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The Perspective of the European Court of Human Rights Over Incriminations Relating to Sexual Offenses

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Abstract: *The article is set to identify whether or not the jurisprudence of the European Court of Human Rights has set any standards for the Contracting States in respect to the obligation of incriminating a conduct that infringes sexual liberty. As the Romanian legislature has adopted alterations of the texts incriminating sexual abuse and rape especially, where minors are concerned, the article tends to analyze whether or not these modifications are in accordance with the jurisprudence of the European Court of Human Rights. The article emphasizes on the need to establish the value of consent in respect to sexual offenses, whether or not that consent should be express or implicit and if there is a need for the perpetrator to understand there is a lack of consent or an opposition from the victim. In this respect the article we'll analyze a case from the Romanian jurisprudence in which the courts found that statutory rape can only be committed by direct or indirect intent.*

Keywords: *sexual misconduct; rape; sexual aggressions; minor; consent.*

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Introduction

The European Convention of Human Rights protects the most basic rights of a human being and these include sexual freedom. Article 8 of the European Convention which protects private life, family life and personal integrity has been applied by the European Court alongside Article 3 of the Convention in respect of situations that tend to infringe sexual liberty.

As the doctrine already showed (Harris et. al., 2018) the States have a positive obligation to ensure that the Convention rights are secured and therefore the Court has established that there are positive obligations upon contracting parties to protect a person's rights from the conduct of other private persons, including sexual freedom. In this respect, in the case of *X and Y v. Netherlands* the state was held liable because its criminal law did not provide a means by which a sexual assault upon a mentally handicapped young woman could be subject to criminal prosecution.

Therefore, the need to ensure a proper protection of the sexual liberty of the individual constitutes a positive obligation that is incumbent on the Contracting States in order to respect the standards imposed by the European Convention.

The Romanian legislator has recently adopted a new legislation that incriminates as rape any sexual act committed upon a minor that is under the age of 16, if committed by an adult. The crime of rape committed against a minor was introduced into the Criminal Code by Law no. 217/2023 and was amended by Law no. 424/2023. The standard variant provided for by art. 218^1 paragraph (1) of the Penal Code, the mitigated variant provided for by art. 218^1 paragraph (11) of the Penal Code and the special variants provided for by art. 218^1 paragraphs (5^1) and (5^2) of the Penal Code took over, with some modifications and with significantly increased penalty limits, the variants of the crime of sexual intercourse with a minor provided for by art. 220 paragraphs (1), (2) and (3) of the Penal Code which were repealed by Law no. 217/2023 (Kadar, 2024).

Therefore, the valid consent for any sexual act is dependent on the age of the party involved, and it seems the legislature is harshening the conditions in which a person can be held criminally liable for engaging in sexual activity.

But the age is not the only factor that influences the need for a valid consent. The national jurisprudence has considered that this consent needs to be unequivocal, as the Courts acquitted a defendant accused of raping a victim, on the grounds the crime was committed without intent, due to the equivocal conduct of the victim prior to the sexual act. In this case the victim

did not explicitly refuse the sexual act with the accused who was married to another person but stated that "it's not right". The jurisprudence tends to take a leaner approach on sanctioning sexual misconduct.

In the face of these two paradigms, we need to establish what does a proper protection of the right to sexual freedom mean in respect to the standards of the European Convention and how does these standards impact the changes within the Romanian legislation.

ECHR on sexual aggressions

In a recent ruling the European Court of Human Rights considered whether or not the French legislation offered sufficient protection to possible victims that were potentially sexually aggressed even though there was no explicit lack of consent (European Court of Human Rights, 2025)

In the first case, *L. v. France*, no. 46949/21 the applicant complain that she had been raped in 2009, when she was 14 years old, by two 21-year-old men who were firefighters. She had multiple admissions to a psychiatric unit for children and followed treatment with antidepressants, as she suffered from tetanic seizures since the age of 12, for which she received emergency care on several occasions from firefighters. The plaintiff stated that she "was not forced", but argued that her judgment had been impaired by strong medication and that she lacked "the power to physically defend herself". The initial legal classification of the crime - gang rape and sexual assault on a minor under 15 years of age - was changed to sexual assault on a minor under 15 years of age, the judicial body noticing the absence of violence, threat, coercion or taking advantage of the victim's condition. The Court of Cassation held that the applicant had the necessary understanding to be able to consent to the contested acts, especially once she had reached the age of 14, this assessment being the prerogative of the judge (European Court of Human Rights, 2025).

