# International conventions: improving the position of victims of sexual offences

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**Internationalisation of Criminal Law**

Criminal law has customarily been considered an exceptionally "national" branch of law. Along with family law, it is supposedly one of the last areas that will feel the impact of globalisation and efforts to harmonise rights.

This view is largely mistaken, however. Although criminal laws are the products of national legislative processes, the principles, theories and solutions that inform their content are often imported – born elsewhere and formulated to suit domestic purposes. Finland, like most countries, can probably be credited with no more than a single innovation in the realm of criminal law: the system of day fines, implemented in 1921 and known as the "Scandinavian fine system". Other criminal sanctions, such as community service, have spread from country to country and taken on local forms.

Likewise, the conceptual system underpinning general doctrines, a product of philosophical deliberations, has most often taken shape over time. The notions of criminal responsibility and the concepts we find in the general doctrines of criminal law date back to antiquity; some go back even farther. Intention and choice have been discussed since Aristotle, and the Romans drew the distinctions intentionality, negligence and accident. Canon Law and the Church, for their part, emphasised the responsibility of the individual to an extent where secular law also began to pay more attention to the position of women and slaves and the mentally ill were no longer considered criminally

responsible.[1]

In Finland, the criminal codes of other countries often provided models for not only the general part of the Criminal Code but also the description of individual offences. The country's first Criminal Code, enacted in 1889, owed a great deal to the Swedish (Strafflagen 1864) and German codes (Strafgesetzbuch 1871). The two countries continued to have a strong influence on Finnish criminal legislation thereafter.

Implementing international conventions in national legislation is far more effective than debating law on the theoretical level and copying individual provisions from one country to another. The expansion of international law and growing array of treaties concluded since the Second World War have had an impact on essentially every branch of law. As one professor of International Law has noted, nearly every field of law has become international law.

**Sexual Abuse and Violence against Women**

Recent decades have seen the emergence of an extensive range of treaties designed to improve the position of victims of sexual offences, crimes of violence and human trafficking. The paramount concern has been to protect women and children. The treaties have been the outcome of efforts by the United Nations and a number of other international organisations, such as the International Labour Organization, the Council of Europe and the European Union. Another crucial actor has been the European Court of Human Rights and the body of case-law it has created in applying the European Convention on Human Rights. Also figuring significantly is the Rome Statute of the International Criminal Court (ICC), an instrument that was approved in 1998 and

[1] J. Walter Jones, *The Law and Legal Theory of the Greeks*. pp. 271-275, Oxford 1956; Arlette Lebigre, *Quelques Aspects de la Responsibilité Penal en Droit Romain Classique*. pp. 55-56, 60-70, Paris 1967; Andrea Wacke, *Fahrlässige Vergehen. – Revue Internationale des Droits de l´Antiquité*. pp. 508-509, 518-541, Bruxelles 1979; Georg Schubert, *Der Einfluss des kirchlichen Rechts auf das weltliche Strafrecht der Frankenzeit*. pp. 18-28, Münster 1937.

came into force in 2002. Further contributions have come from third-sector organisations, such as Zonta International, which has campaigned against violence towards women and disseminated information on international conventions.

The first specific criminal penalty for human trafficking in the Finnish Criminal Code (s. 25:1) was enacted in 1926, after Finland had acceded to two international conventions, one for suppression of the white slave trade and the other for the suppression of the traffic in women and children, concluded in 1910 and 1921, respectively. Here we see conventions going back a good one hundred years. This development was followed by a number of quieter decades.[2]

Things were quite different indeed as we approached the 2000s. The Council of Europe and the European Union had concluded a succession of international conventions on the protection of women and children. These prompted numerous additions and amendments to the legislation on sexual offences in Finland, as elsewhere.[3]

1. *International conventions on child abuse*

The 1989 UN Convention on the Rights of the Child obligates the states parties to protect children from all forms of sexual exploitation and abuse. Finland brought the Convention into force in 1991, and its 2000 Optional Protocol in 2012. The Protocol expanded the scope and level of detail of the Convention's provisions, with specific application to the sale of children, child prostitution and child pornography. The instrument also imposed obligations on the states parties to criminalise certain activities.

In 1999, the International Labour Organization concluded the Convention on Prohibiting and Eliminating the Worst Forms of Child Labour, which the convention deemed to be the use of a child for prosti-

[2] It was only after the airplane hijackings of the 1960s and 1970s that international treaties were concluded which prompted Finland to criminalise airplane hijacking and sabotage of air traffic (34:14a, 14b).

[3] Minna Kimpimäki, *Kansainvälinen rikosoikeus*. pp. 182-204, Kauppakamari 2015.

tution, for the production of pornography or for pornographic performances.

