M.C. v. Bulgaria – a Swedish Perspective

Petter Asp*

1 Introduction ……………………………………………………...…. 192

2 The Case ………………………………………………………….. 195

3 The Consent Report and M.C. v. Bulgaria ……………………….. 199

4 An Alternative Interpretation ……………………………………... 202
- 4.1 The Task of the Court and the Convention System ……….…. 202
- 4.2 The Structure of the Court's Reasoning ……………………….. 204
- 4.3 The Importance of the National Interoperative Approach …….. 205
- 4.4 References to Statements of the Bulgarian Authorities ………... 206
- 4.5 Margin of Appreciation ……………………………………... 207
- 4.6 The Wrongful Focus upon Rape and the Nature of Consent …... 207

5 Concluding Remarks ………………………………………………. 211

* Professor Iain Cameron and Dr Kerstin Berglund has both read the script and given helpful comments. The remaining errors are my own.

Scandinavian Studies In Law © 1999-2012

1 Introduction

1. In the case of M.C. v. Bulgaria the European Court of Human Rights added yet another judgement to its case law concerning the *positive obligations* of the Convention states.[1] In this case the Court found that Bulgaria had violated its positive obligations under articles 3 and 8 by falling:

> "short of the requirements inherent in the States' positive obligations – viewed in light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse".[2]

2. In this essay I will analyze and comment upon this case in a Swedish perspective using the Swedish debate on sexual offences as a point of departure. My conclusions, though, will mostly concern the interpretation of the case as such, and thus be general in nature (i.e. they are not valid only in a Swedish context).

3. As indicated, I will take my point of departure in Sweden. In Sweden there has, for many years, been an ongoing debate about the way the legal system deals with sexual offences. The debate has been quite intense and it has focused on a lot of different issues, e.g., the design of the legislation as such, the court's application of the legislation, the attitudes of public officials involved in investigating and prosecuting rape, the tendency to ask intimidating question about the victims sexual history etc. The debate has often started (or re-started) with a court case that has attracted public attention[3] or – but not as often – with a controversial reform proposal.[4]

4. As regards the debate on the design of the legislation, the case of M.C. v. Bulgaria has often been invoked as an argument for a reform. The case, it is claimed, implies that the present legislation – which entered into force in 2005 and according to which a conviction for rape (cf. section 4.6 paragraphs 1–4 infra) presupposes that the perpetrator has used violence or threats or that he has improperly taken advantage of the fact that the victim has been in a helpless or in some other state of incapacitation – is insufficient and that it has to be replaced (or complemented) by a legislation that is built on notion of non-consent. A frequently used short-formula for a legislation that builds on the notion of non-consent, rather than on violence, threats, force etc., is "consent based legislation" (in Swedish: samtyckesbaserad lagstiftning).[5]

---

1 *See, e.g.*, Cameron, *An Introduction to the European Convention on Human Rights*, 5th edition, Uppsala 2006 p. 45 f. On positive obligations in a criminal law context, *see*, *e.g.*, Emmerson and Ashworth, *Human Rights and Criminal Justice*, London 2001 p. 78 ff.

2 *See* M.C. v. Bulgaria, paragraph 185.

3 *See e.g.* NJA 1993 p. 310, NJA 1997 p. 538 and NJA 2004 p. 231.

4 *See* especially SOU 1976:9.

5 Since the term consent based legislation may be misunderstood (as meaning e.g. a legislation which has non-consent as its rational, as the reasons behind the norms, but which

5. In this article I will try to show that (and why) this position is untenable. This is not done for the purpose of denying that the case is of great importance both in putting up a (ambitious and important) standard as regards protection against sexual abuse and in emphasizing the values at stake.[6] On the contrary: the case is highly relevant when discussing the proper design of the future legislation on sexual offences. I am in a sense trying to argue that we, when discussing the case, should shift focus – *from* the question whether we are required to have a consent based legislation *to* the question what we should regard as valid consent.

6. The argument that the case of M.C. v. Bulgaria necessitates a reform of the Swedish law on sexual offences has been used by different persons and in different contexts.[7] In this text I will, for the sake of clarity,[8] take my point of departure in a recent report written by the former professor of criminal law at the University of Stockholm, Madeleine Leijonhufvud.

7. The reasons for this are twofold. Professor Leijonhufvud is not only one of the most important debaters in this field, but recently she has also published a

---

relates to sex obtained by violence, threats or misuse of helplessness in the legislation) I want from the very start to be very explicit as regards the definition: I will use the term consent based legislation when referring to legislation, according to which it is explicitly prescribed in the legislation, that non-consent on the part of the partner is a sufficient requirement for establishing the offence (i.e., a legislation that has non-consent as the explicit bottom line). (All general conditions for liability, e.g. intent, disregarded.)

6 *See, e.g.*, Conaghan, *Extending the reach of Human Rights to Encompass Victims of Rape*: *M.C. v. Bulgaria*, Feminist Legal Studies 2005 p. 154 f.

7 As indicated this interpretation of the case is widespread. One could, e.g., refer to Amnesty International, Case Closed, Rape and Human Rights in the Nordic Countries, p. 144, to different proposals made by members of the parliament (*see* e.g. Motion 2004/05:Ju22 and Motion 2008/09:Ju426). *See also* Wennberg, *Våldtäkt – med eller mot kvinnans vilja?,* Juridisk Tidskrift 2004-05 p. 128 ff (who is a bit more careful as regards her conclusions). Further, I have also myself, been supervising students who has come to the conclusion that M.C. v. Bulgaria necessitates a reform of Swedish rape law etc. In the international literature one could refer to e.g. Pitea, *Rape as a Human Rights Violation and a Criminal Offence: the European Court's Judgment in M.C. v. Bulgaria*, Journal of International Criminal Justice, 2005 p. 454, who seems to take the view of the Consent Report, or at least interprets the case quite extensively ("In other words, the Court has found that the Convention may be interpreted as requiring how domestic criminal law must be drafted, interpreted and applied, with a view to expanding the scope of substantive criminal law.") and Rudolf & Eriksson, *Women's rights under international human rights treaties: Issues of rape, domestic slavery, abortion, and domestic violence,* International Journal of Constitutional Law, Advance Access, published June 2007, p. 6 footnote 35, whose interpretation is a bit more restrictive ("The Court's approach does not amount to prescribing the full definition of a crime."). *See also* Conaghan, *Extending the reach of Human Rights to Encompass Victims of Rape: M.C. v. Bulgaria*, Feminist Legal Studies 2005 p. 155 f, who appear to take the latter view, i.e. that the case is circumscribing rather than prescribing ("it endeavours to prescribe clear normative limits on the content and the application of rape law in individual States").

