

MASTER'S THESIS 2021/22

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*Radical Feminism, Prima Facie  
Wrongdoing, and the Council of Europe:*

Tackling Rape Before the European Court of  
Human Rights

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## ABSTRACT

This paper is centred around the link between human rights and the crime of rape. The European Court of Human Rights is the final interpreter of the European Convention on Human Rights, and increasingly the Court is hearing more cases regarding sexual assault. Article 3, the prohibition of torture or degrading or inhuman treatment, and Article 8, the right to private and family life, have been reinterpreted recently to directly apply to sexual assault cases where the state has failed to effectively prosecute the crime. This paper, through a case study of *E.B. v Romania*, will analyse how the Court has reinterpreted the Convention to protect survivors of sexual assault by evaluating its triumphs as well as its failures. Secondly, I argue that the study of consent theory can be a very valuable tool for understanding how rape laws should be constructed and interpreted for the better. I demonstrate this by looking primarily at two consent theories. First, Catherine MacKinnon's radical feminist theory on consent and coercion, and secondly, Jonathan Herring and Michelle Madden Dempsey's theory on sexual penetration as *prima facie* wrong. Using these theories as a starting point, I analyse *E.B. v Romania* in light of the MacKinnon and the Herring/Dempsey theories in order to demonstrate how these theories can function in practice. Finally, I argue that some elements of these theories may indeed be incorporated by the Court in order to further ensure state accountability on the issue of rape and to promote better prosecutions across Europe.

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## INTRODUCTION<sup>1</sup>

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With the recent onslaught of media attention within Europe concerning certain high-profile rape cases, there is evidence of a call for change in how rape cases are treated in court.<sup>2</sup> Sexual assault is a crime that affects a large proportion of the female population, with statistics claiming that 1 in 3 women will suffer from some form of sexual abuse in their lifetime.<sup>3</sup> Despite this, it is a crime that carries some of the lowest conviction rates. So often victims are undermined and humiliated at trial, and securing a conviction can be extremely difficult. More and more, information is being published about the damning effect of rape myths, and individuals, as well as lawyers, judges, and lawmakers are beginning to understand the real-life circumstances and consequences of rape that generally fail to be captured in court. The law across Europe has fallen behind societal expectations, and this must be recognised when considering how antiquated so many legal definitions of rape are. For example, the marital defence to rape, that is, the notion that a husband cannot rape his wife, has only been abolished very recently in many countries, and remains a valid defence in some jurisdictions. Even looking at the Spanish case, the criminal code finds that rape without the use of violence or intimidation can only be classified as sexual abuse.<sup>4</sup> Society is changing, and women are pushing more than ever for equality. Sexual violence is a gendered crime that disproportionality affects women and is rooted in misogyny. Therefore, a huge aspect of tackling gender inequality concerns tackling violence against women. This is a crime that affects every woman, regardless of class, race, or nationality. A high number of women experience sexual assault, and many of those who have not experienced it first-hand have friends or family members who have fallen victim to it. On a social level, women have always altered their behaviour in fear of sexual assault, for example, the universal caution that women should not walk home alone at night. As this crime touches all women in some way, I believe

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<sup>1</sup> N.B., this paper will primarily be concerned with heterosexual instances of sexual assault, where the victim is female and the perpetrator is male. Rape can and does occur between members of the same sex; transgender and gender non-conforming people are often also victims of sexual attacks; and men can be victims of rape perpetrated by women. However, due to the brevity of this paper, I will focus on male/female relationships as this represents the majority of cases of sexual assault.

<sup>2</sup> One example would be the highly publicised case ‘La Manada’, involving the gang rape of a teenager by 5 men during the San Fermin festival in San Sebastian. This case propelled the women’s rights movement in Spain, triggering mass protests across the country.

<sup>3</sup> Bohner et al, ‘Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator’, in Horvath & Brown (eds.), *Rape: Challenging Contemporary Thinking*, (UK, Willan 2009), 17.

<sup>4</sup> Spanish Penal Code 1995, arts. 178-181. Note: since the backlash caused by ‘La Manada’, the Spanish legislator is in the process of passing a new law to reform the Penal Code on sexual offences. In May of 2022, the draft bill on the Guarantee of Sexual Freedom was approved by Parliament. This marks an exciting change for Spain, and I anticipate that it will create change for the better in Spain.

that this should be tackled on a supranational level. A particular area of interest for me is the interaction between human rights and sexual assault. As stated by the Council of Europe, violence against women is a serious violation of human rights in Europe that is still shrouded in silence.<sup>5</sup> This paper, therefore, will seek to shed light on this issue.

In Chapter I, I will discuss how the European Court of Human Rights (hereafter, 'ECtHR' or 'the Court') has dealt with the various sexual assault cases that have come before it in recent years. In particular, I will analyse how the European Convention on Human Rights (hereafter, 'ECHR') has been reinterpreted to include sexual assault victims within its scope. This will be achieved primarily through a case study of *E.B. v Romania*, a recent rape case that has come before the ECtHR. I believe that the ECtHR falls short of its potential to effect change across Europe when it comes to rape prosecutions, and so it is submitted that there is more that can be done by the ECtHR to encourage reform across the EU to protect individuals' human rights. Chapter II will look at consent theories written by Jonathan Herring and Michelle Madden Dempsey, and Chapter III will focus on Catherine MacKinnon's feminist consent theory. It is my belief that these 'radical' consent theories can be used as a tool to gain a deeper understanding of how consent works within sexual relations and to improve the conceptualisation of rape laws for better prosecution. Chapter IV will look concretely at my proposals for new obligations that the ECtHR could adopt to demand a higher standard of protection from states.

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<sup>5</sup> Council of Europe, Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 11 May 2011, Council of Europe Treaty Series – No. 210, para 1.

## CHAPTER I: A CASE STUDY OF E.B. v ROMANIA

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This chapter will concern a detailed look at the how the European Court of Human Rights deals with cases concerning rape.

### 1. Applicability of the ECHR to Rape Cases

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The Court has established obligations and principles that member States must adhere to when prosecuting sexual assault cases. This has been established by case law developed over the years, beginning with the case *X and Y v The Netherlands*, brought in 1985, concerning the rape of a 16-year-old girl and the failure of the state authorities to prosecute it effectively.<sup>6</sup> This landmark case signified the first time that the ECtHR had found a violation of human rights concerning sexual offences. It held that Article 8, the right to respect for private and family life, was applicable. The Court stated:

*There was no dispute as to the applicability of Article 8: the facts underlying the application to the Commission concern a matter of “private life”, a concept which covers the physical and moral integrity of the person, including his or her sexual life.<sup>7</sup>*

Having established that article 8 could be applied to such cases, the question was how the Court could impose obligations on member States to uphold and protect this right. The Court’s reasoning followed the previous *Airey* judgement, finding that there may be positive obligations inherent in an effective respect for private and family life.<sup>8</sup> As the right to respect for private and family life functions as a way to protect individuals from arbitrary interference of public authorities, it also must operate to ensure that the state will protect individuals from interference with this right within the sphere of relations between individuals themselves.<sup>9</sup> This was a powerful judgement, making it clear that now the state has a positive obligation to protect victims when their private life, including their sexual life, had been interfered with by another individual. The recognition that sexual violence and the state’s handling of it is well within the scope of

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<sup>6</sup> *X. and Y. v The Netherlands*, 26 March 1985, Series A no. 91.

<sup>7</sup> *Ibid.*, §22.

<sup>8</sup> *Ibid.*, §23.

<sup>9</sup> *Ibid.*

Article 8 has meant that the ECtHR, as the final interpreter of the Convention, has an ever-important role in ensuring that MS take the prosecution of sexual assault not only as a serious problem, but particularly as a potential human rights violation if it is not carried out effectively.

Furthermore, in subsequent case law, the ECtHR has included cases of sexual violence within the scope of Article 3 – the prohibition of torture or inhuman or degrading treatment. *Aydin v Turkey*<sup>10</sup> was the first case in which a rape was brought within the scope of Article 3, the Court finding:

*...rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.*<sup>11</sup>

Having regard to the particularly painful and traumatising nature of rape, the Court concluded that the especially cruel act of rape to which the applicant was subjected amounted to torture in breach of Article 3 of the Convention.<sup>12</sup> The gravity with which the ECtHR has treated the issue of rape makes a clear statement to member States – that to fail to effectively prosecute cases of sexual assault can mean not only an interference with Article 8 of the Convention, but may also amount to a violation of Article 3, which has been described by the Court as ‘enshrining one of the fundamental values of democratic societies, and admits of no exceptions nor derogation from it.’<sup>13</sup> An interference with this right, therefore, will reflect particularly negatively on a member State that fails to adequately protect its individuals, as there can be no justification for such an interference.

