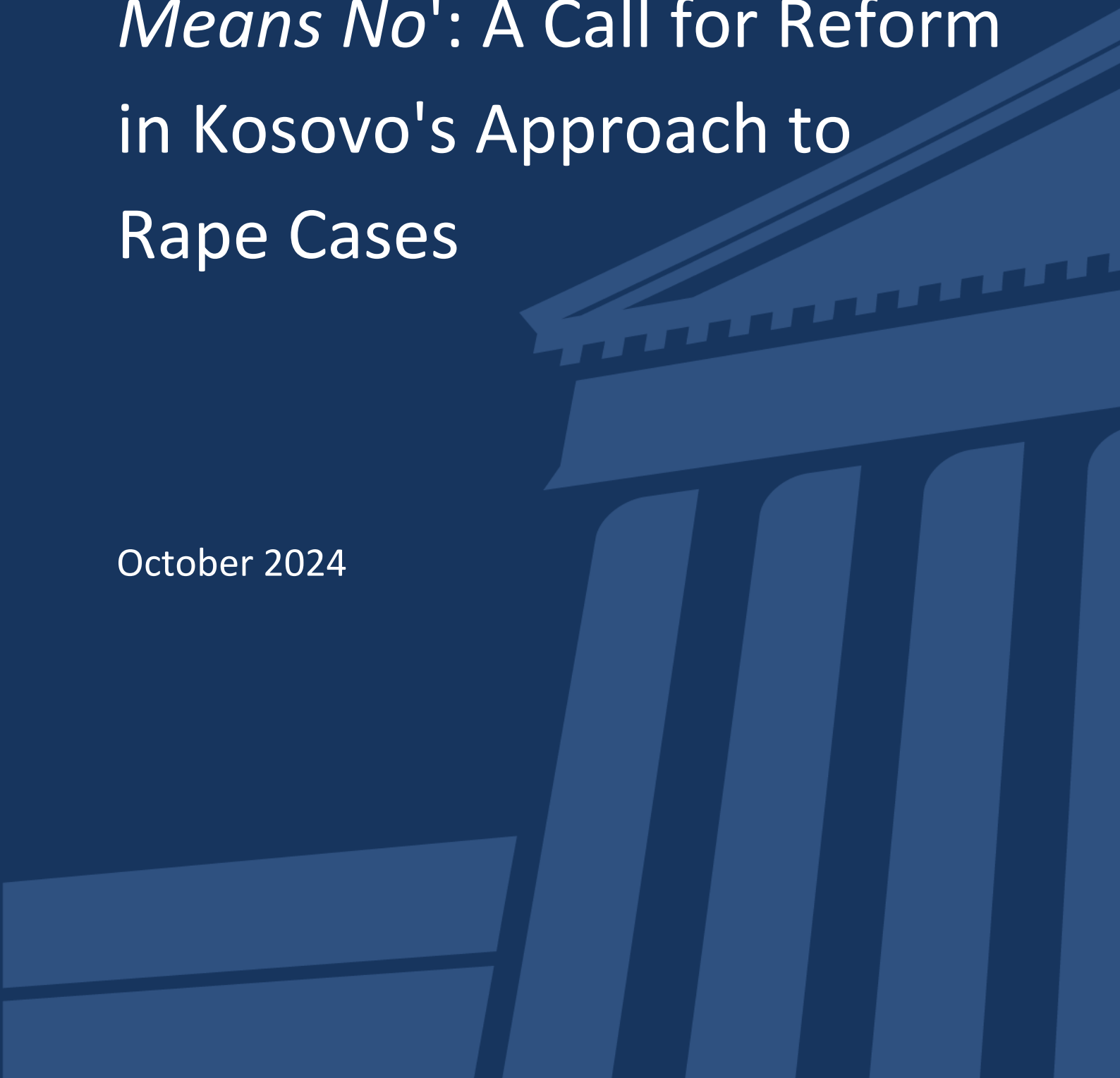


Towards and Beyond '*No Means No*': A Call for Reform in Kosovo's Approach to Rape Cases