8 A golden rule, when it comes to the exchange of views, is that one should avoid arguing against "generalized" positions (often) held by no one.

Scandinavian Studies In Law © 1999-2012

semi-official report including a proposal for changed legislation as regards the central sexual offences. The report has the title “Samtyckesutredningen” (The Consent Report, my translation) and its basic proposal is that the present sections on rape, sexual coercion and sexual abuse (Chapter 6 sections 1–3 of the Criminal Code) should be replaced by one single new section built upon the notion of *(in)voluntariness*: anyone who has sex with a person who does not participate voluntarily should be convicted of sexual abuse.[9]

8. In the report, the case of M.C. v. Bulgaria is invoked as one reason that necessitates a reform of this kind.

9. The report was produced as a result of the fact that professor Leijonhufvud, in March 2008, was appointed by the Environmental (Green) Party as special investigator with the task of considering the existing legislation on sexual offences and especially whether the present legislation should be replaced by a new legislation built on non-consent.[10]

10. The position taken in the report, i.e. that Sweden is obliged under the Convention to change its law on sexual offences, has (so far) not been accepted by the government. Thus, in a 2005 bill to the parliament (on a reform of Chapter 6 of the Criminal Code, i.e. the legislation on sexual offences) the government came to the conclusion that the proposals in the bill – containing, *inter alia*, a rape statute built on the use of violence, threats or misuse of persons being in a helpless state or otherwise incapable – were compatible with the requirements under the convention.[11]

11. Nevertheless, the question whether the Convention obliges Sweden to change its law on sexual offences (i.e. the position taken in the Consent Report) or whether it does not (the position taken by the Government and the parliament) is still very much alive. As indicated above (see footnote 7) the first mentioned position is often used in the political debate (e.g. by members of the parliament and by different NGOs), and it is the official position of at least one of the seven political parties represented in the parliament.

12. In addition the question will be dealt with by a legislative committee that was appointed by the Government in June 2008, a couple of months before the Consent Report was delivered to the Environmental Party. The committee has the task of evaluating the 2005 reform and considering a reform of the legislation, and one of the issues especially mentioned in the instructions to the committee is that it shall consider whether the legislation on rape should be

---

9 The reason for building the law on the concept of (in)voluntariness rather than on non-consent is that Leijonhufvud wants to avoid proscribing cases involving “misrepresentation” or “fraud”.

10 *See* the Consent Report p. 103–107 for the instructions.

11 *See* proposition 2004/05:45 p. 38 ff. Cf. also the position taken by the Council on Legislation at p. 206 ff (implying that there might be reason to adjust the protection against abuse when being in especially cumbersome situations). The Council on Legislation (Lagrådet) is a body (constituted of present and former Justices of the Supreme Court and the Supreme Administrative Court) with the task of scrutinizing proposed legislation as regards its relation to the constitution, to the legal system in general, to the principle of rule of law etc. *See* the Instrument of Government Chapter 8 section 18.

based upon coercion or upon non-consent. The instruction does not specifically relate to the interpretation of M.C. v. Bulgaria or to Sweden's obligations under the European Convention on Human Rights, but it will, of course, be very difficult for the committee not to deal with these issues when considering whether there are reasons for a reform. This legislative committee will deliver its report in October 2010.[12]

13. All in all, the question whether the European Convention on Human Rights, as interpreted in M.C. v. Bulgaria, makes it mandatory to have a consent based legislation (i.e. a legislation according to which sex without consent is a sufficient requirement to establish the offence; see footnote 5) will most certainly be one of the themes dominating the discussion on whether or not we need a new legislative reform in this area.

2 The Case

1. As should be evident from the text above, the aim of this essay is not to give a complete account of the case of M.C. v. Bulgaria. In order to make the analysis, that will be conducted in section IV *infra*, comprehensible, it is nonetheless necessary to give a basic picture of the case and of the reasoning of the court. This will be done in the present section. I would, however, recommend everyone that has the possibility to read the original judgement.

2. The background to the case can be summarized as follows.

3. The applicant, a fourteen year old girl, had (allegedly) been raped by two different men after a night spent at a couple of disco bars. After a complaint had been filed by the applicant's mother, a preliminary investigation was initiated by the district prosecutor. The investigation eventually led the investigator to the conclusion that the case should be closed since there was no "evidence that [the alleged offenders] had used threats or violence" (see paragraphs 9–55).

4. The district prosecutor, however, ordered an additional investigation, stating that the initial investigation had not been objective, thorough or complete (paragraph 56). As a consequence of this decision, the investigator reopened the case and took some additional investigatory matters – for example the investigator had contact with a psychiatrist and a psychologist giving their opinion on, *inter alia*, the question:

> "whether it was likely that the applicant would have spoken calmly with Ms T., the singer at the restaurant, and then listened to music in the car, if she had just been raped and whether it was probable that several days after the alleged rape the applicant would have gone out with the person who had raped her". (Paragraph 57.)

The experts stated, inter alia, that the facts that the applicant had (possibly) had a conversation with Ms T. after one of the rapes and that she had been going out

12 *See* Dir. 2008:94.

with one of the alleged perpetrators a couple of days after the events, did not exclude the possibility of her being raped.

5. But also this time the investigator came to the conclusion that the case should be closed. On the basis of the report given by the investigator, the district prosecutor then decided to close the case: the use of force or threats had not been established beyond reasonable doubt and, in particular, no resistance on the applicant's part or attempt to seek help from others had been established. (Paragraphs 57–61.)

