Coercion by Violence and its Changing Meaning. The Experience of Italy

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A. Introduction

For a long time, the regulation of rape has been based on the concept of coercion, and specifically on coercion by force.[1] Italy is no exception and is, moreover, one of the few Western jurisdictions where the definition of rape still requires the use of violence.[2]

With the exception of some subsequent adjustments, the current legal framework of sexual offences was established in 1996. The reform was hailed as a victory for women and a cultural turnaround in its symbolic recognition and protection of sexual autonomy.[3] The main feature of the reform is that the law now classifies sexual offences as "offences against personal freedom". Previously, under the 1930 fascist penal code (the so-called "Rocco Code"), sexual autonomy had not been protected as an interest in itself but as a part of the public interest in "public morality and decency".[4]

Beyond this ideological message to society, the reform brought few innovations with regard to the structural elements of the offence of "sexual violence" ("*violenza sessuale*"). The crime continues to be based on coercion and predicated upon the traditional components of violence and threats. Several commentators have emphasised that retaining the old structure

1 Stephen J. Schulhofer, 'Unwanted Sex. The Culture of Intimidation and the Failure of Law' (1998), 114.

2 See the chapter on Italian law in this volume.

3 Giuliano Balbi, 'Violenza sessuale', in: Enciclopedia Giuridica (1998) 1, 3.

4 Marta Bertolino, 'La riforma dei reati di violenza sessuale', (1996) Studium Iuris 401; Rachel A. Fenton, 'Rape in Italian law: towards the recognition of sexual autonomy', in: Clare McGlynn and Vanessa E. Munro (eds), 'Rethinking Rape Law' (2010), 183.

of the offence is not entirely consistent with the reform's aim to provide stronger protection for sexual autonomy.[5]

If the law in the books remains linked to the concept of coercion, the law in action is extremely different. Although the word "violence" is associated with the use of physical force, in case law – especially of the Supreme Court – the requirement of violence has been completely dematerialised.[6] The particularity of the Italian law on sexual offences, therefore, is that – despite the official focus on coercion – the Supreme Court has consistently interpreted it in terms of consent of the victim. In order to convict the defendant, a forcible *actus reus* is no longer required.

This chapter thus will explore how the concept of coercion has been transformed over the years in Italian case law to the point of being identified with the absence of consent. This process has been influenced not only by compelling changes in social attitudes but also by external inputs from comparative analysis of other legal systems and from supranational jurisprudence. The chapter will try to demonstrate these connections, but also setbacks that occurred along the way, such as when in 1999 an Italian judge made international headlines by announcing a rule that a man could not possibly rape a woman wearing tight blue jeans (see *infra*, § 5). This case of showing a revival of the concept of coercion by force will also demonstrate that a paradigm based on violence is no longer acceptable. That model, indeed, is closely linked to false myths and stereotypes of the past and is based on a concept of sexuality rooted in bygone myths.

B. The historical origin of forcible rape and the duty to resist

Historically, the concept of rape by force arose in a context in which sexual intercourse with a married woman or a girl under the custody of her father was inherently wrongful.[7]

At the time of the ancient Greeks, forcible rape and adultery were considered to be equally serious and were treated by the law as the same

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5 See e.g., Tullio Padovani, 'Pre-Art. 609-bis c.p. Commento ad Art. 2 l. 15 febbraio 1996, n. 66', in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn. 2006) 431, 434; Bertolino (note 4), 403.

6 Among several scholars, recently Matteo L. Mattheudakis, 'L'imputazione colpevole differenziata. Interferenze tra dolo e colpa alla luce dei principi fondamentali in materia penale' (2020), 418–422.

