



STEALTHING: IN SEARCH OF THE CRIMINALIZATION OF THE OBTUSE ACT OF REMOVING A CONDOM WITHOUT THE PARTNER'S CONSENT (AN APPROACH TO THE SUBJECT): IN PORTUGUESE LAW

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ABSTRACT

With this study, which reality forced us to ponder, we tried to answer a simple question: is the act of removing a condom during sexual intercourse without the partner's consent criminalized? (And if not, should it be?)

Keywords: *consent; sexual act; condom.*

1 INTRODUCTION

Allow us to begin with a *mea culpa*; we do not endorse the title we have chosen for this article. But even though we are disgusted, we do so because the phrase *stealthing* is the one that has been repeatedly used in legal literature to label this vile practice. To put it more bluntly, *stealthing*, loosely translated, means stealth, concealment, disguise and allegedly entered the legal lexicon under the influence of a technology used in aeronautics that allows aircraft to remain undetected (or more difficult to detect) by radar, a parallel that we find very difficult to endorse.

What's more, the phrase was coined by the perpetrators of this disgraceful practice themselves in abject communities *on line*, where they boast of doing it and share their learned teachings for others to emulate¹.

Therefore, without prejudice to the title we are keeping for the sake of exposition²,

¹According to BRODSKY, A. 'Rape-Adjacent': Imagining Legal Responses to Nonconsensual Condom Removal. *Columbia Journal of Gender and Law*, v. 32, n. 2 (2017), p. 184, which, however, is often considered the "mother" of the express (thus, NUNES Danilo Henrique and SOUZA, Lucas, *Stealthing: aspects about gender violence and affront to fundamental rights*". *Revista Libertas*, Brazil: Federal University of Ouro Preto. vol. 3, no. 2. a. 2018, p. 100).

² As have the few national authors who have spoken on the subject.



we will baptize the practice by listing what it translates into: removing³ the condom without the other person's consent (making the partner mistakenly believe that they are practicing safe sex). We emphasize this point: we are confining ourselves to critically analyzing the circumstance of the condom being removed by stealth without the partner's knowledge, so in these lines, brevity's sake, we are not going to inquire about the cases in which the partner is persuaded (pressured) to accept that sexual intercourse takes place without a condom, because in *casu* there are other (and perhaps more complex) issues that arise [and for the most part, we won't analyze cases in which the perpetrator, after having been "caught", "uses violence or a serious threat to re-penetrate the victim"⁴], or when they agree that there will be no ejaculation inside the partner (v.g., in the vagina or mouth) and the male member does not comply with the agreement, cases in which the determination of guilt raises specific problems (due to the existence of an increase in the objective risk that was agreed between the two), or even when the agent omits a health condition (the paradigmatic case of the HIV-positive person), because, here too, different considerations arise [first of all, because of the immense parallels that could be made here, especially the "myths of consent"⁵ (e.g. being married, being in a relationship, not being in love with the partner or being in love with someone else, being transgender)] that would take our conclusions far beyond our premises and require an independent study.

³ Wrongly or wrongly, we have chosen not to equate condom removal with condom manipulation, because, while both practices are vile and reprehensible, they have (may have) different motivations, so treating them synonymously could distract us (to use a fashionable expression).

Since, *com maxima data venia*, we do not subscribe that "there is, on a legal level, no distinction" (MONTEIRO, Ana. The criminal relevance of *Stealth* in the Portuguese legal system: a contribution to the study of the legal asset of sexual freedom. [Master's thesis]. Lisbon: Faculdade de Direito da Universidade de Lisboa, 2019, p. 26), between removing a condom and contraceptive sabotage³, firstly because the legal asset protected is different. If in *stealth* what is protected is sexual freedom, in contraceptive sabotage it is the fundamental right to decide on the moment of parenthood (apparently in the same sense, ALBUQUERQUE, Paulo Pinto de. Commentary on the Penal Code in the light of the Constitution of the Republic and the European Convention on Human Rights. 3rd Ed. Lisbon: Universidade Católica Editora, 2015, p. 668). In fact, what we have written is in line with the new approach to the crime of rape (which currently encompasses oral coitus, anal coitus and the introduction of body parts and objects), which has disconnected itself from a reductive and anachronistic view that associated rape with procreation and the valuation of motherhood (in a similar vein, RIBEIRO, Gil. Deficiency of the crime of rape in light of the Istanbul Convention. [Master's thesis]. Porto. Faculdade de Direito da Universidade Católica, 2019, p. 24).

⁴ NUNES Danilo Henrique and SOUZA, Lucas, *Stealth*: aspects of gender violence and affront to fundamental rights. *Revista Libertas*, Brazil: Federal University of Ouro Preto. vol. 3, no. 2. a. 2018, p. 94.

