Parliamentary Assembly
Assemblée parlementaire
https://pace.coe.int

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Doc. 12013
14 September 2009

Rape of women, including marital rape

Report[1]
Committee on Equal Opportunities for Women and Men
Rapporteur: Ms Marlene RUPPRECHT, Germany, Socialist Group

Summary

Every year, millions of women are raped: by their husbands, partners or ex-partners, male relatives or acquaintances, or complete strangers. However, most of these rapes are not reported and the perpetrators go unpunished.

Rape is a serious violation both of women's physical and psychological integrity and also of the right to freedom, safety and dignity enjoyed by all human beings.

Any woman can be raped, but no woman deserves to be raped. Consent is necessary for sexual intercourse every time, whatever the relationship of the victim with the rapist.

The Committee on Equal Opportunities for Women and Men believes that the fight against rape needs to be stepped up, and thus recommends that member states ensure that their legislation on rape and sexual violence reaches the highest possible standard. Member states should also develop a comprehensive strategy which should comprise measures to prevent rape in the first place, as well as to ensure (securely-funded) protection of and assistance to rape victims at every step of the proceedings, including, possibly, compensation for the victims.

The Parliamentary Assembly should call on the Committee of Ministers to instruct the Ad hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) to include in the future Council of Europe convention the severest and most widespread forms of violence against women, including rape and sexual assault. It should also recommend that the Committee of Ministers launch a Council of Europe campaign to change attitudes, possibly in the framework of the promotion of the future Council of Europe convention, and encourage member states to concomitantly launch national campaigns.

1. Reference to committee: Doc. 11324 rev, Ref. 3366 of 01.10.07

Contents **Page**

A. Draft resolution 3
B. Draft recommendation 5
C. Explanatory memorandum by Ms Rupprecht, rapporteur 6
1. Introduction 6
2. Definition and consequences 6
3. Victim protection and assistance 8
4. Rape and the criminal justice system 8
5. “Marital rape” – a serious crime 10
6. Prevention of rape 11
7. Conclusions and recommendations 11

A. Draft resolution

1. Every year, millions of women are raped: by their husbands, partners or ex-partners, male relatives or acquaintances, or complete strangers. However, most of these rapes are not reported and the perpetrators go unpunished.

2. Rape is a serious violation both of women's physical and psychological integrity and also of the right to freedom, safety and dignity enjoyed by all human beings.

3. Unfortunately, the extremely low level of reporting of rape is matched by a very high rate of attrition and an extremely low level of conviction – especially, but not only, for marital rape. This is due to several factors, including:

3.1. widespread attitudes to rape and sexual assault which tend to shift the blame from the attacker to the victim and undermine victims' credibility (attitudes widespread also amongst the members of the police, the legal profession, public prosecutors and the judiciary);

3.2. unreformed rape legislation which requires a victim to physically resist the attacker, to initiate proceedings, and/or makes it possible for the most intimate details of victims' private lives to be exposed in court;

3.3. a lack of support, assistance and protection for victims.

4. It needs to be made clear that any woman can be raped, but no woman deserves to be raped, and that consent is necessary for sexual intercourse every time, whatever the relationship of the victim with the rapist. Only then will more rapes be reported to the authorities, and will more rapists actually be convicted of their crimes.

5. The Parliamentary Assembly thus recommends that Council of Europe member states:

5.1. fully implement the recommendations on sexual violence and rape contained in Recommendation (2002) 5 of the Committee of Ministers on the protection of women against violence, as well as the recommendations contained in Assembly Recommendation 1777 (2007) on sexual assaults linked to "date-rape drugs", and in Assembly Resolution 1670 (2009) and Recommendation 1873 (2009) on sexual violence against women in armed conflict;

5.2. ensure that their legislation on rape and sexual violence reaches the highest possible standard, ensuring that rape is defined in essence by the absence of consent or the absence of the choice to consent by the victim, and avoiding a re-victimisation of the victim by the criminal justice system; legislation should thus, as a minimum:

5.2.1. make rape (including marital rape) an *ex officio* crime;

5.2.2. define consent as agreement by choice when having the freedom and capacity to make that choice;

5.2.3. not require that a victim physically resist the attacker;

5.2.4. have prosecutors make all discontinuance decisions, and give the victim the right to challenge such decisions;

5.2.5. allow victims to be a party to the case in court;

5.2.6. protect victims' private lives, especially in court;

5.2.7. allow evidence gathered in pre-trial proceedings to be used when the victim avails herself of her right to refuse to testify once in court;

5.2.8. give victims a legal right to advice and support throughout the process.