7 Tullio Padovani, 'Violenza carnale e tutela della libertà', (1989) Riv It Dir Proc Pen, 1301, 1306.

crime ("*moicheia*").[8] However, from the perspective of the man who owned his wife or his daughter, the conduct of another male who seduces the woman secretly was more dangerous than that of the rapist who, driven by an overwhelming sexual desire, occasionally forces her to have sexual intercourse.[9] As Lysias states in *On the murder of Eratosthenes*, "seducers corrupt minds, to the point that the wives of others belong to them more than to their husbands; they become masters of the house and one no longer knows who is the father of the children".[10]

During the Roman Empire, force was the element that made it possible to draw a line between adultery and rape. The *lex Iulia de adulteriis* punished very harshly (with exile, loss of property, in later times even death) both the man and the woman who were complicit in adultery.[11] Proof that sexual intercourse had been brought about by force allowed the woman to avoid criminal liability and exempted her husband from the duty of repudiating her.[12]

The history of rape developed along these lines until the age of Enlightenment. In the criminal law of the *ancien régime*, sexual activity did not constitute a right of the person or an expression of autonomy; it was an instrument for procreation within the legal family.[13] For this reason, any sexual intercourse not directed toward legitimate procreation was criminalised, leaving aside any concern about consent.[14]

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8 Eva Cantarella, 'I reati sessuali nel diritto ateniese. Alcune considerazioni su "moicheia" e violenza sessuale', in: Alberto Maffi and Luca Gagliardi (eds), 'Eva Cantarella. Diritto e società in Grecia e a Roma. Scritti scelti' (2011), 373, 385.

9 Isabella Merzagora, 'Relativismo culturale e percezione sociale in materia di comportamenti sessuali deviati', in: Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (1996), 343, 345; Keith Burgess-Jackson, 'A History of Rape Law', in: Keith Burgess-Jackson (ed), 'A Most Detestable Crime. New Philosphical Essays on Rape' (1999), 15.

10 Lysias, 'On the murder of Eratosthenes', 32–33.

11 Giunio Rizzelli, 'Lex Iulia de adulteriis. Studi sulla disciplina di adulterium, lenocinium, stuprum' (1997), 171.

12 Fabio Botta, 'Per vim inferre. Studi su stuprum violento e raptus nel diritto romano e bizantino' (2004), 57.

13 Padovani (note 7), 1303.

14 To be accurate, during the period of so-called 'intermediate' law, there was a kind of presumption of rape, even where there was the woman's consent, in all cases where sexual interaction was illegitimate because it took place outside of a regular marriage. The woman's consent was assumed to be invalid. The qualification of such sexual interactions as rape served to force the man to marry the woman in a so-called 'reparative' marriage, restoring the family order and the legitimacy

While the crime of adultery survived until late in the 20th century, for the crime of rape a distinction was introduced between "simple" (when the sexual encounter takes place with an unmarried woman), "qualified" (when the woman is persuaded by a non-fulfilled promise of marriage) and "violent" (when there is forcible coercion) rape.[15] Consistently, even violent rape of prostitutes was not criminalised, since they were neither the property of a husband nor in the custody of a father waiting for marriage and maternity.[16]

The Enlightenment approach of separating law from morality – of not punishing mere sins – led 19th century lawyers to challenge the figure of "simple rape". The legal justification for decriminalising this form of rape was based on the woman's consent.[17] As one scholar has argued, however, the emphasis on women's free consent did not reflect the transposition of new values and principles into the law, because in that period society was not ready to recognise women's sexual autonomy.[18] The change can be explained in political terms: The upper classes wished to abolish mandatory marriage as a consequence of any "simple rape" to prevent lower class men from gaining access to wealthy families by seducing young women.[19] Consent was therefore a rhetorical device to justify the loss of ancient protections for women, such as marriage after "simple rape". It was not seen as an act of women's freedom, but as a sign of their guilt.

On this basis, it became important for the lawyers of the time not to grant protection to seductive women who did not deserve it, i.e., those who failed to demonstrate that they were not complicit in the sexual intercourse and that they had resisted with all their strength. It is in this historical period that numerous stereotypes of seduction were established.

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of the union. See Giovanni Cazzetta, 'Praesumitur seducta. Onestà e consenso femminile nella cultura giuridica moderna' (1999).