## 2. E.B. v Romania

Having established which human rights may be violated in rape cases, I will now explore how this has functioned subsequently through a case study of *E.B. v Romania*.<sup>14</sup> This case concerned E.B., a woman who was walking home after work one evening and was approached by a man,

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<sup>10</sup> No. 23178/94, 25 September 1997.

<sup>11</sup> *Aydin v Turkey*, §83.

<sup>12</sup> *Ibid.*, §86.

<sup>13</sup> *Ibid.*, §81.

<sup>14</sup> No. 49089/2010, 19 March 2019.

T.F.S., who offered her money to perform oral sex on him.<sup>15</sup> After E.B. refused this, he grabbed her by the arm and dragged her close to a cemetery, and subsequently told her to undress and lie on the ground, threatening her with a knife. She obeyed, in a state of shock, and T.F.S. raped her.<sup>16</sup> The domestic courts held that her lack of consent could not be proven, largely on the grounds that the forensic report showed no rape-specific injuries. The domestic County Court also found a socio-moral assessment to be irrelevant and a psychiatric assessment to be unnecessary.<sup>17</sup> The applicant sought that the failure of the state to effectively prosecute her sexual assault be recognised by the ECtHR as a violation of her Convention rights on the basis of Articles 3 and 8.

In order to analyse the Court's current position on rape cases and the obligations that it imposes on member States to prosecute this crime and to protect victims, this is a useful case to use as a study. It is a more recent case than the two aforementioned cases, meaning that now the Court has had time to establish its line of jurisprudence on this issue. Additionally, this is a relatively 'simple'<sup>18</sup> case of rape. It involves one victim and one perpetrator, both adults, and does not concern state corruption and brutality as in the *Aydin v Turkey* case. As the facts of the case concern a rape which shares circumstances that are seen across many cases of sexual assault, the Court's reasoning in this particular case will be valuable to consider the extent to which member States are encouraged to change policies in order to fall in line with international human rights standards. If state authorities are held to a higher international standard even in the more common circumstances of rape, this can, in turn, be powerful to promote improvement. It is a statement to member States that cases such as *Aydin v Turkey* are not just an exceptional circumstance, but that violations of human rights can be found in any and all rape cases where the authorities fail to protect individuals. There is a serious deficit when it comes to prosecution of rape cases across Europe, as rape is one of the crimes with the least convictions. Furthermore, it is argued that one of the key tools that can be used to attempt to improve this issue is changing international standards to promote change at a domestic level. Therefore, we will explore the obligations that the ECtHR has imposed on member States up until now in rape cases to understand what has been done to promote change and how this may be improved upon.

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<sup>15</sup> *E.B. v Romania*, §10.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, §29.

<sup>18</sup> It is recognised that no case of rape is truly simple, else securing convictions would be a straightforward question, and conviction rates would likely be higher.

## 2.1. Positive Obligations

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The Court in *E.B. v Romania* reiterated the general principles applicable to this case, beginning with the positive obligations corresponding to Article 3:

*States have a positive obligation inherent in article 3 of the Convention to enact criminal-law provisions that effectively punish rape and to apply them in practice through effective investigation and prosecution.*<sup>19</sup>

Furthermore, with regards to Article 8:

*Positive obligations on the State are inherent in the right to effective respect for private life under article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance is in principle within the State's margin of appreciation, effective deterrence against serious acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.*<sup>20</sup>

The positive obligations inherent to Articles 3 and 8, therefore, require above all else effective prosecution of rape. However, this is, of course, extremely vague and leaves these obligations open to interpretation. What may be considered effective by a State Prosecutor may not be considered effective by the judges of the ECtHR, and vice versa. Therefore, this leaves ambiguity as to how effective the measures taken by a member State must be in order to prevent a human rights violation. Furthermore, does efficacy mean implementing provisions that will increase rape convictions? In what way can this be quantified? It seems that the ECtHR has left this open to interpretation which allows member States more scope to determine its own policies and provisions. However, on the other hand, it creates more of a *soft* obligation, as it does not determine a concrete minimum standard that should be implemented to improve access to justice for rape victims across the board.

Moreover, what it does clarify is that member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any

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<sup>19</sup> *E.B. v Romania*, §54.

<sup>20</sup> *Ibid.*, §55.

non-consensual sexual act, including in the absence of physical resistance by the victim.’<sup>21</sup> The interpretation which can be taken from this paragraph is that the ECtHR is in favour of adopting a consent-based definition of rape, as found in the Istanbul Convention, which was ratified by Romania in 2016.<sup>22</sup> As the ECtHR often has regard to international treaties when adopting principles in its case-law, in recent cases regarding sexual assault the Istanbul Convention has been a source of law. The fact that the ECtHR has found that all states should adopt a consent-based approach to sexual assault is no small achievement, especially considering that within Europe, only 13 countries recognise in law that sex without consent is rape.<sup>23</sup> This means that more than half of the member States of the Council of Europe still fall behind this standard. We are currently facing a period of change within Europe, as to date, 34 states have ratified the Istanbul Convention. This signifies that a transition is currently taking place in Europe, and it is hoped that within the next few years more and more states will join the current 13 in adopting a consent-based approach to rape.

In terms of the meaning of consent, the Court is, once again, vague – seemingly in the interest of the margin of appreciation and to ensure that it does not overstep its role as the final interpreter of the Convention. Of course, the object of the ECtHR is not to impose strict guidelines on how laws should be construed and interpreted, but to ensure that member States are held accountable to potential human rights violations. The issue with this, however, is that it once again leaves ambiguity. The only specified dimension of consent is that physical resistance should not be required; however, this does not mean that consent must be explicit, nor does it mean that in cases where there is a lack of physical resistance, i.e. submission to the perpetrator, that this cannot be used to imply consent in the domestic courts. It only requires that physical resistance not be used as the determining factor in finding that rape did or did not occur. Due to this ambiguity, the meaning of consent is left open to be interpreted on a domestic level.

## 2.2. Tackling Rape Myths

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Despite my criticisms of this judgement, it must also be acknowledged how the Court has made an attempt to tackle rape myths. Rape myths are defined as ‘descriptive or prescriptive beliefs about rape that serve to deny, downplay or justify sexual violence that men commit against

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<sup>21</sup> *Ibid.*, §56.

<sup>22</sup> Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence, 11 May 2011, Council of Europe Treaty Series – No. 210, art 36.

<sup>23</sup> ‘Slovenia: Recognition that sex without consent is rape is a ‘historic victory for women’, (Amnesty International, 4 June 2021) Available: <<https://www.amnesty.org/en/latest/news/2021/06/slovenia-recognition-that-sex-without-consent-is-rape-is-a-historic-victory-for-women-2/>>

women.’<sup>24</sup> They are a fundamental barrier to justice in that they shift the blame from the perpetrator to the victim, which in the majority of cases means shifting blame away from the male perpetrator and instead placing it onto the female victim. Rape myths are based in sex inequality and consist of a pattern of misogyny that is perpetuated in many court cases in order to convert the male perpetrator into a blameless figure. This is one important reason why access to justice is so difficult for victims of rape. The danger is that it creates a ‘cycle of blame’ – the same rape myths that limit convictions may in turn be strengthened by not-guilty verdicts.<sup>25</sup> Meaning that when rape myths are used in court and accepted by juries, this causes a more restrictive approach to rape, which in turn makes securing a conviction even harder as the not-guilty verdicts will only serve to reinforce the rape myths used in the first place. The need to break the cycle and condemn the use of rape myths is evident.

In *E.B. v Romania*, the rape myth most relied on by the state authorities was the applicant’s lack of physical resistance, as E.B., fearing for her life and in a state of shock, had not resisted the attack.<sup>26</sup> The idea that a victim must fight back against a sexual attack in order to prove that they did not consent to it is a rape myth that is not only used in courts, but which has been read into legal provisions in many jurisdictions as a requirement. It casts doubt on the veracity of the victim’s allegations and transfers blame away from the perpetrator. Instead of the burden falling on the perpetrator to prove that he did not commit a rape, the burden is placed on the victim to prove what act of physical resistance she made in order to prevent it from happening. A common misconception, therefore, is that rape can only occur where the victim physically resists. The European Institute for Gender Equality found in 2016 that 23 national jurisdictions make reference to the requirement of the use of force in legal definitions of rape.<sup>27</sup> This means that doubt may be cast on allegations in cases where there is a lack of resistance. This comes from a gross misunderstanding of trauma responses in victims, as there are various ways that a victim may react to a situation of extreme stress and fear. Coined by Walter Cannon in 1915, the classic responses to extreme stress are fight or flight.<sup>28</sup> However, in recent years there has been more research in humans on a third common response: freeze. Tonic immobility is a temporary state

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<sup>24</sup> Gerger et al., ‘The acceptance of modern myths about sexual aggression scale: development and validation in German and English’ (2007) 33(5) *Aggressive Behaviour* 422, 423.