5.3. establish marital rape as a separate offence under their domestic law so as to avoid any hindrance of legal proceedings, if they have not already done so;

5.4. penalise sexual violence and rape between spouses, cohabitant partners and ex-partners, if they have not already done so, and consider whether the attacker's current or former close relationship with the victim should be an aggravating circumstance;

5.5. consider instituting compensation for the victim, if they have not already done so;

5.6. develop a comprehensive strategy which should comprise measures to prevent rape in the first place, by empowering girls and women not to be victims and teaching boys and men to respect women, as well as to ensure (securely-funded) protection of and assistance to rape victims at every step of the proceedings;

5.7. develop compulsory training programmes for police officers, judicial, medical and forensic personnel, social workers and teachers so as to enable them to identify cases of rape and sexual violence, and, in particular, of marital rape, and to enable them to advise and assist the victims more effectively and consistently.

B. Draft recommendation

1. The Parliamentary Assembly refers to Resolution No. … (2009) on rape of women, including marital rape, which underlines that rape is an unacceptable violation of women's rights and dignity, as well as a most serious crime.

2. The Assembly believes that the fight against rape needs to be stepped up, and thus recommends that the Committee of Ministers ask its member states:

2.1. fully implement the recommendations on sexual violence and rape contained in Recommendation (2002) 5 of the Committee of Ministers on the protection of women against violence, as well as the recommendations contained in Assembly Recommendation 1777 (2007) on sexual assaults linked to "date-rape drugs", in Resolution 1670 (2009) and Recommendation 1873 (2009) on sexual violence against women in armed conflict and in Resolution No. … (2009) on rape of women, including marital rape;

2.2. ensure that their legislation on rape and sexual violence reaches the highest possible standard, and avoids a re-victimisation of the victim by the criminal justice system;

2.3. establish marital rape as a separate offence under their domestic law so as to avoid any hindrance of legal proceedings, if they have not already done so;

2.4. develop a comprehensive strategy which should comprise measures to prevent rape in the first place, as well as to ensure (securely-funded) protection of and assistance to rape victims at every step of the proceedings, including, possibly, compensation for the victims.

3. The Assembly calls on the Committee of Ministers to instruct the Ad hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) to include in the future Council of Europe convention the severest and most widespread forms of violence against women, including rape and sexual assault.

4. The Assembly believes that widespread public attitudes to rape and sexual assault which tend to shift the blame from the attacker to the victim are among the highest obstacles to the reporting, effective investigation and prosecution of cases of rape and sexual assault. It thus recommends that the Committee of Ministers launch a Council of Europe campaign to change those attitudes, possibly in the framework of the promotion of the future Council of Europe convention, and encourage member states to concomitantly launch national campaigns.

C. Explanatory memorandum by Ms Rupprecht, rapporteur

1. Introduction

1. Every year, millions of women are raped: by their husbands, partners or ex-partners, male relatives or acquaintances, or complete strangers.[2] However, most of these rapes are not reported and the perpetrators go unpunished.

2. Violence against women, in particular sexual violence, is a serious violation both of women's physical and psychological integrity and also of the right to freedom, safety and dignity enjoyed by all human beings. Even now that the Council of Europe campaign to combat violence against women, including domestic violence, has ended,[3] it is important that Europe stays at the forefront of the fight against violence against women, of which rape is one of the worst forms.

3. In June 2007, I presented a motion for a resolution on the subject of "marital rape", together with a number of colleagues. The motion was referred to the Committee on Equal Opportunities for Women and Men for report, and I was appointed Rapporteur in October 2007. Following the discussion in our Committee on my outline report on marital rape, I proposed in my introductory memorandum to widen the scope of this report to all forms of rape and sexual violence, with three exceptions: sexual violence in armed conflict, on which our colleague Ms Smet prepared a report,[4] sexual assaults linked to "date-rape drugs", on which the Committee already presented a report to which I have nothing to add,[5] and sexual abuse of children, which is regulated by a Council of Europe Convention which will hopefully enter into force soon.[6] The Committee agreed to this proposal, which involved a change in title, at its meeting in Paris in March 2009. In the meantime, the Committee presented an opinion on "the state of human rights in Europe: the need to eradicate impunity" during the June 2009 part-session, which also touched on the subject of rape.[7] I would like to present my report to the Assembly during the autumn 2009 part-session of the Assembly, but would like to focus my report on rape of women, which would again involve a change in title.