⁵We stole the expression from MONTEIRO, Ana. The criminal relevance of *Stealth* in the Portuguese legal system: a contribution to the study of the legal asset of sexual freedom. [Master's thesis]. Lisbon: Faculty of Law of the University of Lisbon, 2019, p. 70.

Thus, and still from a densification perspective to nuance the object of this study, we believe that one should only speak of *stealth* when three cumulative requirements are met: (i) it has been expressly or tacitly agreed that the sexual act will be carried out with a condom; (ii) the condom has been deliberately removed (which, as we said in the introduction, raises major problems of proof); (iii) the removal has been concealed from the partner.

2 THE (STRANGE) MOTIVATIONS: A SOCIOLOGICAL (PSYCHOPATHOLOGICAL?) NOTE

In the middle of the 21st century, in a society that naively boasts of being the most informed in history, after the revolution of the information and knowledge society, in a time of transhumanism and artificial intelligence, after many millions spent on sex education, it is unusual to be confronted with the need to answer the question of why men remove condoms during sex without the knowledge (or against the express wishes) of their partner. After listening to the victims [because we don't confuse listening with hearing], they heard answers like "I don't get the same pleasure", "I'll warn you before I finish", "My ex was on the pill and I'm not used to it"⁶. Unfortunately, it is not surprising (nor is it strange) that the privileged victims of this practice are sex workers, where the power-coisification binomial is most pressing.

Deeply disturbing is trying to listen to the voices of the perpetrators who, in online⁷ forums where they debate the practice and teach how to do it [because, in fact, the worst of humanity is also on the internet], in addition to claiming that they get more pleasure from a relationship without a condom, they resort to a caveman narrative of unbearable misogyny, with arguments of male superiority (man's natural instinct to ejaculate inside a woman, the need to spread the seed, "they like it"), as well as

⁶ For reference, we refer to the testimonies in the article by CÂNCIO, Fernanda. Should removing a condom during sex without your partner knowing be a crime? *Diário de Notícias* (May 27, 2018), available at: <https://www.dn.pt/portugal/-tirar-preservativo-durante-sexo-sem-o-parceiro-saber-deve-ser-crime-9382519.html/>

⁷ And, if you'll allow us to steal the words of others that we endorse, because it was a shock for us too, "there's a whole world of forums *on line* of men teaching other men how to do things and justifying what they do." CÂNCIO, Fernanda. Should removing a condom during sex without your partner knowing be a crime? *Diário de Notícias* (May 27, 2018), available at: <https://www.dn.pt/portugal/-tirar-preservativo-durante-sexo-sem-o-parceiro-saber-deve-ser-crime-9382519.html/>

considerations that border on hate speech (women are inferior, women's duty is to spread their legs [sic])⁸.

And, because fiction is so often a refined version of reality, allow us to invoke the words of *Mieko Kawakami* when in the sublime *Breasts and Ova* [whose excerpt motivated us to reflect critically on the subject]: "It has nothing to do with continuing my genes or having children, but it gives me a sense of personal fulfillment. Maybe that's how all men feel. You know when men go to places where they can pay to be with women? Or when they call girls to their house? Of course they are supposed to use a condom, but some men do something when they're having sex from behind, where they take the condom off at the last moment, as if it's payment for the women doing that kind of work, and then they cum inside. I have a friend... Well, maybe not a friend, but I know someone who does it all the time. It gave him a sense of accomplishment. But he also liked the fact that the girl he was having sex with didn't even realize what was going on. He said there was nothing like that emotion."

A final note to address the sad democratic nature of this practice; thus, it is not only men with low cultural and economic status who practice it, as is exemplified by the case of Julian Assange, founder of Wikileaks, who, in 2010, in Sweden, was accused by two women of having deliberately removed a condom during consensual sexual intercourse, without their consent (Although, if we want to put on some optimistic lenses, this case has been widely covered in the media and has had the merit of helping to unveil the practice and compel legal reflection on it).

3 CRIMES AGAINST SEXUAL FREEDOM IN PORTUGUESE CRIMINAL LEGISLATION

Ab initio, an initial consideration: we are somewhat dubious about classifying this practice as gender violence⁹. Although it is common knowledge that the perpetrators are men¹⁰, as far as victimology is concerned, we lack conclusive studies to confirm

⁸ According to BRODSKY, A. 'Rape-Adjacent': Imagining Legal Responses to Nonconsensual Condom Removal. *Columbia Journal of Gender and Law*, v. 32, n. 2 (2017), p. 188.