<sup>25</sup> Bohner et al., ‘Rape myth acceptance: Cognitive, affective, and behavioural effects of beliefs that blame the victim and exonerate the perpetrator’ In Horvath & Brown (Eds.), *Rape: Challenging Contemporary Thinking* (Cullompton, UK: Willan), 27.

<sup>26</sup> *E.B. v Romania*, §10.

<sup>27</sup> EIGE, ‘Analysis of National Definitions of Rape’, (October 2016), 2.

<sup>28</sup> Cannon, *Bodily Changes in Pain, Hunger, Fear and Rage* (New York: Appleton-Century-Crofts, 1915), 211.

of motor inhibition believed to be a response to situations involving extreme fear.<sup>29</sup> Schmidt, *et al.*, found in a study aimed at evaluating the ‘freeze’ response in humans that individuals who experience significant fear often reported tonic immobility as a response.<sup>30</sup> Applying this to the context of sexual assault, it was reported by Galliano, *et al.*, that women who were immobile during rape showed behaviours consistent with tonic immobility, and that such immobility applied to up to 50% of victims during their assault.<sup>31</sup> Therefore, the research carried out by various psychologists and scientists suggests that freezing is a common response to the trauma caused by sexual assault, and that it is impossible to know beforehand what involuntary reaction the body will have when faced with such a traumatic experience. It is for this reason that rape laws requiring force or physical resistance are so problematic, as despite the will of a victim in such a case, if tonic immobility sets in then force will not be required by the perpetrator in order to achieve their goal. This is seen in *E.B. v Romania*, where the applicant was in a state of shock and feared for her life, caused by T.F.S.’s threats that he was carrying a knife. *E.B.* most likely experienced tonic immobility in her case. This should not negatively affect the reliability of her allegations, as this is a common trauma response.

In *E.B. v Romania*, the Court considered that the authorities put undue emphasis on the absence of proof of resistance from the applicant, and that they failed to take a context-sensitive approach.<sup>32</sup> The requirement for a context sensitive approach is a key aspect of the case law of the ECtHR, stating:

*The Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy.*<sup>33</sup>

The Courts view on this is substantially progressive, especially given the requirements for force that still form part of the law on rape in many jurisdictions. It signals that change must be made, going as far as to suggest that the jurisdictions that still require physical resistance in rape cases are open to jeopardising the effective protection of its individuals’ sexual autonomy. The

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<sup>29</sup> Abrams *et al.*, ‘Human tonic immobility: measurement and correlates’, (2009) 26(6) *Depress Anxiety* 550, 550.

<sup>30</sup> Schmidt *et al.*, ‘Exploring human freeze responses to a threat stressor’ (2008) 39 *Journal of Behaviour Therapy and Experimental Psychiatry* 292, 299.

<sup>31</sup> Galliano *et al.*, ‘Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and its Correlates’ (1993) 8(1) *Journal of Interpersonal Violence* 109, 112.

<sup>32</sup> *E.B. v Romania*, §63.

<sup>33</sup> *Ibid.*, §56.

ineffectiveness of prosecution for the crime of rape that may arise from the ‘force’ requirement can result in human rights violations. Member States must use this judgement as encouragement to adapt laws to fall within international human rights standards. The empirical research on this topic cannot be denied, and evidently the law must reflect the advances that have been made to better understand trauma responses and how humans will instinctively react to traumatic situations. Whilst I have criticised the Court for its vagueness when it comes to defining rape, the tackling of the rape myth surrounding physical resistance is a step forward and should not be minimised.

### 2.3. The Conclusions of the Court

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Having discussed the obligations that the Court has created to better guide member States in complying with human rights standards, we will now turn to the conclusion of *E.B. v Romania*. The Court found that in light of the issues discussed above:

*The failure to adequately respond to allegations of rape in this case and to adequately respect the applicant’s rights as a victim of violence raises doubts as to the effectiveness of the system put in place by the State in accordance with its international obligations, and leaves the criminal proceedings in the case devoid of meaning.*<sup>34</sup>

Bearing this in mind, as well as the failure of the state to meet its positive obligations to apply an effective criminal law system to punish rape, there had been in this case a violation of Articles 3 and 8 of the Convention.<sup>35</sup> This decision was unanimous.

The significance of this case is not just the fact that E.B. was able to find a sense of justice in her case, but rather the impact that this can have on every future rape case that occurs within a member State that has ratified the ECHR. The scope is huge, covering the 47 States that have acceded to the Convention since 1953. It is for this reason that the Court’s interpretation of articles 3 and 8 to apply to rape cases is so powerful, especially considering that sexual assault was most probably not at the forefront of the drafting parties’ agenda when first determining which fundamental rights should be protected. The Court has so much power to influence change in this area, and accordingly it must have regard to the specific wording used in its judgements as it can be applicable to many states. There is also a huge political influence as international

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<sup>34</sup> *Ibid.*, §67.

<sup>35</sup> *Ibid.*, §68.

human rights standards are taken seriously within the Western world. It is of paramount importance for states to comply with human rights standards for the sake of their own reputation and in the interest of preserving international relations with other states. This means that in practice, domestic legislative change can often be triggered where the ECtHR has found violations. An example of this would be *I.C. v Romania*,<sup>36</sup> a case from 2016 concerning the rape of a minor with a mild intellectual disability. The Court in this case found a violation of Article 3, and Szabó has concluded that the ECtHR judgement in this case had a significant influence on the Romanian legislator, as law reform was enacted concerning the rights of victims in criminal trials around the time of this judgement.<sup>37</sup>

Considering the great potential that there is to enact change across Europe, it is submitted here that in *E.B. v Romania*, the Court did well to confirm the positive obligations that states must uphold in order to effectively prosecute rape. However, as the English proverb says, fine words butter no parsnips. The obligations imposed are shrouded in ambiguity and allow for obligations to be interpreted in any way. Evidently, this will not be sufficient to tackle the rape crisis affecting Europe. The ECtHR should not shy away from the issue of rape prosecutions by making vague statements – this will only result in more applications needing to be heard by the Court in order to determine whether there has been a violation in any particular rape case where the circumstances differ slightly. It is submitted here that a look at different consent theories would be valuable with the purpose of exploring how the ECtHR can be more specific in implementing standards. The goal here is to improve state accountability and encourage more radical reform, whilst ensuring respect for the margin of appreciation. We are facing a serious deficit in rape convictions, and without a real push, no small change will do enough to adequately tackle this issue.

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<sup>36</sup> No. 36934/08, 24 May 2016.

<sup>37</sup> Szabó, 'The Effects of Romania's Conviction by the ECHR in the Case *I.C. v Romania* on the Rights of Victims – Persons with Disabilities – in the Romanian Criminal Process' (2019) 8(1) *Acta Universitatis George Bacovia. Juridica* 73, 76.

## CHAPTER II: HERRING & DEMPSEY'S CONSENT THEORY

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### 1. An Introduction to Consent Theory

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Consent is a term which has been used for centuries in ethics and philosophy. It has generally been considered to have deep moral significance, as it implies relinquishing some authority in order to permit an act to be done.<sup>38</sup> Popular work on consent in the political and philosophical sphere considers consent to be the fundamental aspect of the social contract in terms of political legitimacy. Indeed, in the legal sphere, consent is of great importance to the validity of contracts of any kind. If we apply these ideas on consent to sexual relations between individuals, it follows that consent is the fundamental issue in determining whether sexual intercourse constitutes sex or rape. For the most part, this is the case. Jurisdictions, whether following a consent-based conception of rape or a definition that requires the use of some force, it always comes down to the same issue – consent. This is since even in jurisdictions where force is required to prove rape, evidence of force is used as a way to determine, in a more concrete manner, whether the victim had any choice in the matter. So, having established that consent is the most fundamental issue in distinguishing between sex and rape, it must be determined how consent is to be interpreted in rape cases. This issue is controversial. There has been discourse on how to interpret rape for years without any real consensus on the issue, however, what is clear is that under current conditions, rape is not prosecuted as effectively as it could or even should be. As discussed in Chapter I, the ECtHR has made steps to impose positive obligations on member States regarding the prosecution of sexual assault. However, I have criticised the Court for its lack of clarity on how this should be achieved. It is my view that if failing to effectively prosecute rape can give rise to human rights violations, then the ECtHR should specify further the ways in which states can ensure this effective prosecution. As the fundamental issue in prosecuting rape lies in how consent is interpreted, I believe that a study of consent theories can be an invaluable tool to consider how consent operates in practice and how it should be interpreted in a legal sense.