In *H.B. v. France*, no. 24989/22 the applicant aged 14 years and 10 months, disappeared from home and returned the next day in a clear state of intoxication, which did not allow her to answer the police's questions. Following the investigation, two adults, aged 21 and 29, were charged with sexual assault without violence, coercion, threat or taking advantage of the victim as a result of having sexual relations with a victim that was in an advanced state of intoxication. The victim stated that she had "spent the evening with three Kosovars" and that as she was "drunk", she had "agreed" to "have relations with the three people", but that "she would never have done this if she had not consumed alcohol". The Court of Appeal acquitted the defendants (European Court of Human Rights, 2025).

M.L. v. France, no. 39759/22 the applicant, alleged that the defendant committed repeated acts of sexual penetration without her consent on the night of 10 to 11 January 2008, at the end of a party he had organized at her home, when she was 16 years old and the defendant was 18. The plaintiff alleged that she told the defendant that she was a virgin and that she did not want to have sexual relations with him, but when the young man insisted, she stated that "she did not physically resist, but she said no". As witnesses testified that there was a romantic relationship between the parties, given that they had seen them kissing at parties, the Paris prosecutor decided not to pursue criminal proceedings because a constitutive element of the crime - intention - had not been sufficiently proven. The investigating judge considered that although it is not disputed that the civil party suffered trauma, the judicial investigation did not allow the establishment of either acts of violence, coercion, threat or taking advantage - constitutive elements of rape, or of the defendant's intention to coerce the plaintiff (European Court of Human Rights, 2025).

The Court deliver the ruling in which considered that in this case, in respect to all applicants the investigating authorities and domestic courts failed to protect them in an adequate manner (European Court of Human Rights, 2025). Also stated that the domestic courts had not properly assessed the impact of all the circumstances surrounding the events nor had they properly evaluated whether the applicants had been capable of understanding the meaning of the actions and giving a proper consent (European Court of Human Rights, 2025). The Court emphasized on the particularities of the cases and the vulnerable situation in which the victims found themselves, especially in view of their ages, emphasizing that consent had to reflect a free willingness to engage in sexual relations at a given moment. The Court considered that, given the legal framework in place at the time and the way in which it had been applied, the respondent State had failed to fulfil its obligations as provided by the requirements of the Court's case-law and international standards. The respondent state failed to apply a criminal-law system capable of punishing non-consensual sexual acts thus failing to comply to the positive obligation derived from Articles 3 and 8 of the Convention (European Court of Human Rights, 2025).

In M.C. v. Bulgaria - 39272/98 the Court also took in consideration the adequate protection of minors. In this case, the applicant was fourteen years and ten months old when she claims to have been raped by two men. The sexual intercourse was confirmed by a medical examiner the next day. The

accused disputed the version of the events given by the applicant and maintained that they had had sex with the applicant with her full consent. A neighbor of one of the defendants testified that he had heard the applicant quarrel with her mother on the morning after the rape took place, as she refused to leave with her. The investigation concluded that there was no evidence that threats or violence has been used to determine the sexual intercourse, and although conflicting statements by witnesses were given, the applicant was likely to have been overwhelmed by an internal conflict between a natural sexual interest and a sense that the act was reprehensible (European Court of Human Rights, 2003).

The Court found that there was a violation of article 3 and 8 of the Convention. It stated that in accordance with modern standards in comparative and international law in the area of legislation against rape, a State's positive obligations under Articles 3 and 8 require the penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim (European Court of Human Rights, 2003). The Court's task was limited to examining whether the impugned legislation and its application to the present case, together with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8. The court criticized that the investigation and its conclusions gave undue emphasis to the lack of "direct" proof of rape, such as violence, thus elevating the lack of "resistance" by the applicant to the status of the defining element of the offence. This approach was restrictive as the investigation should have been centred on the issue of "non-consent" (European Court of Human Rights, 2003).

