honour-based violence. Sweden uses the following definition

► **Definition** “Honour-based violence is based on strong patriarchal and heteronormative notions, where specific expressions regarding the control of girls and women’s sexuality are central and strongly linked to the collective norms. The family’s reputation and respect are seen as dependent on girls’, and women’s actual or alleged innocence and chastity”⁷⁷

Young victims of such violence describe that life is characterised by control and limitations, where sexuality and love before marriage can have severe consequences.⁷⁸ Growing up and being fostered in a culture of honour is a major influencing factor on an individual’s opportunities to create their own life independently and on equal terms. Areas that are often controlled and surrounded by restrictions or prohibitions are access to; finances, friends, leisure, mobile phone, internet, clothes, and make-up.⁷⁹ The restrictions affect the opportunities to make one’s own life choices, such as choosing a partner, not being allowed education, or being denied work.⁸⁰ In the event of breaching norms of honour, the collective’s

⁷⁶UNFPA (2000).

⁷⁷SOU (2020), p. 57.

⁷⁸Björktomta (2019), Eldén (2003) and Sedem et al. (2014).

⁷⁹Björktomta (2019).

⁸⁰Eldén (2003).

honour and reputation must be restored by punishing the norm-breaker, which can result in severe or even deadly violence.

Areas of a patriarchal structure that support a collectivist clan society have been found to be characterised by high mortality and fertility, poverty, low social mobility, and a lack of democracy and human rights. However, clan structures do not necessarily include honour-based violence.⁸¹ Instead, it is the clan's norm formation around chastity and innocence that is a determining factor as to whether there is an honour culture or not. In societies where there is a culture of honour, equality and women's equal value are rejected, ultimately with a lack of human rights (UNFPA 2020).

Children exposed to honour-based violence are at risk of being taken abroad with the intention of fostering them, since the family considers them to have breached the honour of the family and disgraced them. The only way to restore the honour is to agree to what the patriarch of the family decides. Art. 37 explicitly state that this has to be criminalised

“(1) Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised. (2) Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised”

When abducting children and young adults, which often occurs in a war-torn country, the young person is placed with relatives or in various types of institutions. The abduction occurs because the young person is being accused of following and living according to Western society's values or being involved in crime.

Further, in certain cultures, genital mutilation is part of their rites. For families within this culture, it might be essential to follow this to retain their honour. Art. 38 states that all types of genital mutilation should be criminalised

“(a) excising, infibulation or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris; (b) coercing or procuring a woman to undergo any of the acts listed in point a; (c) inciting, coercing or procuring a girl to undergo any of the acts listed in point a.”

During fictional holiday trips or other made-up travels to relatives in their country of origin, which often occur in the summer, the abducted person is lured into the trip and follows on false premises. They are at risk of being subjected to forced or child marriage or genital mutilation, threats, coercion, or violence by their family. Here, the issue of jurisdiction becomes important. It is important to note that the Istanbul Convention states in Art. 44 that

⁸¹ Makram (2019).

“States shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this convention, where the offence is committed against one of their nationals or a person who has her or his habitual residence in their territory”.

This means that States have the possibility to establish their jurisdiction in cases where female genital mutilation is committed abroad to a woman/girl who has her habitual residence on their territory. As a consequence of this provision, this could prevent families of these women/girls to briefly return to their country of origin (as said, mostly disguised as vacation) only to force them to undergo the mutilation.⁸²

Article 42 states that legislators should be aware that committing crimes in the name of honour is no justification of crimes

“The commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called “honour” shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour”

13.3.5 Forced Abortion and Forced Sterilisation

Forced abortion and forced sterilisation are regulated by Article 39. There, it is stipulated that

“Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

- a) performing an abortion on a woman without her prior and informed consent;
- b) performing surgery which has the purpose or effect of terminating a woman’s capacity to naturally reproduce without her prior and informed consent or understanding of the procedure”.

A common element for both offences, that aim at terminating reproduction one-time or permanently is the prior and informed consent of the woman. Here, the general theory of consent can be narrowed to consent in medical interventions,

⁸²This aspect was outlined, as far as EU Countries are concerned, by the European Commission in its 2013 Communication, p. 5. De Vido (2015), p. 101.

and this further into consent of the two specific interventions of abortion and sterilisation. A consent can be regarded as valid when the following requirements are cumulatively fulfilled: entitlement to dispose of the legal good; statement of consent; the ability to consent, without defect of consent and informing the patient prior to the procedure (“informed consent”).⁸³ With regard to the respective legal good—it will most probably, but not exclusively, fall under the integrity of life and limb; with regard to the statement of consent—its form, scope, time and revocability will be of concern; and with regard to an informed consent—it will depend on the respective legal acts in the respective countries that define this in more detail (i.e. on moment of information, its scope, information about side effects, etc.).⁸⁴