Consent theory, as the name suggests, is theoretical in nature. Consequently, there are many radical theories that suggest a complete overhaul in the law on sexual offences.<sup>39</sup> Perhaps

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<sup>38</sup> This definition can be found under the term 'consent' in the Encyclopaedia Britannica, available at: <https://www.britannica.com/topic/consent-political-philosophy-and-ethics>

<sup>39</sup> My personal view is that the theories that will be discussed here are not radical, but rather reasonable. However, I use the term *radical* to reflect societal opinion. Indeed, many societal changes that have occurred over time have seemed radical until societal expectations have caught up.

suggesting that the ECtHR should impose a complete reform of the domestic laws on rape would be unrealistic. Nevertheless, a look at some more radical views of rape law, in my opinion, may provide some invaluable insight into how we can challenge the rules and norms currently in place. By establishing a theory of consent that does not pertain to any specific legal system or have any historical bias, instead being based on the reality and psychology of rape, then we may be able to determine the primary obligations that should be implemented to actually tackle the rape crisis present across Europe. This chapter, therefore, will take a look at the unorthodox views of Jonathan Herring and Michelle Madden Dempsey on how ‘consent’ should be interpreted. Later, Chapter III will focus on the radical feminist theory of Catherine MacKinnon on the use of the term ‘consent’ in rape.

## 2. Jonathan Herring and Michelle Madden Dempsey

Jonathan Herring and Michelle Madden Dempsey propose a reconceptualization of rape laws, specifically by turning the idea of sex on its head so that all sexual penetration is *prima facie* wrong, rather requiring sufficient justification to override the wrongness of this action. On the face of it, this seems to be a counter intuitive idea, however, within their reasoning, it is my view that Herring and Madden Dempsey make a good case for thinking about the distinction between sex and rape in a different light.

### 2.1. Sexual Penetration as *Prima Facie* Wrong

Herring and Dempsey distinguish between two views when it comes to the law on rape. There is the majority ‘orthodox’ view, which claims that sexual penetration is not wrongful in itself and so does not require justification.<sup>40</sup> This view generally follows the tradition form of regulation, in that sexual penetration is not considered inherently wrong, and that rather in cases of rape, the burden lies on the victim to demonstrate evidence that proves that there was not consent beyond a reasonable doubt. The issue with this view is that it makes prosecuting sexual assault extremely difficult, as rape often occurs in private with no witnesses. Additionally, as Catherine MacKinnon has shown in her work on rape, there have been countless situations in which women have been found to consent, even where they have shown clear signs that sexual

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<sup>40</sup> Dempsey and Herring, ‘Why Sexual Penetration Requires Justification’ (2007) 27(3) *Oxford Journal of Legal Studies* 467, 468.

intercourse was not desired, even in the case where the word ‘no’ has been repeated.<sup>41</sup> This is where the unorthodox approach comes in.

The unorthodox approach promoted by Dempsey and Herring claims that sexual penetration does call for justification, i.e., that when a man sexually penetrates a woman with his penis, he should have good reason to do so.<sup>42</sup> Their claim is that this view should be considered as the orthodox view has a tendency to limit one’s ability to consider whether our traditional understandings of what counts as rape or sexual assault have been drawn too narrowly.<sup>43</sup> Accordingly, in support of this argument, Dempsey and Herring present various reasons justifying why sexual penetration should be considered a *prima facie* wrong. These reasons are organised within three categories: physiology and force; risks of harm; and social meaning.

Firstly, sexual penetration may be considered *prima facie* wrong as it requires the use of force.<sup>44</sup> Secondly, risks of harm may take form of sexually transmitted diseases, risk of unwanted pregnancy, or even a degree of abrasion to the vagina or the anus<sup>45</sup> which are sufficiently serious to consider sexual penetration as *prima facie* wrong. It is the following two reasons that Herring and Dempsey give that I find to be of most relevance to this paper, so I will consider them separately.

In the third place, Dempsey and Herring argue that the risk of psychological harm to the woman is a further reason why sexual penetration should be considered *prima facie* wrong.<sup>46</sup> They argue that this is due to the fact that we live in a society dominated by rape culture, where women have to live with their sexual objectification in all aspects of life. To demonstrate this point, a survey is cited, where over a third of women had agreed to have sex for fear that otherwise their partner would get angry.<sup>47</sup> The sex inequality and rape culture in society presents a very relevant and inescapable psychological harm to women, and so Herring and Dempsey

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<sup>41</sup> This was shown in *Berkowitz v Commonwealth*, a case where the victim repeatedly said the word ‘no’ throughout the assault, and yet the Superior Court of Pennsylvania found that this was insufficient to constitute a rape. A more detailed and insightful discussion of this case can be found in MacKinnon, ‘Rape Redefined’ (2016) 10 *Harvard Law & Policy Review* 431, 466.

<sup>42</sup> Dempsey and Herring, 469.

<sup>43</sup> *Ibid.*, 471.

<sup>44</sup> *Ibid.*, 474.

<sup>45</sup> *Ibid.*, 476.

<sup>46</sup> *Ibid.*, 479.

<sup>47</sup> *Ibid.*

claim that unless the risk of psychological harm falls below the relevant threshold, this is a further reason why sexual penetration is *prima facie* wrong.

The final reason which Herring and Dempsey give is grounded in the negative social meaning of penetration.<sup>48</sup> Herring and Dempsey believe that there is always a reason against sexual intercourse, ‘at least when it involves a man penetrating a woman’s vagina or anus in the context of current social meanings.’<sup>49</sup> The social meaning of sexual penetration can only be interpreted as a devaluation of women and a disrespecting of women’s humanity, they argue. This is because the devaluing and disrespecting of women through penetration is a consistent theme in society – for example, women are always seen as passive objects whereas men are always seen as powerful subjects (Bobbie fucked Marion – subject-verb-object).<sup>50</sup> As this is a societal issue, the only way to overcome this would be by transforming the social meaning of sexual penetration in our culture, as its negative meaning cannot be escaped by merely intending to value and respect women in individual relationships.<sup>51</sup>

## 2.2. Sexual Penetration and Sex Inequality

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I have briefly outlined the main reasoning that Dempsey and Herring give for proposing this unorthodox view. Before looking at any criticisms of this theory, I will outline the reasons why I find it convincing. On a general level, I am more convinced by the overarching meanings attached to sex in society as a reason why such an overhaul in how we consider sexual penetration is necessary. As will be discussed in Chapter III, MacKinnon has illustrated why rape is concerned primarily with sex inequality, being used as a tool to exert power over women and subordinate them. The main point in this paragraph that I wish to illustrate is that the systematic use of sexual violence to dominate women can be found in all areas of society – be it the widespread production and consumption of violent porn that has been entirely normalised; the way that we talk about having sexual intercourse with women, using inherently violent terms such as ‘fuck’, ‘bang’, ‘rail’ or ‘smash’;<sup>52</sup> or even the way that sexual violence against women is often trivialised as a plot device for shock factor in film and television, without any particular

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<sup>48</sup> *Ibid.*, 481.

<sup>49</sup> *Ibid.*, 482.

<sup>50</sup> *Ibid.*, 486.

<sup>51</sup> *Ibid.*, 487-8.

<sup>52</sup> *Ibid.*, 485.

nuance, criticism, or even acknowledgement of the fact that this is used entirely to subordinate and oppress women.<sup>53</sup>

The normalisation of sexual violence within society, created by sex inequality, affects every woman's relationship with sex from a young age. Even on the most basic level, women are scared of men – one of the classic examples of this is how women are generally afraid to walk home alone at night. Women are advised against it their entire lives and programmed to believe that this is something to be feared – that fear being abduction, rape, or murder. A YouGov survey carried out in the UK in 2021 even found that 63% of women feel unsafe walking alone at night, compared with 15% of men.<sup>54</sup> Additionally, Warr, conducting a study on the fear of rape amongst women, concluded that it is difficult to imagine many other social problems that affect so many people in such a direct way.<sup>55</sup> Considering that the backdrop of rape is a society where sexual violence against women is a crime which is so normalised and widespread as a way to specifically oppress one gender, it is incredible that conviction rates fall so short of the reality.