New Romanian legislation

The Romanian doctrine argued that the amendments to the Criminal Code introduced by Law No. 217/2023 and Law No. 424/2023 represent a substantial reform in terms of defining and sanctioning the crime of rape. The main aim consists of protecting victims and eliminating existing legislative gaps, as the new rules represent the result of a pressing need to clarify the legal framework, especially regarding sexual acts committed against minors and establishing the age of sexual consent. Clarifying the issue of consent has emerged as a major problem, due to the lack of a clear definition of the age of sexual consent, which has led to non-unitary interpretations and inconsistent sentences (Duda, 2025).

The explanatory memorandum of the law states that the health and protection of the sexual integrity of minors is an important social value. The

respect of this value determines the formation of a young generation aware of the freedom of self-knowledge, but also prepared to understand and reject acts of sexual corruption. The aim of these modifications was to stop the aggressive sexualization of minors through various methods, that make them vulnerable to those who know how to abuse their position to sexually corrupt them. The parliament stated that authorities must have the necessary leverage for a proper intervention through a clear and efficient legal framework (Parlamentul României, 2023).

It was noted that at European level there is a visible concern for the express inclusion and separate regulation of conduct that determines a minor who has not reached the age of sexual consent to participate in sexual acts with another person, without the use of coercion, force or threat. Moreover, the way in which incitement of minors to commit sexual offences is criminalized, if it does not cover the conduct of incitement of minors without the use of violence, has been criticized in other European legislation, such as Spanish, and is regarded as a deficiency in respect to other legislations such as French, which criminalizes sexual offences against minors in a manner similar to previous national legislation (Aruxandei & Ardelean, 2024).

In essence the interpretation of the doctrine in respect to the changes brought by the new modifications of the Romanian legislation is that the new legislation brings important changes regarding the age of the victim and sexual consent, establishing that in relation to victims under 16 any sexual act is automatically considered non-consensual, even if the minor expresses consent, a provision that aims to protect adolescents from abuse and manipulation (Duda, 2025).

However, another author showed that the notion of "rape" implies the lack of consent, the coercion to engage in a sexual act. Just as the use of the term "homicide by manslaughter" is incorrect, the use of the notion of "rape" for consented sexual acts provided for in art. 218^1 para. (1), (1^1) and (5^1) of the Penal Code is equally inappropriate.

The legal presumption

We will argue that the legislator introduced a legal presumption of lack of consent, as an absolute presumption, in order to protect minors from abuse. It is debatable whether or not such an intervention was needed or if it should be regarded as useful.

From the standpoint of the European Court jurisprudence, it is clear that the French legal framework (which was very similar to the previous Romanian legislation) was insufficient in offering protection to minors aggressed or abused.

But nevertheless, the legislation needs to take into consideration the social realities, and establishing the age of 16 as the limit of the valid consent for sexual relations might seem, in today's society, as over restrictive. In an era in which sexually explicit content and promiscuity is promoted both in social media and classic mass media, it is debatable whether or the incrimination in this form is necessary.

We think that regulating an absolute presumption of lack of consent in children under 16 is inconsistent with the social realities, as we as we argue that some of them may have the capacity to consent to sexual relationships, and to understand the consequences of this consent.

Protecting the integrity and sexual freedom of minors is vital both as a social need and as obligation derived from the European Convention of Human Rights. However, this does not mean that all crimes against minors should be qualified as rape. Therefore, the above-mentioned doctrinal criticism of such a qualification is justified.

We strongly believe that if a 15-year-old minor consents to a sexual act, understanding the implications of his consent, the need to protect children`s health would imply the incrimination of such a sexual act, but we express serious doubt whether this kind of conduct should be incriminated as rape, as we believe rape to imply the lack of consent. Such a conduct may be incriminated as a separate offence.