6. The applicant appealed to the regional and the central level of the prosecution authority in Bulgaria, but the appeals were dismissed. (Paragraphs 62–65.) After these decisions, the applicant requested that criminal proceedings for perjury should be initiated against two person who had been heard as witnesses in the investigation. The prosecutor – the same prosecutor that had decided to close the rape case – refused this request stating:

> "that it was unfounded and even abusive, as all the facts had been clarified in previous proceedings". (Paragraphs 66–67.)

7. A complaint was brought before the European Court of Human Rights.

8. In its judgment the court started by giving an account of the circumstances of the case and of the relevant domestic law and practice (parts I and II of the judgement) and it also made an account of trends in comparative and international law (part III of the judgement). In the latter part the court dealt with: (i) the legislation in some European countries (Belgium, Denmark, Finland, France, Germany, Hungary, Ireland and Slovenia), (ii) the (2002)5 recommendation of the Committee of Ministers of the Council of Europe on the protection of women against violence (recommendating that the member States should penalize any act committed against non-consenting persons, even if they do not show signs of resistance), (iii) the definition of rape under international law (as interpreted by the International Criminal Tribunal for the former Yugoslavia) and (iv) the recommendation given by the United Nations Committee on the Elimination of Discrimination against Women.

9. After having dealt with the complaint[13] and after having given an account of the submissions of the parties and the Interights, (paragraphs 109–147) the court started its own reasoning.

10. The Courts started (paragraphs 148–153) with a section in which the Court justified the conclusion that the Convention States:

> "have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution".

13 Reiterated by the Court as follows: "The applicant complained that Bulgarian law and practice did not provide effective protection against rape and sexual abuse, as only cases where the victim had resisted actively were prosecuted, and that the authorities had not investigated the events … effectively."

11. Having drawn this conclusion the court examined the modern conception of rape and its impact on the positive obligations of the Member States (paragraphs 154–166). In this respect the Court noted that States "undoubtedly enjoy a wide margin of appreciation" as regards the means to ensure adequate protection against rape, but also that this margin of appreciation is circumscribed by the provisions of the Convention (paragraphs 154 and 155). Further, the Court noted that there is trend towards "abandoning formalistic definitions and narrow interpretations of the law in this area" (paragraph 156), meaning *inter alia* that there is no longer a requirement of resistance in the statutes of the European states (paragraph 157) and that there is – even though the legislation of most European States have definitions of rape that contains references to the use of violence or threats (paragraph 159) – a tendency to apply a broader approach which puts focus on non-consent. In some states reference to physical force has been removed (paragraph 158); in others:

> "the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms … and through a context-sensitive assessment of the evidence" (paragraph 161).

The same tendency is also found in an international context (paragraphs 162–163).

12. The court concluded this part of the judgment as follows:

> "166. In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim."

In this context it should, perhaps, be noted that it is, first and foremost, this passage of the judgement that has been used as an argument for the position taken in the Consent Report; and *read in isolation* one can, of course, say that it undoubtedly ("penalisation of *any* non-consensual sexual act") provides strong support for that interpretation.

13. In the next section the court applied this standard to the case.

14. The Court started by stating that its task is to examine:

> "whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligation"

and it underlined that its task is not to examine single errors or omissions in the investigation. (Paragraphs 167–168.)

15. As regards the legislation the Court found that the Bulgarian Criminal Code defined rape in a way which by and large resembles the wording found in other statutes of the Member States (no mention of physical resistance, but still defining rape by reference to the means used to obtain submission; paragraph 170), but it also added that the legislation is not in itself decisive:

> "171. What is decisive, however, is the meaning given to words such as "force" or "threats" or other terms used in legal definitions. For example, in some legal systems "force" is considered to be established in rape cases by the very fact that the perpetrator proceeded with a sexual act without the victims' consent or because he held her body and manipulated it in order to perform a sexual act without consent. As noted above, despite differences in statutory definitions, the courts in a number of countries have developed their interpretation so as to try to encompass any non-consensual sexual act".

16. When examining the application of the law in Bulgaria the Court found that it was hard to arrive at a safe conclusion as regards the question whether every sexual act carried out without the victim's consent is punishable under Bulgarian law, that the Government had not been able to disprove the applicants allegation of a restrictive practice (for example, no case law or commentaries were provided showing that the legislation is applied in a broad way) (paragraphs 172–174) and that the authorities, in the specific case:

> "failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made". (Paragraphs 175–178.)

As regards the assessment of the facts in the case, the Court continued as follows:

> "179. It is highly significant that the reason for that failure was, apparently, the investigator's and the prosecutor's opinion that, since what was alleged to have occurred was a "date rape", in the absence of "direct" proof of rape such as traces of violence and resistance and calls for help, they could not infer proof of lack of consent and, therefore, of rape from an assessment of all the surrounding circumstances. That approach transpires clearly from the position of the investigator and, in particular, from the regional prosecutor's decision … and the Chief Public Prosecutor's decision."

17. Even though the Court acknowledged that it might, in practice, be difficult to prove lack of consent in the absence of "direct" proof of rape:

> "181. … the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent. …
>
> 182. That was not done in the applicant's case. The Court finds that the failure of the authorities in the applicant's case to investigate sufficiently the surrounding circumstances was the result of their putting undue emphasis on "direct" proof of rape. Their approach in the particular case was restrictive,

> practically elevating “resistance” to the status of defining element of the offence”. (Paragraphs 181–182.)

18. Thus, with reference to the abovementioned factors – and to a couple of other features of the case (that the authorities had attached little weight to the particular vulnerability of young persons, that the investigation was handled with significant delays) – the Court found that Bulgaria had failed to live up to its positive obligations under Articles 3 and 8 of the Convention.

> “185. In sum, the Court, without expressingan opinion on the guilt of P. and A., finds that the investigation of the applicant’s case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States’ positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.”