⁹ Without hesitation, we find NUNES Danilo Henrique and SOUZA, Lucas, *Stealth: aspects about gender violence and affront to fundamental rights*. *Revista Libertas*, Brazil: Federal University of Ouro Preto. vol. 3, no. 2. a. 2018, p. 106.

¹⁰ In a not entirely coincidental sense, Inês Ferreira Leite offers the example of a sexual relationship in which the man is tied up and the female partner removes the condom without his consent; in our defense, we resort to popular wisdom and recall the adage that the exceptions only exist to confirm the rule.

that women are the primary victims of these practices (since the practice is recurrent in the male homosexual community) and, as the Council of Europe Convention on preventing and combating violence against women and domestic violence has emphasized, *gender-based violence against women means any violence directed against a woman because she is a woman or which disproportionately affects women* (art. 3.º). We emphasize: what dogmatically characterizes an act as gender violence is not the fact that it is typically carried out by men, but the fact that the victims are primarily women, which, *in casu*, we are not sure of.

On the other hand, we refuse to subscribe [because we're writing these lines at the end of the first quarter of the 21st century] that "it's normal to give in to not using condoms because it's the woman's passive role to satisfy the man for his sexual purposes"¹¹; while gender equality is a constant challenge and there is still a long way to go to make misogyny obsolete, increasingly, the women of the 21st century are not the passive *Giocondas* of *Leonardo da Vinci*, but the *Madonnas* immortalized by *Munch*, who assume and fully live their sexuality and their pleasures, without allowing themselves to be subjugated to the macho ravings of a society that, still being patriarchal, is beginning to glimpse that *dawn that was expected, the initial day, whole and clean, where we emerge from the night and silence and freely inhabit the substance of time*¹².

Returning to our epistemological route, it is important to ask whether the factuality *sub judice* (the removal of the condom without the partner's knowledge) can be subsumed under the criminal types against sexual freedom and self-determination provided for and punished by the Portuguese Penal Code.

A hypothetical first possibility would be to subsume these facts under the crime of **sexual fraud** (art.167) which states that *whoever, taking fraudulent advantage of a mistake about their personal identity, performs a significant sexual act with another person shall be punished with imprisonment for up to one year*.

If it is attractive that this incrimination is based on fraudulent intent, the existence of a mistake (and, *in this case*, the disguised way in which the condom is removed would fulfill this category without dogmatic difficulties), a mere literal interpretation of

¹¹ MONTEIRO, Ana. The criminal relevance of *Stealth* in the Portuguese legal system: a contribution to the study of the legal asset of sexual freedom. [Master's thesis]. Lisbon: Faculty of Law of the University of Lisbon, 2019, p. 25.

¹²The words, as the reader recognizes, were stolen from Sophia de Mello Breyner Anderson.

the rule condemns us to recognize that, of the panoply of possible errors, only the error of personal identity is criminalized, in the sense that one person impersonates another (invariably, the academic example is the twin who engages in significant sexual acts with his brother's partner). In this sense, the words of Anabela Rodrigues, who refers to the minutes of the reform where it is crystal clear that "identity is not referred to the qualities of the person (engineer, plumber), but rather (and only) to another natural person"¹³. From the above, it is unnecessary to say that, in the way the criminal type was constructed, it is not possible to frame *stealth*ing.

Another possibility in the abstract would be to refer to the criminal offence of **sexual abuse of a person incapable of resistance**, which criminalizes *anyone who engages in a significant sexual act with a person who is unconscious or otherwise incapable of resistance, taking advantage of their condition or incapacity* (art. 165), a path that has already been followed in comparative law (especially Swiss law); however, this system has a different criminal construction. Thus, if the Swiss penal code states that *whoever knows that a person is incapable of discernment or resistance, to take advantage of the opportunity to commit a sexual act, similar or otherwise*, and so, not without aporias, it could be said that in (certain) positions of the bodies the agent could leave the victim incapable of resisting and take advantage of this fact; however, when we analyze the national rule, we are forced to recognize that "the legislator's intention was to criminalize the exploitation of a pre-existing state or incapacity and not as realities that the agent himself can create through his will. It is precisely the deliberate exploitation of the fragility of an already existing physical or psychological state that justifies this criminalization, and this is its distinguishing feature from other types of sexual crime."¹⁴.

Figueiredo Dias' words are also apt in this regard: "the specificity of the content of the offense in this precept lies in the fact that the perpetrator does not break the victim's resistance - as happens in the cases of articles 163 and 164 - but takes

¹³ RODRIGUES, Anabela. Commentary on art. 166 (Sexual Fraud). Conimbricense Commentary on the Penal Code. Volume II. Org. DIAS, Figueiredo. Coimbra: Coimbra Editora, 1999, p. 491.