15 Padovani (note 7), 1304.

16 For a debate on the rape of prostitutes, see Isabella Rosoni, 'Violenza (diritto intermedio)', in: 'Enciclopedia del diritto' (1993), 843, 854.

17 This was, for example, the opinion of the most renowned Italian criminal lawyer of the 19th century, Francesco Carrara. See Giovanni Fiandaca, 'I reati sessuali nel pensiero di Francesco Carrara: un onorevole compromesso tra audacia illuministica e rispetto per la tradizione', (1988) Riv It Dir Proc Pen, 903.

18 Giovanni Cazzetta, 'Colpevole col consentire. Dallo stupro alla violenza sessuale nella penalistica dell'Ottocento', (1997) Riv It Dir Proc Pen, 424.

19 Ibid.

C. "Vis grata puellae": from "vis atrox" to force of "any intensity"

Nineteenth-century lawyers rediscovered the "wisdom" of the ancient poets and, among others, that of Ovid, who contended that a little force is appreciated by maidens in order to overcome their modesty and reluctance ("*vis grata puellis*").[20] The woman in Ovid's poetry "*pugnando vinci se tamen illa volet*" ("although fighting, wants to be defeated").[21]

In view of that, not all degrees of force were considered sufficient for a rape conviction. Physical force against the victim's body was required with such intensity that nothing could be done to overcome it in any way (so-called "*vis atrox*").[22] A lesser amount of force was held inadequate, because it was assumed that the woman could have eluded the assault with some resistance, if she were truly committed. The presence of particularly intense force was also required to make sure that the complainant was not lying about the rape.

This approach was followed for decades by the Italian courts,[23] surviving even in the period after the Second World War and only being abandoned gradually from the 1960s. Even in 1986, the Court of Cassation felt obliged to make the following clarification with regard to resistance: *"It is not necessary for the victim to resist vividly, constantly and to the point of exhaustion of her physical strength, which inevitably leads to physical signs*".[24] In fact, the false myths of resistance and the impossibility of raping a woman if she really does not want it continued to surface in some local courts' judgments.[25]

The "*vis atrox*" model has evolved into a less strict one, but still based on the use of some amount of force. The violence required to commit rape became that force which coerces the victim's will, even without completely overwhelming it. In this perspective, coercion, i.e., the absence of free consent, is the effect caused by violence. Italian scholarship describes violence

20 Ovidio, 'Ars amatoria', Liber I, 613–614.
21 Ibid. 666.
22 Matteo Vizzardi, 'Violenza sessuale (art. 609-bis)', in: Carlo Piergallini, Francesco Viganò, Matteo Vizzardi, Alessandra Verri (eds), 'I delitti contro la persona. Libertà personale, sessuale e morale. Domicilio e segreti' (2015), 47, 84.
23 Cass. pen., 7.2.1934, GP, 1934, II, 1334; Cass. pen., 10.5.1948, RP, 1949, II, 34; Cass. pen., 18.5.1954, GP, II, 706.
24 Cass. pen., 20.1.1986, CP, 1987, 753.
25 Trib. Bolzano, 30.6.1982. Luigi Domenico Cerqua, 'Considerazioni in tema di violenza carnale', (1984) Giur Mer, 135.

as an "instrument" by which the perpetrator turns the victim to his own will.[26]

This second paradigm requires a minimum of physical force as did the previous one. On this basis, the Supreme Courts acquitted a man who ejaculated on a woman's leg, taking advantage of the overcrowding of a public transport vehicle.[27]

D. The paradigm of "improper violence" and the dematerialisation of the concept of violence in the wake of German scholarship and case law

In Italy, as elsewhere (see, for instance, the theory of "inherent force" in United States law[28]), the courts have tried to expand the concept of violence in order to offer greater protection to sexual autonomy. While this broader conception of force has never really been implemented in U.S. case law,[29] in Italy this occurred with the adoption of the so-called "improper violence" interpretation,[30] according to which "coercion" need not be the effect of the use of physical force.