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I. Introduction

Globally, rape remains under-convicted, with less than 1% of reported cases leading to convictions in the United Kingdom¹ and the United States.² In the European Union, 1 in 20 women have been raped since the age of 15, with many victims facing repeated abuse, particularly in intimate relationships, and suffering long-term emotional and physical consequences.³ Such systemic issues within the justice system, including delays and biases as well, contribute to the lack of accountability for perpetrators, lack of support for the victims and general mistrust towards the justice system. Kosovo reflects similar trends, with data indicating that even when an increase in reporting the sexual violence cases is noted, issues with adequate support for the victims arise.⁴

Moreover, systematic challenges are present within the legal framework as well, particularly around interpretations of "consent." The term "rape" is legally defined as any sexual act performed without consent.⁵ However, in practice, courts frequently rely on outdated notions that equate non-consent solely with physical resistance. This perception persists despite modern legal definitions and feminist scholarship advocating for a broader, more nuanced understanding of consent. Contemporary definitions emphasize that consent should "be affirmative, voluntary, informed, reversible, specific, and unburdensome".⁶ In this context, it is not the responsibility of the victim to express non-consent; instead, the onus is on the perpetrator to obtain clear, affirmative consent. Despite this shift in understanding, many legal systems, including Kosovo's, *still operate under misconceptions that prioritize physical evidence of resistance over broader psychological and contextual elements that can invalidate consent.* This reliance on physical proof significantly complicates the prosecution of rape cases, especially when such evidence is absent.

To provide a clearer picture of the state of play of these issues, this paper aims to explore how current legal definitions and interpretations of "consent" and "rape" in Kosovo affect the judgment of sexual violence cases. It investigates the challenges in prosecuting rape cases that lack physical evidence or explicit resistance, examining how these challenges perpetuate rape myths within the legal system. Furthermore, the paper seeks to identify potential solutions to align Kosovo's judicial practices with international human rights standards, particularly in recognizing psychological and contextual factors in determining consent. To do so, the paper will initially examine how consent is currently defined and interpreted within Kosovo's legal frameworks. **Second**, it reviews the landmark case of *M.C. v. Bulgaria* from the European Court of

¹ Hohl, K. (2022). New scorecards show under 1% of reported rapes lead to conviction – criminologist explains why England's justice system continues to fail. City Press Office.

² Data retrieved from Rape, Abuse & Incest National Network (RAINN). (n.d.). *The criminal justice system: Statistics*

³ European Institute for Gender Equality. (2023). Understanding rape in the European Union: The essential need for administrative data collection.

⁴ EULEX. (2022). Assessment of the handling of rape cases by the justice system in Kosovo: Monitoring Report. pp 23-26.

⁵ Criminal Code of the Republic of Kosovo, Art. 227, paragraph 1.1., Official Gazette No. 06/L-074 (2019)

⁶ Im, J., Dimond, J., Berton, M., Lee, U., Mustelier, K., Ackerman, M. S., & Gilbert, E. (2021). Yes: Affirmative Consent as a Theoretical Framework for Understanding and Imagining Social Platforms. CHI '21: Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems, Article No.: 403, 1-18.

Human Rights (ECtHR), which set a precedent for understanding consent and the obligations of authorities in rape investigations. **Third**, the paper debunks the myth of physical resistance in rape, utilizing research to challenge these outdated legal views. **Fourth**, it analyzes rape judgments from Kosovo's Basic Courts to highlight problematic legal interpretations that reinforce harmful stereotypes and place undue burdens on victims. **Fifth**, the paper discusses the broader societal implications of these flawed legal standards, particularly how they discourage reporting and affect public perceptions of justice. **Sixth**, it explores potential challenges and solutions for proving rape in the absence of physical evidence or resistance, advocating for a more victim-centered approach in line with modern human rights standards.