Rape, at the time of committing the act, is shrouded in misogyny, and this follows throughout the process of reporting, to collecting evidence, to prosecution, leading to the day on which the judgement is given. Consent is routinely interpreted favourably for men, construed broadly and setting a low bar for what is considered appropriate behaviour from men against women. This is evident from the fact that simple submission, without any affirmative reaction or response from the victim, is considered enough to prove consent in many jurisdictions (often due to the force requirement and sometimes due to a broad interpretation from the court), even despite the fact that submission and 'freezing', as mentioned in Chapter I, is a common trauma response for victims, even representing a protective response, for fear that resisting will create more violence. The problem with the current system of prosecutions is that they facilitate situations where the blame is shifted from the perpetrator to the victim, meaning that women are increasingly held responsible for being raped. An illustrative example would be how within society, women who drink to the point of intoxication are considered to be reckless and endangering themselves, whereas conversely, men who drink to the point of intoxication are not considered to be

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<sup>53</sup> For a further discussion of this issue, see Gilbert, 'What the Sexual violence of *Game of Thrones* Begot' (The Atlantic, 4 May 2021), Available <https://www.theatlantic.com/culture/archive/2021/05/game-of-thrones-the-handmaids-tale-them-tv-sexual-violence/618782/>

<sup>54</sup> Smith, 'Women feel less safe walking home alone at night than in 2018' (YouGov, 1 November 2021), available <https://yougov.co.uk/topics/lifestyle/articles-reports/2021/11/01/women-feel-less-safe-walking-home-alone-night-2018>

<sup>55</sup> Warr, 'Fear of Rape among Urban Women' (1985) 32(3) *Social Problems* 238, 249.

endangering themselves. This translates to the crime of rape as an unjust double standard. It has been found that individuals judge intoxicated male perpetrators to be less blameworthy than sober perpetrators, but the same individuals will judge intoxicated female victims *harsher* than sober victims.<sup>56</sup> This perpetuates the misogynistic lens through which female and male sexuality is viewed – if a man rapes a woman, he is less blameworthy, becoming a sympathetic character who did not know what he was doing. On the other hand, if a woman is raped she is held to a higher standard of responsibility and taught that she should not have put herself in such a situation. This common scenario perpetuates an acceptance that men will always rape women, and so instead of teaching men about consent and holding them accountable, women must be better at protecting themselves in order to not be raped. In order to tackle this issue, what needs to be changed is the way that sexual assault is prosecuted. The solution cannot simply be to teach women how to protect themselves, but to hold men accountable for their actions.

Therefore, I am in favour of Herring and Dempsey's unorthodox view of treating sexual penetration as *prima facie* wrong. I am most convinced by the consideration of the social meaning of sexual penetration, as it is my belief that the rape culture within which we live is inescapable, and is the biggest reason why so many women suffer sexual assault. I support the idea that instead of placing the burden on the victim to explain exactly why the sexual intercourse which occurred was rape, it would be productive to instead ask the perpetrator to justify his reasons for sexually penetrating a woman on this occasion. The presumption should not be that all sex is good and equal, as this simply does not reflect the society which we live in. As Herring writes, 'all too often sexual penetration is a powerful violation of a victim's sexual autonomy, the ultimate treating of women as objects for men's sexual pleasure...'<sup>57</sup>

### 2.3. Consent in a Rich Sense

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In terms of what qualifies as a justification, it is 'rich consent' that I consider to be the most practicable. Herring states:

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<sup>56</sup> Maurer and Robinson, 'Effects of Attire, Alcohol, and Gender Perceptions of Date Rape' (2008) 58 *Sex Roles* 423, 425.

<sup>57</sup> Herring, 'Human Rights and Rape: A Reply to Hyman Gross' (2007) *Criminal Law Review* 228, 229. In this article, Herring is extremely critical of Gross's idealised view of sexual intercourse as 'one of nature's blessings' and 'an innocent and natural activity'. Herring correctly points out that whilst this view of sexual intercourse may be the reality for men, it is not the reality for women.

*If a legal system is to rely on consent as a justification for what would otherwise be a grave wrong, it must demand consent in a rich sense: with full truthful understanding of what is involved and free from illegitimate pressures*<sup>58</sup>

In simple terms, a man who penetrates a woman needs to have good reason to do so<sup>59</sup> – that reason being full and rich consent. To illustrate more clearly how this functions, Dempsey argues the following:

*When the victim (V) gives effective consent, this provides the defendant (D) a justifying reason for having sex with V. It gives D a reason to assume that the act is in the V's well-being and so allows D to set aside reasons against penetration which rest in the wellbeing of V. Broadly understood, this is because D, in this context, is permitted to rely on V's assessment that the act is overall in the V's best interests.*<sup>60</sup>

This creates a level of responsibility on the perpetrator to ensure that he has good reasons for sexually penetrating the victim.<sup>61</sup> It is my belief that creating a positive level of responsibility to justify such an action is the correct way to approach sex and rape, as it has been shown above that the societal conditions under which we live mean that there is a much greater risk of harm to women when it comes to sex. In order to fully respect a woman's sexual autonomy, asking for affirmative, rich consent should be considered the standard. No longer is it acceptable to take a mere submission as full consent, as it can never be so. Indeed, when a woman simply submits without making any positive action, she does not give consent, she does nothing.<sup>62</sup> The law should treat rape as such. Too often, women are treated as submissive creatures who do not participate in sex, but rather it is done to them. The idea that women are the submissive party in sex is so ingrained in our society that all too often submission is taken as consent. However, it should be clear that this is not consent. In order to protect female autonomy and sexuality, it must be understood that only active participation can qualify as consent, in the same way that a man is considered to be an active participant in sexual intercourse. Especially considering the evidence which shows that women often submit out of fear or panic during rape. Therefore, it is

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<sup>58</sup> *Ibid.*, 229.

<sup>59</sup> Herring, 'Rape and the Definition of Consent' (2014) 26(1) *National Law School of India Review* 62, 63.

<sup>60</sup> *Ibid.*, 64.

<sup>61</sup> *Ibid.*, 65.

<sup>62</sup> *Ibid.*, 64.

my assessment that rich consent should be the recognised standard in rape trials in order to protect women's autonomy and sexuality.

### 3. Applicability to *E.B. v Romania*

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If the standard to be applied is that sexual penetration is a *prima facie* wrong which needs to be justified, then applying this to the facts of the case of *E.B. v Romania* creates a vastly different result to the one found by the domestic authorities. First, in *E.B. v Romania*, the applicant was propositioned by T.F.S. to perform oral sex on him, which she declined. On this basis alone, E.B. had declined to consent to sexual acts and so could not have been found to consent. However, consent is fluid, of course, and a person is free to change their mind at any point, so there remained the possibility that E.B. could decide to consent later. However, what must be taken into account is that using pressure to convince someone to consent, i.e., by asking multiple times or insisting, creates a situation where the consent cannot be given as freely, especially if there is an atmosphere of pressure. So, even if consent had been given affirmatively after this first declination, it could be argued that the consent could not be as freely given, T.F.S. having applied some pressure, and being in a position of power as a man who was likely larger and stronger than she was. Further, when E.B. was dragged into the cemetery and told to undress and lie on the ground, she made no positive response other than complying with his orders, fearing for her life. E.B. submitted in a state of shock and fear. Evidently, if we consider sexual penetration to be *prima facie* wrong, then T.F.S. needs to have sufficient reason to justify sexually penetrating E.B. Moreover, if the only way to justify such conduct is by ensuring that E.B. gives rich consent, this means that T.F.S. must seek a positive affirmation from E.B. which allows him to understand that E.B. believes that to engage in sexual intercourse will not harm her well-being, and that it is in her best interests to do so. If T.F.S. does not have effective consent which allows him to make this assessment, then his conduct is not justified, and he has indeed committed a wrong against E.B., by invading her sexual autonomy.

I hope that I have demonstrated by applying Herring and Dempsey's consent theory to the facts of *E.B. v Romania* that this is a theory that may protect victims in many situations where the fact that rape has occurred seems clear, yet where courts find it difficult to find rape based on the difficulty in determining where consent lies in the law. In Romania, the authorities chose not to proceed with prosecution, meaning that E.B. was never given the opportunity defend her

case before a court. I strongly argue that an emphasis on rich consent based on an assessment of best interests is the way that courts should interpret consent in rape cases, as to allow any lower standard than this endangers so many women and makes seeking a rape conviction so difficult.