National jurisprudence - Oradea Court of appeals ruling

With within the national jurisprudence, the Oradea Court of Appeals was asked to give a ruling in a high profile case (Curtea de Apel Oradea, 2025). The debate was whether or not the consent should be explicit and perceived by the accused. The court established that while at the party at the injured person's house, the accused entered her bedroom as the injured person, after consuming alcohol, was sleeping alone, dressed in underwear. The defendant climbed into her bed, as the injured person woke up. He began to caress her and gave her various compliments. Then he pushed her pants and panties aside, at which point he saw that she was wearing an external absorbent and asked if she was "on her period?". He then began to perform oral sex, as the injured person replied that "it's not ok", without reacting in any other way. The defendant performed oral sex on her for about a minute, after which he took off her pants and panties and began to have unprotected sexual intercourse with the injured person. The injured person also told the defendant to finish at once. Later she claimed that she was aware of everything that happened to her, but she could not react because she entered a blockage, in which "her body did not help her".

The Court considered the objective component of the accusation to be proved. However, it considered that there was no evidentiary basis to justify the subjective typicality of the crime, and that the limitation of the accusation to the level of judicial presumptions cannot be accepted.

The Court considered that, in relation to the standard of proof beyond any reasonable doubt, in the case of sexual assaults, the coercion to have sexual intercourse cannot remain at the level of a judicial presumption. The Court noted that the manner in which the victim reacted after the sexual intercourse, cannot alone lead to the conclusion that there was opposition on her part at the time of the sexual intercourse.

It is essential that the victim's lack of consent be concurrent with the performance of the sexual act, and not subsequent, since subsequent regret for having performed a sexual act is not likely to confer criminal valences on such an act.

Also, in order to assess subjective typicality, it must be analyzed whether, under the objective conditions of the case, the defendant was in a position to know the existence of a refusal by the victim. Only under these conditions can the commission of the crime of rape be held against him, derived either from ignoring a refusal or taking advantage of a state of vulnerability of the victim (Curtea de Apel Oradea, 2025).

The Court concluded that, in relation to the dynamics of the unfolding of the facts, the error of fact regarding the typicality of the act is incident in the case, the defendant having the representation that the victim consented to having sexual intercourse. The Court considered that the few assertions of the victim do not betray an explicit refusal to have sexual intercourse with the accused. Thus, the statement "it's not ok" is evasive and could refer to the circumstance that performing sexual acts with the defendant was not moral, in the context in which he was married, or the circumstance that the victim is not ready to have sexual intercourse as she was menstruating. The occurrence of a freezing effect on the victim is improbable and was not known to the defendant. The court considered that such a freeze could not have been foreseen by the defendant since there was a dialogue between the parties (Curtea de Apel Oradea, 2025).

In respect to the assertions of the Court in this case, we will argue that the lack of consent must be either known to the defendant or outlined enough. For the crime of rape to be held against the defendant, there must be an perceivable lack of consent not just an infringement of the victim's will by violent means.

Conclusions

We think that in the light of the jurisprudence of the European Court of Human Rights the requirement that the victim offer physical resistance is no longer the valid standard to follow, and although in many European legislations the definition of rape still refers to the use of violence or threats of violence, the current trend regarding the constituent elements of this crime must determine an analysis of the absence of consent.

The absence of consent must refer either to the effective absence or to an improper consent. We argue that a valid consent cannot qualify the crime as being rape, even if given by an underage minor. Such a crime should be regulated distinctively as the need to protect minors and their health and development is obvious.

Nevertheless, the jurisprudence of the European Court of Human Rights does not impose on the Contracting States the incrimination of an absolute presumption of lack of consent in cases in which minors are involved. Such an absolute presumption maybe instituted in respect to persons that cannot offer a valid consent, for example in respect to victims that are mentally disabled. Of course, minors at a young age can also fall within this category, for instance minors of 5 years old. But the difficulty in setting up an age limit consists of sanctioning the lack of consent where there is none, for instance in the case of minors over 15 years old, if they have the capacity to understand the implications of such a consent.

The emphasis should be put on the lack of consent, even if there is no explicit physical resistance from the victim. For the crime of rape to be held against the defendant, there must be an perceivable lack of consent, not just an infringement of the victim's will by violent means. The simple refusal of sexual intercourse should be enough to engage the criminal liability of the perpetrator.

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