II. Legal Framework

In the Criminal Code of the Republic of Kosovo (the Code), Consent is defined as “the voluntary agreement of a person who has reached the age of sixteen to engage in the sexual act in question”.⁷ Additionally, it includes a provision for individuals aged fourteen, provided the age difference between the parties does not exceed two years.⁸ However, the law explicitly states that consent is not valid in several key situations: when the individual expresses, either through words or actions, a lack of agreement to *engage or continue* in the sexual act; when the consent is given by someone other than the victim; when the consent is obtained through deception, fear, or intimidation; or when the individual is incapable of consenting due to diminished mental or physical capacity, or intoxication by alcohol, drugs, or other substances.⁹ Furthermore, the law clarifies that these conditions do not limit the potential scenarios where consent might be absent, providing a broad protective scope.¹⁰ This definition emphasizes consent in a comprehensive way, underscoring that it must be continuous and actively maintained, rather than it being a one-time agreement. However, it does not explicitly require that consent be enthusiastic, leaving room for interpretation in situations where the agreement may be less clearly expressed. Moreover, the Code defines rape as subjecting another person to a(ny) sexual act without their consent, punishable by imprisonment ranging from two to 15 years, based on the circumstances.¹¹

Besides its Code, Kosovo’s Constitution incorporates international human rights standards, including the European Convention on Human Rights (ECHR), which is directly applicable in the domestic legal order.¹² This inclusion reflects Kosovo's commitment to uphold human rights and align its laws with internationally recognized principles. The judiciary is also required to interpret these rights in line with the case law of the European Court of Human Rights (ECtHR).¹³ This institution gave a broad definition of consent on the landmark case of *M.C. v. Bulgaria*, in 2003, as outlined in the following chapter.

Additionally, the Istanbul Convention, which is also part of Kosovo's Constitution,¹⁴ mandates measures to combat violence against women, including sexual violence.¹⁵ This convention

⁷ Criminal Code of the Republic of Kosovo, Art. 225, paragraph 1.1., Official Gazette No. 06/L-074 (2019)

⁸ *Id.*, Paragraph 1.2.

⁹ *Id.*, Paragraphs 2.1-2.4.

¹⁰ *Id.*, Paragraph 3

¹¹ *Id.*, Article 227

¹² Constitution of the Republic of Kosovo (2008), Official Gazette of the Republic of Kosovo, No. K-09042008, Article 22

¹³ *Id.*, Article 53

¹⁴ Amendment No. 26 to the Constitution of the Republic of Kosovo (2020), Official Gazette of the Republic of Kosovo, No. 07-V-058.

requires the adoption of legislative and protective measures to prosecute sexual offenses effectively and to support victims.¹⁶ By embedding the Istanbul Convention into its legal framework, Kosovo commits to a victim-centered approach, reinforcing the need for robust legal protections against sexual violence.

III. What can we take away from M.C. v. Bulgaria?

In 2003, the ECtHR decided on a case, which put a different definition to the importance of treating lack of consent, as the key element in rape cases, to overshadow coercion as an exclusive element of rape. The M.C. v. Bulgaria case serves as a landmark judgment that reformed the legal definition regarding the understanding and treatment of consent in rape cases. This case, for the first time, showcased many problems related to the legal standard of consent, the problematic reliance on physical resistance as the sole evidence, and the broader implications of coercion and fear in the context of sexual violence. The Court's decision critiqued the Bulgarian legal system's approach but also set a precedent for how consent should be understood and applied across Europe. The case arose when a 14-year-old girl from Bulgaria, reported that she had been raped by two men.¹⁷ The Bulgarian authorities, however, refused to prosecute the case, arguing that there was no evidence of physical resistance by the victim, which they considered necessary to prove a lack of consent and therefore, rape.¹⁸ The case was brought before the ECHR, where M.C. argued that Bulgaria's refusal to prosecute her case violated her rights under the European Convention on Human Rights. The Court ruled in favor of M.C., and its reasoning included two key points relevant for this paper: **first**, that the absence of consent alone, even without physical resistance, constitutes rape; and **second**, that authorities must take steps to establish rape, even in the absence of physical evidence.