¹⁴ MONTEIRO, Ana. The criminal relevance of *Stealth*ing in the Portuguese legal system: a contribution to the study of the legal asset of sexual freedom. [Master's thesis]. Lisbon: Faculdade de Direito da Universidade de Lisboa, 2019, pp. 17 and ss.

advantage of an already existing incapacity to resist”¹⁵, so not all interpretative *bonhomie* could indicate the subsumption of this practice to this criminal type.

The hypothetical application of the crime of **sexual intercourse**, as it is foreseen and punished in Portuguese criminal legislation, cannot be considered either, since what characterizes this crime is the fact that the agent performs a significant sexual act without penetration and it is apodictic that the use of condoms presupposes (at least) the intention to penetrate, whether through copulation, oral coitus or anal coitus, falling into the *facti species* of the crime of rape.

Consequently, we have saved the scalping of the **crime of rape** for the end of this journey, because when we dissect the (sparse) literature that has critically looked at *stealth*, we find warned voices that want to subsume this practice into the criminal type of rape, arguing assertively that in a *momentum* in which the touchstone for qualification as rape is consent and not force or threat, this practice could be subsumed into that criminal type¹⁶.

Unfortunately, the Portuguese criminal law is stuck in archetypes and prejudices from the past, as we will try to demonstrate.

As we have mentioned, the doctrine has tried to subsume *stealth* to the crime of rape. In this vein, we bring Isabel Ventura’s words to the debate: “From my point of view, it’s a sexual crime, which falls under the current wording of the crime of rape. Because we are dealing with a consensual sexual act which, by removing the condom, becomes a non-consensual act: the person did not consent to sex without a condom.”¹⁷. However, the author herself recognizes that an explicit reference in the legal text would be desirable, because “if it is not explicit, it is more likely that a magistrate will consider that it is not a crime”¹⁸. In a similar vein, Rita Mota e Sousa, a magistrate in the Public Prosecutor’s Office, asks: “would the person want to, would they consent to sexual intercourse if they knew there was no condom?” Concluding in the negative, he argues that “it is obvious that sexual freedom and self-determination

¹⁵ DIAS, Figueiredo. Commentary on art. 166 (Sexual abuse of a person incapable of resistance). *Conimbricense Commentary on the Penal Code*. Volume II. Org. DIAS, Figueiredo. Coimbra: Coimbra Editora, 1999, p. 477.

¹⁶ In this sense, BRODSKY, A. ‘Rape-Adjacent’: Imagining Legal Responses to Nonconsensual Condom Removal. *Columbia Journal of Gender and Law*, v. 32, n. 2 (2017), p. 187.

¹⁷ Isabel Ventura, in dialog with CÂNCIO, Fernanda. Should removing a condom during sex without your partner knowing be a crime? *Diário de Notícias* (May 27, 2018), available at: <https://www.dn.pt/portugal/-tirar-preservativo-durante-sexo-sem-o-parceiro-saber-deve-ser-crime-9382519.html/>

¹⁸ Isabel Ventura, in dialog with CÂNCIO, Fernanda. Should removing a condom during sex without your partner knowing be a crime? *Diário de Notícias* (May 27, 2018), available at: <https://www.dn.pt/portugal/-tirar-preservativo-durante-sexo-sem-o-parceiro-saber-deve-ser-crime-9382519.html/>

must be protected. It can be understood that the person being deceived is being forced into an act to which they did not consent. And in that sense I think that *stealthing* fits the current letter of the law. Because the whole sexual relationship has to be consensual.”¹⁹

Ana Monteiro, after densifying the criminal type, especially the fact that the type is fulfilled when the agent puts the victim in the impossibility of resisting in order to later force her to perform a significant sexual act with penetration, maintains that “in situations of *Stealthing* we can verify that the victim is mentally without the capacity to resist, since, through ignorance of the agent’s true intention, the victim believes that everything will unfold as initially planned”²⁰.

A. continues her reasoning and also considers “deception as a means that forces the victim to perform a sexual act that she never really wanted”²¹, so she joins those who argue that our legal system already punishes *stealthing* as rape. For the sake of exposition, we bring to the text the criminal type which, in its current wording²², in a paradigmatic example of legislating by “trial and error”²³, provides:

Anyone who embarrasses another person:
 (a) engaging in copulation, anal intercourse or oral intercourse with the perpetrator or with another person; or
 b) Suffering or performing acts of vaginal, anal or oral introduction of body parts or objects;
 is punishable by imprisonment from one to six years.
 2 - Whoever, by violence or serious threat, or after having rendered the person unconscious or unable to resist, constrains another person:
 (a) to undergo or engage in copulation, anal intercourse or oral intercourse with the perpetrator or with another person; or
 b) Suffering or performing acts of vaginal, anal or oral introduction of body parts or objects;
 is punishable by imprisonment from three to ten years.

