ARTICLES

PRESUMPTION OF CONSENT OR A LACK THEREOF OF THE VICTIM AND THE PRESUMPTION OF GUILT (INNOCENCE) OF THE ACCUSED IN CASES OF SEXUAL OFFENCES: EMPHASISE WHAT IS NECESSARY, CROSS OUT EVERYTHING UNNECESSARY

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The article focuses on the significance and relevance of victim's consent in sexual offenses cases. The case-law of national legal systems as well as of international judicial bodies demonstrates that consent is a conditio sine qua non for qualifying an act as a sexual offense. However, the recent examples of criminal cases raised from national and international jurisprudence allow authors to conclude that the non-consensual character of sexual acts is frequently complicated to prove in due to some peculiarities of the sexual offenses per se. This paper analyses the modern technique of sexual offenses criminalization which can be characterized by one of two possible approaches: first, the presumption of the alleged victim's consent to sexual intercourse or, on the contrary, second, the presumption of the lack of thereof. Despite the fact that the second approach seems to be more favorable for alleged survivors, the implementation of this approach entails a number of difficulties. The main one is the hypothetical conflict with the meta-presumption of criminal procedure (i.e. the presumption of innocence). In the paper this contradiction is analyzed from the perspective of the legislation and jurisprudence of different jurisdictions, as well as the practice of international judicial bodies (European Court of Human Rights, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda).

Keywords: burden of proof; consent; evidence; presumption; presumption of innocence; rape; rape victims; sexual offenses.

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Introduction

The eminent French philosopher and historian of the 20th century Michel Foucault wrote:

> The disappearance of public executions marks therefore the decline of the spectacle; but it also marks a slackening of the hold on the body.[1]

Thus he explained the shift of the paradigm of punishment in the 18th – and 19th – century, which was manifested in the reduction of the number of death sentences imposed, as well as the deformation of the theatricality of their execution. Indeed, the State is gradually losing its dominance over the human body. This statement, certainly true to this day, is now filled with different meanings. The government is losing not only direct physical domination over the human body; it is losing its power over what is hidden from prying eyes – the intimate side of human life. The government is no longer sovereign in the private life of the individual: it has stopped, or must stop deciding what one should do and who should be the one to do so as part of their sexual life.

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[1] Michel Foucault, *Surveiller et punir : Naissance de la prison* 16 (1975).

Although there is no single definition of "sexual crime,"[2,3] it is obvious that, in the most basic way, it can be represented as follows: sexual intercourse (in various forms) performed *without the consent* of the victim. Consequently, lack of consent is a constitutional element of sexual offences. In other words, establishing the absence of consent of the alleged victim is a *key* phase in the process of characterising the act as a sexual offence.[4] This shows the peculiarity of sexual offences, since in all other cases the lack of consent of the victim is irrelevant to the existence of a crime.[5] They are related like *yin and yang*: where there is a sexual offence, there is no consent, and conversely, where there is consent, there is no sexual offence.[6]

This claim has perhaps become an axiom. In the course of the evolution of the consciousness of human society, consent has become such a significant category in the area of sexual relations that, hypothetically, even a person engaged in permanent prostitution may become, for instance, a victim of rape. Until recently (1980–1990) it was not so obvious: it was stubbornly believed that a person engaged

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[2] In the absence of a well-established term to describe a *set* of crimes of a sexual nature, the term "sexual offences" will be used, as well as "sex crimes" due to their *compactness*. It should be borne in mind that "sex crimes" *per se* are not related to gender in any way. The term "sex crimes" is saturated with gender characteristics of the crimes in question, which is fundamentally incorrect, since, in principle, a person of *any* gender can become the victim of *any* "sexual offence," regardless of how the legislator formulates the object of the crime. The term "sexual crimes," in turn, seems applicable in the article as in Russian the collocations "*sex crime*," "*crime sexuel*," etc., used in the analyzed foreign publications and court decisions in foreign languages, can be translated into Russian both as "sexual crimes," and as "sex crimes."

[3] This is not only about the national legislation of a particular state, but also international law. The latter has increasingly sought to develop a synthesized definition of the notion "sexual crime." For example, Women's Initiatives for Gender Justice, a non-profit organization concerned with the lack of a clear definition of sexual violence in the text of the Rome Statute of the International Criminal Court, launched the "Call It What It Is" campaign, the main objective of which is to develop a missing definition involving survivors of sexual violence. These victims were asked to answer the question of what sexual violence was to them. As a result of the work, a civil society declaration on sexual violence was prepared in September 2019. However, only time will tell how successful these intellectual attempts to define sexual violence have been.

[4] Bernard Pellegrini, *Grandeurs et apories de la notion de « dignité de la personne humaine » comme catégorie juridique*, 1 La Revue lacanienne 118, 120 (2008); Catherine Le Magueresse, *Viol et consentement en droit pénal français. Réflexions à partir du droit pénal canadien*, 34 Archives de politique criminelle 223, 227 (2012).

[5] Nathan Brett, *Sexual Offenses and Consent*, 11(1) Can. J. L. Jur. 69, 70 (1998).

[6] In Russian legislation, Rape (pt. 1 of Art. 131 of the Criminal Code of the Russian Federation), as well as Violent Actions of Sexual Character (pt. 1 of Art. 132 of the Criminal Code of the Russian Federation) are referred to cases of private-public prosecution (pt. 3 of Art. 20 of the Code of Criminal Procedure). This implies, as the general rule, that the prosecution of these crimes begins upon them being reported by the victim. On this basis, some authors conclude that the absence of a victim's statement means his or her consent to the violence committed against him or her and, as a result, the absence of a crime. *See, e.g., Сидоренко Э.Л.* Квалификация преступлений против личности, совершенных с согласия потерпевшего // Мировой судья. 2016. № 9. С. 27–34 [Elina L. Sidorenko, *Qualification of Crimes Against the Person Committed with the Consent of the Victim*, 9 Justice of the Peace 27 (2016)]. However, the present study does not raise the issue of establishing a relationship between the victim's claim of sexual violence, his or her acceptance of the violence and the criminal nature of the latter.

in prostitution and receiving income from that activity could not be raped; they are always expressing consent to sexual intercourse, with anyone, anywhere.[7] One British law as early as the 18th century recognised that a person engaged in prostitution could be a victim of rape.[8] However, it was necessary to wait two centuries for this legislative provision to begin to be implemented in practice.[9]

1. "Consent" Is *Conditio Sine Qua Non* of Sexual Relations

If before the sexual life of a person was under the control of the government and protected for the sake of maintaining public morals and ethics,[10] these perceptions have now changed. The right to have sex (as some new legal value[11]) is believed to be derived from the right to do with one's body as one pleases, which is in turn a constituent part of law on personal integrity. Applying the logical law of transitivity, it can be concluded that the right to have sex henceforth refers to the privacy of any person. If this is the case, the only case in which a State, through its bodies and officials, may interfere in this area is *coercion* to engage in sexual relationships (that is, sexual relations *without the consent* of at least one of their participants).[12] Let us trace the evolution of these views using the example of the practice of the European Court of Human Rights (hereinafter referred to as the European Court, ECtHR or Strasbourg Court), where it is particularly visible.

In the *Dudgeon v. United Kingdom*[13] case (1981), the applicant, a British subject residing in Northern Ireland, believed that the Offences Against the Person Act of 1861, which provides for criminal penalties up to life imprisonment for "unnatural" sexual relations (even between adults who have expressed their mutual consent), violated his right to privacy guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter referred to as the European Convention or ECHR).[14] Furthermore, as a homosexual, he regarded himself as a victim of a violation of Article 14 of the European Convention (prohibition of

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7 Barbara Sullivan, *Rape, Prostitution and Consent*, 40(2) J. Criminol. 127, 128 (2007).

8 Terese Henning & Simon Bronitt, *Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence* in *Balancing the Scales: Rape, Law Reform and Australian Culture* 76 (Patricia Easteal ed., 1998).

9 For more information, *see* Susan S.M. Edwards, *Female Sexuality and the Law* (1981).

10 Jean-Pierre Marguénaud, *Liberté sexuelle et droit de disposer de son corps*, 49 Droits 19, 26 (2009).

11 Alberto Cadoppi, *Les infractions sexuelles en Italie. Problèmes et perspectives*, 34 Archives de politique criminelle 167, 171 (2012).

12 Michela Marzano, *Le mythe du consentement. Lorsque la liberté sexuelle devient une norme de servitude volontaire*, 48 Droits 109, 110 (2008); Daniel Borrillo, *La liberté érotique et l'exception sexuelle* in *La liberté sexuelle* 45 (Daniel Borrillo & Danièle Lochak eds., 2005).

13 ECHR, *Dudgeon v. United Kingdom*, 22 October 1981, Series A no. 45.

14 *Id.* para. 37.

discrimination) for the reason that homosexuals in Northern Ireland are oppressed in comparison with homosexuals in England and Wales, and Scotland, where homosexual relations had been decriminalised by the 1967 and 1980 Acts respectively.[15]

In this case, the European Court found a violation of Article 8 of the European Convention.[16] Nevertheless, in the course of its reasoning, the ECtHR reflected the views of European society in the 1980s about the possibility of legislative regulation of sexual relations. It agreed that "some degree of regulation of male homosexual conduct" could be justified in a democratic society, in order "to preserve public order and decency [and] to protect the citizen from what is offensive or injurious."[17] In other words, the Strasbourg Court found that a lawmaker's restriction of the right to privacy in the area of sexual relations may have legitimate purposes provided for in Article 8-2 of the ECHR, namely: "the protection of morals in the sense of moral standards obtaining in Northern Ireland."[18]

Therefore, the European Court recognised in its decision that the right to have sex is a constituent element of the right to privacy. However, the government, in order to protect any interests (above all, public morality and ethics) may limit the right to respect for privacy (in the aspect of sexual relations), resorting even to the *ultima ratio* of its capabilities – the tools of criminal justice.