In 1986, the Court of Cassation stated: "*For the purposes of the penal code, violence should also be the actus reus which, depending on the circumstances, puts the victim in a position where she is unable to provide all the resistance she would have wished to, and coercion may occur even if the victim has not called for help, raised alarm, suffered lacerations to clothing and injuries to the body…*". The Court thus relieved the victim of the burden of resisting and regarded as "violent" any coercion brought about by the circumstances and not by physical violence.[31]

The Italian courts also created a type of violence where the perpetrator employs an element of surprise.[32]. In such situations, it is the suddenness and rapidity of the act which overcomes the victim's opposition and constitutes "violence", e.g., when a doctor suddenly penetrates the patient's

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26 Ferrando Mantovani, 'Diritto penale. Parte Speciale. I delitti contro la persona' (7th edn. 2019), 444.

27 Cass. pen., 19.11.1965, GP, 1966, II, 464.

28 Sanford H. Kadish, Stephen J. Schulhofer, Carol S. Steiker, Rachel E. Barkow, 'Criminal Law and its Processes. Cases and materials' (9th edn. 2012), 363.

29 See the criticism by Susan Estrich, who believes that American appellate courts have always applied masculine standards to the concepts of force and resistance; Susan Estrich, 'Real Rape' (1987), 63.

30 Mantovani (note 26), 405.

31 See supra note 24.

32 See the chapter on Italian law in this volume.

vagina with his fingers during a gynaecological examination without any medical purpose.[33]

This theory is also called the "theory of coercion" since violence is dematerialised to such an extent that it does not require any force. Violence, which was originally meant to constitute the causal antecedent of coercion, now merges with coercion itself. In order to justify their approach, courts often refer to the sexual self-determination of the victim as the true objective of protection of sex crimes.[34]

It should be noted that sexual offences are not the only field in which the concept of violence has been dematerialised. Sex crimes have indeed been the last area of criminal law to develop this concept of violence independent of physical force[35], perhaps because of the resistance of myths and stereotypes linked to sexuality as a predatory activity. In all the other numerous crimes in the penal code that require violence as a constitutive element, the process of abandoning force took place many years earlier.

According to three prominent commentators, this trend of dematerialisation was strongly influenced by the German criminal literature and case law.[36] In Germany, there has been a process of "spiritualization" (*Vergeistigung*) or "dissolution" ("*Auflösung*") of the "*Gewaltbegriff*" (concept of violence), in which the latter has come to coincide fundamentally with coercion.[37]

The German Constitutional Court, however, in 1995 declared this broad interpretation of the concept of violence to be unconstitutional because it violated the principle of predictability of the law.[38] In response to the adoption of a restrictive interpretation of the concept of violence by the courts, the German legislature in 1997 introduced the so-called "*Ausnutzungsvariante*", i.e., a new variant of rape based on taking advantage of a situation in which the victim is helpless and at the mercy of the

33 Cass. pen., Sez. III, 16.4.1999, RP, 967. See Alberto Cadoppi, 'Art. 609-bis c.p.', in Alberto Cadoppi (ed), 'Commentario delle norme contro la violenza sessuale e contro la pedofilia' (4th edn. 2006), 439, 501.

34 David Brunelli, 'Bene giuridico e politica criminale nella riforma dei reati a sfondo sessuale', in Franco Coppi (ed), 'I reati sessuali. I reati di sfruttamento dei minori e di riduzione in schiavitù per fini sessuali' (2nd edn. 2007), 37, 68–69.

35 Marta Bertolino, 'Libertà sessuale e tutela penale' (1993), 115–130.

36 Giulio De Simone, 'Violenza (diritto penale)', in: 'Enciclopedia del diritto' (1993), 881; Marco Mantovani, 'Violenza privata', in: 'Enciclopedia del diritto' (1993), 930; Francesco Viganò, 'La tutela penale della libertà individuale. L'offesa mediante violenza' (2002).