These two offences add up and complete the description of Chapter V as entailing “unacceptable and punishable acts (...) that injure women physically, sexually, psychologically and reproductively.”⁸⁵ The explicit mention of the reproductive aspect is a direct acknowledgement of the gender-related aspect of this form of violence. Bearing in mind that forced abortion and forced sterilisation, beside FGM and forced marriage, and contrary to sexual assault, rape and domestic violence are not universally criminalised, its inclusion in the catalogue of criminal behaviour fosters a uniform approach across the states that have ratified the Istanbul Convention.⁸⁶

At the same time, the reverse situation—forcing a woman to carry a child she has not wanted to conceive, is not regarded as violence by the Convention.⁸⁷ By contrast, the CEDAW General Recommendation No. 35 sees forced pregnancy, forced continuation of pregnancy and criminalisation of abortion as forms of gender-based violence,⁸⁸ in terms of violations of women’s sexual and reproductive health and rights, that “depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.”⁸⁹

According to Article 41 of the Convention, aiding and abetting, as well as the attempt to commit forced abortion and forced sterilisation are to be established as offences. In line with the criminal law doctrine, the Article specifies that those punishable behaviours are all performed intentionally.

For this crime, states can formulate reservations, meaning that the statute of limitation may not impede the victim to initiate the process after she has come of age, in line with Article 58:

⁸³Marković (2012b), p. 315.

⁸⁴Ibid.

⁸⁵Peroni (2020), p. 47.

⁸⁶In this regard also: Jurasz (2015), p. 5.

⁸⁷Niemi and Sanmartin (2020), p. 89.

⁸⁸Ibid.

⁸⁹Convention on the Elimination of All Forms of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, para. 18.

“Parties shall take the necessary legislative and other measures to ensure that the statute of limitation for initiating any legal proceedings with regard to the offences established in accordance with Articles 36, 37, 38 and 39 of this Convention, shall continue for a period of time that is sufficient and commensurate with the gravity of the offence in question, to allow for the efficient initiation of proceedings after the victim has reached the age of majority.”

Last but not least, the issue of double criminality is mentioned in Article 44 (3), concerning certain offences. According to the principles of international law on jurisdiction in criminal matters, double criminality is required when the country where the crime was committed is different from the country where the perpetrator was prosecuted. Yet this requirement of the crime to be stipulated as such in both countries is excluded for rape, forced marriage, FGM, forced abortion and forced sterilisation:

“For the prosecution of the offences established in accordance with Articles 36, 37, 38 and 39 of this Convention, Parties shall take the necessary legislative or other measures to ensure that their jurisdiction is not subordinated to the condition that the acts are criminalised in the territory where they were committed”

Cyprus, Greece, Romania, Serbia, Slovenia, and Sweden made use of this option and expressed reservations without clarification, whereas France, Denmark, Switzerland and North Macedonia added clarifications to their reservations.⁹⁰ It should also be noted that other offences from Chapter V are not included.

13.4 Conclusion

The Istanbul Convention, through the analysis of particular provisions on criminal law, has been confirmed as the anchor point of the intersection between gender and (substantial) criminal law, which so far has not had as many contact points as other fields of academic interest.

Speaking in terms of the general concept of crime, the Convention offers provisions on all of its elements. Typicality, especially the identification of legal goods that have to be protected, is manifested through specifications of behaviours that are to be criminalised—psychological violence; stalking; physical violence; sexual violence, including rape; forced marriage; female genital mutilation; forced abortion and forced sterilisation and sexual harassment; almost all of them being gender-related. Unlawfulness (or justification) offers various examples where its connection to gender becomes clear in general terms. At the same time, the Istanbul Convention contains a regulation on the exclusion of unacceptable justifications for crimes, including crimes committed in the name of so-called “honour”. Guilt as the

⁹⁰Burek (2020), p. 284.

last element of crime, though not specifically regulated by the Convention, appears in various contexts of gender equality (insanity based on substance abuse, diminished responsibility, mistake of law, etc.).

Mirroring the content of the principle of legality, elements that specify criminal liability have also been regulated—aggravating circumstances, as well as the traditional institutes of aiding or abetting and attempt. There are also provisions on reporting; created to encourage and facilitate access to justice for the victims.

Requirements will remain ineffective if their breach is not sanctioned. Hence, penalties are another important issue that the Istanbul Convention covers.