The next ECtHR case that deserves our attention when considering the evolution of views on the concept of individual sexual freedom is the *Norris v. Ireland*[19] case (1988). The applicant, an English lecturer and campaigner for the rights of homosexuals in Ireland, argued that Irish legislation of 1860–1880 (still in force at the time of the case before the Strasbourg Court), according to which homosexual relations between consenting men who have reached the age of majority are crimes, violates their right to respect for privacy. Realising that he is homosexual and aware of the existence of this legislation, the applicant feels "deep depression and loneliness" because any implementation of his orientation would be penalised by criminal means. To avoid an internal crisis, a psychiatrist even advised him to leave Irish territory. If he was treated with understanding by the Irish police, he began to be attacked by ordinary people and bystanders after a public interview.[20] Unlike the previous case, the applicant in the case had not been subjected to any criminal prosecution by the State,[21] but this did not prevent the Strasbourg Court from acknowledging his complaint acceptable.

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15 ECHR, *Dudgeon v. United Kingdom*, paras. 17–18, 65.

16 *Id.* para. 63.

17 *Id.* para. 49.

18 *Id.* para. 46.

19 ECHR, *Norris v. Ireland*, 26 October 1988, Series A no. 142.

20 *Id.* para. 10.

21 *Id.* para. 38.

The ECtHR reiterated its position that restricting sexual intercourse by criminalising certain types of intercourse may have a legitimate goal of preserving morals and ethics.[22] At the same time, the European Court pointed out, largely reiterating its position in the *Dudgeon* case: given that society has become more tolerant of homosexual orientation and that representatives of the State did not provide evidence of the abrupt failure of the Irish society to accept sexual relations between consenting adults of homosexual orientation, criminalising such relations is not necessary in a democratic society.[23]

Having analysed the practice of the European Court of the 1980s on the right of persons to have sex at their own will, we can conclude that during this period of time the ECtHR *still* allowed for the possibility of the State to restrict the freedom of everyone to lead the sexual life they want to lead, but *has already* considered in the vast majority of cases such limitations as unnecessary in a democratic society.

The situation changed dramatically in the late 1990s: the practice of the Strasbourg Court took a step (perhaps even a few) back. In the *Laskey, Jaggard and Brown v. United Kingdom*[24] case (1997), three applicants believed that they were victims of a violation by the British State of Article 8 of the European Convention guaranteeing the right to privacy.[25] The fact is that video recordings of practices of sadomasochistic content ("[t]he acts consisted in the main of maltreatment of the genitalia (with, for example, hot wax, sandpaper, fish hooks and needles) and ritualistic beatings either with the assailant's bare hands or a variation of implements, including stinging nettles, spiked belts and a cat-o'-nine tails were obtained by the police. There were instances of branding and infliction of injuries which is related in the flow of blood and which left scarring"[26]), featuring the applicants as well as other men. The applicants were charged with causing harm to various parts of the bodies of certain persons by the prosecutor's office. Furthermore, it is important to note that these persons did not on their initiative complain to the police; they were satisfied with their current situations. The applicants objected to the charge, because the sadomasochism in which they took part was carried out by mutual consent between all persons and "behind closed doors." In addition, inflicting pain had the sole purpose of bringing sexual pleasure.[27] Ultimately, the applicants were found guilty of the acts referred to by the prosecutor's office.

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22 ECHR, *Norris v. Ireland,* para. 40.

23 *Id.* paras. 33–34.

24 ECHR, *Laskey, Jaggard and Brown v. United Kingdom*, 19 February 1997, Reports of Judgments and Decisions 1997-I.

25 *Id.* para. 35.

26 *Id*. para. 8.

27 *Id.*

The ECtHR acknowledged in the given case that British law, which had allowed the conviction of the applicants and thereby restricted their right to respect for privacy,[28] pursued legitimate purposes, as provided for in Article 8-2 of the ECHR, the preservation of health and morality.[29] The European Court noted that one of the roles assumed by any State was

> to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm. This [was] so whether the activities in question occur in the course of sexual conduct or otherwise.[30]

At the same time, the extent of damage to which a national legislator may be treated indifferently should be determined by the legislator itself.[31] So far, it seems that the ECtHR has written nothing supernatural in the abovementioned decisions. But there's more ahead. Unlike the previous cases (*Dudgeon*, *Norris*), in which the European Court found that government's interference in the regulation of sexual relations is not necessary in a democratic society, the case in question differs in the fact that real bodily harm was inflicted on some persons in the course of sexual practices of a certain nature.[32] Given the nature, the amount of damage suffered by a number of persons in the process of sadomasochistic practices in the course of over 10 years, the Strasbourg Court recognised the actions of the government to condemn the applicants conventional in the sense that they are necessary in a democratic society.[33]

Therefore, the European Court, without denying that the sexual life of a person is an integral part of his or her privacy, imposed limits on the exercise of freedom in sexual intercourse. A person may, with the consent of others, do whatever he pleases in the area of sexual life, *so long as* his or her actions do not cause real harm (in particular, bodily harm). And what constitutes "real harm" and its intensity, which can no longer be ignored, is decided by the legislator itself. Such a position cannot be called logical: on the one hand, the government cannot interfere in the intimate area of the individual as long as everything happens "behind closed doors," voluntarily, with *consent*; on the other hand, the government may still impose some

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[28] In fairness, it is worth noting that the ECtHR was uncertain whether the activities that the applicants had engaged in, given the number of people who took part, could relate to the privacy of the applicants or not. However, since neither party challenged this aspect, the Strasbourg Court felt it inappropriate to begin doing so on its own initiative (ECHR, *Laskey, Jaggard and Brown v. United Kingdom,* para. 36).

[29] *Id.* para. 35.

[30] *Id.* para. 43.

[31] *Id.* para. 44.

[32] *Id.* para. 45.

[33] *Id.* para. 49.

restrictions on consent to sexual intercourse. But what the restrictions will be and in what cases they will be applied will be decided by the government itself. Wouldn't the "inconsistency" in the position of the Strasbourg Court lead to the government eventually gaining full domination over the sexual life of a person?

This problem goes back to the legal issue of the victim's consent to harm being caused to him or her. The Russian legal doctrine has strengthened the view that there are a number of conditions under which the person who caused harm in connection with the consent of the victim may be exempted from criminal responsibility: first, the admissibility of victim's consent, secondly, the capacity of the victim's consent; thirdly, the voluntariness of victim's consent.[34] *Admissibility* of consent means that the legal regime established in a State allows for the possibility to make use of a good by causing harm, to which the person agrees. For example, a person's consent to the taking of a life by another person has no legal effect. This explains the legal prohibition of euthanasia (Art. 45 of the Federal Law of 21 November 2011 No. 323-FZ "On Basics of Health Protection of the Citizens in the Russian Federation"). Researchers relate the *capacity* of consent to the psychological and social willingness to realise the nature and consequences of harming legally protected values. This criterion for various crimes may be based on the capacity of a person, reaching a certain age, his or her legal capacity, etc. The legal doctrine[35] considers the *voluntariness* of consent as the absence of vices of consent (such vices of consent are sometimes not obvious from the outside).

A. Krasikov, one of the most famous Russian legal scholars who studied the legal value of a victim's consent to causing harm and discussed the importance of mechanisms of reconciliation with the victim and the victim's consent stated that

> the desire of the victim to reconcile with the perpetrator is essential for the exemption of the perpetrator from criminal responsibility only in cases where criminal infringement shall be carried out on rights and freedoms which are only in his possession or, conditionally speaking, in his property.[36]

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[34] In addition, the Russian doctrine also identifies other requirements for the expression of consent (timeliness, specificity, availability), which will be discussed below (*infra*, II). For these requirements, *see* more *Газданова Е.К.* Согласие потерпевшего в уголовном праве: понятие, характеристика, значение: автореф. дис. … канд. юрид. наук [Elena K. Gazdanova, *Consent of the Victim in Criminal Law: Concept, Characteristic, Meaning*, Extended Abstract of PhD Thesis] (Moscow, 2011); *Лопашенко Д.В.* Соотношение частного и публичного в уголовном праве: дис. … канд. юрид. наук [Daria V. Lopashenko, *The* Ratio *of Private and Public in Criminal Law*, PhD Thesis] (Moscow, 2018).

[35] *Сидоренко Э.Л.* Презумпция согласия потерпевшего в российском уголовном праве // Юридическая техника. Ежегодник. № 4 [Elina L. Sidorenko, *Presumption of Consent of the Victim in Criminal Law* in *Legal Drafting, Yearbook. No. 4*] 503, 503–504 (Vladimir M. Baranov ed., N. Novgorod, 2010).

[36] *Красиков А.Н.* Примирение с потерпевшим и согласие потерпевшего – «частный сектор» в публичном уголовном праве // Известия высших учебных заведений. Правоведение. 1998. № 1(220). С. 179 [Arkadii N. Krasikov, *Reconciliation with the Victim and Consent of the Victim – "Private Sector" in Public Criminal Law*, 1(220) Proceedings of Higher Educational Institutions. Jurisprudence 178, 179 (1998)].