3 The Consent Report and M.C. v. Bulgaria

1. Having given this short account of the case of M.C. v. Bulgaria it is time to show how this judgement is used in the Swedish debate, and especially in the Consent Report.

2. As indicated above the main proposal of the Consent Report is that the present sections on rape, sexual coercion and sexual abuse should be replaced by a statute built on the concept of voluntariness: a person who has sex with someone that does not voluntarily participate shall, according to the proposal, be convicted of sexual abuse. If the perpetrator has used means amounting to an offence under Chapters 3 and 4 of the Criminal Code, or if the sexual abuse has had such a result, the perpetrator should be convicted for this offence as well and the crimes should “collectively” be labeled rape.

3. This proposal is both interesting, complex and thought provoking. For example, it raises questions about the role and importance of “labeling” (does it, e.g., matter – all other things equal – whether someone is found guilty of rape or sexual abuse?), about questions relating to the principles of concurrence of crime (according to the proposal two different offences merges into a third, but the perpetrator shall also be convicted of the offences forming the constituent part of the collective offence) and about the relation between the proposal and the present legislation. However, I have no intention of reviewing the proposal, or of analyzing the abovementioned questions in this text. Instead, I will focus solely on the weight attached to the case of M.C. v. Bulgaria (as one out of four basic reasons for the proposal).

4. In section 2 of the report the reasons for the proposed reform are presented. The main reasons are:

(i) that the reform is necessary in order to comply with international obligations under, *inter alia*, the European Convention on Human Rights (as interpreted in the case of M.C. v. Bulgaria),

(ii) that the reform is necessary if we want to have a legislation on sexual offences that corresponds to the present view of sexuality (only sexual acts in which both parties voluntarily participates are ok),

(iii) that the reform is necessary in order to counteract harmful behavior (not only sex obtained by the means of violence and threats is harmful), and

(iv) that the reform is necessary for reasons of legal security (a legislation that contains requirements of violence and threats will have to be applied in an extensive way; this is problematic from the viewpoint of legal security).[14]

Thus, the report clearly builds on the assumption that the case of M.C. v. Bulgaria necessitates a reform of the present legislation.

5. In section 2.1 (the part of the report that deals with the question what is required in order to comply with international obligations) it is, for example[15] – and with reference to a legal opinion written by Elisabeth Palm, published as an enclosure to the report – concluded that:

> "Sweden is obliged to have a law which means that non-consent constitutes a sexual offence."[16]

Some fifteen pages later it is stated – even more explicitly – that it is not an option to keep the present legislation:

> "Thus, we cannot choose to keep our rules as they are, without violating our international obligation".[17]

Professor Leijonhufvud has taken this position also earlier, inter alia in different chronicles and debate articles.[18] Thus, the fact that the report takes this position was not very surprising.

6. As indicated above there is an enclosure to the report which contains an expert opinion on the meaning of M.C. v. Bulgaria written by the former (1998–2003) judge of the European court of Human Rights, Elisabeth Palm.

7. The opinion by Elisabeth Palm is, in the report, used – more or less – as an authoritative interpretation of the case. As indicated in subsection 5 supra, the

---

14 *See* the Consent Report p. 67 ff, 75 ff, 78 ff and 82 ff. *See* also Berglund in Juridisk Tidskrift 2008-09 no. 3 (not yet published).

15 *See also*, e.g., p. 28 in the Consent Report.

16 The Consent Report p. 72. My translation, original in Swedish: *"Sverige måste alltså ha en lag som innebär att bristande samtycke konstituterar ett sexualbrott"*.

17 The Consent Report p. 87. My translation, original in Swedish: *"Vi kan således inte välja att bibehålla vår reglering som den är utan att bryta mot våra internationella internationella förpliktelser"*.

18 *See e.g.* Leijonhufvud & Diesen, *Sexbrottens moment 22*, Svenska dagbladet 5 th of July 2004, Leijonhufvud, *Våld och sex – hur skyddar den nya sexualbrottslagen?,* Krönika, tillgänglig på: "www2.amnesty.se/svaw.nsf/Krönika/49F851E137C865DEC1256FBD0055 65FB?opendocument", and Leijonhufvud, *Krav på samtycke före samlag*, Svenska Dagbladet 9th of September 2007 and *Hånfullt och beklämmande av åklagare*, Svenska Dagbladet 16 th of Sepbember 2007.

conclusion that Sweden must have a legislation based on non-consent is drawn with explicit reference to a passage in the opinion. The passage that is referred to, reads as follows:

> "It is completely clear that the case law of the European Court of Human Rights in this area now means that it is the lack of consent that is decisive for the question whether rape has been committed. … Even though it has happened occasionally that the Court has changed its case law in certain cases, it seems highly unlikely that the Court – after its comprehensive examination of national and international rules – would change its case law would there be a new case, against another state, where non-consensual sex has not been considered to constitute rape."[19]

8. I have no intention of going into details as regards the opinion, but it should be noted that the opinion – in a way corresponding to the judgement of the Court – contains formulations that might be understood as indicating that things are not as clear-cut as they might seem to be. For example, the opinion explicitly states that the Court *did not* rule out the Bulgarian legislation as such (despite its references to the means used by the perpetrator to obtain submission). Another example that could be worth mentioning is that the opinion, directly after the above quotation, continues as this:

> "It follows from the judgment that the convention states are given a wide margin of appreciation as regards the construction of their legislation as long as its application means that any non-consensual act is punished."[20]

Thus, one could perhaps argue that the opinion itself is open to interpretation and that it is questionable whether – or at least to what extent – it actually supports the position taken in the report.

9. Be that as it may: the important thing in relation to this essay is not to clarify the position of the opinion, but rather to highlight the position taken in the main report, i.e. *that the Convention as interpreted in the case of M.C. v. Bulgaria necessitates a reform of the Swedish law on rape*.