2. Definition and consequences

4. Any sexual assault, but especially rape, is an inexcusable crime which subjects the victim to severe physical and psychological trauma. It is an assault on the dignity and the integrity of a person. Unfortunately, rapes are one of the most underreported crimes in Europe.[8] As Ms Damanaki explained in her report, "many victims feel unable to come forward in a society whose attitudes about rape are still to a large extent shaped by myths which serve to minimise the seriousness of rape and shift the blame away from those who commit the crime".[9] The common myths she cited include: only certain types of women get raped (those who are promiscuous or have poor judgement); women provoke rapes by the way they dress[10] or the way they flirt; men rape women because they are sexually aroused or have been sexually deprived (in fact, men rape women to exert control and humiliate).

5. NGOs active in the area give several reasons why so many rapes are not reported, which are linked to the myths cited above: shame and embarrassment, fear of being blamed, fear of not being believed, distrust of the police/courts/legal process, fear of family and friends knowing/public disclosure/stigma, fear of retaliation/further attacks, as well as uncertainty whether a crime has been committed. Reporting to the police

---

2. The English network of rape crisis centres estimates that 85% of rapists were known to their victims. http://www.rapecrisis.org.uk/rape.html.
3. 2006-2008 Council of Europe campaign under the slogan "Stop domestic violence against women!".
4. See Assembly Resolution 1670 (2009), Recommendation 1873 (2009) and Doc. 11916 on sexual violence against women in armed conflict.
5. See Ms Damanaki's report on the issue, Parliamentary Assembly Doc.11038, and Recommendation 1777 (2007) which resulted from this report.
6. CETS No. 201, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007, signed by 35 member states, and ratified by two so far.
7. See Doc. 11964, p. 3-4.
8. In a report published in 2007, the British Crown Prosecution Service Inspectorate and Inspectorate of Constabulary estimated that 95% of rapes in England and Wales are never reported to the police. See Briefing by the campaign "End violence against women" on "False allegations of rape" of February 2007.
9. Doc. 11038 *op. cit.*, explanatory memorandum, paragraph 2.
10. A 2008 survey in Ireland on attitudes to rape found almost 40% of the 1000 adults questioned believed rape victims themselves bore some responsibility in certain circumstances – if, for instance, they wore sexy clothing or were flirting. See Guardian article "There is no excuse" of 25 July 2008.

can be a difficult decision indeed. There are many myths that underlie the belief that women make false and malicious allegations of rape against innocent men. Studies show, however, that the allegations of rape that are false are exactly the same as that of any other crime, i.e. 6 - 8%.[11]

6. Reporting and proving rape is even more difficult in "date-rape"-situations, when the rapist is a friend or acquaintance who maintains that the victim consented to sexual relations. Of all sexual assaults, marital rape is the most underreported.[12] The reasons listed above are compounded by personal, cultural, religious, and societal beliefs. Additional reasons for not reporting marital rape may be: love for the partner, commitment to the relationship, shared children and/or thoughts about "obligation" and "duty".

7. Due to popular stereotypes of "real" rape, it is often assumed that, because spouses have been sexually intimate, forced sexual intercourse in marriage is not as traumatic as rape by a stranger. However, this is not necessarily the case. Rape by a stranger can be highly traumatic but is usually a one-off event and is clearly understood as rape.[13] In the case of rape by a spouse or long-term sexual partner, the history of the relationship affects the victim's reactions – and that of society. Marital rape is likely to be part of an abusive relationship. Trauma from the rape adds to the effect of other acts of domestic violence. Furthermore, marital rape is likely to happen repeatedly.

8. It is important to understand that rape is not a "sexual" activity, i.e. the rapist's motivation is usually not sex, but power. Rape is a powerful tool to control, overcome, harm and humiliate a woman. This is one of the reasons why marital rape is so common at the end of relationships, when, for example, a woman has left an abusive relationship or has filed for divorce, or is fighting a custody battle.

9. Men are also sometimes subjected to rape. Usually, the motivation of the rapist is the same as with women victims: as explained before, rapists primarily rape to control, overcome, harm and humiliate – not in order to have sex.[14] However, outside of certain institutional settings, such as prisons and army barracks, and outside of times of armed conflict,[15] rapes of adult men are relatively rare, though reliable figures are hard to come by. One reason is that the level of reporting of male rape is as low, if not even lower, than that of female rape – the stigma attached to being a rape victim can be even bigger for men than women in certain societies and communities, in particular those with a patriarchal, macho and homophobic culture. Most of the recommendations in this report are valid for all sorts of rape, regardless of the gender of the victim. However, in view of the prevalence, I will focus mainly on rapes of women in this report.