A subsequent convention, more detailed and with more obligations to criminalise, was the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. It was adopted by the Council of Europe in 2007 and came into force in Finland in 2011.

The Convention covered an extensive range of the forms of child abuse, encompassing not only sexual intercourse with a child but child prostitution and child pornography as well. Its criminalisation obligations were extended to situations where a child had not yet participated in sexual activity by requiring that sanctions be imposed for corrupting a child and for grooming. The former refers to causing a child to witness sexual abuse or sexual activities, the latter to soliciting children for sexual purposes.

An instrument similar in content to the Convention was the 2004 Framework Decision of the Council of Europe on combatting sexual abuse of children and child pornography (2004/68/JHA). The Decision was replaced in 2011 by the Directive on Combating the sexual abuse and sexual exploitation of children and child pornography (2011/93/EU). The Directive is more detailed, and its obligations to criminalise more extensive and specific. It also sets out the lowest maximum penalty for each form of offence.

The obligations imposed on Finland under international conventions have meant numerous amendments to the country's legislation on sexual offences. The relevant provisions were revised in 1998 as part of the general reform of the Criminal Code, the point of departure in the work being to protect the right to sexual self-determination.At the time, international conventions did not as yet influence how the provisions on sexual offences were formulated; not surprisingly, they have been revised a number of times in the 2000s, addressing a need largely prompted by the conventions.

The provisions on human trafficking, sexual abuse of children and child pornography, among other offences, were revised in 2004 (Act no. 650/2004). Later, in 2011, a rather extensive reform was carried out

when the Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse was brought into force (Act no. 540/2011). The provisions in chapter 20 of the Criminal Code on child abuse and child prostitution were amended and augmented. Similarly, chapter 17 of the Code was revised to include the provisions on child pornography. The reform also extended the criminal liability of a juridical person and increased the scope of the prohibition to pursue a business.

The new provisions were added to the Code under the old systematics, introduced in 1998, with the result that today the provisions on child prostitution and child pornography are fragmented.

2. *International conventions combatting violence against women*

Many human rights conventions, such as the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), also seek to combat violence and sexual offences against women. Violence is a form of discrimination. Another instrument geared to combating violence is the Council of Europe recommendation on the protection of women against violence (Rec (2002)5).

From the perspective of human rights agreements, crimes of violence and sexual offences are violations of human rights. Accordingly, states parties have a positive obligation to see to it that no violations of human rights occur in their territory, with these to include domestic violence.

The European Court of Human Rights has played a crucial role in changing attitudes. Numerous provisions of the European Convention on Human Rights have been applied in cases involving violence and sexual offences against women, examples being Article 2 on the right to life, Article 3 on the prohibition of torture, Article 5 on the right to liberty and security and Article 14 on the prohibition of discrimination.[4]

One instrument with a particular focus on eliminating violence and

[4] E.g. Opuz v. Turkey, 9.6.2009.

domestic violence against women is the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence. Also known as the Istanbul Convention, it came into force in Finland on 1 August 2015.

The Convention seeks to change attitudes through awareness-raising, education and information and emphasises that culture custom, religion, tradition or "honour" cannot be considered justifications for violence. It provides that telephone helplines and shelters should be set up for victims, and that victims should be given legal aid and that protection should be given to witnesses. The obligations under the Convention are set out as applying to state officials, regional and local representatives and non-governmental organisations. In Finland, responsibility for co-ordination, implementation, monitoring and evaluation of policies and measures pursuant to the Convention rests with the Ministry of Social Affairs and Health.

The Convention also imposes obligations on parties ensure that offences established in the Convention are made punishable by effective sanctions. For example, they are to ensure that where the victim of the offence was the perpetrator's spouse or former spouse, this constitutes aggravating circumstances in determining the sentence. The Convention requires that psychological, physical and sexual violence, stalking, forced marriages, female genital mutilation, forced abortion and forced sterilisation be made criminal offences (Articles 33-40)

Most of the acts which the Istanbul Convention requires parties to criminalise were already offences in the Finnish Criminal Code. Among the new offences enacted pursuant to the Convention was stalking, which was made a punishable offence in 2013 (Act no. 879/2013).A person is guilty of stalking if the person repeatedly threatens, observes, contacts or in another comparable manner unjustifiably stalks another so that this is conducive towards instilling fear or anxiety in the person being stalked (Criminal Code, ch. 25, s. 7a).