Consent to sex cannot be treated in the same way that consent is treated in other areas of law. Sex is not a contract; it is a deeply personal experience that affects every person on a psychological level that cannot be found with most other human experiences. Jean Hampton writes:

*one's humanity is perhaps never more engaged than in the sexual act. But it is not only present in the experience; more important, it is 'at stake'...*<sup>63</sup>

The risks of harm are so high, especially for women, and so accordingly the law cannot interpret consent in the same way that it does for other areas of law like contract law, for example. The harms caused to women by engaging in non-consensual sex are so grave that the law must always demand that a perpetrator has sought rich consent before invading a woman's sexual autonomy to protect not only women, but any person who has experienced an unwanted invasion of sexual autonomy.

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<sup>63</sup> Dempsey and Herring, 479.

## CHAPTER III: MACKINNON'S CONSENT THEORY

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Catherine MacKinnon is a pioneer of the radical feminist movement, having published works on many aspects of women's subordination in society. She is very critical of the term consent, not only by definition but also by virtue of its interpretation by lawmakers and courts regarding rape. In this section, I will discuss MacKinnon's theory on redefining rape, its merits, shortcomings, and how her consent theory could be interpreted in human rights cases to improve the deficit in rape prosecutions.

### 1. The Meaning of Consent

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First, we will deal with how rape is currently defined, beginning with the definition of consent. MacKinnon highlights that consent is problematic by definition, in that it is a 'voluntary acquiescence in what another proposes or desires', as defined by the Oxford English Dictionary.<sup>64</sup> This concept, as MacKinnon argues, describes a disparate interaction between two parties: active A initiates, passive B acquiesces in or yields to A's initiatives.<sup>65</sup> The textbook definition of consent is inherently cloaked in misogyny, imply subordination of women from the outset. Consent, on the most basic level, paints women as passive creatures that merely accept sexual intercourse when it is imposed on them. By definition, this must be interpreted as contrary to female autonomy and sexuality. Within a mutually respectful relationship, women should be given the same level of autonomy as men – not as an acquiescing party, but rather as a person free to actively express their sexuality. Nor should either party be considered the subordinate one. However, consent does imply subordination,<sup>66</sup> and within the sphere of sex the subordinate party is generally the female one. As MacKinnon writes, the obvious subtext in sexual relations is 'the unequal stereotypical gender roles of A's masculinity and B's femininity, his unilateral initiation followed by accession when the interaction achieves his envisioned outcome.'<sup>67</sup> This calls into question the subconscious meaning of all sexual interactions – if the term 'consent' is synonymous with positive, intimate sexual experiences, but implies a power imbalance, then what does this mean for women? The implication is that all sexual experiences, as long as they

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<sup>64</sup> MacKinnon, 'Rape Redefined', (2016) 10 *Harvard Law & Policy Review* 431, 440.

<sup>65</sup> Ibid.

<sup>66</sup> In political consent theory, consent represented the acquiescence of the individual in allowing the state to limit their rights and govern them. For more on this, see Pateman, 'Women and Consent', (1980) 8(2) *Political Theory*, 149.

<sup>67</sup> MacKinnon, 'Rape Redefined', 440.

are defined by consent, will always be tainted with female subordination and traditional gender roles, no matter how mutually respectful such experiences may seem.

Furthermore, consent theory in the traditional sense has always been a concept created and determined without contemplating women. The starting point of the early social contract was a specific conception of individuals as naturally free and equal, or born free and equal to each other.<sup>68</sup> However, Pateman has discussed in depth how Locke's consent theory in particular has purposefully excluded women from this idea. The marriage contract is one where women have historically been considered subordinate to their husbands, and Locke even believed that the will of a husband should take place before that of his wife in all things of their common concernment.<sup>69</sup> Pateman has insightfully found that:

*Women are excluded from the status of individual that is basic to consent theory; if a wife's subjection to her husband has a 'natural' foundation, she cannot also be seen as a 'naturally' free and equal individual. Only if women are seen as 'free and equal individuals' is their consent relevant at all.*<sup>70</sup>

The conclusion to be found from this is that consent, as terminology, is inherently problematic when it is applied to women and sex. Consent, from its inception, has described relationships of power and subordination, and even within this realm has always excluded women, as women have never been 'free and equal' individuals. If one must be 'free and equal' in order to fully consent, then the consent of women is not an issue that writers such as Locke have ever concerned themselves with. The use of consent to describe sexual relations has many implications for women – a concept used as a weapon against women who do not 'fight back' sufficiently when they are raped, is also a concept that was created, defined, and interpreted by and for men. If consent always carries with it an implicit power imbalance, how can this be the defining factor for women in a society that strives for gender equality?

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<sup>68</sup> Pateman, 150.

<sup>69</sup> *Ibid*, 152.

<sup>70</sup> *Ibid*.

## 2. The Consent Model of Rape

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As mentioned above, rape laws generally share a common feature, this being the absence of consent. However, this can be problematic when considering the way that consent is interpreted. On a regulatory level, many jurisdictions, as previously mentioned, require the use of force. This means that where a victim merely submits, be it out of fear of further attack or as an involuntary response or even due to intoxication caused by alcohol or drugs such as Rohypnol (commonly known as the ‘date rape’ drug), seeking a rape conviction can be extremely difficult, as consent may be found as a mere acquiescence to another party. This, evidently, does not reflect the reality of rape. As MacKinnon has found, rape is defined in male sexual terms. The law adjudicates the level of acceptable force from the level of normal male sexual behaviour, rather than from the victim’s, or women’s, point of violation.<sup>71</sup> The problem, thus, is that rape is a sexual crime, so when it falls short of the level of force that men consider to be normal, it becomes sex. Indeed, this is shown in all the cases where consent has been found even when the victim has said the word ‘no’.<sup>72</sup> As MacKinnon writes:

*Consent theory scrutinises the forms in which submission or subordination can occur to or by or be attributed to B [the victim], routinely inferring back from the outcome to a mental state consistent with that outcome – also termed she let it happen so she must have wanted it.<sup>73</sup>*

This illustrates how the interpretation of consent, as a subordination to the initiating party, can be so detrimental to women in rape cases. If mere acquiescence is sufficient to find consent, but at the same time tonic immobility is a common trauma response to rape, then how can a state ever effectively prosecute rape using consent in this way? This also gives rise to a further contradiction in terms – within rape cases, courts do not usually acknowledge the fact that between men and women, there is a rape culture present in society, and there is an imbalance of power between the female and male parties in any interaction. The issue is consent, instead of asking why the perpetrator felt entitled to invade a woman’s body without an enthusiastic and positive response. Rape is overwhelmingly concerned with the victim’s actions, with it failing

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<sup>71</sup> MacKinnon, ‘Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence’ (1983) 8 *Signs* 635, 649.

<sup>72</sup> MacKinnon gives many examples in ‘Rape Redefined’ of cases where women have not consented but still been found to consent, see 443 onwards.

<sup>73</sup> MacKinnon, ‘Rape Redefined’, 442.

to analyse the source of power in such a situation, and further why it is overwhelmingly women who are raped. Rape is an inherently misogynistic crime, and the definition of consent which is used by courts only serves to perpetuate this and define sex in male terms.

### 3. Coercion Over Consent

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The question that remains, therefore, is how we can define rape if consent, as the central concept, is so problematic. MacKinnon proposes a solution with a focus on equality. The equality perspective ‘considers sexual interactions claimed to be rape in the context of historically unequal power relations, in which members of one group have more power than members of another.’<sup>74</sup> What is key, in this case, is the implication that such a perspective will have on consent. On this level, consent emerges as an ‘intrinsically unequal concept whether in real life, philosophically, historically, or in legal practice.’<sup>75</sup> MacKinnon argues that consent, from an equality perspective, is a legally impracticable tool through which to pursue sex equality in a sex-unequal context.<sup>76</sup>

Seeing that consent is ‘legally impracticable’, MacKinnon proposes that we use coercion instead of consent. This is primarily due to the fact that the reference point for evidence in rape cases will begin in the external, physical world, not primarily in the internal psychological one, as consent does.<sup>77</sup> Consent, in practice, deals with the internal psychological state of the victim, whereas coercion would deal with the surrounding circumstances present – was there an imbalance of power? If so, how did the perpetrator act, knowing that they were in a position of power? If they acted in a way that was coercive, or took advantage of their position of power, then we may find that rape did occur, irrespective of the victim’s actions or reactions to the assault. As MacKinnon aptly states: ‘its focus is on action not passion, him not her.’<sup>78</sup> The key, therefore, rests in focusing on the actions of the perpetrator, as the victim’s reaction should have no bearing on the decision of whether rape occurred or not. What should be considered important in such a case is the situation of coercion or the imbalance of power that has placed the victim in this position.