10. Unfortunately, the extremely low level of reporting of rape is matched by a very high rate of attrition[16] and an extremely low level of conviction[17] – especially for marital rape. A new study by Professors Jo Lovett and Liz Kelly of the London Metropolitan University covering reported rape cases in 11 European countries concludes that "the classic attrition pattern – of increased reporting and falling rates of prosecution and

---

11. See http://www.rapecrisis.org.uk/rape.html, as well as the Committee's exchange of views with Ms Kräuter-Stockton (Germany), public prosecutor, member of the European Women Lawyers Association (EWLA), at its meeting in Paris on 23 March 2009. The preliminary conclusion of a vast study on rape entitled "Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries" by Professor Liz Kelly of the London Metropolitan University, as presented on 28 April 2009, underlined that the percentage of cases designated as false allegations is "extremely low" (ranging from 2 to 9%), leading Professor Kelly to conclude that "This is extremely strong evidence that the extent of false allegations is exaggerated by professionals, but this over-estimation creates a culture of scepticism." See: http://www.epacvaw.org/IMG/pdf/Summary_Findings.pdf. Professor Kelly has kindly provided me with an advance copy of her final report, which underscores her preliminary findings: "Cases designated false allegations ranged between 1-9 per cent across the case tracking samples, which was lower than many of the interviewed experts estimated." (advance copy, p. 125).

12. However, it appears that making rape in marriage an *ex officio* offence, as well as introducing effective laws to combat domestic violence, can create a context more conducive for women to report partner rape. Thus, Professor Kelly reports that Germany had the highest proportion of current or ex-partners amongst the largest group of suspects (35%) in her study, which she attributes to feminist campaigning and the resulting legal reforms (advance copy, *op. cit.*, p. 62).

13. The issue is unfortunately not always clear-cut, for example in the case of "date-rape" or "drug-assisted" rape. See Parliamentary Assembly Recommendation 1777 (2007) on sexual assaults linked to "date-rape drugs".

14. This is why both homosexual and heterosexual men can be both victims of rape, and attackers.

15. For example, the number of rapes reported by men in the eastern part of the Democratic Republic of Congo is rising, see New York Times article "Symbol of Unhealed Congo: Male Rape Victims" of 4 August 2009. http://www.nytimes.com/2009/08/05/world/africa/05congo.html?em

16. Attrition is the process by which the majority of reported rape cases fail to reach trial. Attrition in the early stages of the investigation can be as high as 82% – raising "serious questions about the professionalism of the investigation" in the eyes of Professor Kelly, the author of the most recent study on attrition. *Op. Cit.*http://www.epacvaw.org/IMG/pdf/Summary_Findings.pdf.

17. For example, the British Home Office has published a study which shows that less than 6% of rapes reported to the police result in a rape conviction. See http://www.cer.truthaboutrape.co.uk.

conviction – is now predominant in Europe across both adversarial and investigative legal systems."[18] In many legal systems (including European ones), victims of sexual violence are expected to put up resistance and show that they are not consenting. Yet there are many women who do not dare to resist: because the attacker is bigger and stronger, threatens her with a weapon or other forms of violence, or (in the case of marital rape) because she would be putting her children at risk of witnessing the rape or at risk of violence, etc.

11. Moreover, the people working on the ground, ie police officers, doctors, lawyers and social workers, whose duties bring them into contact with the victims, do not always respond adequately to the needs of the latter. Some member states require women to press charges (and face what some NGOs have termed the "second assault" in court). In the case of marital rape, there can also be a problem on what can be called a procedural level. Whilst the law in theory may hold no distinction between a spouse or any other person, in practice, when the case comes to court, there will be difficulties in proving that rape in fact took place. This is due to the fact that, in marriage, sexual relations can be expected to a certain extent, and if the defence claims consent, then the evidential burden is a very difficult burden for the prosecution to discharge, in particular if the rapist did not use physical force.

3. Victim protection and assistance

12. It is thus obvious that what is needed most of all is adequate protection for the victims of rape and sexual assault.