Criminalisation of sexual harassment did not proceed as smoothly. In 2013, the government proposed that sexual harassment be made an offence punishable under the Criminal Code (Government Bill

216/2013), but the definition of harassment adopted was narrower than that in the Convention. When the bill came before Parliament, the scope of the proposed provision was narrowed further and the name of the offence changed to "sexual molestation". It refers to touching of a person that is conducive to violating the person's sexual self-determination. Gestures, facial expressions and sexually suggestive remarks do not fall under the definition of molestation. Finland has two Acts – the Act on Equality between Women and Men and Occupational Safety and Health Act – that contain provisions on sexual harassment that are more comprehensive than the provision in the Criminal Code.

The Criminal Code has no specific provisions on forced marriage or female genital mutilation. These have been proposed for inclusion, as has the renewed provision on rape, with lack of consent as the key constituent element of the offence.[5]

## Rape as a Criminal Offence: From the Interests of the Community to Respect for the Will of the Individual

International conventions have resulted in new offences being added to the Finnish Criminal Code and existent ones being amended to conform to Finland's obligations under the conventions. The conventions and related legal praxis have also had an impact on as "classic" an offence as rape. The definition of rape has been broadened and development can be seen from protection of the family's and extended family's interests to respect for the will of the individual, and from physical coercion into a sexual act to the lack of consent to a sexual act.

### 1. *Change in the interest being protected*

For a very long time, the prevailing view in the case of rape was that it was not so much the victim's self-determination that had been violated – because at one time women and children essentially had none – but that the offence affected the family and lowered the status

[5] Kimpimäki 2015, pp. 211-212.

of the victim in the community. In ancient Athens, the immediate object of a rape might be a wife, daughter of slave but it was the husband, father or master of the house who was holder of the legal interest. The basic unit of society among the ancient Romans, Old Testament Jews and Christians was the family, with a man being the head of what was a patriarchal family. It was important to safeguard the lineage of one's progeny and codes of morality were upheld through honour and shame. Rape violated a woman's honour, the family of the master of the house and the social order.[6]

The notion that rape also brought shame upon the victim persisted for quite some time in the Nordic countries. Accordingly, the 1734 Swedish Code prohibited, under threat of punishment, "reproaching" a victim of rape. The connection between marriage and rape also persisted, with marriage seen as a means to atone for the offence. As late as 1994, the Finnish Criminal Code still contained a provision whereby no punishment was imposed if the perpetrator married the victim of his crime. This was certainly a curious state of affairs given that the 1971 reform of sexual offences was based on the principle of sexual self-determination. In 2003 the European Court of Human Rights heard a case, *M.C. v. Bulgaria* (4.12.2003), in which the perpetrator offered to marry his 14-year-old victim when she turned 18.

For many years, legislation on sexual offences was designed to protect the social order from unwanted sex. This notion still prevails in many countries, one indication of this attitude being honour killings.

Yet, rape gradually came to be considered a crime of physical violence against a woman. The 1734 Swedish Code still mentioned that the offence took place against the woman's will. Thus, the victim could have been asleep, could have been mentally ill or might have been a child. Later, the element of will was removed from the laws, and reference was made to coercing the victim into sexual intercourse. Rape be-

[6] Georg Doblhofer, ;Vergewaltigung in der Antike;. *Beiträge zur Altertumskunde*. Band 46. pp. 4-5, 97-98, 110-111; Terttu Utriainen, 'Vad biblen berättar om våldtäkt'. In: *Festskrift till Madeleine Lejonhufvud*. pp. 363-368. Vällingby 2007.

came a crime of violence and the victim's physical body the object of the offence. This was the definition that applied in the Finnish Criminal Code until the 2000s; to be sure, the degree of violence used in coercion was less than that defined as *vis absoluta* of the 1800s.

2. *From violence to lack of consent*

One impact of international conventions has been that lack of consent to sexual intercourse has replaced violence as the key constituent element of rape. The change in attitudes that has taken place can be attributed to women's achieving a position more equal to that of men. Sexual intercourse is seen as an act based on the consent of two equal persons. Another development – the wars in Rwanda and the former Yugoslavia – brought home the fact that it is not always possible to forcibly resist rape. The conflicts played a part in forcing a redefining the constituent elements of rape.

Even before the tribunals dealing with the former Yugoslavia and Rwanda and the Rome Statute of the ICC, efforts had begun in the Anglo-Saxon countries to rewrite the provisions on rape. As early as the 1970s, the American women's movement had begun to draw attention to the weak position of rape victims in criminal proceedings. Work began on reformulating the provisions on rape in criminal codes. A similar development took place in England as well, where the Sexual Offences Act (70) treated sex acts as objective acts.[7]

In its 2003 Bulgaria judgment (M.C. v. Bulgaria 4.12.2003), the European Court of Human Rights observed with respect to the situation at the time that all references to physical resistance had been removed from the rape provisions in common law countries and that Irish law expressly stated that consent cannot be inferred where there is a lack of resistance.