¹⁹ Rita Mota Sousa Isabel Ventura, in dialog with CÂNCIO, Fernanda. Should removing a condom during sex without your partner knowing be a crime? Diário de Notícias (May 27, 2018), available at: <https://www.dn.pt/portugal/-tirar-preservativo-durante-sexo-sem-o-parceiro-saber-deve-ser-crime-9382519.html/>

²⁰ MONTEIRO, Ana. The criminal relevance of *Stealthing* in the Portuguese legal system: a contribution to the study of the legal asset of sexual freedom. [Master’s thesis]. Lisbon: Faculty of Law of the University of Lisbon, 2019, p. 77.

²¹ *Ibidem*.

²² And, let’s remember, in just over a decade, the article has had four different versions, most notably the version of Law No. 59/2007, of 04/09, which after the ratification of the Istanbul Convention was amended by Law No. 83/2015, of 05/08, which, with doctrinal criticism was amended first by Law No. 101/2019, of 06/09 and still recently by Law No. 45/2023, of 17/08.

²³ As assertively qualified by CAEIRO, Pedro. Observations on the planned reform of the regime of sexual crimes and the crime of domestic violence. *Portuguese Journal of Criminal Science*. a. 29, n. 3 (2019), p. 635.

3 - For the purposes of paragraph 1, constraint shall mean any means, not provided for in the preceding paragraph, employed for the performance of the acts referred to in the respective paragraphs a) and b) against the victim's cognizable will.

A perfunctory analysis of the criminal type indicates that the Portuguese legislator has placed the emphasis on the concept of embarrassing²⁴, not upholding the obligations assumed when the Portuguese state ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)²⁵, where, with regard to sexual violence, Article 36 states that:

The Parties shall take the necessary legislative or other measures to ensure the criminalization of the following intentional conduct: a) non-consensual vaginal, anal or oral penetration of another person's body with any part of the body or with an object;
b) other non-consensual sexual acts with a person;
c) forcing another person to perform non-consensual sexual acts with a third person.
Consent must be given voluntarily, by the free will of the person, assessed in the context of the surrounding circumstances.

Therefore, we don't need to be penalists²⁶ to conclude that the rock on which the Istanbul Convention erected the protection of victims of sexual violence is non-consent (and not embarrassment). And, for the sake of exegetical bonhomie, we cannot, out of benevolent analytical desire, interpret the expressions as synonyms or argue that "the concept of 'constraint', even by any means, covers all conduct that is not freely consented to"²⁷. It is enough to take a stroll through a Portuguese dictionary to conclude that if to constrain is "to hinder the freedom of (or from); to subjugate, subject,

²⁴ On the subject see the critical assertions by SOTTOMAYOR, Maria Clara. The legal concept of rape: a contribution to penal doctrine. Regarding the judgment of the Porto Court of Appeal of April 13, 2011. *Revista do Ministério Público*. a.128 (2011), pp. 273-318.

²⁵ And so that our words do not stand alone, we call on the Group of Experts on Action against Violence against Women and Domestic Violence, GREVIO's (Baseline) *Evaluation Report, on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) PORTUGAL*, GREVIO/Inf (2018)16, Council of Europe, 21 January, p. 49. 49.

²⁶ And we leave it written that we are an outside observer of criminal law, because the cassock of the penalists is too heavy for the lightness of our knowledge.

²⁷ RIBEIRO, Gil. *Deficiency of the crime of rape in light of the Istanbul Convention*. [Master's thesis]. Porto. Faculdade de Direito da Universidade Católica, 2019, p. 8. In the same vein, CAEIRO, Pedro. Observations on the planned reform of the regime of sexual crimes and the crime of domestic violence. *Revista Portuguesa de Ciência Criminal*. a. 29, n. 3 (2019), p. 644, considers that "to constrain, in the context of sexual crimes, is to force another person to perform or suffer a sexual act against their will".

dominate [...] to compel”²⁸, when we call up the locution consent it is “the act or effect of consenting, manifestation favorable to someone doing (something); permission, license [...] manifestation that one approves of (something); consent, acquiescence, agreement”²⁹. However, we can’t ignore the fact that the Portuguese legislator didn’t use the word consent in the criminal offense of rape out of a desire for exegesis, but because its inclusion in the language of sexual crime has raised objections³⁰. In fact, in the aftermath of the ratification of the Istanbul Convention, the Left Bloc³¹, v.g., drew up a bill that was not accepted by the Plenary, in which the crime of rape would be based on the victim’s lack of consent³².