Similarly, it is possible to consent to causing harm only in respect to the rights that a person actually possesses. In most jurisdictions around the world, economic rights and a number of civil rights are considered freely alienated; inalienable (with rare exceptions of several European States decriminalising euthanasia) is the right to life; with regard to health rights, there are various legislative provisions concerning the legal effect of consent to causing harm.[37] As noted above, concerning sexual offences, the category of consent is of particular importance, and it distinguishes sexual offences from other crimes. As noted above, in the context of sexual offences, the category of consent is of particular importance, and it differs sexual offences from other crimes. At a certain stage of the development of society, it was through the category of consent that the State had been "removed" from the sexual life of a person.

In sexual relations there is no room for State regulations and, accordingly, responsibility for free and voluntary contacts, so long as they involve individuals who are capable (due to age and mental state)[38] of giving *valid* consent to enter into sexual contacts. The State can only invade a person's sexual life when it is marred by violence, that is, a lack of consent.

Legal doctrine states that harm to a victim's health (not related to his or her sexual rights) must meet additional criteria in order to exclude criminal liability. For instance,

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[37] In particular, the only example of grounds established by Russian substantive criminal law for exemption from criminal liability in connection with the consent of the victim to causing harm is the rule established in the note to Article 122 of the UK RF. This rule applies if a person placed in danger of infection or infected with HIV has been timely warned about the presence of this disease by the infected person and voluntarily agreed to commit acts that posed a risk of infection. In the legislation of foreign countries there are different approaches to the legal effect of consent of persons to cause harm to their health (*see* more *Капинус О.С.* Согласие жертвы на причинение вреда // Современные уголовное право в России и за рубежом: некоторые проблемы ответственности: сборник статей [Oksana S. Kapinus, *Consent of the Victim to Causing Harm* in *Modern Criminal Law in Russia and Abroad: Some Problems of Responsibility: Collection of Articles*] 50 (Moscow, 2008).

[38] The problem of qualification of sexual offences against persons below the age specified in the law (referred to in the literature as the "age of sexual consent"), as well as against persons who are incapable of understanding the meaning of their actions due to the mental state, is not included in the topic of our essay, since the "consent" of these persons to enter into sexual relations does not, according to the general rule, have legal effect in the vast majority of modern "ordre public" (for the "age of consent" *see, e.g.*, *Чугунов А.А., Морозова А.А.* Особенности квалификации насильственных действий сексуального характера // Современное право. 2016. № 6. С. 96–99 [Alexander A. Chugunov & Alexandra A. Morozova, *Peculiarities of Qualification of Violent Acts of Sexual Nature*, 6 Modern Law 96, 96–99 (2016)]; Matthew Waites, *Inventing a 'Lesbian Age of Consent'? The History of the Minimum Age for Sex Between Women in the UK*, 11(3) Social & Legal Studies 323 (2002)). Thus, Article 222-22-1 of the Criminal Code of France (as amended by 3 August 2018) establishes: "When violent acts of a sexual nature in one form or another are committed against a minor under the age of 15, moral coercion or deceit is manifested always in the abuse of the vulnerability of a victim who, because of their age, cannot fully understand the nature of the actions taken against them." In other words, in this case, the juvenile age of the victim is itself a defect of will. *Cf.* Note to Article 131 of the UK RF recognizing minors under the age of 12 who are always in a helpless state as unable to understand the character and the effect of the actions taken against them.

But in cases where the consent of such persons is still relevant (for example, in situations of voluntary sexual contact with other minors) everything stated in the article on consent applies to these situations as well.

if without such harm it would be impossible to save human life or health. Similarly, it may be a required motive and purpose useful for public wellbeing.[39] It seems that sexual freedom, as a value protected by criminal law, does not require such reservations and is, in this sense, a more stringent legal category: having reached the "age of consent" defined by law, a mentally healthy individual has the right to decide and enjoy his or her sexual freedom at his or her own discretion. Therefore, we shall agree with those authors who have noted that the disposition of sexual freedom by a person who is able (due to age and mental state) to be aware of the character and the effects of the actions taken against him or her should not be limited.[40]

Further development of the practice of the European Court has turned towards the recognition of the determining legal effect of the victim's consent, the absence of which predetermines the possibility of the State to interfere in the area of sexual relations. Evidence of this is the revolutionary decision of the ECtHR in the *K.A., A.D. v. Belgium*[41] case (2005). Two applicants were convicted of beating and mutilating the wife of the first applicant during sadomasochism practices.[42] The domestic jurisdictions of Belgium, which examined the applicants' case, noted that despite the woman pleading for mercy, the applicants continued to commit painful acts of sadistic sexual nature against her.[43] The domestic jurisdictions stated that sexual freedom protected by Article 8 of the ECHR cannot be unlimited: its limit is the dignity of the personality of other individuals.[44] The applicants believed, *inter alia*, that their criminal conviction was contrary to Article 8 of the ECHR, which protects everyone's right to privacy.[45]

The ECtHR recalled that the concept of "private life" is broad and includes elements such as gender, sexual orientation and a sex life.[46] So there is nothing surprising that the conviction of the applicants could be considered and regarded

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[39] Although there is also an opposite view, which is that the presence of purpose of socially beneficial harm to life and health does not neutralize the criminal law-effect of a victim's consent in all cases. *See, e.g.*, *Соктоев З.Б., Ринчинова А.Р.* Согласие лица на причинение его жизни и здоровью // Вестник Университета имени О.Е. Кутафина (МГЮА). 2018. № 12. С. 121–129 [Zorikto B. Soktoev & Anna R. Rinchinova, *Consent of a Person to Causing Harm to His Life and Health*, 12 Courier of Kutafin Moscow State Law University (MSAL) 121, 121–129 (2018)].

[40] *See, e.g.*, *Орешкина Т.Ю.* Обстоятельства, исключающие преступность деяния: дискуссионные вопросы общего характера // Уголовное право. 2016. № 4. С. 66–76 [Tatiana Iu. Oreshkina, *The System of Circumstances Excluding Criminality of an Act: Disputable General Issues*, 4 Criminal Law 66, 66–76 (2016)].

[41] ECHR, *K.A., A.D. v. Belgium*, nos. 42758/98 & 45558/99, 17 February 2005.

[42] *Id.* para. 11.

[43] *Id.* paras. 13, 15.

[44] *Id.* para. 23.

[45] *Id.* para. 62.

[46] *Id.* para. 79.

as an interference with their privacy.[47] The criminal nature of battery and injury is prescribed by law and certainly pursues the legitimate purposes provided for in Article 8-2 of the ECHR (protection of the rights and freedoms of others, health, public safety, prevention of disorder and crimes, etc.).[48] Was the conviction of the applicants in the case at hand a measure necessary in a democratic society? The right to respect private life guaranteed by Article 8 of the European Convention protects the right to the personal development of everyone and involves the possibility to establish and maintain relations with others, including in the intimate area of life.[49] Therefore, in principle, criminal law can invade the area of sexual life based on the mutual consent of persons only if there are "*extremely serious reasons*"[50] for this. The *K.A., A.D. v. Belgium* case is characterised by the presence of a reason of this nature: in the situation under consideration, the applicants continued to carry out sadistic actions against the victim, ignoring her requests to stop it.[51] In other words, the acts of sexual nature carried out by the applicants had gone from the realm of mutual consent into the realm of coercion. That is exactly why their criminal conviction was recognised by the Strasbourg Court as a measure proportional to the aims pursued, which were necessary in a democratic society.

Thus, in this case, the ECtHR moved away from the "automatism" of restricting sexual freedom that it demonstrated in the 1997 case of *Laskey Jaggard and Brown*. Indeed, the Strasbourg Court developed a criterion for possible State interference in the sexual life of the individual – the presence of "extremely serious reasons" – and linked it to the lack of consent of the victim. The ECtHR recognised the actions of the Belgian State as appropriate to the ECHR not because sadomasochism, given its cruelty and traumatising nature, should in principle be prohibited for the sake of ensuring public morality, health and rights of others. That's not the point at all. The Strasbourg Court supported the Belgian authorities because they had penalised the applicants' actions which had been committed after repeated pleas for mercy by the victim, the wife of the first applicant. That is, the applicants continued to carry out their actions while realising that the victim was no longer willing to tolerate these actions: after asking for mercy several times, she clearly withdrew her initially given consent. And again we return to the category of consent in the sexual life of a person. If sexual relations occur in the absence of the consent of at least one of the persons, the State can and should intervene in it, because that is a violation of the sexual freedom of the individual.

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47 ECHR, *K.A., A.D. v. Belgium,* para. 78.

48 *Id.* paras. 80, 81.

49 *Id.* para. 83.

50 *Id.* para. 84.

51 *Id.* para. 85.

The analysis of the ECtHR jurisprudence leads to conclusions about a gradual increase of the importance of consent in the area of sexual life. It is "consent" that became the criterion by which it is possible to distinguish criminal from non-criminal.[52] Therefore, the further parts of our research will focus on different approaches to include the category of consent in the concept of sexual offences.