37 De Simone (note 36), 892–901.

38 Viganò (note 36), 96.

perpetrator. Surprise sexual acts still did not fall under the German definition of violence but were explicitly criminalised in the 2016 reform of sex offences.[39] In Italian jurisprudence, by contrast, these situations continue to be encompassed in the definition of violence, although there have been several setbacks.

E. Reviving resistance: The "blue-jeans" decision"

As indicated above, in 1996, when the reform of sexual crimes did not remove the element of coercion by violence from the definition of the offence, violence had already been dematerialised in case law and no longer implied the use of force. Myths, however, are firmly rooted in social culture and sometimes re-emerge from hidden chasms. Very surprisingly, the Court of Cassation in 1999 returned to a traditional interpretation of violence, re-creating a burden of resistance on a young girl raped by her driving instructor.[40] The judgment is so awkward that it made international headlines[41], in particular for the ridiculous statement that it is impossible to rape a woman wearing blue-jeans.

An 18-year-old girl was picked up from her home by her driving instructor, as had happened on other occasions. The man, who was married, took her from the town centre to an isolated road in the fields on the pretext of picking up another girl for a lesson. He threw her to the ground and, after removing her jeans from one leg, penetrated her. He then drove back to the village, letting the girl drive only for the last part of the way to avoid arousing suspicion.

In the opinion of the judge who wrote the judgment the victim's account was not credible because

a) "as rule of thumb, it is almost impossible to remove even part of a woman's jeans without her active cooperation, since it is an operation that is already very difficult even for the people wearing them";

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39 Tatjana Hörnle, 'The new German Law on Sexual Assault and Sexual Harassment', (2017) Germ LJ, 1309.

40 Cass. pen., Sez. III, 6.11.1998 (dep. 1999), Foro It, 1999, II 163. See Giovanni Fiandaca, 'Violenza su donna "in jeans" e pregiudizi nell'accertamento giudiziario', (1999) Foro It 1999, 165.

41 Alessandra Stanley, 'Ruling on Tight Jeans and Rape Sets Off Anger in Italy', N.Y. TIMES, Feb. 16, 1999.

b) "the girl could have falsely accused someone to justify to her parents the sexual intercourse, which she preferred to keep hidden because she was worried about the possible consequences";

c) "it is instinctive, especially for a young girl, to oppose with all her energy anyone who wants to rape her and it is illogical to affirm that a girl can be submissively subjected to rape, a serious violence to the person, for fear of suffering other hypothetical and certainly not more serious offences to her physical safety";

d) "it is very peculiar that a girl, after becoming the victim of a rape, is in a state of mind which permits her to drive a car with her rapist sitting beside her".[42]

The judgment appears as a collection of rape myths: a set of banalities that have been debunked over the years by criminology. Regarding certain circumstances, such as driving home after the sexual assault, the judge's preconceptions led him to the point of manipulating the facts that emerged during the trial.[43]

The "blue-jeans" decision raised a lot of criticism and debate, showing that certain stereotypes were no longer part of social attitudes. It remained an exception in the process of shifting violent coercion away from concepts of force and resistance.

Recently the courts went even further in this direction.

F. From coercion to dissent and coercive circumstances: European influences from Strasbourg and Istanbul

In confronting new case situations, in particular the so called "rape by omission",[44] or "post-penetration rape",[45] the "improper violence" model eventually led to a consent-based definition of the offence. The Court

42 See supra note 40.

43 Francesco M. Iacoviello, 'Toghe e jeans. Per una difesa (improbabile) di una sentenza indifendibile', (1999) Cass pen, 2194. The same applies to the consideration that the girl might have lied out of fear of a possible pregnancy (*sub* b), since the defendant had reported in his testimony that he had used a condom.

44 Maria Chiara Parmiggiani, 'Rape by omission, ovvero lo "stupro omissivo": note a margine di un recente caso californiano', (2005) Ind Pen, 311.