13. In England and Wales, a network of 38 "rape crisis centres" has been set up, which offer specialist, comprehensive and non-judgemental services to victims of rape and sexual violence, whether adults or children. Some victims currently have to travel 120 miles to access such a centre – travel times which may still increase, as it is reported that some centres are threatened with closure due to a lack of funds, a fact which has been strongly criticized by the English Equality and Human Rights Commission. On 5 August 2009, in a welcome development, it was reported that the centres are to be allocated £1.6 million by the government, with that amount again to help to develop a network of sexual assault referral centres.[19]

14. As already stated, a large proportion of rapes stay unreported to the police. If more rape victims had access to the type of service provided by the rape crisis centres in England and Wales (which is provided by NGOs in many other countries), the reporting rate may go up. It should also be possible to have evidence collected and preserved (by forensic scientists, for instance) before a complaint is lodged, since many victims need some time before they feel ready to press charges. Issues such as the possible consequences of rape – pregnancy,[20] or sexually transmitted diseases (including HIV/AIDS) – also need to be tackled as part of victim protection and assistance.

15. Rape victims need protection and assistance which goes beyond the immediate aftermath of the crime. In my opinion, victims should also have the right to compensation.

16. Victim protection also means working with the perpetrators, once caught, to prevent repeat victimisation and further crimes. It appears that, in Germany, for example, a third of rapists are adolescents (under 18). It can be hoped that, at that age, the rapists are still reformable.

4. Rape and the criminal justice system

17. In England and Wales, the Sexual Offences Act came into force on 1 May 2004. The purpose of the Act was to strengthen and modernise the law on sexual offences, whilst improving preventive measures and the protection of individuals from sexual offenders. The Act extended the definition of rape and changed the law about consent and belief in consent. A person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. The essence of this definition is the agreement by choice.[21] The law does

---

18. Advance copy, *op. cit*, p. 124.

19. See the Times article "Labour tries again to give women greater protection" of 5 August 2009, which cites the following figures as one of the reasons for the decision: "One in 20 women has been raped but only one in six victims reports an attack to the police. Of those, seven in ten cases never make it to court."
http://www.timesonline.co.uk/tol/news/uk/crime/article6739458.ece.

20. In Recommendation 1777 (2007) on sexual assaults linked to "date-rape drugs", the Assembly recommended that Council of Europe member states "recognise the inalienable right of rape victims to terminate resulting pregnancies if they so wish" (paragraph 6.2.5.).

not require the victim to have resisted physically in order to prove a lack of consent. The question of whether the victim consented is a matter for the jury to decide, although the Crown Prosecution Service considers this issue very carefully throughout the life of the case.

18. In Germany, in contrast, the use of force is a precondition for obtaining a rape conviction. The problem is that material evidence (such as bruising) does not always exist. In the absence of the evidence that the woman has struggled, however, a German prosecutor cannot take action, even if the victim is physically incapable of resisting (because her attacker is bigger, stronger, heavier). In addition, in Germany, only testimony given in court can be used in proceedings.[22]

19. In many countries, the low number of complaints is also due to victims' fear of having their private lives exposed in court. The legislation of England and Wales, as well as that of Germany, allows questions about victims' sex lives to be asked only in quite specific circumstances, thus minimising the additional stress on the victim in court.

20. Another factor contributing to the low level of reporting on the crime, as well as the low conviction rates, is the fact that, in many countries, rape (in particular, marital rape) is not yet an *ex officio* crime. Thus, in Slovenia, for example, it is the victim who has to initiate proceedings, make the complaint and press charges. In these circumstances, it is easy for the attacker – in particular if he knows the victims well – to put pressure on her to withdraw her complaint, thus pre-empting legal proceedings. Even in countries like Germany which have enacted *ex officio* prosecution, pressure can be put on victims not to testify in cases of marital rape, since German law allows married and engaged victims to refuse to testify once in court.[23]

21. The judiciary in some countries is prey to the same fallacious stereotypes on rape as the general population, which can lead to unfair – and even, in some cases, outrageous – verdicts which protect the rapists rather than their victims. Thus, for example, it took almost a decade for the Italian Court of Cassation to reverse 1999 case law which had ruled that a woman wearing tight jeans cannot be raped, since her co-operation is needed to remove them.[24] The "Cristiano" judgment in question revealed troubling views of the judges about women, sex and rape, being concerned much more with the credibility of the victim's statements – and her clothing – than with the facts of the case. Even worse, the Court declared that it would have been better for the victim to have suffered physical injury (does that include death?) rather than submit to rape.[25] In the view of researcher Rachel A. Van Cleave, the Court's statement "that no injury could be more harmful than unwanted sex reveals most clearly the persistent importance of honor".[26] This focus on honour rather than on the harm done to the victim is typical of patriarchal mindsets, which can also lead to so-called "honour-crimes" – where raped victims are further punished by their relatives for allegedly having besmirched the family's honour.[27]