We underline our conviction on the matter because we have no dogmatic ambiguities: sexual intercourse without consent is rape; it just so happens that, for strange reasons [possibly Sophia’s axiom is still true and *the woman continues to live in the city of the man*], the premise is not valid in Portuguese criminal law, where some kind of constraint is still required, because, even after three legislative changes, we continue to fail to fulfill the obligations we assumed with the ratification of the Istanbul Convention. And, if we are allowed to enter into another’s field, let us not support the exegetical aspiration of, based on the direct reception of art. 8.º of the Portuguese Constitution, interpreting the provisions on the crime of rape in light of the Convention, broadening the criminal type, since the exegesis seems to us to be incompatible with the primacy of typicality and legality of criminal law and would raise insurmountable constitutional questions.

Thus, there are four possible ways to qualify an act as a violation: (i) constraint, which requires the use of force or serious threat, (ii) dissent; (iii) consent, and (iv) enthusiastic consent.

Allow us to start at the end. If we support the concept of enthusiastic consent, expressed in the axiom *if it’s not an enthusiastic yes, then it’s a no*, i e., an active,

²⁸ Houaiss Dictionary of the Portuguese Language. António Houaiss Institute of Portuguese Lexicography. Lisbon: Themes and Debates, 2005.

²⁹ Houaiss Dictionary of the Portuguese Language. António Houaiss Institute of Portuguese Lexicography. Lisbon: Themes and Debates, 2005.

³⁰ As recognizes VENTURA, Isabel. A body that is yours - can women [not] consent? *Revista ex &quo*, n. 31 (2015), p. 76 ff. in an excellent historical overview of the voice of women.

³¹ For a comparison of the multiple bills, see CAEIRO, Pedro. Observations on the planned reform of the regime of sexual crimes and the crime of domestic violence. *Portuguese Journal of Criminal Science*. a. 29, n. 3 (2019), pp. 631-679;

³² “Whoever, without consent, forces another person to vaginal, anal or oral penetration, through body parts or objects, shall be punished with imprisonment from 3 to 10 years.”

clear, unequivocal and enthusiastic consent by all parties involved, without ambiguity or doubt, because this is what promotes healthy and respectful relationships, in which the parties feel valued, listened to and respected, and we believe that this is the paradigm for a sexuality that we want to be healthy, so the moral order must promote a culture of consent to prevent sexual violence, with equal vehemence, we understand that the same cannot be the legal standard, otherwise we will extend the sexual type of rape to immeasurable parameters. Indeed, there are multiple and heterogeneous motivations for a person, in the enjoyment of their freedom and self-determination, to interact sexually and to criminally punish one party when the other is not enthusiastic would create an unsustainable uncertainty in the world of sexuality.³³

Since we reject outright the idea that rape only exists if the perpetrator threatens the victim or threatens her, which is a credit to a patriarchal and misogynistic society that insists on interpreting the man as predator and the woman as prey, who bears the burden of resistance, the unbearable weight of having to fight for her purity; therefore, without ambiguity or doubt, *no, means no* and the consummation of a sexual act after the victim's refusal is rape.

The crux of the matter, except in the best opinion, is to determine whether the parameter of violation should be consent (*only a yes is a yes*) or dissent (*a no is a no*). And, *ab initio*, we clarify that the issue is not mere semantics, but a truly Copernican quarrel over the lawfulness of sexual interaction.

But before tackling it, a brief detour to emphasize that consent to a sexual act is not that provided for in Article 38 of the Penal Code, which *excludes the lawfulness of the act when it refers to freely available legal interests*, since the act does not offend good customs. This is because the sexual act cannot be interpreted as an aggression whose consent excludes its punishability, because, as *Simone de Oliveira taught us*,

³³ Similarly: "This is because it seems to us that criminalizing sexual behavior based on the lack of enthusiastic acceptance/participation would go beyond the limits of legitimate criminal intervention, and may also not be appropriate to the reality of interpersonal relationships. Criminal intervention, and may also not be appropriate to the reality of interpersonal relationships. While it's true that the idea that a woman's "no" should be read as a "yes" - a stereotype or myth from the past - is completely outdated, it also seems to us that "yes" doesn't always have to be verbal and expressed with enthusiasm, and can be tacit or not very expansive. We don't believe that those who act in the face of the mere acceptance or tolerance of others should be held criminally responsible (the most severe type of responsibility in the legal system) (CUNHA, Maria da Conceição Ferreira da. The protection of sexual freedom and the problem of configuring the crimes of sexual coercion and rape - a reflection in the light of the Istanbul Convention. In: Sex Crimes. 2nd Ed. Lisbon: Judicial Studies Centers, 2021, p.31).

nowadays *who makes a child does so for pleasure* and the end of marital debt also means that women have an active and desired contribution to sexuality.