2. "Consent" and the Criminalisation of Sexual Offences

Consent as a key category of sexual offences separates criminal sexual behaviour from non-criminal behaviour. The presence of consent is the "point of no return" at which law enforcement bodies must decide whether or not it is possible to prosecute for particular conduct. As a part of the sexual offences concept, the establishment of consent can be done through two opposite approaches. One is based on the *presumption of consent* of the alleged victim. In other words, the victim is presumed to have given consent to engage in sexual relations until vices of his or her consent are proven (i.e. consent was given under duress or in a helpless state, etc.), in which even the formal existence of consent cannot be considered as such. Another approach is based on the *presumption of a lack of consent* of the alleged victim. It is presumed that the victim did not agree to have sexual intercourse, which is why it is the accused person who must demonstrate how he or she obtained the consent of the victim. At the same time, the proven presence of vices of consent *automatically* eliminates the possibility of obtaining consent. The difference between the approaches is apparent: in the case of the presumption of consent, the dispute is based on the victim's vices of consent to engage in sexual intercourse, in the case of the presumption of a lack of consent, the emphasis is transferred from vices of consent to the direct existence of the intended victim's consent. In fact, even if the vices of consent are not manifested outside, it does not mean the existence of the consent of the intended victim (for example, economic or kinship dependence is not always visible to the prying eye). It turns out that the absence of visible vices of the victim's consent and the existence of her or his consent are not equal categories.

The evaluation of these two approaches should also take into account the fact that presumptions are important not only in substantive and procedural law, but also in creating an image of an average man,[53] which often escapes from the view of lawyers who underestimate the imagery of law. Indeed, in the area of substantive law, the existence of, for example, the presumption of innocence involves the assumption

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[52] At the same time, the category of consent cannot be considered as absolute. As some authors rightly point out, a person engaged in prostitution is "consenting" to engage in sexual intercourse with her or his client not because she or he really wants to, but because it is necessary to make money (Marzano 2008, at 117).

[53] Rémy Libchaber, *Les présomptions, entre fonction probatoire et rôle substantial*, 11 Droit & Philosophie 129, 136–140 (2019).

of the law-abiding nature of each person, and the existence of a presumption of good faith – the assumption of reasonable use of one's civil rights, of avoiding the abuse of them. It turns out that the right is "designed" initially for the honest man.

Applying this reasoning to presumptions of consent and a lack thereof, it can be concluded that the significance of these presumptions is not limited to their direct influence on criminal law (as part of the concept of sexual offences) and criminal proceedings (concerning the shifting of the burden of proof). The presumption of consent creates an image of an average person who, by default, easily engages in sexual intercourse with others, thereby limiting their inviolability. On the contrary, the presumption of a lack of consent gives an image of a person who places above all their personality and the inviolability of their material shell – the body.

Let us briefly refer to the examples from the practice of international criminal justice, which demonstrates the existence of two different approaches to the criminalisation of sexual offences, so that our thought does not remain so hypothetical and theorised. Thus, in the famous case of the International Criminal Tribunal for the former Yugoslavia (hereinafter referred to as the ICTY), *The Prosecutor v. Furundžija*[54] (1998), Trial Chamber I defined as constitutional elements of rape the following:

> (i) sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) on the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.[55]

As a consequence, in the absence of the use of force, threats, coercion, the crime of rape cannot be constituted because it is obvious that elements (i) and (ii) are cumulative. In other words, if there is no vice of consent in the form of violence, threats, coercion – there is no rape. This is the example of the presumption of consent approach, which considers that the victim consents until defects of her or his consent can be proved.

Another approach based on the presumption of absence of consent was reflected in the decision of the International Tribunal for Rwanda (hereinafter referred to as the ICTR) in *The Prosecutor v. Akayesu*[56] (1998) case. In this judgement, the ICTR defined rape as

> a physical invasion of a sexual nature committed on a person under circumstances which are coercive. Sexual violence which includes rape, is

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[54] ICTY, *The Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Judgement, Trial Chamber I, 10 December 1998.

[55] *Id*. para. 185.

[56] ICTY, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-94-6-T, Judgement, Trial Chamber I, 2 September 1998.

> considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.[57]

Defining the crime of rape in this case, the ICTR sought to avoid the mechanical enumeration of the vices of consent (violence or threats) and refused to enumerate those parts of the body that should be involved.[58] A similar definition of rape was given in the decision of the Trial Chamber of the ICTR in *The Prosecutor v. Musema*[59] case (2000). In the *Akayesu* and *Musema* cases, it was determined that rape was any act "of a sexual nature which is committed on a person under circumstances which are coercive,"[60] irrespective of the manifested vices of consent.

Further perception of the second approach can be found in the ICTY judgment in *The Prosecutor v. Kunarac et al.*[61] case (2001). The judges (and it is interesting to note that presiding over the *Furundžija* and *Kunarac* trials was the same judge from Zambia) decided to clarify or, as it is stated[62] by some authors, to "expand the definition of rape" done in the *Furundžija* case. The Trial Chamber, deciding to retain the first part of the definition of rape from the *Furundžija* case, amended the second part as follows:

> (ii) sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.[63]

Therefore, both ICTY (in 2001) and ICTR judges believe that rape should not only be penetration of a sexual nature committed in various forms, with the use of force, threats, coercion (vices of consent), but also in the absence of the latter. That is, there

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57 ICTY, *The Prosecutor v. Jean-Paul Akayesu*, para. 598.

58 The judges of the Trial Chamber in the *Akayesu* case explicitly stated that they considered rape as a form of aggression the basic elements of which cannot be reflected in the legal rule by the enumeration of used body parts or objects (*Id.* para. 597).

59 ICTR, *The Prosecutor v. Alfred Musema*, ICTR-96-13-T, Judgement and Sentence, Trial Chamber, 27 January 2000, para. 965.

60 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgement, Trial Chamber, 2 September 1998, para. 688; ICTR, *The Prosecutor v. Alfred Musema*, ICTR-96-13-T, Judgement and Sentence, Trial Chamber, 27 January 2000, para. 965.

61 ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgement, Trial Chamber, 22 February 2001.

62 Gloria Gagiolli, *Les violences sexuelles dans les conflits armés : une violation du droit international humanitaire et du droit international des droits de l'homme*, 96 Revue internationale de la Croix-Rouge, Sélection française, Débat humanitaire : droit, politiques, action, Violences sexuelles dans les conflits armés 85, 90 (2014).

63 ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, para. 460.

may not be vices of consent, but this does not mean that the consent of the victim in such a case appears on its own. Its presence is to be proved.

In the *Kunarac* case, it was stressed that the issue of voluntariness of sexual contact should be assessed in the light of all the circumstances surrounding the commission crimes, and coercion should not be reduced merely to the use of violence or threat of its use.[64] At the same time, the existence of vices of consent in the form of violence, threats of violence, in principle, precludes the possibility of proving the existence of consent,[65] as we casually mentioned earlier. In other words, under the second approach, a lack of consent is not rigidly tied to the presence of vices of consent.

On the one hand, this approach was presented by researchers and practitioners as progressive and appropriate because it solves some issues of proving the constitutive elements of sexual offences. In situations of armed conflict, systematic attacks against civilians carried out in some situations as part of a large-scale plan or policy, the balance in interpersonal relations is levelled. In such situations (armed conflict or systematic attacks on civilians) victims are so disadvantaged that their vulnerability often does not require violence or threats to overcome the reluctance of victims to engage in sexual contact. On the other hand, those have convicted of rape interpreted in this way indicated that the victim had to resist in order to make it clear to the alleged perpetrator that sexual intercourse was undesirable. In 2002 the ICTY rejected the argument of the convicted that only the victim's resistance could provide adequate notice to the perpetrator of the undesirability of his sexual advances on the basis that "it is contrary to the law[66] and is absurd on the facts."[67] But in fact, the question of how consent or a lack thereof should be expressed for engaging in sexual intercourse has not lost its relevance. This will be discussed in more detail below.

Prima facie it is possible to give the following characteristics for the described approaches. *On the one hand*, if the right to have voluntary sexual intercourse is to be elevated to the rank of absolute, the second approach based on the presumption of a lack of consent is more appropriate. This is because it allows all cases of sexual acts where the consent of the victim is absent to be considered sexual offences, not only those where vices of her or his consent are present. That is, the protection of sexual freedom is comprehensive, it is not limited to cases of vices of consent. *On the other hand*, the approach based on the presumption of a lack of consent is questionable from the point of view of the rights of the accused.

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64 ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, para. 440.

65 *Id.* paras. 458–459.

66 In considering whether the victim needs to express resistance to the rapist in order for the act to be classified as rape, the ICTY turns to the legislation of various jurisdictions: California, New Jersey, District of Columbia and the Federal Republic of Germany (ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, paras. 130–133).

67 *Id*. para. 128.

It seems that any evidential presumptions are a technique designed to reverse the burden of proof. So does the presumption of a lack of consent requiring the accused person to prove the way of obtaining the victim's consent to engage in sexual intercourse. This presumption *de facto* leads to the shifting of the burden of proof: it turns out that the accused partially has to prove his or her innocence.

A number of recent events have influenced social consciousness and led it to turn its attention to the problem of sexual violence in modern society. In addition, the existence of two approaches in international criminal law that give different definitions of sexual offences has led to a debate on the applicability of the definitions based on presumptions of a lack of consent within national legal systems. Some researchers[68] supported the presumption of a lack of consent approach as more progressive and to be enshrined at the national level. Advocates of the contrary point of view emphasise in particular that the essence and direction of criminalisation of rape in international criminal law and national legislation differ: "in this national context, there is no attack against an entire population" and "the issue is typically the interactions between two individual people who are treated in law as equally autonomous individuals."[69]

Both in the real actions of national legislators and in the proposals expressed *de lege ferenda* it is possible to observe the manifestations of the global trend of a shift from the paradigm of consent to the paradigm of a lack of consent of victims of sexual offences *(I)*. At the same time, it should be recognised that the problem of relationship between the presumptions of consent or a lack thereof and the *meta*-presumption of criminal proceedings – the presumption of innocence – remains largely unresolved. In other words, the transition from the presumption of consent to the presumption of a lack of consent has not only a positive effect *(II)*. The Russian legislator is still inactive in the area of reforming crimes against sexual freedom and the sexual integrity of a person. Such situation contributes to an in-depth analysis on what paradigm of criminalising sexual violence is dominant in Russian law and whether manifestations of another paradigm are observed. It is thought that this analysis will answer the question of whether it will be rational to transfer Russian legislation from the track of the presumption of consent to the track of the presumption of a lack of consent.