22. This type of attitude in the judicial profession can go as far as ruling that the rape of a young girl is a less serious offence if she has already been sexually active.[28] A director of public prosecutions of England and Wales told the Guardian newspaper that young women's "promiscuity" and heavy drinking contribute to low rape conviction rates,[29] while one of Scotland's most senior lawyers commented that in cases of sexual assault, courts should no longer assume that a girl under 16 is "vulnerable", and that defence lawyers should, in certain trials, be able to refer to how an alleged victim was dressed.[30]

---

21. It removed the defence that a person could avoid conviction for rape if there was an honest but mistaken belief that a person had given consent.
22. See the Committee's exchange of views with Ms Kräuter-Stockton (Germany), public prosecutor, member of the European Women Lawyers Association (EWLA), at its meeting in Paris on 23 March 2009.
23. Ibid.
24. The Supreme Court stated in the "Cristiano case": "we must also consider that it is a fact of common experience that it is nearly impossible to remove jeans on another person without the wearer's active co-operation, after all [taking off jeans] is a difficult enough operation for the one wearing them." Cited in: Rachel A Van Cleave, "Sex, Lies and Honor in Italian Rape Law", Suffolk University Law Review, Vol. XXXVIII:427, p. 448.
25. The Court found: "But it is instinctive, especially for a young woman, to resist with all her strength one who tries to rape her and it is illogical to suggest that a girl would passively submit to rape, which is a serious assault on the person, out of fear of some other hypothetical and certainly not more serious harm". Cited *ibid*, p. 451.
26. *Ibid*, p. 451.
27. See Parliamentary Assembly Resolution 1681 (2009) and Recommendation 1881 (2009) on the urgent need to combat so-called "honour crimes".
28. In a 2006 ruling on a case involving the appeal of a 40-year-old man who had sexually abused his girlfriend's 14-year-old daughter, the Supreme Court of Italy decided that the rape of a minor was a more moderate offence if the child envolved was no longer a virgin. See BBC news item "Italy rape ruling draws criticism" of 17 February 2006.
29. See Guardian newspaper article "There is no excuse" of 25 July 2008.
30. *Ibid*.

23. The above-mentioned study on attrition in reported rape cases in 11 European countries further found that the failure in the investigation stage to interview the victim and/or the suspect, and high rates of victim withdrawal contributed to low conviction rates, while the higher conviction rates were achieved where prosecutors took control of the investigation and made most decisions about whether cases proceeded.[31]

24. Unfortunately, the legislation on rape in many Council of Europe member states remains unreformed, which does nothing to help change such attitudes. To be truly effective, legislation on rape needs to protect victims better, and should thus, as a minimum:

a. make rape (including marital rape) an *ex officio* crime;

b. define consent as agreement by choice when having the freedom and capacity to make that choice;

c. not require that a victim physically resist the attacker;

d. have prosecutors make all discontinuance decisions, and give the victim the right to challenge such decisions;

e. allow victims to be a party to the case in court;

f. protect victims' private lives, especially in court;

g. allow evidence gathered in pre-trial proceedings to be used when the victim avails herself of her right to refuse to testify once in court;

h. give victims a legal right to advice and support throughout the process.

5. "Marital rape" – a serious crime

25. Marital rape is a serious crime and should be considered as such in national legal systems.

26. Historically speaking, marital rape was not considered a crime in most countries. Marriage gave conjugal rights to a spouse and imposed conjugal duties on wives. It therefore seemed to follow that a wife could not legally revoke consent to sexual intercourse, and if there was consent there was no rape. Rape statutes thus often came with a "marriage exemption". This exemption had been removed by twelve countries by 2006.[32] Marital rape was recognised in law in Austria in 1989; in the United Kingdom in 1991; in Switzerland in 1991 (though not until 2003 did it become a state offence); in the Netherlands in 1992; in Germany in 1997, and in France in 2006.[33]

27. It does not seem to me that there are still Council of Europe member states which practice a "marriage exemption". In effect, the difference rather seems to be the existence or not of a "specific" crime of "marital rape". Some Council of Europe countries apply the "normal" rape statutes.