Likewise, in the statutes of the international criminal courts rape was described such that it did not require physical resistance on the

[7] Jennifer Temkin & Andrew Ashworth, 'The Sexual Offences Act 2003. (1) Rape, sexual assault and the problems of consent'. *The Criminal Law* Review 2004, 331-332.

part of the victim. In war, circumstances can be so threatening that resistance is not possible or that it is dangerous or futile. The judgments of the tribunals on the former Yugoslavia and Rwanda compared the rape provisions of different countries. One decision of the Yugoslavia tribunal expressly stated that one feature common to the legislation in different countries is that rape involves violence, coercion, a threat or in any case that the act has taken place contrary to the consent of the victim.[8]

Unlike the ad hoc criminal courts set up for the former Yugoslavia and Rwanda, the International Criminal Court is a permanent institution. The foundational and governing document for the Court, the Rome Statute, was approved in 1998 and came into force in 2002. When the Statute was being drafted, the experiences, praxis and sets of standards of the earlier tribunals were taken into account. Not surprisingly, rape is mentioned both as an offence against human rights and as a war crime (Art. 7-8) In addition, the opportunity to appeal to consent as a defence is restricted in the Statute's Rules of Procedure and Evidence (Rule70), the rationale being that consent cannot be inferred from the victim remaining silent or from a lack of resistance. Moreover, neither verbal or implicitly given consent has any significance if coercion or coercive circumstances have left the victim with no possibility to give truly voluntary consent.[9]

In a word, consent has become widely acknowledged as an essential element of rape. Among civil law jurisdictions, however, one can still find countries in which the definition of rape is still predicated on indications that the perpetrator used violence against the victim or threatened to do so. This is the case in the Nordic countries and in Germany, for example. In Germany a threat still requires danger to life or limb (StGB § 177). It has been speculated that one reason why Germany is conservative in the matter of sexual offences is that the women's

[8] ICTY, Furundzija IT-95-17/1-T Judgement 10.12.1998 paras 180-186.

[9] Minna Kimpimäki, 'Raiskaus kansainvälisenä rikoksena'. In: *Väkivalta Seuraamukset Haavoittuvuus*. pp. 126-127. Helsinki 2006.

movement in the country has not had the same opportunities to influence criminal policy as in the United States.[10]

**Significance of International Treaties**

On 13 March 2015, speaking at a celebration marking the 20th anniversary of the adoption of The Beijing Declaration and Platform for Action to promote women's rights, Hillary Clinton noted that 20 years ago it was revolutionary to declare that women's rights are human rights but happily, today it is routine to do so.

That this notion has become a routine one can be attributed in considerable measure to international treaties and the case-law of courts. The changes that have taken place in values and attitudes are now enshrined as norms in international instruments. In many countries, such as Finland, norms in the form of laws are generally taken seriously: officials implement them and they are complied with. The obligations imposed by international treaties have exerted pressure on political decision making and the work of government authorities. For example, one outcome of the Istanbul Convention was that Finland was forced to increase the number of places available in shelters and to set up round-the-clock telephone helplines.

Monitoring mechanisms, with the national reports they include, also help non-governmental organisations in following implementation of the conventions. This has occurred in where the CEDAW is concerned and will obviously be the case when the Grevio monitoring system for the Istanbul Convention begins operating.

Research in victimology can be credited with drawing more attention to the position of the victim in the latter decades of the 1990s, the same time as one can see the burgeoning network of international conventions. This put a face on the victims of sexual offences and efforts began to improve their posit on in national legislation.

Development to date has been positive. But will this be the case in

[10] Terttu Utriainen, 'The difficulty of rape law reforms'. In: *Kriminologie – Jugendkriminalrecht – Strafvollzug. Gedächtnisschrift für Michael Walter*. pp. 828-829. Duncker & Humboldt. Berlin 2014.

the future as well? It cannot be taken for granted that human rights will continue to be safeguarded and their protection improved. Development is not necessarily linear, a change for the better. Enacting legislation and honouring conventions are a matter of political will. The nationalistic trends that we have seen of late are getting stronger in many countries, and many adherents of these movements do not consider international treaties and universal human rights necessary or worth monitoring. In times of economic difficulties and political instability, we see values and attitudes surface that are at odds with those represented by human rights conventions. Then again, economic globalisation and advances in information technology promote more expansive integration. The upshot is that we cannot afford to stand still; international treaties must be developed further and research on them promoted, for example by setting up international doctoral programmes.