Returning to our route, the core of the libel is to assess whether a sexual act is free only when the woman expressly consents (requiring her to act positively, an unequivocal manifestation, express or tacit, that she agrees to the sexual act) or whether the sexual act is legitimate whenever the woman expressly or tacitly does not refuse it, so her passive behavior legitimizes the act.

We believe that the Istanbul standard is dissent, which means that a significant sexual act should only be criminalized when the victim has not consented to it.

This, it should be emphasized, can be stated expressly (the no) or tacitly, when, by their behavior, the agent was or should have been aware that the other person did not desire that act of sexual intimacy.

Furthermore, even if the Portuguese legislator had done what it had undertaken to do [or when it does, because we believe that this will happen in the next revision of the rule] and, as we have long believed, dissent is the characterizing element of the crime of rape, which separates the lawful from the unlawful, we are not convinced that *stealth* could fall under the type.

In the sense that, in light of Istanbul, *stealth* is rape, it is argued that “considering the removal of a condom during sexual intercourse without the knowledge of the partner as a breach of consent, it adopts the position that the practice of *stealth* is a non-consensual sexual act and, therefore, rape,”³⁴ since consent only covers sexual intercourse with the use of a condom. In a similar vein, it is also said that the victims consented to being touched by the condom but not by their partner’s body (penis),³⁵ so the requirements for classifying the facts as rape would be met.

We have reservations about this interpretation. If, without a doubt, it seems unquestionable to us that consent to copulation does not imply consent to anal sex, if consent to oral sex does not imply permission to ejaculate in the partner’s mouth, we no longer agree that permission to fondle the left breast does not imply consent to

³⁴ Pedro Neto, in dialog with CÂNCIO, Fernanda. Should removing a condom during sex without your partner knowing be a crime? Diário de Notícias (May 27, 2018), available at: https://www.dn.pt/portugal/-tirar-preservativo-durante-sexo-sem-o-parceiro-saber-deve-ser-crime_9382519.html/

³⁵ The argument is presented by BRODSKY, A. ‘Rape-Adjacent’: Imagining Legal Responses to Nonconsensual Condom Removal. *Columbia Journal of Gender and Law*, v. 32, n. 2 (2017), p. 190. Even less convincing is the argument that, when the agent removes the condom, he is re-penetrating without there having been consent for this; if we take the premise as sound, a new consent would be necessary every time there is a new penetration, a conclusion that would go far beyond the concept of consent.

fondling the right breast, in the same way that allowing fondling of the vagina does not imply clitoral stimulation.

Since, for the most part, we are skeptical of the argument that victims consent to being touched by a condom but not by their partner's body, that seems to us to lend credence to the understanding that every sexual act is an aggression³⁶.

What we agree with is that, because unprotected sex carries a pertinent set of risks, the desire to have sex with a condom can disappear if the sexual act is unprotected.

On the other hand, we're not sure that widening the criminal offence of rape to include the non-consensual removal of condoms is the most desirable course of action, as we fear that an excessive widening of the offence could vulgarize the undeniable axiological value of this crime by emptying its content. And if we call on the victims, they too have difficulty qualifying *stealth* as rape³⁷.

It must always be borne in mind and never overlooked that the restriction of rights that criminal penalties entail is based on the primacy of proportionality and necessity contained in Article 18(2) of the CRP, which must be measured on a case-by-case basis in the light of specific circumstances.

A further note on the possible classification of these acts as **sexual harassment**, insofar as art. 170 of the Criminal Code punishes *anyone who constrains another person to sexual contact*. While we have no hesitation in stating that removing a condom against the partner's will could amount to sexual contact, once again we fear that the application of the criminal law will be tainted by the requirement of constraint.

Based on everything we have written after comparing the abstractly applicable criminal types, we are convinced that this practice can only be classified as **domestic violence**. Thus, when we analyze the legal norm, *we realize that the perpetrator who,*

³⁶ Inês Ferreira Leite, quoted by CÂNCIO, Fernanda, also ruled against classifying the practice as rape. Should removing a condom during sex without your partner knowing be a crime? *Diário de Notícias* (May 27, 2018), available at: <https://www.dn.pt/portugal/-tirar-preservativo-durante-sexo-sem-o-parceiro-saber-deve-ser-crime-9382519.html/>

³⁷As BRODSKY, A. 'Rape-Adjacent' says: Imagining Legal Responses to Nonconsensual Condom Removal. *Columbia Journal of Gender and Law*, v. 32, n. 2 (2017), p. 183. Although the argument we use is not decisive, it is well known that many victims of rape do not realize that they are victims, especially in cases of date rape, as Maria Clara Sottomayor points out. The legal concept of rape: a contribution to penal doctrine. Regarding the judgment of the Porto Court of Appeal of April 13, 2011. *Revista do Ministério Público*. a.128 (2011), p. 293.

repeatedly or not, inflicts physical or psychological abuse, including corporal punishment, deprivation of liberty, and sexual offenses, is punishable.