First, **the Court emphasized that the mere absence of consent, rather than the presence of physical resistance, should be the defining element in cases of sexual violence and rape.**¹⁹ ECHR rejected the notion that a victim must demonstrate physical resistance to prove that they did not consent, arguing that such a requirement fails to account for the realities of sexual violence, where fear, coercion, and psychological factors often prevent victims from resisting.²⁰ The ECHR also acknowledged that Bulgarian national law, like that of many other CoE member states, does not require physical resistance from the victim as a condition for establishing rape.²¹ However, similarly to many cases in Kosovo, legal authorities in Bulgaria have interpreted key elements of the offense, such as 'coercion' or 'force,' in ways that contradict this principle,²² making the cases highly comparable. This misinterpretation, prevalent in Kosovo case law as well (discussed in the following chapter), may stem from a lack of understanding and a societal tendency to accept rape myths.²³ Moreover, the Court emphasized the importance of considering

¹⁵ Council of Europe Convention on preventing and combating violence against women and domestic violence (2011).

¹⁶ Ibid.

¹⁷ M.C. v. Bulgaria, App. No. 39272/98, Eur. Ct. H.R., 4 Dec. 2003.

¹⁸ Ibid.

¹⁹ Id., paras 179-180

²⁰ Ibid.

²¹ Id., Para 170

²² Id., paras 169-170

²³ Rape Myths, as defined by Bohner et al. (2009) represent descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay, or justify sexual violence that men commit against women. Source: **Bohner, G., Eyssele, F., Pina, Viki,**

the broader context in which consent is (or is not) given.²⁴ This may include the victim's psychological state, the presence of fear or intimidation, and the power dynamics between the victim and the perpetrator. The ruling stressed that the absence of physical resistance does not imply consent and that legal systems must recognize the complex realities of how consent may be undermined by non-physical forms of coercion.²⁵

Second, **this case establishes a standard regarding the burden of proving non-consent, emphasizing the responsibility of legal authorities to thoroughly investigate beyond sole physical evidence.**²⁶ The court noted that Bulgarian authorities were faced with the issue of selecting between two conflicting accounts of the events, compounded by the limited evidence available,²⁷ once again, underscoring the absence of physical resistance signs, or physical proof in general. In this context, the court underscored the need for a “*context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances*”.²⁸ The court found that the Bulgarian authorities failed to thoroughly investigate and accurately establish the true sequence of events based on the testimonies, largely due to the reliance on the absence of physical evidence of resistance. This approach is important when it comes to 'proving consent,' a point that will be further examined in the following chapters. Additionally, it imposes a demanding standard on legal authorities because it requires them to go beyond simply looking for physical evidence or clear-cut signs of resistance. This standard, challenges authorities to critically assess the credibility of testimonies and the surrounding circumstances without relying solely on tangible evidence like injuries or physical resistance. Thus, the case raises the bar for what constitutes a fair investigation, demanding greater diligence, sensitivity, and expertise from those tasked with upholding justice in such sensitive cases.

IV. Why must the myth of physical resistance in rape cases be urgently debunked?

The M.C. v. Bulgaria ruling has played a significant role in debunking the rape myth that equates physical resistance with non-consent. But additionally, there are several studies which have shown that not all victims are capable of or choose to physically resist during rape. Despite this, Kosovo case law reveals a concerning lack of understanding of these dynamics among both judicial authorities and experts involved in prosecuting rape cases. Before showcasing these systemic shortcomings, this brief will firstly explore the research that effectively debunks the myth of physical resistance in rape cases.

In their examination of rape myths, Dhingra and Persson (2021) address the problematic expectation of physical resistance in rape cases, a notion in both social beliefs and legal frameworks.²⁹ This expectation is closely tied to the concept of the "legally perfect rape," a term originally coined by MacKinnon (1989/1991).³⁰ The "legally perfect rape" is described as a scenario that perfectly aligns with stereotypical ideas of a "real rape": one that involves a

G. T., & Siebler, F. (2009). Rape myth acceptance: Cognitive, affective, and behavioural effects of beliefs that blame the victim and exonerate the perpetrator. In M. A. H. Horvath & J. M. Brown (Eds.), *Rape: Challenging contemporary thinking* (pp. 17-45). Cullompton, UK: Willan.

²⁴ M.C. v. Bulgaria supra note 17, Para 181

²⁵ Id., para 181-183

²⁶ Id., paras 177 and 181

²⁷ Id., para 176

²⁸ Id., para 177.