10. The rest of this article will, as indicated above, be devoted to the task of showing that the position taken is untenable. Thus, I will argue: (i) that the case of M.C. v. Bulgaria does not – in the way often implied in the Swedish debate – necessitate a reform of the Swedish law on sexual offences and (ii) that it does

---

19 The Consent Report p. 123 f. My translation, original in Swedish: "Det står helt klart att Europadomstolens praxis på detta område nu innebär att det är bristande samtycke som är avgörande för om våldtäkt föreligger. Även om det förekommit att domstolen har ändrat sin praxis i vissa fall framstår det som helt osannolikt att domstolen efter denna noggranna genomgång av nationella och internationella regler skulle ändra sin praxis om det kommer ett nytt mål mot ett annat land inför domstolen där bristande samtycke till en sexuell handling inte har bedömts som det som konstituerar brottet våldtäkt."

20 My translation, original in Swedish: *"Av målet kan utläsas att konventionsstaterna ges en stor frihet att utforma sin lagstiftning så länge tillämpningen av den innebär att varje form av sexuell handling som skett utan samtycke bestraffas."*

not settle the issue of how the Swedish law of sexual offences should be designed (should a reform be considered desirable).

11. This is neither to say that the case is irrelevant (the case could, of course, be considered to *provide a reason* for a reform even though it does not *necessitates* a reform), nor is it a general judgement on the reasonableness (as such) of a non-consent standard in the law of rape. I will get back to these "negative" reservations in my concluding remarks.

4 An Alternative Interpretation

4.1 The Task of the Court and the Convention System

1. As indicated, I will in this section carefully examine the judgement with the purpose of displaying that, on a reasonable interpretation, the case does not imply that the Convention states are obliged to introduce a consent based legislation. However, before getting into the details of the case I would – humbly and without strong argumentation – like to start with some reflections on the general task of the Court and of the Convention System.

2. The general task of the system built upon the European Convention on Human Rights is to set a minimum standard as regards some central civil and political rights. The task of the Court is, first and foremost, to draw the line between the acceptable (not necessarily praiseworthy) and the unacceptable in concrete cases, thereby setting and developing standards.[21]

3. In performing this task the system will inevitably lead to sort of a harmonization of the legal systems of the Convention States, at least on deeper levels (as regards basic values, principles etc.). The ambitions as regards harmonization is, however, obviously limited in comparison with, *e.g.*, the work done within the EU (where harmonization or approximation is an explicitly recognized aim, at least in certain areas).[22] The ambitions are – in contrast with the ambitions within certain areas of the EU – (and also when it comes to positive obligations) essentially *negative* in character. The aim is not to find the one and only way to do it,[23] but rather to exclude the unacceptable.

4. Thus, the Convention, as applied in M.C. v. Bulgaria, surely provide a minimum standard and it is one which actually is fairly ambitious.

5. Some might be inclined to say that this is, in itself, problematic since it means that the Convention is used for the purpose of promoting state punishment (rather than to protect people from the state).[24] Others are more

---

21 *See* on the role of the Court, *e.g.,* Cameron *Protocol 11 to the ECHR: the European Court of Human Rights as a Constitutional Court?*, Yearbook of European Law, volume 15, 1995 p. 219 ff (e.g. p. 235 f).

22 *See e.g.* Lenaerts & Van Nuffel, *Constitutional Law of the European Union*, 2nd edition, London 2005 p. 267 ff.

23 That is not necessarily the aim of the EU either; cf. the terms "harmonization" and "approximation" which both indicate a certain laxness.

24 *See e.g.* Greve, *Juridiska konflikter, Afskedsforelaesning den 28nde marts 2008* p. 24.

positive in relation to this development, e.g. in that it makes clear that the "investigation and prosecution of rape raise human rights issues *for victims* as well as for defendants".[25]

6. In my view one should, for obvious reasons, be very careful when obliging states to make use of their punishing powers. This is especially true when it comes to measures that might put pressure on prosecutors and courts to "achieve results" (i.e. to get people convicted; it is obvious that such measures might collide with other and very basic rights); the rights of the victim must be understood as meaning a right to a serious and thorough investigation, but it is evidently problematic to start to think in terms of a victims' rights to convictions. On a more general level, I would, however, like to add that – on a realistic account of Human Rights – positive obligations (also in the sphere of criminal law) are probably necessary if one wants the rights to be real rather than illusory. And that is all due to our dependence on the state: we are in modern society, with its weak informal social control – whether we like it or not – dependent upon the state and on the protection it provides. And in this context one should perhaps add that some of the statements made during the proceedings clearly indicate that there is a need for a minimum standard as regards the protection against rape.[26]

7. Be that as it may, the main point to be made here is that even a fairly ambitious minimum standard is essentially negative: it excludes certain things, but it does not prescribe in detail how to avoid the unacceptable.

8. Any legal minimum standard must, arguably and in addition, focus not only on a particular piece of legislation as such, but also take into account how the legislation is applied in practice, how it interacts with other types of rules etc. In this context one could e.g. refer to the basic presumption or the starting point for comparative legal research, i.e. that even if things look different on the surface, they might be – and probably are – quite similar as regards the result.

9. Having said this I would like to end this section by simply inviting the reader to reflect upon the questions whether it is reasonable to assume

(i) that a Court which have the task of providing a minimum level as regards the protection of human rights would take the step *from* ruling out insufficient law and practice *to* positively prescribing how the criminal law proscriptions in the convention states should be constructed, and

(ii) that such a Court would focus solely on the design of the legislation[27] – thus disregarding the question of how the proscriptions work in practice.

10. In addition one could reflect upon the question whether the Court would not hesitate to rule out a legislative design which is (see paragraphs 88–100 and

---

25 *See* Conaghan, *Extending the reach of Human Rights to Encompass Victims of Rape: M.C. v. Bulgaria*, Feminist Legal Studies 2005 p. 153 ff.

26 *See infra* section 4.4.

27 *See* Träskman, *Har det gått mus i kvinnofriden?*, Festskrift till Madeleine Leijonhufvud, Stockholm 2007 p. 333.