45 This terminology was first utilised by Amy McLellan, 'Post-penetration rape — Increasing the penalty', (1991) Santa Clara Law Review 31, 779. For an updated overview of the issue in Anglo-American scholarship, see Theodore Bennett, 'Consent interruptus: rape law and cases of initial consent', (2017) Flinders Law Journal 19, 145.

of Cassation stated that "in interactions between adults, the originally given consent to sexual acts must continue throughout the act without interruption, with the result that the offence extends to the continuation of intercourse if a manifestation of dissent, even if it is not explicit, intervenes 'in itinere' through conclusive facts which clearly indicate the partner's contrary will"[46].

If the sexual interaction was initially consensual, a manifestation of dissent then occurred, and the defendant did not consider it but continued with his conduct, he will be charged with "*violenza sessuale*" according to art. 609-*bis* of the Penal Code. Earlier judgments' more superficial references to consent have now become more explicit: The criminal liability of a person who continues with sexual intercourse when it has become unwanted is justified on the basis of a mere (even non-verbal) expression of dissent. This obviously reminds of the "no means no" paradigm. In this case, as in many others, the Court of Cassation refers to consent without trying to cloak the decision in overstretched definitions of "violence".

In other judgments, the Court of Cassation highlights the coercive circumstances, especially in cases where the victim decides to consent to the defendant's sexual desires because of the situation (e.g., previous episodes of violence, the isolated location in which the events take place, the time of night)[47]. In the past, these situations were qualified as "improper violence". In recent case law, there is no longer any mention of violence, and such coercive circumstances are considered sufficient to establish criminal liability. In some judgments, the conviction is justified not by reference to violence but rather by the invalidity of the consent given under such "environmental" circumstances.[48]

It does not seem arguable that the attention of Italian courts to coercive circumstances is linked to the famous Akayesu judgment of the International Criminal Tribunal for Rwanda (ICTR)[49] – a judgment which part some, especially feminist, scholars have proposed as a model[50].

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46 Cass. Pen., Sez. III, 11.12.2018, n. 15010. Previously in the form of *obiter dictum* already Cass. Pen., Sez. III, 24.2.2004, n. 25727. On the concept of "sexual act" under the Italian law, see Alberto Cadoppi and Michael Vitiello, 'A Kiss is Just a Kiss, or is It? A Comparative Look at Italian and American Sex Crimes' (2010) Seton Hall Law Review, 191.

47 Cass. pen., Sez. III, 12.1.2010, n. 6643.

48 Cass. pen., 22.11.1988, RP, 1990, 565; Cass. pen., 8.2.1991, GP, 1991, II, 366.

49 ICTR-96–4-T, Judgement of 2 Sept.1998.

50 See Vanessa Munro, 'From consent to coercion. Evaluating international and domestic frameworks for the criminalization of rape', in: Clare McGlynn, Vanessa E. Munro, 'Rethinking Rape Law' (2010), 17, with further references.

The shift from coercion to lack of consent seems to be influenced, however, (also) by the jurisprudence of the European Court of Human Rights on rape and by the definition of rape by the Istanbul Convention, even if this is hardly mentioned in the judgments. Starting with the well-known case of M.C. v. Bulgaria[51], the European Court of Human Rights has held that a regulation of rape is in line with the principles established by Articles 3 and 8 of the European Convention on Human Rights only if it makes punishable any sexual act with a non-consenting person, without any limitation regarding the modalities of the actus reus[52]. Adherence to the Istanbul Convention, moreover, would imply that Italy adopts a consent-based definition of rape (Art. 36).

Due to its case law on consent, Italy can contend to be compliant with both Conventions, at least in the law in action[53].

G. Towards an affirmative consent model?

In the last three years, the Supreme Court seems to be moving towards an affirmative consent model ("only yes means yes").[54] The following judgment presents several clues in this direction, especially with the exclusion of any defence of mistake on consent, arguing that it is a mistake of law rather than of fact: "The objective element of the offence of sexual violence is not only conduct invading the sphere of the sexual freedom and integrity of others carried out in the presence of a manifestation of dissent by the victim, but also conduct carried out in the absence of the consent, not even tacit, of the victim. It follows that the consent must be validly given and must remain throughout the period during which the sexual acts are performed. The defence of putative consent of the victim is

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51 M.C. v. Bulgaria, Case no. 39272/98, Judgment of 4 Dec.2003.