28. The Council of Europe already has a clear policy position on this matter. The Appendix to Recommendation Rec (2002) 5 of the Committee of Ministers on the protection of women against violence contains the following recommendations to member states:

> *"35. provide for appropriate measures and sanctions in national legislation, making it possible to take swift and effective action against perpetrators of violence and redress the wrong done to women who are victims of violence. In particular, national law should:*
>
> *– penalise sexual violence and rape between spouses, regular or occasional partners and cohabitants;*
>
> *– penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance;*
>
> *– penalise sexual penetration of any nature whatsoever or by any means whatsoever of a non-consenting person;*
>
> *…*

31. Advance copy, *op. cit.*, p. 125.
32. Stocktaking study on the measures and actions taken in Council of Europe member States, prepared by Prof. Dr. Carol Hagemann-White with the assistance of Judith Katenbrink and Heike Rabe, University of Osnabrück, Germany, published by the Council of Europe in 2006, pp. 19-20.
33. *Ibid*, pp. 19-20.

38. ensure that all victims of violence are able to institute proceedings as well as, where appropriate, public or private organisations with legal personality acting in their defence, either together with the victims or on their behalf;

39. make provisions to ensure that criminal proceedings can be initiated by the public prosecutor;

40. encourage prosecutors to regard violence against women and children as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest;".

29. The explanatory memorandum to the Recommendation made clear that:

"77. While the definition of rape and sexual violence is entirely a matter for domestic legislation, it should be noted that the recommendation plainly advocates criminalizing rape between spouses or partners.

78. Under the legislation of most countries, the act is punishable only if performed without the passive partner's consent. This is normally for the court to determine. The drafters nevertheless wanted to emphasise that lack of physical resistance does not necessarily signify consent; fear or threat can subdue any inclination to resist, without there being any question of valid consent. Use of force cannot be measured solely according to the degree of resistance put up by the victim."

30. I think it is clearly in the victims' interest that "marital rape" constitute a separate criminal offence in national law, and that prosecutors prosecute *ex officio* in such cases. Both of these measures would make it more likely for victims to come forward and report these crimes, as they would have the feeling that their suffering is taken seriously. In fact, it may even be a good idea to make the fact that a rape happens in marriage, or between cohabiting partners or ex-partners, an aggravating circumstance, as the betrayal of trust involved can aggravate the psychological consequences for the victim.

6. Prevention of rape

31. I find it completely unacceptable that women still have to fear rape in Council of Europe member states. As the English network of rape crisis centres rightly points out, the threat of violence is a total intrusion into women's personal space and transforms a routine and/or potential pleasurable activity (for example, a walk in the park, a quiet evening at home, a long train journey) into a potentially upsetting, disturbing and often threatening experience.[34] There is thus room for improvement in our member states concerning women's protection from rape.

32. However, the way chosen by the Italian government recently to improve women's protection from rape is, in my opinion, fallacious. At the end of February 2009, following a spate of rapes blamed on foreigners, Italy's government rushed through a decree (which was passed into law by the Italian Senate in April 2009) which aims to protect women from rape inter alia through the establishment of citizen street patrols, in which volunteer retired police and soldiers are meant to play a major role (it is up to local mayors to decide how, where and when to use these volunteers).[35] I feel that this measure is hardly going to be effective, and legitimises vigilantism and xenophobia to a degree.

33. I would plead for a different approach, which would have a dual focus: first, empowering women not to be victims, by building up their self-esteem and their capacities for self-defence, and second, teaching men to respect women – and their decision to say no.

7. Conclusions and recommendations

34. In conclusion, I feel that a comprehensive strategy is needed to tackle rape, including marital rape, in Council of Europe member states more effectively. This strategy should comprise measures to prevent rape in the first place, by empowering girls and women not to be victims and teaching boys and men to respect women, as well as to change attitudes to rape in society as a whole – possibly via a Council of Europe and concomitant national awareness-raising campaigns.

35. This strategy should ensure protection of and assistance to rape victims. Such important establishments as the rape crisis centres in England and Wales, for example, with their comprehensive, specialist and non-judgemental services, could serve as a model to other member states.

---

34. http://www.rapecrisis.org.uk/rape.html.

35. BBC news, "Italy passes emergency rape law", 23 February 2009. UPI.com, "Italy passes harsher rape penalties", 22 April 2009.