170) commonly used in the Convention states.[28] One should, for obvious reasons, not exclude the possibility that the Court would do such a thing under certain conditions – imagine e.g. that very far reaching terrorist legislation was introduced retroactively in the 27 Member States of the European Union – but it seems clear that the Court would take such a step only in fairly extreme cases. The Court does, for good and for bad, build its case law on the common tradition of the Convention States; in that sense the Court is a controller rather than a revolutionary.[29]

4.2 The Structure of the Court's Reasoning

1. The conclusion implicitly drawn in the previous section – i.e. that the Convention does not require a consent based legislation (i.e. a legislation under which sex without consent explicitly is a sufficient condition for establishing the offence) – becomes even more evident if one considers how the court deals with the case before them, i.e. with the case of M.C. v. Bulgaria.

2. When the Court is about to apply its standard to the case in front of it, it is clear from the very start (see paragraph 170) that the Bulgarian Criminal Code defines rape in a way which is not deviating from most other European states, but which would certainly not be compatible with a clear-cut legislative non-consent standard.

3. The proscription (which is cited in paragraph 74 of the judgement) comprises:

(i) cases where the woman is incapable of defending herself,
(ii) cases where the woman is compelled by the use of force or threats, and
(iii) cases where the woman is brought to a state of helplessness by the perpetrator.

(This is a design which is roughly comparable with the Swedish rape statute in Chapter 6 section 1 of the Criminal Code.)

4. Despite the fact that it is clear that the Bulgarian legislation does not explicitly relate to non-consent as the base line standard for judging whether a sexual offence has been committed, the Court goes on and examines how the law has been applied.

5. Thus, the Court does not find that the design of the Bulgarian legislation as such – due to the mere fact that it is constructed in a certain way – amounts to, or implies that there has been a violation of the convention. Rather, it goes on and makes a careful examination of the way in which the law was applied – relating not only to the application in the specific case, but also to the way the section is applied in general – by the Bulgarian courts and authorities.

---

28 *See* Träskman, *Har det gått mus i kvinnofriden?,* Festskrift till Madeleine Leijonhufvud, Stockholm 2007 p. 332 f. Cf. also the explicit statements by the Court in paragraph 167.

29 In this context one could add that the case was a Chamber judgment concerning Bulgaria, i.e. it was not a case to which Sweden was a party (cf. the general obligation under article 1 and the more specific one under article 46). These factors does not, of course, undermine the importance of the case, but they imply some carefulness when discussing the implication of the case for the design of the Swedish legislation.

6. This structure, this way of reasoning, I would say, speaks for it self; had the construction of the statute been decisive, the court would not have reasoned (see paragraphs 175 ff) extensively about the way the Bulgarian authorities dealt with the complaint, neither would it have worried about the general interpretation and application of article 151 § 1 of the Bulgarian Criminal Code .

4.3 The Importance of the National Interpretative Approach

1. Not only the role of the Court and the structure of the judgement, but also *explicit statements* made by the Court, indicates that the way in which the legislation is interpreted and applied in practice is highly relevant when assessing whether (or not) a State lives up to the standards set by the Convention.

2. Thus, in paragraph 161 the Court notes that prosecution of "non-consensual sexual acts in all circumstances" are not seldom sought by means of interpretation (of statutory requirements such as "coercion", "violence" and "threat") and through a "context-sensitive" assessment of existing evidence. Here it is, e.g., referred to French law according to which the terms "violence, coercion, threats or surprise" have been applied in an extensive way encompassing, *inter alia*, cases where the victim's refusal is "inferred from the circumstances, such as paralyzing shock, as a result of which the victim could not protest or escape". (See paragraph 95.)

3. Later on – after having found that the Bulgarian Criminal Code refers to means such as force, threats and helplessness – the Court even more explicitly states that the decisive thing is the meaning given to the terms ("force" etc.) that are used for constructing the offence. The Court exemplifies this by noting that in some legal systems the requirement of "force" is considered to be fulfilled by the fact that the perpetrator proceeded without the victim's consent *or* because "he held her body and manipulated it in order to perform a sexual act without consent". (Paragraph 171.)

4. This approach is also reflected in paragraph 167 where the Court makes clear what its task is:

> "the Court's task is to examine whether or not the impugned legislation *and practice and their application in the case at hand*, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention". (Ital. by the author.)

5. I must say that I have difficulties in understanding how one, having read these paragraphs, can come to the conclusion that the judgement requires the Convention states to introduce a consent based legislation (i.e. a legislation according to which it is explicitly prescribed, that non-consent on the part of the partner is a sufficient requirement for establishing the offence, see footnot 5); it simply seems to be a conclusion which directly contradicts explicit statements by the Court.

6. And it is not much easier – in fact, even harder – to understand how one can come to the more specific conclusion that Swedish law must be changed. As regards Swedish law there are clear examples that the requirement of force

(violence or threats) – which is one alternative requirement for the principal offence of rape under Chapter 6 section 1 of the Swedish Criminal Code – has been interpreted extensively and with focus on involuntariness (see e.g. NJA 1993 p. 310) and the requirements have since then been lowered (new legislation was, as indicated above, introduced in 2005). Thus, even though the legislation still builds upon the usage of violence etc., it is a good example of a legislation which have been applied in a fairly extensive (rather than restrictive) way. (One can, of course, discuss whether the Swedish law draws the demarcating line on the right place – cf. for example the adjustments discussed by the council on legislation, referred to *supra* in footnote 11.)

4.4 References to Statements of the Bulgarian Authorities

1. In addition it seems reasonable to assume that the outcome of the case was – at least to some extent – affected by the legal approach used, and the attitudes held, by the Bulgarian authorities on the one hand *and* by the submissions of the Bulgarian Government on the other. It is not unfair to say that some of the statements referred to in the judgement are definitely problematic both from a human rights perspective and from a women's rights perspective.

2. Thus, the decisions of the regional and central prosecutorial office (dismissing the appeal of the applicant and including statements such as: "[t]his presupposes resistance, but there is no evidence of resistance in this particular case") are quoted in section I of the case (see paragraphs 64 and 65). Later, (in paragraphs 178 and 179) the Court explicitly refers to these decisions when concluding that the authorities has:

> "failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made".