52 Patricia Londono, 'Defining rape under the European Convention on Human Rights: torture, consent and equality', in: Clare McGlynn and Vanessa E. Munro, 'Rethinking Rape Law' (2010), 107.

53 It should be noted, however, that the prevailing scholarship denies the courts the authority to interpret offences in accordance with the positive obligations of incrimination arising from the Convention. This is said to violate the principle of legality, which is protected by the Convention itself in Article 7. See Francesco Viganò, 'Diritto penale sostanziale e Convenzione europea dei diritti dell'uomo', (2008) Riv It Dir Proc Pen, 42, 95.

54 On the features of this paradigm, see Stephen J. Schulhofer, 'Consent: What it means and why it's time to require it', (2016) University of the Pacific Law Review 47, 665; Aya Gruber, 'Not affirmative consent', *Ivi*, 683.

not applicable to the offence of sexual violence, since the lack of consent is an explicit requirement of the offence, and the error is therefore a mistake about the criminal law".[55]

The evidence is further confirmed by the Court's assumption concerning intent: "Regarding the mental element of the offence of sexual violence, it is sufficient for the perpetrator to be aware of the fact that the consent of the victim to perform sexual acts has not been clearly expressed."[56]

It follows that the only admissible form of mistake concerns an ambiguous expression of consent by the victim. As the Court stated, "a doubt concerning the recurrence of a valid subjective element may instead be taken into consideration only in the event that the mistake is based on the expressive content, in hypothesis equivocal, of precise and positive manifestations of will emanating from the victim".[57]

These principles have been applied to different types of cases, but especially to those where the victim is unconscious due to alcohol or other substances and unable to consent or dissent,[58] which is a difficult situation to address by the paradigm of violent coercion.[59]

H. Final remarks

In the century since 1930 when the Italian Penal Code was enacted, the meaning of sexual coercion by force has changed tremendously. Although practically under the same law, which provides a violence-based definition of rape, the courts have touched both antipodes: from the atrocious and overwhelming violence of the paradigm of "*vis atrox*" to the absence of consent typical of more modern systems that have adopted an affirmative consent model.

The courts have interpreted the changes in social attitudes concerning sexual violence, repudiating the legacy of the historical evolution of the crime such as the burden of resistance on the woman. This change in social attitudes is clearly demonstrated by the reactions to the "rules of thumb" of the "blue-jeans" decision.

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55 Cass. pen., Sez. III, 19.3.2019, n. 20780.
56 Ibid.
57 Cass. pen., Sez. III, 9.3.2016, n. 49597.
58 Cass. pen., Sez. III, 11.7.2018, n. 43565.
59 On the problematic nature of these cases, see Stephen J. Schulhofer, 'Taking sexual autonomy seriously: Rape law and beyond', (1992) Law and Philosophy, 35.

However, this process presents several issues with regard to the constitutional principle of legality. The disappearance of forcible coercion, especially in a model based on affirmative consent, is an interpretation that ignores the wording of the law and, in particular the element of violent coercion which the law requires for the perpetration of the offence. At this point, a legislative reform of sexual offences seems inevitable and urgent. It would have several positive implications, regardless of the paradigm adopted ("no means no" or "only yes means yes").

First, citizens would know more clearly when a rape is committed under Italian law.[60] At present, a person who reads the Penal Code is bound to think that rape requires coercion by violence and consequently – on the basis of what violence means in everyday language – the use of force. It must be admitted, however, that a conviction for rape without the use of force is not unforeseeable – at least by the standards of ECtHR jurisprudence –, because many years have passed since case law has dematerialised the requisite use of force.