When talking about the special part, particular focus is put on the most gender-relevant offences: psychological and physical violence; stalking; sexual violence, including rape, and sexual harassment; forced marriage and female genital mutilation; forced abortion and forced sterilisation. Even among them, the depth and scope of the connection to gender varies. Looking, for example, at stalking: this overarching offense differs from its definition in various national laws, includes (but is not always recognised as such) psychological violence, and is hence difficult to prove. It is a highly gendered crime, where the majority of perpetrators are men stalking women. On the other hand, there is some kind of equality when it comes to the gender of the offender: male and female stalkers are equally violent. Lastly, the consequences of crime are similar: the harm is (also) manifested in psychological and social terms, regardless of the gender of the victim. Ironically, when it comes to stalking, we can observe a kind of reversed gender equality, both as perpetrators, as well as victims.

On the other side, female genital mutilation, forced marriage, forced abortion and forced sterilisation are crimes that derive from the very basis of gender, sexual reproduction (directly or indirectly) and physical integrity of the victim.⁹¹

The aspiration of the creators of the Istanbul Convention to

“create a Europe free from violence against women, and domestic violence”

as stated in its Preamble is, of course, solemnly far-fetched. A realistic view at the respective provisions and the statistical outcomes in the respective countries with regard to violence against women and girls speaks a different language. And yet, it is the best unifying international legal instrument we have so far.

Ironically enough, Turkey, the first country to sign the Istanbul Convention and its name giver, is now the first country to withdraw from it.⁹² This negative precedent shows that besides consensus in creating the legal basis and implementation of it, continuity is the third essential factor. Another current example is the rise of

⁹¹This is valid even in cases of forced marriage, where (mostly women and girls) are forced to marry early and consequently to give birth to children earlier than it would happen outside a forced marriage.

⁹²https://www.europarl.europa.eu/doceo/document/E-9-2021-001699_EN.html, last accessed on 5 May 2021.

domestic violence and cases of violence against women during the COVID 19 pandemic. It indicates that social rethinking and mutual respect are still lacking when it comes to the basic aspects of gender equality, such as the right to physical and mental integrity.

Questions

1. When does the gender perspective occur as necessary in criminal law?
2. How was the relationship between the dogmatic of criminal law and gender shaped so far?
3. Does gender perspective change the mainstream criminal law creation, interpretation, and implementation, and if so, how?
4. What is the importance of the Istanbul Convention, particularly from the gender point of view?
5. What institutes of criminal law does the Istanbul Convention entail? How are they regulated?
6. What are the particularities of unlawfulness as element of crime and gender? What does the so-called medicalisation of female offenders mean?
7. What are the issues of sentencing and gender?
8. How are forced marriage, female genital mutilation, forced abortion, forced sterilisation, and stalking, as highly gender-sensitive crimes regulated?
9. What forms of violence does the Istanbul Convention criminalise? How do they differ among each other and how is the gender aspect incorporated in every one of them?
10. What conclusions can be drawn in general on criminal law and gender?

References

- Acale Sánchez M (2006) *La discriminación hacia la mujer por razón de género en el Código penal*. Reus, Madrid
- Acale Sánchez M (2013) *Justicia penal y género*. *Revista Eletrônica de Direito Penal, AIDP---GB* Ano 1 1(1), Junho
- Acale Sánchez M (2019) *Violencia sexual de género contra las mujeres adultas. Especial referencia a los delitos de agresión y abusos sexuales*. Tirant lo Blanch, Valencia
- Allen H (1987) *Justice unbalanced: gender psychiatry and judicial decisions*. OU Press, Milton Keynes
- Armenta Deu T (2012) *Sistemas procesales penales. La justicia penal en Europa y América*. Marcial Pons, Barcelona
- Armstrong I (1999) Women and their 'uncontrollable impulses': the medicalisation of women's crime and differential gender sentencing. *Psychiatry Psychol Law* 6(1):67-77
- Australian Bureau of Statistics ABS (2006) 2005. *Personal Safety Survey*. Australia