3. In a similar way the Court reiterates the submissions of the Government (see paragraphs 122 and 123) and later makes clear that it has found the submissions inconsistent and unclear and incapable of disproving a restrictive application of the legislation (paragraph 174). At first the Governement actually (paragraph 122) stated that:

> "proof of physical resistance was required in cases of rape and that, moreover, in accordance with 'international practice, including in France' rape was only possible between strangers, whereas the applicant knew the alleged perpetrators."

4. The fact that the Court gives such an emphasis on the behavior and the statements of the Bulgarian authorities clearly indicate that it is making an all-in-all assessment of the case (rather than an investigation that focus on the design of the legislation).

5. One could perhaps also add that the emphasis put on the statements made by the authorities in different decisions indicates that the Convention states should not only make correct (or acceptable) decisions, but also be careful in giving proper reasons for them; it should be obvious for all lawyers that one can

make a decision which is fully justifiable and give very poor and even misleading reasons for it.

4.5 Margin of Appreciation

1. When discussing the implications of the case one must also bear in mind that the Court explicitly states that the States, as regards the means to ensure adequate protection against rape, "undoubtedly enjoy a wide margin of appreciation" and that, in particular, "perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account". (Paragraph 154.)

2. Having said that, the Court emphasizes, however, that this margin of appreciation is limited by the obligations under the convention, and – this is important to note – it is precisely in this context the Court examines the "trends" in national and international law in this area and finds that the positive obligations under Articles 3 and 8 requires "the penalization and effective prosecution of any non-consensual sexual act".

3. This is, as stated above, a strong – and perhaps even surprisingly far reaching – statement which clearly has implications for the Convention states' law and practice as regards sexual offences. One might say that the very essence of the case is that it *limits* the state's margin of appreciation by invoking an evolving standard of rape.[30]

4. Nevertheless, this statement (about the limits of the margin of appreciation) *must be read in relation to the starting point*, i.e. the wide margin of appreciation enjoyed by the Convention states. Thus, what the Court says (see paragraphs 154–155) is that:

> the states *have* a wide margin of appreciation … *which is circumscribed* by the Convention.

4.6 The Wrongful Focus upon Rape and the Nature of Consent

1. The abovementioned factors have been focusing on the Court and its reasoning. However, I think that there are a couple of additional factors, which should be taken into account when interpreting the judgement and which support the above conclusions.

2. These factors are connected to (i) the indefinite possibilities to structure legislation in different ways and (ii) the relation between consent on the one hand and different types of means for achieving acceptance, submission etc. on the other.

3. Let us start with the first factor: the indefinite possibilities to structure legislation in different ways. The starting point here is that there is no natural offence of rape and no natural distinction between rape and other imaginable sexual offences such as sexual coercion, sexual abuse, indecent assault or statutory rape. When saying this I am not, obviously, referring to any special

---

30 *See* Rudolf and Eriksson, Women's rights under international human rights treaties: Issues of rape, domestic slavery, abortion, and domestic violence International Journal of Constitutional Law Advance Access, published june 2007 p. 6.

jurisdiction, but I am merely attempting to illustrate the facts that one may in the law divide sexual offence into different categories and that this categorization may be done in thousands of ways. For example, what is considered as sexual abuse in one state may well be considered as rape in another. And acts classified as rape in one state could be labeled (simply) as coercion in another (which indicates that one could abstain from having a specific category of sexual offences).

4. If one accepts this starting point it follows that one, when discussing the implications of M.C. v. Bulgaria, cannot – as has often been done in the Swedish debate – focus solely on the Swedish section on rape in Chapter 6 section 1 of the Swedish Criminal Code when considering whether Swedish law lives up to the standard set by the Convention. Rather, one must look at the totality of the provisions of (at least) Chapter 6 of the Criminal Code.[31] For example certain types of low intensity threats (e.g. a threat to turn someone in to the police) are clearly not such as to establish responsibility for rape, but they might very well trigger responsibility for sexual coercion.

5. Secondly, I would like to draw attention to the concept of consent and its very close connections to different types of means for achieving acceptance, submission etc. If one allows oneself to think about the concept of consent one quickly realizes that consent is neither equivalent with "saying yes" nor with a positive attitude towards a certain thing (i.e. with a certain state of mind). Rather consent is "saying yes" in a way which is – using a terminology from Alan Wertheimer[32] – *considered to be transformative in a relevant sense (morally, legally etc.)*. Thus, one could say that consent is (i) acceptance on the part of the individual (ii) under such conditions that we consider the acceptance to be such as to make a difference (as regards the assessment of a certain act).

6. In relation to this two specifications need to be made.

7. First, one should be careful not to read too much into the word "transformative". The term transformative seems to connote that one thing evolves out of the other. This is in my view a misrepresentation. A normal intercourse between two people (be it in a life-long relationship, a one night stand and everything in between) is obviously misrepresented if thought of as constructed of an instance of rape which, by adding consent, is transformed into an intercourse. Thus, consent is not really transformative, but rather *distinctive*. It makes a difference in that it distinguishes different things from each other, but it does not transform one into another: an instance of vaginal penetration is *either* a *or* b (rape *or* a simple intercourse) and the *distinguishing* feature is the presence of consent.

8. Second, and more importantly, the focus on the conditions under which the individual acceptance is given implies that there is a close connection between consent (what we count as consent, what we should count as consent

---

31 I share this conclusion with, e.g., the Council on Legislation (*see* proposition 2004/05:45 p. 208) and Per Ole Träskman, (*see Har det gått mus i kvinnofriden*, Festskrift till Madeleine Leijonhufvud, p. 333).

32 Wertheimer, *Consent to Sexual Relations*, Cambridge 2003 p. 119 ff.

etc.) on the one hand, and the means for obtaining "consent" on the other hand. This may seem confusing, so let me give a couple of examples.

9. Consider first an example taken from the world of the university: I am, as a university professor, often asked to do things that I do not necessarily enjoy, for example I may be asked to write an article or to give a lecture in a situation where I do not really have the time to do it, and in which I rather save my spare time for my family. At times – quite often actually – I nevertheless agree to do it. Do I consent?