Nevertheless, in an area such as sexual relations, where old legacies and traditions still play a role,[61] only a clear change in the law seems adequate to provide clear guidance for citizens in their behaviour. Sexual mores are constantly evolving, and nowhere is it more necessary than in this area of criminal law to offer unambiguous indications. This is especially true for the defendant, but also for victims, many of whom do not report rape because they do not realise they have been raped.[62]

A reform of the law on sexual violence would therefore have an undeniable expressive function: the media would talk more openly about consent in sexual relationships, people would debate the issue, and a change in social attitudes would be accelerated.[63] The recent Italian law on non-consensual pornography is a good example of the potential of

60 See e.g., Michele Papa, 'La fisiognomica della condotta illecita nella struttura dei reati sessuali: appunti per una riflessione sulla crisi della tipicità', in Giovannangelo De Francesco, Alberto Gargani, Domenico Notaro, Antonio Vallini (eds), 'La tutela della persona umana. Dignità, salute, scelte di libertà (per Francesco Palazzo). Atti del Convegno. Pisa, 12 ottobre 2018' (2019), 145.

61 For a review of some Italian statistical and sociological surveys which demonstrate the percistance of many ancient prejudices, see Fenton (note 4), 184.

62 Kadish, Schulhofer, Steiker and Barkow (note 28), 334.

63 On the importance of the expressive function of the law in relation to sex crimes, Danielle K. Citron, 'Hate crimes in Cyberspace' (2014).

the law's expressive function, especially in relation to sexual offences.[64] In 2016, the first Italian victim of revenge porn was mocked, publicly humiliated online, and became the victim of jokes on the radio. In 2020, after the criminalisation, a young kindergarten teacher whose pictures were shared by her boyfriend to his soccer team and then disseminated, was supported by public opinion. Thanks to this support, the teacher obtained the resignation of the female director of the kindergarten who had fired her following the scandal.[65]

Furthermore, once the consent-based model has been implemented in the Code, scholars and judges can debate new problems, such as "stealthing".[66] A law that formally requires the use of force for conviction in fact blocks any kind of deeper investigation on consent and its applications. Therefore, a reform would be the opportunity for a truly systematic reorganisation of the subject of sex crimes in a consent-oriented perspective.

Over the years, sexual coercion by violence has assumed many different meanings. But at the end of this journey, can we really say that coercion by violence still really has a meaning? The evolution of Italian case law shows that the disvalue of rape lies in the perpetration of a non-consensual act, not in the violent manner utilised. Moreover, history shows that the dogma of coercion by force did not emerge for well-considered reasons of criminal policy, but as a result of a normative stratification that had matured during periods of women's subjugation. As argued by Tamar Pitch, an Italian feminist jurist: "Violence begins where there is no consent, since

64 There is a growing consensus that the dissemination of intimate images constitutes a sexual offence, starting from Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse', (2017) Oxford Journal of Legal Studies 37, 534.

65 Gian Marco Caletti, 'Can affirmative consent save "revenge porn" laws? Lessons from the Italian criminalization of non-consensual pornography', (2021) Virginia Jorunal of Law and Technology 25, 112, 164.

66 According to those who have addressed the issue in Italian literature, the Italian legal framework does not permit considering stealthing to be sexual violence; see Paolo Caroli and Julia Geneuss, 'La rimozione fraudolenta del preservativo come aggressione sessuale. Lo Stealthing davanti al giudice penale', (2021) Dir Pen Cont Riv Trim, 136. But it is considered highly likely that, if asked to do so, the Supreme Court would rule that stealthing constitutes rape. This is also in view of the fact that the Court has in the past qualified as rape the performance of sexual interaction in a manner different from that agreed upon (e.g., ejaculation in the vagina). See Cass. pen., Sez. III, 18.3.2015, n. 9221. On the issue of stealthing see also in this volume Sebastian Mayr and Kurt Schmoller, 'Particularized Consent and Non-Consensual Condom Removal'.

it is not violence that reveals the lack of consent, but rather the lack of consent that defines the sexual relationship as violent."[67]

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67 Tamar Pitch, 'Un diritto per due: la costruzione giuridica di genere, sesso e sessualità' (1998), 149–190.

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