- Baum K, Catalano S, Rand M, Rose K (2009) Stalking victimization in the United States. National Crime Victimization Survey. Special Report. NCJ 224527. U.S. Department of Justice, Washington D.C.
- Belfrage H, Strand S (2009) Validation of the guide for stalking assessment and management in Swedish law enforcement. *Int J Police Sci Manag* 11:67–76
- Björktomt S-B (2019) Honor-based violence in Sweden – norms of honor and chastity. *J Fam Violence* 34:449–460
- BRÅ, National Council of Crime Prevention (2006) Stalking in Sweden. Prevalence and measures (Report 2006:3). www.bra.se
- Burek W (2020) Reservations and declarations under the Istanbul Convention. In: Niemi J, Peroni L, Stoyanova V (eds) *International law and violence against women. Europe and the Istanbul Convention*. Routledge, London, pp 277–295
- De Vido S (2015) Culturally motivated crimes against women in a multicultural Europe. The case of criminalization of FGM in the 2011 CoE Istanbul Convention. <https://edizionicafoscari.unive.it/media/pdf/books/978-88-6969-054-9/978-88-6969-054-9-ch-05.pdf>. Accessed 27 Oct 2021
- Denno D (1994) Gender, crime, and the criminal law defenses. *J Crim Law Criminol* 85:80–180
- Devries K et al (2013) The global prevalence of intimate partner violence against women. *Science* 340:1527–1528. <https://doi.org/10.1126/science.1240937>
- Dobash RP, Dobash RE (2005) Efectividad de los programas penales de tratamiento de maltratadores. In: Moliné JC, Pijoan EL (eds) *La delincuencia violenta ¿prevenir, castigar o rehabilitar?* Tirant lo Blanch, Valencia, pp 147–190
- Donini M (2017) An impossible Exchange? Prove di dialogo tra civil e common lawyers su legalità, morale e teoria del reato. *Rivista Italiana di Diritto e Procedura* 1:14–47
- Dressing H, Kuehner C, Gass P (2005) Lifetime prevalence and impact of stalking in a European population epidemiological data from a middle-sized German city. *Br J Psychiatry* 187:168–172
- Dressing H, Gass P, Kuehner C (2007) What can we learn from the first community-based epidemiological study on stalking in Germany? *Int J Law Psychiatry* 30:10–17. <https://doi.org/10.1016/j.ijlp.2006.03.006>
- Echiburúa E, Fernández-Montalvo J, de la Cuesta Arzamendi JL (2001) *Psicopatología clínica. legal y Forense* 1:19–31
- Eldén Å (2003) *Heder på liv och död. Våldsamma berättelser om rykten, oskuld och heder. Avhandling Socialt arbete*. Uppsala Universitet, Uppsala
- Finney A (2006) Domestic violence, sexual assault and stalking: findings from the 2004/05 British Crime Survey. British Home Office
- Forsythe S, Miller MK (2014) Novel defenses in the courtroom. *Jury Expert* 26:66–78
- Jurasz O (2015) The Istanbul Convention: a new chapter in preventing and combating violence against women. *Aust Law J* 89:619–627
- Logan TK (2020) Beyond a dichotomy: threat context factors associated with fear and stalker capability of harm among women stalked by (ex)partners, close acquaintances, and distant acquaintances/strangers. *J Threat Assess Manag* 7:13–28
- Logan TK, Walker R (2017) Stalking: a multidimensional framework for assessment and safety planning. *Trauma Violence Abuse* 18(2):200–222
- Lundgren E (2012) *Våldets normaliseringsprocess och andra våldsföreståelser. kartläggning [The normalisation process of violence and other understandings of violence]*. Riksorganisationen för kvinnojourer och tjejjourer i Sverige (ROKS), Växjö
- Makram O (2019) Det är moralen – inte klanen. *Nättidskriften Kvartal / riksorganisationen GAPF*. <https://kvartal.se/medverkande/omar-makram/>. Accessed 27 Oct 2021
- Maran DA, Varetto A (2017) Motives to report stalking cases to the police: a comparison between a large city and a small town in Italy. *J Aggress Maltreat Trauma* 26(5):507–524
- Marković I (2012a) Krivično delo ubistva deteta pri porođaju. In: Taboroši S (ed) *Razvoj pravnog sistema Srbije I harmonizacija sa pravom EU*. Pravni fakultet Univerziteta u Beogradu, Beograd, pp 77–94