10. I would say that I do. However, this conclusion is not only based upon the fact that I say "yes", but also upon the assumption that no improper means has been used (by the persons asking me) in order to make me say yes. There is, e.g., a clear difference between the following situations as regards the question whether valid (distinctive) consent has been given:

i) A asks B if B wants to give a lecture. B hesitates. A flatters B (says that B:s lectures are brilliant) and A also alludes to B:s loyalty to the university (if you do not do it we will loose the possibility to give this lucrative course in the future). B accepts to give the lecture.

ii) A asks B if B wants to give a lecture. B hesitates. A shows B a gun and says that he or she will shoot B unless B accepts to give the lecture. B accepts to give the lecture.

11. The point to be made is that there will always be (a) means to achieve a "yes" that are considered as acceptable (in the sense that they do not preclude valid consent) and (b) means that are not acceptable (in the sense that they mean that "yes" is not to be equated with consent).

12. And sex is not different in this respect. Let us assume that A is trying to get physical with B, and that B hesitates. In such a situation A might, at least theoretically, say e.g. (I have no ambition to make the examples realistic as regards their "form"; it is quite clear, however, that they are realistic as regards substance):

"Have sex with me…

(a) or I'll shoot you

(b) or I'll go mad

(c) or I will not help you

(d) or I'll die of arousement

(e) or I'll start to cry

(f) and I'll help you to install your new TV

(g) and I'll buy you a romantic dinner

(h) because I really love you!"

13. If you do not add any extra circumstances there is a clear difference between, e.g., (a) and (h). It is quite clear that acceptance of sex after (a) will normally be enough to establish rape and that acceptance of sex after (h) will not. However, if we, in relation to (h), add

(i) that A is B:s teacher, that A is presently correcting a very important exam taken by B, and that A has invited B to discuss "the possibilities to get an A (i.e. the highest grade)", *or*

(ii) that A is working as a nurse at a asylum and B is one of A:s patients, *or*

(iii) that B is 14 years old, *or*

(iv) that B is so drunk that she has lost most or all of her normal inhibitions,[33]

then it is not that evident that the acceptance on the part of B should count as morally distinctive.

14. If one thinks of these examples, it becomes evident that consent is to a large extent the reflection of the non-use of means, or non-existence of factors, that *negate* consent. This connection between consent and means of obtaining "consent" is reflected in the construction of the English legislation: it focuses on consent, but it also enumerate factors which should be presumed to negate consent.

15. The point of highlighting this connection is twofold. The first point is, of course, that it means that there is no sharp dividing line between a consent based legislation and a legislation constructed as the Swedish legislation. One could say that, in Sweden, non-consensual sexual acts are defined negatively by the different factors mentioned in – first and foremost – Chapter 6 of the Criminal Code.

16. The second point to be made is that we have a very limited knowledge of what consent actually means, until we have discussed what we accept – or rather: what we should accept – as legally distinctive consent in the context of sex (having regard to the situation under which acceptance is given, the means used by the person taking the initiative etc.).

17. Until we have had such a discussion we do not actually know what a consent based legislation means.

18. This also means that it is impossible to unify the laws of different states simply by referring to the concept of consent. Imagine that all states would introduce a consent based legislation. Would this mean that they would necessarily agree on

– the age of consent,

– the question whether consent is negated by economic pressure,

– the question whether consent is negated by an offer hard to refuse (e.g. an offer to assist a person stuck with a brokedown car in the middle of nowhere),

– the level of drunkedness necessary to negate consent etc?

19. Of course not. Consent is not a dime which you put into the "jukebox" of moral deliberation (sort of automatically triggering the result), but rather the result coming out of it.

20. This is not to say that one should not use consent as a standard, merely that one should be aware it is a standard which is empty and thereby very approximate.

33 Rape can, according to Swedish law, be committed against both men and women; the vast majority of rapes are of men against women, so it would risk being misleading to write ”he or she” in this context.

5 Concluding Remarks

1. The aim of writing this article has not been to say that nothing should be done as regards the legislation on rape in Sweden. The aim has been much more modest than that. The aim has been to defend the position that the case of M.C. v. Bulgaria does not in itself *require* a legislative reform.

2. This position does not, of course, imply that the case of M.C. v. Bulgaria does not put up any standards at all. It certainly does. It puts up an ambitious (but approximate) standard which should definitely be taken into consideration when deciding on whether, and if so, how the Swedish law on sexual offences should be reformed (and which may also, in the future, raise interesting and difficult question concerning the relation between the positive obligation to provide adequate protection against rape and sexual abuse and the obligation not to violate the presumption of innocence).

3. The main point to be made here, however, is that the standards put up by the court are *not* focusing merely on the design of the legislation; the convention states are – that is for sure – obliged to provide effective protection against rape and sexual abuse, but whether this is done (or not), does not only depend on the design of the legislation

4. Neither does the text imply that a consent based legislation is not preferable to a legislation designed as the Swedish one. It may very well be. One can, e.g. and as is done in the Consent Report, argue that the present legislation misrepresents the content of the offence by explicitly requiring the use of violence or threats and that this implies that it would be better to change the law and to introduce a non-consent standard… …but one can also, and easily, provide arguments which speaks in the other direction.[34]

5. I have no intention of taking a stand on these issues within the framework of this essay. On the contrary, I am about to conclude. One thing is clear, however, before deciding on a consent based legislation we need a serious discussion on how to construct the concept of consent (or voluntariness).[35]

---

34 *See e.g*. SOU 2001:14 p. 123 ff, Berglund in Juridisk tidskrift 2008-09 no. 3 (not published yet) and Wersäll & Rapp, *Utan samtycke – Om våldtäktsbrottets konstruktion i svensk rätt*, Festskrift till Madeleine Leijonhufvud, Stockholm 2007 p. 429 ff.

35 Consent and voluntariness are not (necessarily) identical concepts; however, the basic questions are the same.