2.1. Change of Presumption: The "Silence of the Lambs" or the "Roar of the Lions"?

The scandal around the Hollywood director Harvey Weinstein, which unfolded at the end of 2017 led to the emergence of the #*metoo* campaign mainly in the

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[68] Le Magueresse 2012, at 225–226; Melanie Randall, *Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming*, 22(2) Can. J. Women L. 397, 418 (2010).

[69] Alison Cole, *Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape Under International Law*, 8(1/2) Int'l Crim. L. Rev. 55, 75 (2008).

English-language segment of the Internet and its analogues (#*balancetonporc* in France, #*янебоюсьсказать* in Russia and Ukraine). This also led to awarding in 2018 the Nobel Peace Prize to Denis Mukvedzh and Nadia Murad who combatted rape during armed conflicts. All these events widely reported in the press are united by the fact that they are the result of the "liberation" of victims of sexual violence from the oppression of silence. In this sense, indeed, "the silence of the lambs" has become "the roar of the lions"! It turns out that one who *was considered* to be giving consent (because of her or his silence), can be, in fact, non-consenting at all. And it is recognised thanks to the fact that the former "consenting" began to speak. But these events are also united by the fact that they could not but influence the criminal law policy of some States in the field of sexual offences.

A clear example of this is France.[70] In the French Parliament at the moment many legislative projects (*projets*) and proposals (*propositions*) have been introduced. One of the main aims of these projects and proposals is to tighten accountability for committing sexual offences. Some projects and proposals become laws. The adopted law of 3 August 2018 on tightening the fight against sexual and sexist violence[71] increased, in particular, the statute of limitations on criminal prosecution for sexual crimes up to 30 years if committed against minors. This statute of limitations should be counted from the age of majority of the victim.

A similar influence (albeit in a more modest volume) can be traced in some other states: Ukraine, Sweden and Iceland.

Ukrainian Law of 11 January 2019 No. 2227-VIII "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine for the Purpose of Implementing the Provisions of the European Council Convention on Preventing and Combating Violence Against Women and Domestic Violence Which Came into Force"[72] expands

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[70] *See, e.g.*, Proposition de loi tendant à rendre imprescriptibles les crimes et les délits sexuels sur mineurs du 14 septembre 2017, Proposition de loi tendant à porter à trente ans le délai de prescription applicable aux crimes sexuels sur des mineurs du 25 avril 2017, Proposition de loi d'orientation et de programming pour une meilleure protection des mineurs victimes d'infractions sexuelles du 12 février 2018, Proposition de loi visant à renforcer la définition des agressions sexuelles et du viol commis sur des mineur-e-s de moins de 15 ans du 30 octobre 2017, Proposition de loi pour une meilleure protection des mineur.e.s victimes de viol et des autres agressions sexuelles du 26 octobre 2017, Proposition de loi tendant à renforcer la protection des mineurs contre les agressions sexuelles du 17 octobre 2017, Proposition de loi visant à requalifier les faits d'atteintes sexuelles en agressions sexuelles en agressions sexuelles ou viol du 18 janvier 2018, Proposition de loi visant à créer une présomption irréfragable d'absence de sentement pour les mineurs de moins de quinze ans ayant eu des relations sexuelles du 07 décembre 2017, Proposition de loi relative à la qualification de viols sur mineur en vue de fixer l'âge minimum de présomption du consentement sexuel à quinze du ans 12 octobre 2017, Sénat, Un cite au service des citoyens (Jul. 2, 2021), available at https://www.senat.fr/ and at http://www.assemblee-nationale.fr/.

[71] Loi du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes (Jul. 2, 2021), available at https://www.legifrance.gouv.fr.

[72] Закон України «Про внесення змін до Кримінального та Кримінального процесуального кодексів України з метою реалізації положень Конвенції Ради Європи про запобігання насильству стосовно жінок і домашньому насильству та боротьбу з цими явищами» (Jul. 2, 2021), available at https://zakon.rada.gov.ua/laws/show/2227-19.

the legal definition of the crime of rape. Now it includes *any act* of a sexual nature committed *without the voluntary consent* of the victim. Proving vices of consent are no longer mandatory for the legal qualification of an act as rape. Similarly in Sweden,[73] named the "rape capital of the world,"[74] as well as in Iceland[75] where the laws entered into force define the crime of rape through a lack of consent rather than through the use of violence, as was previously the case.

Moving now to a more technical level, it may be noted that the impact of these events on criminal law policy is expressed in a shifting of the paradigm used in the criminalisation of sexual offences (in particular, rape[76]). *On the one hand*, the system of sexual offences is something more or less well-established in the national legislation of various States. What is obvious, for example, is the fact that rape is criminalised one way or another (with a greater or lesser degree of gender focus in the legal definition) in all countries. In some countries (for example, in Russia now and in the United Kingdom until 1994[77]) rape is considered exclusively as a crime against females, since the victims could only be women. In France, the gender focus of rape was abandoned as early as 1980, but at the mental level rape still continues to be a crime against females.[78] It is worth noting that it remains in question (even in European States), for example, whether rape committed by one spouse in respect of the other can be criminalised.[79] Furthermore, it is impossible to avoid the influence of the cultural aspect of a certain State on the range of sexual offences specified in criminal legislation. In countries where customary law continues to operate (Afghanistan, Iran), the criminalisation of spousal

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73 Brottsbalk (1962:700) (BrB), 6 kap. Om sexualbrott (Jul. 2, 2021), available at https://www.lagen.nu/1962:700#K6.

74 Björn Borschos & David Shannon, *Indikatorer på sexualbrottsutvecklingen 2005–2017*, *Rapport 2019:5* [*Rapport on Phenomenon of Sexual Offenses 2005–2017, Rapport 2019:5*] (2019) (Jul. 2, 2021), available at https://www.bra.se/download/18.62c6cfa2166eca5d70e1919f/1565079287510/2019_5_Indikatorer_%20pa_sexualbrottsutvecklingen_2005_2017.pdf.

75 Almenn hegningarlög, nr. 19, 12 febrúar 1940 [General Criminal Code No. 19 of 12 February 1940] (Jul. 2, 2021), available at https://www.althingi.is/lagas/nuna/1940019.html.

76 Without denying the existence of countless forms in which sexual violence can appear, from rape and sexual slavery to sexual harassment, we will use the term "rape" as general for the sake of simplicity (Organisation mondiale de santé, Rapport mondial sur la violence et la santé (2002), at 165 (Jul. 2, 2021), available at https://www.who.int/violence_injury_prevention/violence/world_report/en/full_fr.pdf). The term "rape" will be used as a synonym for the terms: "sexual violence," "sexual crimes," "sexual offences." This will not affect the essence in any way, because the idea still remains the same, we shall consider sexual offences in general and rape as a particular case.

77 Jennifer Temkin, *Rape and Law Reform* in *Rape*: *An Historical and Cultural Enquiry* 55 (Sylvana Tomaselli & Roy Porter eds., 1986).

78 *See* interesting reasoning about this: Audrey Darsonville, *Le surinvestissement législatif en matière d'infractions sexuelles*, 34 Archives de politique criminelle 31 (2012).

79 On this issue, there is the practice of the European Court which dealt with this problem in the 1990s through the prism of Article 7 of the ECHR (*nullum crimen sine lege*): ECHR, *C.R. v. United Kingdom*, 22 November 1995, Series A no. 335-C; ECHR, *S.W. v. United Kingdom*, 22 November 1995, Series A no. 335-B.

rape is not yet possible in principle.[80] *On the other hand*, the fundamental discrepancy between national legal systems lies not even in the definition of sexual offences, but also in the degree of importance of the victim's consent to sexual intercourse for the qualification of an act as rape. There are two approaches (two paradigms) to this effect. They have already been mentioned above: now, to see global trends, there is a need to focus on this issue in more detailed comparative remarks.

The first of the paradigms based on the presumption of consent has historically emerged earlier. It is generally believed that the presumption of consent is a "child" of the 19th century. Until the mid-19th century, for example, English judges believed that rape was solely sexual intercourse with a woman against her will, committed using force, fear or deception.[81] In France in 1857, the judges of the Court of Cassation stated in one of their decisions:

> The crime of rape consists of abusing a person against his or her will, when the lack of consent results from physical or moral violence exerted against him or her, or when it results from any other means of coercion or deception to achieve, outside the will of the victim, the goal of the subject of the action.[82]

From these provisions it is noticeable that in the 19th century the fact of rape could be stated only if violence, threats, and deception were used to force sexual intercourse. In other words, rape occurred only in situations where there were manifested vices of the victim's consent.