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<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, 469.

<sup>78</sup> *Ibid.*

The proposed new definition for rape is, therefore:

*A physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability.*<sup>79</sup>

Whilst seeming to be a significant shift in how rape laws are currently conceptualised, this definition should not seem so alien when considering how rape has been defined on a supranational level. The International Criminal Tribunal for Rwanda presented the first international definition of rape as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’<sup>80</sup> In this case, within the context of the genocide which occurred in Rwanda, the idea of consent was irrelevant, as within coercive circumstances, consent is vitiated anyway.

The purpose of this shift is not to criminalise more sex, or to say that all of a woman’s heterosexual experiences are invalid or wrong due to the inherent power imbalances in society. Rather, the purpose is to provide lawyers, judges, and juries with a better way to frame sexual assaults to reflect the realities of society, rather than ignoring the inherent inequalities present and consequently making securing a conviction for rape so difficult. As earlier stated by MacKinnon, rape is currently defined in male sexual terms, and perhaps if we focus on inequality, the problems surrounding the current interpretations of consent can be resolved. The goal is to protect victims in cases where coercion, threat, or a position of power has been used to violate a woman’s autonomy.

MacKinnon’s proposal on coercion is most compelling on two levels. First, the fact that consent is inherently problematic as a term to be applied to sex, and secondly that current interpretations of consent in court seem to ignore inequality. If rape culture and inequalities in society were taken into account during rape trials, then the coercive aspects of rape could be studied and taken into account when determining the standard of rape. Instead of asking what resistance was made or how the victim acted to ensure that it was clear to the perpetrator that they did not consent, the standard should be to consider why the perpetrator chose to initiate sexual intercourse. Did he do so genuinely believing that the victim wished it to occur, or did he

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<sup>79</sup> *Ibid.*, 474.

<sup>80</sup> *Ibid.*, 470.

rather use a position of power to exploit the victim's vulnerabilities and achieve his envisioned outcome, recklessly neglecting her needs and wants? The 'coercion' standard ties in with Herring and Dempsey's argument that the onus should be on the perpetrator to justify his actions with rich consent and an assessment of the victim's best interests. If there is consent in a rich sense, by looking for affirmative, explicit indications of consent and by determining that both parties have decided that to have sex is in their best interests, then coercion will not be present, and thus, no rape. Where there is mutual respect and enjoyment, there is no coercion. The question asked should not be *why did the victim fail to explicitly say no or physically resist*, but rather *why did the perpetrator take advantage of their position of power to make an invasion of a sexual nature of another person without their full, rich agreement*.

#### 4. Applying Coercion to *E.B. v Romania*

Having this in mind, the next step is to apply this theory to *E.B. v Romania*. In order to do so, we must apply the standard of coercion instead of consent. Therefore, it must be established whether the perpetrator used or threatened to use force, fraud, coercion, abduction, the abuse of power, trust, or a position of dependency or vulnerability. To establish this, we may look at the surrounding circumstances in *E.B. v Romania* on a personal level, as well as on a societal level. Evidently, using fraud, coercion or any of the terms stated above implies that there is an imbalance of power. In *E.B. v Romania* this imbalance of power manifests in multiple ways. On a more general level, the gender inequality which is very much present in Romania is already an indicator of the fact that T.F.S. was the party with more power in that circumstance. Romania scores relatively low in the Global Gender Gap Report carried out by the World Economic Forum, scoring lower than 40 of the 46 member States of the Council of Europe.<sup>81</sup> Gender equality is a problem which Romania has been internationally criticised for,<sup>82</sup> and so the fact that men have a more powerful position in society would have been an overarching factor in the power imbalance between E.B. and T.F.S. Keeping in mind the higher position of men in Romanian society, the fact itself of T.F.S. following E.B. home and repeatedly asking for sexual favours, despite E.B. declining, is representative in of itself of the fact that T.F.S. knew that he

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<sup>81</sup> World Economic Forum, 'Global Gender Gap Report 2021: Insight Report' (World Economic Forum, March 2021). On the scale used, (0.000 representing total inequality and 1.000 representing parity between the genders) Romania scored 0.700 in 2021, ranking 88 out of 156 countries involved in the study.

<sup>82</sup> For example, the Council of Europe Commissioner for Human Rights issued a statement in November 2018 mentioning that Romania needs to step up the efforts to combat violence against women and underscored the importance of Romania's Ratification of the Istanbul Convention. This is discussed at §42 of *E.B. v Romania*.

was the more powerful party in this interaction. If both of them had equal standing then surely E.B.'s declination to perform sexual favours would have been respected at first instance and T.F.S. would have left her alone. However, this is not what occurred. Considering that E.B. had made clear her disinterest, T.F.S. dragged her by the arm to the nearby cemetery and instructed her to undress and lie down, threatening her with a knife. The threat of using a knife to harm E.B. is already sufficient to constitute threat of force under MacKinnon's definition of rape, let alone the overarching fact of E.B.'s vulnerability. On this point, E.B.'s vulnerability is further increased by the fact that she had been diagnosed with a mild intellectual disability.

The conclusion, therefore, is that using MacKinnon's coercion-based definition of rape would have changed the outcome of this case, and avoided the problems with consent. The domestic authorities in this case used a very stringent idea of consent – violence was not used by T.F.S. to invade her bodily autonomy and she did not physically resist, so a lack of consent cannot be proven. However, this interpretation of consent demonstrates exactly why MacKinnon is correct in saying that consent-based conceptions of rape are insufficient and why a reconceptualization of rape is so necessary.

## CHAPTER IV: APPLYING CONSENT THEORY TO THE ECtHR

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In this Chapter, I will apply the Herring/Dempsey and MacKinnon consent theories to the Convention, demonstrating that these theories can be used to improve the positive obligations that the ECtHR currently imposes on member States with regards to Articles 3 and 8.

### 1. Interpreting Rich Consent in Light of the ECHR

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As established, the Herring/Dempsey theory on sexual penetration as *prima facie* wrong requires sufficient justification. The justification that I find most compelling is rich consent from both parties, which includes an assessment that sexual penetration is in both their best interests, and that this is communicated explicitly. On a supranational level reconceptualising sexual penetration as *prima facie* wrong would be difficult to achieve, however, this theory can improve our understanding of how we think about consent. As Herring and Dempsey argue, sexual penetration is an invasion of bodily autonomy, and so the standard for consent should be no less than rich consent. This is justified, as to accept any less would risk causing grave harm to many victims of sexual assault, and as sexual assault is a crime that can cause deep psychological damage to victims of it, ensuring criminalisation of cases where rich consent is not present is in the interest of a society that strives to achieve better equality. Therefore, it is submitted that the ECtHR should integrate a standard of rich consent in the positive obligations that are imposed on member States.

Concretely, with regards to Article 3, states have a positive obligation to enact criminal-law provisions that effectively punish rape and to apply them in practice through effective investigation and prosecution.<sup>83</sup> In order to comply with the effective investigation and prosecution requirement, the Court may encourage state authorities to interpret consent as a positive agreement. The Court has already found that a rigid approach to prosecuting sexual offences, ‘such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished.’<sup>84</sup> Requiring proof of physical resistance feeds into the broad interpretation of consent, that is, if there is no physical resistance, the victim must have consented. In such a case where there is no physical resistance, and the victim instead

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<sup>83</sup> E.B. v Romania, §54.

<sup>84</sup> *Ibid.*, §56.

experiences tonic immobility, then they have made no affirmations of consent. As Herring has argued, if the victim does nothing, this is not consent.<sup>85</sup> The Court already has made the first step, by stating that physical resistance should not be a requirement for rape. I suggest that the ECtHR takes an additional step, and clarifies that not only does the physical resistance requirement risk leaving some kinds of rape unpunished, but that states should be looking for evidence of explicit consent. The Istanbul Convention requires this to an extent, stating in Article 36 that ‘consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.’<sup>86</sup> My suggestion would be to adopt this, including the word ‘explicitly’ or ‘clearly’ in such a definition. This, I submit, would not be a far-reaching step to take. As it stands, 34 member States of the Council of Europe have ratified the Istanbul Convention, and so the standards on sexual offences demanded by the Istanbul Convention may be directly applied in ECtHR cases where the respondent state is also a ratifier of this Convention.