36. The way the criminal justice system works in many countries when it comes to rape also needs to be reviewed. Rape victims should have the right to be taken seriously, and to be treated with dignity and respect at every step of the process, from filing a complaint (for which a female police officer should be available), to forensic testing, up to the trial. It should not be necessary to prove that the victim physically resisted the rapist in order to prove that there was no consent: many rapists have means to ensure that a victim does not struggle (including weapons, drugs, threats to a victim's children, etc.). The history of the victim's relationships should play no role at the trial (it would not have any place if the victim had been robbed, so why should it have a place in cases of rape?); neither should her clothing, of course. It needs to be made clear, also to the judiciary, that any woman can be raped, but no woman deserves to be raped, and that consent is necessary for sexual intercourse every time, whatever the relationship of the victim with the rapist. Only then can we hope that more rapes will be reported to the authorities, and more rapists will actually be convicted of their crimes.

37. I would therefore recommend that the Assembly make a number of recommendations to member states as included in the preliminary draft resolution and recommendation, and hope for your unqualified support.

***

Reporting committee: Committee on Equal Opportunities for Women and Men

Reference to committee: Doc. 11324 rev, Ref. 3366 of 01.10.07

Draft resolution and recommendation unanimously adopted by the committee on 8 September 2009.

Members of the committee: Ms Pernille **Frahm** (Chairperson), Mr José **Mendes Bota** (First Vice-Chairperson), Ms Ingrīda Circene (Second Vice-Chairperson), Ms Anna Čurdová (Third Vice-Chairperson), Ms Sonja Ablinger, M. Francis Agius, Mr Florin Serghei Anghel (alternate : Ms Maria **Stavrositu**), Ms Magdalina Anikashvili, Mr John **Austin**, Mr Lokman Ayva, Ms Marieluise Beck, Ms Déborah Bergamini ; Ms Oksana Bilozir (alternate: Ms Olha **Herasym'yuk**), Ms Rosa Delia Blanco Terán (alternate: Ms Luz Elena **Sanín Naranjo**), Ms Olena **Bondarenko**, Mr Pedrag Bošković, Mr Han Ten Broeke, Ms Anna Maria Carloni, Mr James **Clappison**, Ms Diana Çuli, Ms Lydie **Err**, Ms Catherine Fautrier, Ms Mirjana **Ferić-Vac**, Ms Sónia Fertuzinhos, MsDoris Frommelt, Ms Alena **Gajdůšková**, Mr Giuseppe Galati, Ms Gisèle **Gautier**, Mr Ioannis Giannellis-Theodosiadis, Ms Claude Greff, Mr Attila **Gruber**, Ms Carina **Hägg**, Ms Fatme Ilyaz, Ms Francine John-Calame, Ms Nataša Jovanović, Ms Birgen **Keleş**, Ms Krista **Kiuru**, Ms Elvira Kovács, Ms Angela Leahu, Mr Terry **Leyden**, Ms Mirjana Malić,Ms Assunta Meloni, Ms Nursuna **Memecan**, Ms Danguté Mikutiené, Mr Burkhardt Müller-Sönksen, Ms Hermine Naghdalyan, Ms Yuliya Novikova (alternate: Mr Ivan **Popescu**), Mr Mark Oaten (alternate: Baroness **Gale**), Mr Kent Olsson (alternate: Ms Marietta **de Pourbaix-Lundin**), Ms Steinunn Valdis Óskarsdóttir, MsAntigoni Papadopoulos, Mr Jaroslav Paška, Ms Mª del Carmen **Quintanilla Barba**, Mr Frédéric Reiss, Ms Mailis Reps, Ms Maria Pilar Riba Font, Ms Andreja Rihter, Mr Nicolae Robu, Ms Jadwiga Rotnicka, Ms Marlene **Rupprecht**, Ms Klára **Sándo**r, Ms Miet Smet, Ms Albertina Soliani, Ms Darinka Stantcheva, Ms Tineke Strik, Mr Michał Stuligrosz, Ms Doris **Stump**, Mr Mihal Tudose , Ms Tatiana Volozhinskaya, Mr Marek **Wikiński**, Mr Paul Wille (alternate: Mr Gerolf **Annemans**), Ms Betty **Williams**, Mr Gert Winkelmeier, Ms Karin S. Woldseth, Ms Gisela **Wurm**, Mr Andrej Zernovski, Mr Vladimir **Zhidkikh**, Ms Anna Roudoula Zissi.

N.B. The names of the members who took part in the meeting are printed **in bold.**

Secretariat of the committee: Ms Kleinsorge, Ms Affholder, Ms Devaux.