It is therefore possible to conclude that the presumption of consent of the victim implies the definition of rape as a sexual act committed *with* coercion of the victim (or, more broadly, through the vices of his or her consent determined by each national legislator in its own way, which, *inter alia*, may be caused by threat, violence, deception, misleading, helpless state, etc.). In other words, the victim is presumed to be consenting to sexual intercourse until an apparent vice of his consent identified as a constitutional element of *actus reus* of rape is proven. Countries where the 19th-century approach continues to operate are: Russia[83] and, perhaps surprisingly, certain European countries, except Belgium, Cyprus, Germany, Iceland, Luxembourg and Sweden.[84] For example, under Russian law rape is defined as a

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80 Pejman Pourzand, *La violence sexuelle : cas symptomatique de l'anachronisme des perceptions juridiques afghane et iranienne*, 34 Archives de politique criminelle 241 (2012).

81 Peter Rook & Robert Ward, *Sexual Offences: Law and Practice* (2004); Lillian Artz & Dee Smythe, *Should We Consent? Rape Law Reform in South Africa* (2008).

82 Cour de cassation, Chambre Criminelle, arrêt du 25 juin 1857 (quoted in Le Magueresse 2012, at 227).

83 In Russia, there is perhaps only one presumption of the lack of consent (*see* the note to Article 131 of the Criminal Code of the Russian Federation on sexual acts with minors under 12 years of age). So it is currently impossible to say that this paradigm is dominant in Russian law.

84 Amnesty International, Europe: Right to Be Free From Rape – Overview of Legislation and State of Play in Europe and International Human Rights Standards (2018), at 9 (Jul. 2, 2021), available at https://www.amnesty.org/en/documents/eur01/9452/2018/en/.

> sexual intercourse with the use of violence or the threat of its use to the victim or other persons or with the use of the helpless condition of the victim [pt. 1 of Art. 131 of the Criminal Code of the Russian Federation].

The French legislator, in turn, defines rape as follows:

> Every act of sexual penetration, whatever nature it may be, committed with the use of violence, coercion, threats or deception [Art. 222-23 of the French Criminal Code].

These are two typical examples of the way to define the crime of rape using the presumption of consent. No violence, threats, coercion, deception – no rape.

However, it remains undeniable that, in case when the Prosecution failed to prove such circumstances, the crime of rape will not be found even if the victim claims that he or she did not consent to having sexual intercourse. In other words, if the victim engaged in sexual intercourse in the absence of consent, these circumstances did not constitute the crime of rape unless there were vices of consent.[85]

In modern legal literature, it is noted that in order to prove the existence of elements of the crime of rape, the Prosecution has, in fact, a "double burden of proof."[86] Indeed, it must prove the presence of sexual intercourse, as well as other elements (use of violence, threat, deception, the helpless state of the victim...) indicating the lack of victim's consent. It is difficult to agree with such allegations: the Prosecution always has a single burden of proof that cannot be divided, halved or fragmented. This burden is to prove all necessary elements of the offence (both *actus reus* and *mens rea*, as well as the contextual element if it is about international criminal law). In the end, no one would suggest, for example, that the burden of proof for a Prosecution in murder cases is doubled by virtue of its need to prove, firstly, the fact of a forcible death, and secondly, the accused person's intent to cause death.

The second paradigm (or approach) based on the presumption of a lack of consent assumes that rape should be defined as any sexual intercourse committed without the voluntary consent of the victim (even in the absence of explicit vices of his or her consent). After all, the fact is that if force, threats or deception were not used in relation to the victim, then this does *not always* mean having his or her true consent to engage in sexual intercourse. It is possible to imagine a lot of different types of dependence of the victim on a rapist (material or family dependence, for example), in which the latter does not even have to force the victim to engage in sexual intercourse. How can the Prosecution prove vices of consent in situations

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[85] In France, for example, in addition to the direct prescriptions of the law, this approach is supported by the judges of the Court of Cassation (François Desprez, *Preuve et conviction du juge en matière d'agressions sexuelles*, 34 Archives de politique criminelle 45, 50 (2012)).

[86] *Id.* at 50, 64.

where only the rapist's appearance scares the victim so much that he or she loses any capacity for resistance? In this case, sexual intercourse will take place, but at the same time, the rapist has no need to do anything violent in order to push the victim to "agree." How can the Prosecution establish the existence of vices of consent of the victim in this case if they are not objectified in the material world in any way (except the appearance of the rapist)? It is possible, of course, to imagine surreal images of the criminal trial in such a case: the Prosecution argues, insisting on the victim's subjective feelings, that the alleged rapist inflicts fear with the mere appearance, and the Defence, on the contrary, calls for a common sense and objective appraisal of the appearance of the accused, who is similar to a kind of prince from Disney fairy tales. What is the court to do?

Of course, the most controversial aspect of this approach is the fact that a person accused of committing rape must prove that he or she had made steps to obtain and, most importantly, had obtained the victim's consent to engage in sexual intercourse. The relations between the presumption of a lack of consent and the presumption of innocence will be discussed in detail below, but looking ahead, it should be noted that the doctrine proposes a way out of the delicate situation of the discrepancy between two evidentiary presumptions. Therefore, it is argued that

> the law may establish the Prosecution's duty to provide additional evidence of physical resistance, the words pronounced and other elements of the victim's behaviour which indicated the latter's lack of consent.[87]

Such a decision can hardly be considered effective in the sense that the victim may continue to claim that he or she did not agree, but psychologically could not resist actively. To require the presence of manifested signs of the victim's resistance means to move back from the presumption of a lack of consent to the presumption of consent.

The presumption of a lack of the victim's consent operates in many countries around the world, which demonstrates that this presumption is not linked to particular legal culture. Among such countries we can enumerate is, first of all, Canada. In 1992 in the legislation of this country a law labelled the "No means no" law by doctrine[88] was adopted. Canada is perhaps the flagship in this area, as the Canadian legislator has succeeded in carrying out a real revolution of the transition from presumption of consent to presumption of a lack of consent. This is probably because Canada is not a member of a regional (Inter-American) human rights protection system. The

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[87] Artz & Smythe 2008, at 28.

[88] Le Magueresse 2012, at 231. In fact, the name in question became particularly correct in characterizing the 1992 reform following the 1999 ruling by the Supreme Court of Canada in the *R. v. Ewanchuk* case, which will further be discussed (Elaine Craig, *Ten Years After* Ewanchuk *The Art of Seduction Is Alive and Well: An Examination of the Mistaken Belief in Consent Defence*, 13(3) Can. Crim. L Rev. (2009) (Jul. 2, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492625).

Supreme Court of Canada believes that consent should not be obtained for having sexual intercourse in general, but at each stage of sexual activity it is to be obtained newly. In *R. c. J.A.* (2011) the Court established that a woman had expressed consent to her partner to have sexual intercourse with him during which he was to choke her. The moment she passed out, the partner continued to commit acts of a sexual nature with her. The Supreme Court of Canada indicated that the victim's consent to sexual intercourse during suffocation was not (and could not be) obtained. The victim's consent after the moment she passed out was not (and could not be) obtained, that is why the partner's actions were of a coercive nature.[89]

Namibia and South Africa are African States which currently recognise a presumption of a lack of consent.[90] In the legislation of European states such as the United Kingdom, Belgium, Cyprus, Germany, Iceland, Luxembourg and Sweden,[91] the presumption of a lack of consent has recently been introduced.

Let us give some examples of how the presumption of consent is reflected in terms of domestic law. The British Sexual Offences Act of 2003 (Sec. 1 (1)) defines rape as follows:

> A person (A) commits an offence if – (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) *B does not consent to the penetration*, and (c) A does not reasonably believe that B consents.[92]

This definition is clearly based on the presumption of a lack of consent: rape as a sexual act committed without the consent of victim is not solely confined to cases of vices of his or her consent. However, the presumption of a lack of consent can be expressed "veiled," less explicitly.

Such an example exists at the international level. Let us refer to Rule 70 ("Principles of Evidence in Cases of Sexual Violence") of the Rules of Procedure and Evidence of the International Criminal Court (hereinafter referred to as the ICC). Paragraph (c) of this Rule states:

> Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence.

The quoted rule can be interpreted so that even if the manifested vices of consent are absent and the victim does not resist, it is not yet a reason to claim that she has

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89 *R. c. J.A.*, 2011 C.S.C. 28 (27 mai 2011) (Jul. 2, 2021), available at https://juricaf.org/arret/CANADA-COURSUPREME-20110527-2011CSC28.

90 Artz & Smythe 2008, at 33–35, 46–47.

91 Amnesty International, *supra* note 84, at 9.

92 Sexual Offences Act 2003 (Jul. 2, 2021), available at https://www.legislation.gov.uk/ukpga/2003/42/part/1/crossheading/rape/2004-05-01.

agreed to sexual intercourse. In the case of vices of consent, however, the consent of the victim cannot be established in principle, as stated in paragraph (a) of the Rule in question:

> Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent.

In summary, we note that the Rules of Procedure and Evidence of the ICC insist that in the case of vices of consent there can be no voluntary consent, and in the absence of vices of consent such consent must not be assumed.

It is worth noting that the modern trend (or what we call "the shift of criminal policy paradigm") is the "migration" (or attempts to migrate) of some jurisdictions from the group that recognises the first approach to supporters of the second approach. This was pointed out in 2003 by the European Court of Human Rights in its fundamental decision on rape in the *M.C. v. Bulgaria* case. Particularly, the ECtHR noted that the States' rejection of the presumption of consent and the requirement of using violence, threats or deception to establish the crime of rape is "*a clear trend*"[93] observed in European states. This opinion of the Strasbourg Court was taken into account by the drafters of the 2011 Istanbul Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. Article 36-2 of this Convention provides:

> Consent [to engage in sexual intercourse] must be given voluntarily as the result of the person's free will assessed in the context of surrounding circumstances.