Unlike the criminal types we have analyzed, which require the perpetrator to perform a significant sexual act, the crime of domestic violence only requires a sexual offense, and without complex argumentative and interpretative arithmetic, we can peacefully conclude that removing a condom without the other person's knowledge is a sexual offense.

However, this conclusion does not allay our concerns, because, as is clear from the rule, this is a specific crime in which the victim must be the *spouse*, the *ex-spouse* or the *person of the other or of the same sex with whom the agent maintains or has maintained a dating relationship or a relationship analogous to that of spouses, even if without cohabitation*, so conviction is barred in all situations in which it is a casual or sporadic sexual encounter.

However, we are not reassured that this practice could also be punished as **propagation of a contagious disease**, provided for and punished in Article 283 of the Penal Code, since this type of crime is only referred to when the pathological overlaps with the pathological, i.e. when someone is the victim of a sexual assault and, as a result, contracts a sexually transmitted disease [not least because, we are convinced, here there is a case of concurrence of crimes].

4 THE NEED FOR CLASSIFICATION

Brevitatis causa, because this is neither the time nor the moment to delve into the dense field of criminal law theory or to dissect the theories on the definition of crimes³⁸, we will limit ourselves to recalling that defending the criminalization of a conduct is a syllogism based on two fundamental premises: the punitive dignity of the legal good we wish to protect and the principle of necessity in protecting this claim, which has as its hermeneutic beacon the primacy of subsidiarity or *ultima ratio* of criminal law, translated into the axiom of NATSCHERADETZ: "Criminal law should only intervene

³⁸ Also because great voices have already done so and to whom we refer, v.g, COSTA, José de Faria. On the object of protection of criminal law: the place of the legal good in the doctrine of a non-illiberal criminal law. *Revista de Legislação e Jurisprudência*. a 142 (January-February). Coimbra, Gestlegal, 2013, pp. 158 to 173.

to defend the legal goods that are indispensable to the coexistence of men”³⁹. And, *ab initio* we assume, to both questions we answer in the affirmative.

Thus, as far as the dignity of the protected legal asset is concerned, we are still protecting sexual freedom, as reflected in the agent’s self-determination as to whether or not they want to have sex without a condom, because it seems clear to us that using it or not using it can alter the agent’s will. Not least because, while it’s unnecessary to spell it out because it’s axiomatic, but assuming the sin of pleonasm, let’s remember that, in addition to the vile disregard for the victim’s declared will and subsequent objectification, this practice exposes them to the risk of sexually transmitted diseases and, in the case of women, unwanted pregnancy.

Also with regard to respect for the rule of proportionality, we believe that its criminal classification would be justified by the dissuasive effect of the criminal rule and the dignity of the protected legal asset. The only question we have is whether a specific legal type would be justified or whether a neointerpretation of the type of sexual fraud could protect the criminal conviction of this practice.

5 CONCLUSIONS

We have argued in this study that this practice is subsumable [not without aporias] to the criminal type of domestic violence, but we have found no case law to support our thesis.

But we are convinced that we haven’t had an epiphany or escaped the shadows of Plato’s cave while leaving the judiciary tied to the ropes: if we haven’t detected that the law has been applied to punish this practice, we believe that the little-known reason for this fact is the torpid circumstance that *stealththing* is characteristic of occasional and sporadic relationships and not in the context of an affective relationship (and, we fear, because there is still some lack of awareness of the illegality of this practice on the part of the victims, as well as the ancestral embarrassment in reporting sexual crimes, especially when committed within a so-called affective relationship). In fact, from what we have researched, *stealththing* has never been put on trial in Portugal. This does not mean that the practice does not exist, as empirical studies confirm.

³⁹ *Apud.* RIBEIRO, Gil. *Deficiency of the crime of rape in light of the Istanbul Convention*. [Master’s thesis]. Porto. Faculdade de Direito da Universidade Católica, 2019, p. 23.

Along these lines, we conclude that *stealthing* does not fall under the criminal types that protect sexual freedom, as they are constructed, so the practice is currently criminally irrelevant. But if we also believe that the primacy of necessity and proportionality demands that criminal law should not be the solution to all inequities, *in this case*, given the dignity of the protected legal asset, *stealthing* should be criminally prosecuted.

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