## 2. Interpreting Coercion in Light of the ECHR

Having discussed MacKinnon’s theories on coercion over consent, the next step is to consider how this can be used by the ECtHR. Evidently, the Court cannot simply state that every member State under the Council of Europe must change rape laws from a concept of consent to coercion in order to comply with Articles 3 and 8 of the Convention. This would certainly go beyond the role of the ECtHR, as it is not a lawmaker, but rather the final interpreter of the Convention. It is necessary to be realistic about the extent to which the ECtHR can promote improvements to rape laws. That being said, it is my argument that if we take into account the issues with consent, and use this as a starting point, the ECtHR could adopt a new interpretation, or rather, suggest that states take into account other factors in order to effectively prosecute rape.

A reasonable middle ground, I believe, would be to accept that the internationally used standard is consent, and instead of resisting this fact, working with the term and suggesting a reconceptualization. This could be done by incorporating consent with coercion. This primarily functions because the terms are not mutually exclusive. If we think about consent, but take into account the surrounding circumstances, we may find that consent is vitiated if there is a sufficient

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<sup>85</sup> Herring, ‘Rape and the Definition of Consent’, 64.

<sup>86</sup> Istanbul Convention, art 36(2).

level of coercion present. In this case, the internal state of mind is less relevant, as consent can be vitiated from external factors. If a victim is threatened with force, like in *E.B. v Romania* where T.F.S. threatened E.B. with a knife, consent will be vitiated, no matter E.B.'s state of mind, as it should be evident that one cannot fully consent when being threatened at knifepoint. Therefore, when determining whether consent is present, the ECtHR should encourage member States to take account of the surrounding circumstances present, namely any circumstances that employ the threat or use of force, fraud, coercion, abduction, or the abuse of power, trust, or a position of dependency or vulnerability. If the consent of the victim is considered under this light, then not only will power imbalances between the parties involved be acknowledged and taken into account, but this acknowledgement will allow courts to consider the sex inequality inherent in so many rape cases. This may solve the issues with the traditional definition of consent, that implies an asymmetry between a powerful party and a submissive party. The first issue is recognising the problem and finding accountability, and by considering consent within the realm of power imbalances and coercion, this accountability can be better sought.

Currently, the primary positive obligation that the ECtHR imposes on states regarding sexual assault is that it is effectively prosecuted. I believe that in order to uphold this positive obligation, the ECtHR should be more specific and ask that states, in determining consent or lack thereof, should have regard to the overarching circumstances in any specific case, particularly whether there is an inherent imbalance of power between the parties involved and whether the circumstances were coercive. Consent does not exist in a vacuum, and it should thus be considered having regard to all of the circumstances in a case, including the gender inequality and rape culture present in society. I further argue that this would not go beyond the competency of the ECtHR, as the Court has already previously asked in *M.C. v Bulgaria* that States to take a context-sensitive approach when handling rape cases.<sup>87</sup>

### 3. A New Positive Obligation in the ECHR

My proposals take two forms, on the one hand, that rich consent should be required, and on the other, that any surrounding circumstance which indicates an imbalance of power or coercion should be taken into account when determining consent. I submit that these proposals can be realistically achieved on multiple grounds.

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<sup>87</sup> *E.B. v Romania*, §63.

First, we can look at the Vienna Convention on the Law of Treaties to understand how the ECHR may be interpreted. It states in Article 31 that treaties shall be interpreted in the light of its object and purpose.<sup>88</sup> The object and purpose of the ECHR is to secure the rights and freedoms within it for individuals from ratifying states. As the ECtHR has held, failing to effectively prosecute rape may result in an interference with the rights contained in Articles 3 and 8. Under Article 8, states have an obligation to intervene where the private life of an individual has been interfered with, even if this has been perpetrated by another individual. Therefore, effectively prosecuting rape falls within the object and purpose of the Convention. Secondly, it is submitted that in order to ensure respect for the principle of effectiveness,<sup>89</sup> the ‘effective prosecution’ requirement should be more specific, whilst still allowing states a certain margin of appreciation. The key is to strike a balance – respect the margin of appreciation, whilst promoting state accountability. The margin of appreciation ends where violations of individual’s human rights begin. Seeing rape through an equality perspective as MacKinnon suggests does not overstep the margin of appreciation, as even the Council of Europe, in the Istanbul Convention, has found that rape is a gender specific issue.<sup>90</sup> Additionally, by requiring rich consent, as Herring suggests, still allows member States discretion to determine how this will be implemented. The margin of appreciation is still respected, as states may implement any policy or reform in order to fall in line with this standard. It is submitted that the current positive obligations found in *E.B. v Romania* do not go far enough to ensure that the rights of individuals are protected, and therefore my proposals would go further to ensure that the principle of effectiveness is maintained.

Additionally, the living instrument doctrine further supports this. Evidently, sexual assault was not contemplated in the original text of the Convention, however, thanks to the living instrument doctrine, which finds that the Convention should be interpreted in light of present day conditions, sexual assault has been recognised as falling within the scope of human rights. In light of the present-day conditions, where more work is being done at an international level than ever to tackle the issue of gender inequality and gender violence, we must promote real change in order to make the international work effective. The Council of Europe, through the Istanbul Convention, has made its position clear on the importance of tackling gender violence. Therefore, any state that is a member of the Council of Europe should be held to a minimum standard. When it comes to states like Romania, where gender inequality is a prominent issue,

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<sup>88</sup> Vienna Convention on the Law of Treaties, art 31.

<sup>89</sup> This is one of the fundamental values of the ECHR. Contained in the Preamble, the Convention ‘aims at securing the universal and effective recognition and observance of the Rights therein declared.’

<sup>90</sup> Istanbul Convention, Preamble.

and where rape is not being prosecuted effectively, the Council of Europe, and consequently the ECtHR, should be calling for greater reform in order to fall in line with the human rights standards that it promotes. For this reason, I do not believe that it would go beyond the scope of the ECtHR to ask states to ensure effective prosecution of rape by interpreting consent in a rich sense (that is, affirmatively or explicitly), and to ask states to take into account circumstances of coercion or force or vulnerability of the victim, etc., when determining the validity of such consent, if it is found.

## CONCLUSION

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In this thesis, I have argued that the European Court of Human Rights needs to do more to ensure that member States are held to a higher human rights standard regarding sexual assault. The Court itself has held that in order to comply with Articles 3 and 8 of the Convention, member States must effectively prosecute sexual assault. However, this obligation clearly struggles to be implemented at a domestic level. Since *E.B. v Romania*, little has been implemented by the Romanian legislator to solve the issues that it currently has. *E.B. v Romania* is also not the first case where the ECtHR has called for Romania to amend its laws regarding sexual offences. *M.G.C. v Romania* is a case from 2016 that highlighted many problems with Romanian legislation on rape as well as the problems in the way that the public prosecutor handles rape and the interpretation of rape laws by the Romanian courts. Since this case, and taking into account the subsequent case of *E.B. v Romania*, the Department for the Execution of Judgements of the ECtHR has found that Romania is still failing to develop a settled and consistent judicial practice as to the notion of consent.<sup>91</sup> Additionally, GREVIO has very recently published its report monitoring the progress of Romania in adopting the provisions of the Istanbul Convention, in which it urges the Romanian authorities to amend the provisions of the Criminal Code covering rape and sexual assault and to fully incorporate into the code the notion of the lack of freely given consent.<sup>92</sup> It seems that despite being encouraged to make change by multiple institutions of the Council of Europe, this is not enough to persuade Romania to effectively tackle this issue. Therefore, I submit that my interpretation of MacKinnon's theory on coercion, along with my interpretation of Herring and Dempsey's theory on sexual penetration requiring rich consent as a justification can be inserted into the positive obligations that the ECtHR has already imposed on member States. It is my submission that whilst the ECtHR has made efforts to encourage member States to effectively prosecute sexual assault, these efforts fall short, as more clarity is needed in order to allow member States to determine what effective prosecution means. I believe that the only way to tackle rape and protect its victims is to ensure that consent is only accepted when it is given in a rich sense, and that any possible factors which create a situation of coercion or an imbalance of power be taken into account by legislators, as this can and should vitiate consent when used to place the victim in a position of vulnerability. The ECtHR must do more

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<sup>91</sup> Department for the Execution of Judgements of the European Court of Human Rights, 'Romania: Main Issues before the Committee of Ministers – Ongoing Supervision' (Council of Europe), 1.

<sup>92</sup> GREVIO, 'Baseline Evaluation Report: Romania' (Council of Europe, 16 June 2022), 56.

than it currently is, to ensure that human rights of victims of sexual assault are taken seriously, and to tackle the rape crisis in a meaningful way.

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