The explanatory report to the Convention states that, given the requirements of the ECtHR, States should move away from the narrow definition of rape. The requirement to apply physical violence in any case entails the impunity of sexual assault offenders.[94] In each specific situation it is necessary to establish the consent of the alleged victim to engage in sexual intercourse and it is necessary to do so in accordance with all the circumstances, rather than based on the findings on stereotypes and myths of the behaviour of victims of sexual violence in such situations.[95]

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93 ECHR, *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII, para. 156.

94 Rapport explicatif de la Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique, Istanbul, 11.V.2011, para. 191 (Jul. 2, 2021), available at https://rm.coe.int/16800d383a.

95 *Id*. para. 192.

In addition, the U.N. Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) has already had the opportunity to recommend that a number of countries change the first approach with the presumption of consent to the second with the presumption of a lack of consent, since it is in compliance with current international requirements (in particular the provisions of the 2011 Istanbul Convention): Romania, Sweden, Portugal, Croatia, Finland, Hungary and Norway.[96] Thus, in its concluding observations on the combined eighth and ninth periodic reports of Portugal of 24 November 2015, the Committee pointed to the State's responsibilities

> to take the necessary measures to adequately address sexual violence in its laws and policies and ensure that all forms of non-consensual sexual acts are included *in the definition of rape* under the Penal Code.[97]

The Committee recommended the Portuguese legislator change the track from the narrow definition of the crime of rape, which necessarily requires the presence of vices of consent. More directly, the Committee expressed its wish to Hungary in the concluding observations on the combined seventh and eighth periodic reports of this State of 26 March 2013. The Committee stressed the need to

> amend the Criminal Code [of Hungary] to ensure that rape is defined on the basis of a *lack of voluntary consent* of the victim.[98]

Moving from the presumption of consent to the presumption of a lack of consent is not as straightforward as it could hypothetically be considered. Both the presumption of consent and the presumption of a lack thereof are characterised by advantages and disadvantages which cannot be ignored. Therefore, when assessing the perspectives of such shifting, it is not necessary to bypass the analysis of the positive and negative features of both presumptions.

2.2. Advantages and Disadvantages of Moving from the Presumption of Consent to the Presumption of a Lack of Consent

Let's start with the *advantages*, among which at least *two*, albeit very impressive ones, can be named.

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96 *See* about this Amnesty International, *supra* note 84, at 8.

97 Concluding observations of the U.N. Committee on the Elimination of Discrimination against Women on the combined seventh to ninth periodic reports of Portugal of 24 November 2015, para. 25(a) (Jul. 2, 2021), available at https://www.ohchr.org/en /hrbodies/cedaw/pages/cedawindex.aspx.

98 Concluding observations of the U.N. Committee on the Elimination of Discrimination against Women on the combined seventh and eighth periodic reports of Hungary of 26 March 2013, para. 21(g) (Jul. 2, 2021), available at https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx.

First, using of the presumption of a lack of consent is justified, first and foremost, in terms of the rights of rape victims. This presumption provides them with a higher level of protection by dodging societal stereotypes about rape victims (the so-called "culture of violence"[99]). In our view, this social phenomenon developed under the influence of two groups of stereotypes, one of which directly relates to sex offences and their victims and the other is of a gender nature and affects women exclusively.

First of all, the "culture of violence" which influences law enforcement officers involves separating all rape cases as well as their victims into "real" and "not real."[100] The "real" victim, according to sociologists,

> resists at a time of showing aggression towards her; she reports rape to the police in the shortest possible time; by her appearance, she shows clear oppression and depression; she immediately interrupts all contact with her rapist, and if she is in a couple with him, she leaves with by all her belongings. [She] is also morally impeccable.[101]

It is also believed that if a victim engages in sexual intercourse without the expression of consent, she must resist, which can be proved by signs of violence on her body.[102]

Furthermore, according to some gender stereotypes, a woman should not drink much alcohol, so if she did so, a man "has the right" to reasonably believe that she therefore expressed consent to sexual intercourse.[103] Similarly, a woman who wears a short skirt and comes home down a dark deserted alley, a woman who agreed to get into a man's car, or a woman who agreed to go into an apartment with a man for a cup of coffee – they all agreed (which follows from their behaviour) to engage in sexual intercourse.[104]

Case-law of the ECtHR dealing specifically with the situations of rapes can demonstrate the existence of such stereotypes. In the *Aydın v. Turkey* case the Court pointed out:

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99 Noémie Renard, *En finir avec la culture du viol* 54 (2018); Le Magueresse 2012, at 224; Randall 2010, at 406.

100 For "real" and "not real" rapes, *see* the most authoritative work on the subject: Susan Estrich, *Rape*, 95(6) Yale L.J. 1087 (1986).

101 Renard 2018, at 54.

102 Randall 2010, at 418.

103 Jennifer M. Brown et al., *Characteristics Associated with Rape Attrition and the Role Played by Skepticism or Legal Rationality by Investigators and Prosecutors*, 13(4) Psychol. Crime L. 355, 357 (2007).

104 *Id.* at 358–359.

> In the view of the Government her decision to marry and her ability to be sexually active so soon after her claimed traumatic experience were *scarcely consistent with the behaviour of a rape victim*.[105]

In *M.C. v. Bulgaria*, the Strasbourg Court noted:

> In particular, no resistance on the *applicant's part or attempts to seek help from others had been established*.[106]

In the *I.G. v. Moldova* case we can find the following passage:

> The [national] court concluded that the sexual intercourse had been mutually consensual on the basis of *the fact that there had been no signs of physical violence on the applicant's body*, as confirmed by the forensic expert reports.[107]

In the *D.J. v. Croatia* case we see:

> Legal practice also required *resistance from the* [*rape*] *victim* … In practice the victim was often victimised and traumatised in the proceedings, in particular through the theory of the so-called "victim's contribution." The judges often analysed *aspects of the victim's behaviour, such as wearing a short skirt, visiting night clubs, hitchhiking and so on, and on the basis of such facts applied decreased sentences to the perpetrators*.[108]

Finally, in the decision in the *W. v. Slovenia* case Strasbourg judges noted:

> the verdict was based on the findings that the *applicant had not seriously resisted sexual intercourse*.[109]

All these passages of the decisions of the ECtHR reveal traces of the "culture of violence" in *various* national jurisdictions, that once again underlines the universality of this social phenomenon.

The approach based on the presumption of consent instils a "culture of violence" in public opinion. By requiring the involvement of violence, threats and bodily harm,

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105 ECHR, *Aydın c. Turkey*, 25 September 1997, Reports of Judgments and Decisions 1997-VI, para. 68.

106 ECHR, *M.C. v. Bulgaria*, para. 61.

107 ECHR, *I.G. v. Moldova*, no. 53519/07, 15 May 2012, para. 23.

108 ECHR, *D.J. v. Croatia*, no. 42418/10, 24 July 2012, paras. 71, 72.

109 ECHR, *W. v. Slovenia*, no. 24125/06, 23 January 2014, para. 9.

the criminal law makes it clear that only in this case are the victims of rape "real." Otherwise, if the alleged victims do not conform to the set of stereotypes of "a culture of violence," law enforcement officials do not consider themselves obliged to carry out a full investigation of the facts reported to them and initiate criminal proceedings. The victim is making things up or, at best, exaggerating. This is why the literature notes that "*No Criming*" situations are not something unusual in sex crime cases.[110] Another approach, based on the presumption of a lack of consent without requiring proof of vices of the victim's will, takes into account to a greater extent the psychology of victims of sexual violence. They are not always able to resist and openly object to have sexual intercourse (not to mention "Stockholm syndrome").

Secondly, it is clear that the presumption of a lack of consent protects a larger range of victims because it does not require mandatory vices of consent of the latter. The presence of vices of consent and the lack of consent of the victim are not equivalent concepts. For example, if the victim was forced to engage in sexual intercourse with a rapist if his or her appearance alone scares him or her, it is unlikely that victim's consent is in any way implied. At the same time, the rapist did not use violence or threats thereof *de facto*, therefore evidence of the coercive nature of sexual intercourse will be absent.[111] It is no wonder that cases of sexual offences are characterised by a lack of sufficient evidence and by scepticism regarding the testimony of an alleged rape victim in most domestic legal systems.

At the same time, when the presumption of a lack of consent is used, the vice of consent of an alleged rape victim is excluded from the subject-matter of the case. This approach significantly reduces the evidence base necessary to prove a crime of rape. However, in this case proving consent was obtained must be done by the Defence to get the charges dismissed. Does this situation correspond to the rights of accused?

Let's proceed to consider the shortcomings of the transition to the presumption of a lack of consent. Without claiming to be exhaustive we shall list three shortcomings. *The first* one is related to the difficulties and complexities of the evidentiary process in the cases of sexual offences. The French Court of Cassation stressed that

> in cases of sexual offences, according to the general rule, *in the absence of witnesses*, the testimony of the victim shall be compared with the testimony of the accused person.[112]

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[110] Brown et al. 2007, at 356.

[111] To be fair, it should be noted that, for example, in France, where the presumption of consent is legally recognized, sometimes (but extremely rarely) judges agree even in the absence of resistance from the victim to establish that the violence has been used. This may indicate attempts to move progressively from presumption of consent to presumption of lack thereof (Desprez 2012, at 53).

[112] Cour de cassation, Chambre criminelle, 4 avril 2007, pourvoi n° 07-80253 (quoted in Desprez 2012, at 61).