- Marković I (2012b) Preduzimanje medicinskog zahvata kao osnov isključenja protivpravnosti – sa posebnim osvrtom na nepostojanje pristanka pacijenta. In: Ignjatović D (ed) Kaznena reakcija u Srbiji, II deo. Pravni fakultet Univerziteta u Beogradu, Beograd, pp 306–324
- Marković I (2015) Neka osnovna pitanja u vezi sa objektivnom stranom protivpravnosti. In: Ignjatović D (ed) Kaznena reakcija u Srbiji, V deo. Pravni fakultet Univerziteta u Beogradu, Beograd, pp 285–300
- McColgan A (2000) General defences. In: Nicolson D, Bibbings L (eds) *Feminist perspectives on criminal law*. Cavendish, London, pp 137–158
- McEwan TE, Strand S (2013) The role of psychopathology in stalking by adult strangers and acquaintances. *Aust N Z J Psychiatry* 47:546–555
- Mullen PE, Pathé M, Purcell R, Stuart G (1999) Study of stalkers. *Am J Psychiatry* 156:1244–1249
- Nicolson D (2000) What the law giveth, it also taketh away: female-specific defences to criminal liability. In: Nicolson D, Bibbings L (eds) *Feminist perspectives on criminal law*. Cavendish, London, pp 159–182
- Nicolson D, Bibbings L (2000) *Feminist perspectives on criminal law*. Cavendish, London
- Niemi J, Sanmartin AV (2020) The concepts of gender and violence in the Istanbul Convention. In: Niemi J, Peroni L, Stoyanova V (eds) *International law and violence against women. Europe and the Istanbul Convention*. Routledge, London, pp 77–94
- Oberwittler D, Kasselt J (2014) Honor killings. In: Gartner R, McCarthy B (eds) *The Oxford handbook of gender, sex, and crime*. Oxford University Press, Oxford, pp 652–670
- Peroni L (2020) Unleashing the gender equality potential of the Istanbul Convention. In: Niemi J, Peroni L, Stoyanova V (eds) *International law and violence against women. Europe and the Istanbul Convention*. Routledge, London, pp 43–56
- Pornari CD, Dixon L, Humphreys GW (2013) Systematically identifying implicit theories in male and female intimate partner violence perpetrators. *Aggress Violent Behav* 18:496–505. <https://doi.org/10.1016/j.avb.2013.07.005>
- Purcell R et al (2005) Association between stalking victimisation and psychiatric morbidity in a random community sample. *Br J of Psychiatry* 187:416–420
- Roberts D (1994) The meaning of gender equality in criminal law. *J Crim Law Criminol* 85:1–14
- Sedem M et al (2014) Fear of the loss of honor: implications of honor-based violence for the development of youth and their families. *Child Youth Care Forum* 44:225–237
- Sosa L (2020) The Istanbul Convention in the context of feminist claims. In: Niemi J, Peroni L, Stoyanova V (eds) *International law and violence against women. Europe and the Istanbul Convention*. Routledge, London, pp 25–42
- SOU (2020) Ett särskilt hedersbrott. Betänkande av hedersbrottsutredningen. Statens Offentliga Utredningar, Stockholm
- Stieger S et al (2008) Lifetime prevalence and impact of stalking: epidemiological data from Eastern Austria. *Eur J Psychiatry* 22(4):235–241
- Sumalla T, Marfá J (2005) Artículo 149. In: Olivares GQ, Prats FM (eds) *Comentarios al Nuevo Código penal*. Aranzadi, Pamplona, pp 93–100
- Tjaden P, Thoennes N (1998) Prevalence, incidence, and consequences of violence against women: findings from the National Violence Against Women Survey. National Institute of Justice. Research in Brief. Centers for Disease Control and Prevention U.S. Department of Justice, Washington D.C.
- Tran TD, Nguyen H, Fisher J (2016) Attitudes towards intimate partner violence against women among women and men in 39 low- and middle-income countries. *PLoS ONE* 11(11). <https://doi.org/10.1371/journal.pone.0167438>
- UNFPA (2000) The state of world population 2000. Lives together, worlds apart. United Nations: UNFPA

- UNFPA (2020) State of World Population 2020: against my will - defying the practices that harm women and girls and undermine equality. United Nations: UNFPA
- Weller M et al (2013) Police and public perceptions of stalking: the role of prior victim-offender relationship. *J Interpersonal Violence* 28:320–339
- Wilson W (2011) Criminal law. Pearson, Wales
- Yeo S (1993) Resolving gender bias in criminal defenses. *Monash Univ Law Rev* 19:104–116

Further Reading

- Burman M (2010) The ability of criminal law to produce gender equality: judicial discourses in the Swedish criminal legal system. *Violence Against Women* 16:173–188
- Dressing H et al (2014) Cyberstalking in a large sample of social network users: prevalence, characteristics, and impact upon victims. *Cyberpsychol Behav Soc Netw* 17:61–67
- Finney A (2006) Domestic violence, sexual assault and stalking: findings from the 2004/05 British Crime Survey. British Home Office, London
- McEwan TE et al (2009) Violence in stalking situations. *Psychol Med* 39:1469–1478
- Mullen PE et al (2009) Stalkers and their victims. Cambridge University Press, Cambridge
- Sheridan L, Grant T (2007) Is cyberstalking different? *Psychol Crime Law* 13:627–640
- Strand S, McEwan TE (2011) Same-gender stalking in Sweden and Australia. *Behav Sci Law* 29: 202–219
- Strand S, McEwan TE (2012) Violence among female stalkers. *Psych Med* 42:545–556

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