Indeed, sexual offences, being inherently sexual acts, are committed, because of the shamefacedness of human nature, mainly in the absence of prying eyes. It therefore turns out that the main evidence in these cases is the testimony of an alleged victim and the testimony of an accused, which are often diametrically opposed. Since the presumption of a lack of consent does not require evidence for corroborating the victim's testimony with other evidence (for example, material traces of violence), the judges' task to assess evidence in cases of sexual offences is quite complicated. The situation is also exacerbated by the fact that, according to sociological and legal studies, the number of false denunciations in cases of sexual offences is higher than in other cases.[113]

Secondly, regarding the presumption of a lack of consent, the issue of the proper form of consent expression is extremely controversial. The legal doctrine of the early 21st century noted that "it is not always easy for a man to understand that a woman does not agree."[114] J. Temkin hints at the well-known problem of "female flirtatiousness": "no means yes."

How should a person express his or her consent to engage in sexual intercourse? The answer to this question is not easily to find. One thing is clear. It is not necessary to make it weird and demand a dialogue before each sexual act of similar content: "– Do you agree? – Yes, I agree, let's start." But if the expression of consent with the word "yes" is not required, then there is an even more difficult question: how to assess whether the accused person *bona fide* understood that his partner wishes to engage in sexual intercourse with him? In this regard,[115] two models of expression of consent are distinguished in the theory of communication: *behavioural* (consent is an expressed desire to do something; according to this approach, the accused person's perception of *the victim's desire* to engage in sexual intercourse is analysed) and *communicative* (consent is directly expressed through words or actions; according to this approach, the accused person's perception of *this kind of words or actions* of the alleged victim is subject to analysis).[116] For example, in Canada, according to the Supreme Court position expressed in the *R. v. Ewanchuk*[117] case, a communicative way of expressing consent was chosen. It was necessary for the accused to prove that he *believed* that the victim *has expressed* consent (communicative theory), not that he *believed* the victim *has desired* intercourse (behavioural theory). In another decision, the Supreme Court of Canada stated that

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113 Jennifer Temkin, *Rape and the Legal Process* (2002); Brown et al. 2007, at 356.

114 Temkin 2002, at 121.

115 Brett 1998.

116 Craig 2009.

117 This case is infamous for the fact that "silent" consent to sexual intercourse was prohibited (*Id.*).

> the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying "no," but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying "yes."[118]

That is why "acquiescence" is no longer, in the opinion of the Canadian Supreme Court, the consent that necessary in the cases of sexual offences.

One should not ignore the fact that consent in the area of sexual offences is understood differently than in any other area of human life. Often, in order to prove consent, judges take into account the behaviour of victims of sexual violence before sexual intercourse (for example, the victim was in favour of the accused person's acts, so-called *art of seduction*). At the same time, no one will suggest that, for example, the consent of a patient to surgery is based only on his behaviour before the medical intervention:[119] if a person came to the hospital to carry out an examination, this does not yet mean that he has expressed his consent to the medical intervention.

The problem of expressing the consent of the victim is complicated by the existence of "transitional aspects" and "ambiguous situations"[120] when the victim agreed to have some actions and not to have others, while keeping silence and taking no opposing measures to such actions. For example, a touch to the shoulder entailed a kiss, which in turn entailed undoing the blouse... If the alleged victim consented to such acts, could the accused person believe *bona fide* in his or her desire to engage in sexual intercourse? Or, as in Jessica Jay's famous song "*Casablanca*," "*a kiss is still a kiss*" and nothing else? The Supreme Court of Canada assesses cautiously, on a case-by-case basis, the entire situation as a whole.

Thirdly and finally, with the transition to the presumption of a lack of consent, the issue of the rights of the accused is extremely controversial. The point is that technically changing one presumption to another entails the shifting of the burden of proof. Switching of the dominant presumption implies for the accused person an additional duty: to show that he or she did indeed attempt to obtain the consent of the alleged victim and finally received it. How does the shifting of the burden of proof by switching the dominant presumption correlate with the *meta*-presumption of criminal proceedings – the presumption of innocence? The Canadian reform of 1992, which has been repeatedly mentioned above, and the adoption of the law "No means no" were accompanied by the criticism that tightening the rules of proof the victim's consent violates the presumption of innocence of the accused.[121]

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118 *R. v. Park* [1995] 2 S.C.R. 836 (Jul. 2, 2021), available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1272/index.do.

119 Brett 1998.

120 Craig 2009; Sheila McIntyre et al., *Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law*, 20(3) Can. Woman Stud. 72, 77 (2000).

121 McIntyre et al. 2000, at 80.

This is because it was believed that the alleged victim's evidence of forced sexual intercourse was sufficient to prove the fact of a sexual offence.

If we refer to the ECtHR's jurisprudence, the jurisdiction of which does not extend to Canada but the opinion of which is significant to European countries, its position on the matter is: the introduction of evidentiary presumptions must be accompanied by various guaranties to protect the presumption of innocence.[122] More specifically, an exhaustive analysis of the European Court disparate jurisprudence on the impact of diverse evidentiary presumptions on the presumption of innocence[123] allows one to formulate a number of generalising conclusions.[124] The first two conclusions are formulated in an affirmative form (what the State is enabled to do), while the last two conclusions are presented in a negative form (what the State is not enabled to do).

First, the right to the presumption of innocence is not absolute which implies the possibility for governments to establish various factual and legal presumptions.[125] Consequently, both the presumption of consent and, more importantly, the presumption of a lack of consent do not *per se* contradict the letter and spirit of the ECHR. *Second*, at the same time, by introducing any presumption, the government must maintain a reasonable balance of interests and take into account the importance of considering and resolving the case, as well as respect the rights of the defence.[126] It follows that the burden of proof should not be shifted to the Defence in such a way that it is *forced* to prove anything.[127] *Third*, the deprivation of the judge's real capacity to assess evidence and thereby the "devastation" of the essence of the presumption of innocence is a violation of Article 6-2 of the ECHR.[128] In cases of sexual offences this requirement of judicial capacity to assess evidences is met, since among the evidence, there will be at least the testimony of the victim and the medical report that the victim actually engaged in sexual intercourse. In this regard,

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122 Ludovic Hennebel & Hélène Tigroudja, *Traité de droit international des droits de l'Homme* 1339 (2016).

123 ECHR, *Salabiaku v. France*, 7 October 1988, Series A no. 141-A; *Pham Hoang v. France*, 25 September 1992, Series A no. 243; *Telfner v. Austria*, no. 33501/96, 20 March 2001; *Radio France and Others v. France*, no. 53984/00, ECHR 2004-II; *Falk v. the Netherlands* (dec.), no. 66273/01, ECHR 2004-XI; *Haxhishabani v. Luxembourg*, no. 52131/07, 20 January 2011; *Klouvi v. France*, no. 30754/03, 30 June 2011; *Iasir v. Belgium*, no. 21614/12, 26 January 2016.

124 Among this practice, ECHR *Salabiaku v. France* is doctrinally called the "leading case" (*Харрис Д., О'Бойл, Уорбрик К.* Право Европейской конвенции по правам человека [David Harris et al., *Law of the European Convention on Human Rights*] 623 (Vasily A. Vlasikhin (transl.), Anatoly I. Kovler (ed.), Moscow, 2016).

125 ECHR, *Falk v. the Netherlands* (dec.).

126 ECHR, *Salabiaku v. France*, para. 28; *Pham Hoang v. France*, para. 33; *Falk v. the Netherlands* (dec.); *Radio France and Others v. France*, para. 24; *Haxhishabani v. Luxembourg*, para. 38; *Klouvi v. France*, para. 1; *Iasir v. Belgium*, para. 30; *Zschüschen v. Belgium* (dec.), para. 22.

127 ECHR, *John Murray v. the United Kingdom*, 8 February 1996, Reports of Judgments and Decisions 1996-I, para. 54.

128 ECHR, *Salabiaku v. France*, para. 28; *Klouvi v. France*, para. 41.

the *irrefutable* presumptions that some national legislators are trying to introduce in the field of sexual offenses pose a particular challenge. In France, the authors of a number of projects and propositions of laws propose introducing an irrefutable lack of consent presumption of minors under the age of 15. Do presumptions of this kind meet the requirements of the ECtHR? *Fourth,* the presumption of innocence will be considered violated if, without establishing all the circumstances in accordance with the procedure prescribed by law, the court renders a decision that reflects the culpability of the person.[129] In other words, if the court knows in advance everything that is reflected in its decision, this situation will constitute a violation of the presumption of innocence.

Conclusion

Therefore, both the presumption of consent and the presumption of a lack of thereof used in cases of sexual offences have advantages and disadvantages. Our hope is that this essay demonstrates that the shifting from one presumption to another should not become a "change of gloves": this is about human rights, both alleged victims of rape and accused persons. It seems that the introduction of the presumption of a lack of consent in cases of sexual offences is not *per se* a violation of the right to the presumption of innocence if at the same time:

(a) the application of a lack of consent presumption is not automatic, the judge is actually involved in the proof process and not turned into a mechanical decision-making machine;

(b) the accused is given various means of protecting his or her rights (the ECtHR assesses always the proportionality of the introduction of a legal presumption in one case or another);

(c) the keeping silence by the accused and his or her refusal to prove the way he or she obtained the alleged victim's consent should not be interpreted as his or her plea of guilty, since the imperative obligation of the accused to prove anything violates the presumption of innocence.[130]

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[129] ECHR, *Klouvi v. France*, para. 39.

[130] ECHR, *Telfner v. Austria*, para. 15.

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