²⁹ Dhingra, K., & Persson, S. (2021). *Rape Myths: Understanding, Assessing, and Preventing*. Routledge.

³⁰ Id., p 12

stranger, includes excessive physical violence, and is committed against a woman who is perceived as entirely "innocent" (i.e., White, modestly dressed, and sober).³¹ As it can be seen, the physical violence is perceived as a key component to committing rape. However, Dhingra and Persson's work presents an extensive body of literature that proves the significant variation in how individuals respond to traumatic events. Namely, they present two arguments on why some victims cannot or choose to not physically resist this traumatic experience.

First, **many victims cannot physically resist rape.** A particularly common reaction is 'freezing' or 'tonic immobility,' a physiological response where the victim-survivor becomes temporarily paralyzed and unable to resist. Dhingra and Persson cite a study conducted by Möller, Söndergaard, and Helström involving 298 women who visited a Swedish emergency clinic after being raped, finding that 70% of them reported experiencing significant tonic immobility during the assault.³² This response is an involuntary survival mechanism, not a conscious decision, and its occurrence emphasizes the inadequacy of using physical resistance as the sole indicator of non-consent.

Second, **in order to avoid further violence, victims sometimes choose to not physically resist.** In addition to the psychological and physiological responses that can prevent physical resistance, there is also the reality that some victims make an intentional and calculated decision not to resist physically. This decision is often made in the hope of avoiding further violence to themselves or others. Gbahabo and Duma note that this strategic choice is relatively common among victim-survivors who assess their situation and conclude that physical resistance might escalate the attack, leading to more severe harm.³³ This form of non-resistance, while potentially life-saving, can later contribute to feelings of self-blame among survivors, as they may internalize the false belief that they could have done more to prevent the assault.³⁴

Therefore, legal system's failure to recognize the prevalence and significance of different reactions people might have associated with this traumatic experience can lead to the unjust dismissal of cases, where the absence of resistance is wrongly interpreted as consent. This highlights the urgent need for legal standards to evolve in line with neuroscientific findings, ensuring that the psychological realities of sexual violence are adequately understood and addressed in courtrooms. Moreover, it necessitates enhanced training and capacity building for legal authorities to ensure that these findings and research are fully considered in their decision-making processes.

V. Problematic Interpretations of Consent and Rape

Criminal code official commentary

While the laws define consent and rape in a comprehensive and modern way, the broader interpretations and applications of these laws are far more problematic. For example, a substantive definition of consent within Kosovo's legal literature appears in the official commentary on the last Criminal Code, which can potentially continue to influence legal practice given that the 2019 Criminal Code retained the previous definitions concerning rape. However,

³¹ Ibid.

³² Id., p 60; Möller, A., Söndergaard, H. P., & Helström, L. (2017). Tonic immobility during sexual assault – A common reaction predicting post-traumatic stress disorder and severe depression. *Acta Obstetrica et Gynecologica Scandinavica*, 96(8), 932–938

³³ Dhingra & Persson, *supra* note 29, p 60; Gbahabo, D. D., & Duma, S. E. (2021). 'I just became like a log of wood ... I was paralyzed all over my body': Women's lived experiences of tonic immobility following rape. *Heliyon*, 7(7), e07471.

³⁴ Ibid.

while this commentary refers to the M.C. v. Bulgaria case and its standards in one occasion,³⁵ it also offers a definition of consent that is outdated and misleading, failing to align with modern understandings of sexual autonomy and consent. According to the commentary, rape consists of two separate acts: the act of defeating the victim's will for the sexual act and the sexual act itself.³⁶ The commentary places the burden of expressing clear "non-consent" on the victim, rather than emphasizing the need for the perpetrator to obtain clear, voluntary, and ongoing consent.³⁷ It asserts that the victim must continuously express their non-consent throughout the entire duration of the sexual act, suggesting that any momentary lapse in expressing non-consent could be interpreted as acquiescence.³⁸ This interpretation is deeply problematic, as it contradicts contemporary definitions of consent, which stress that consent must be active, enthusiastic, and sustained, not the obligation to persistently assert non-consent.³⁹

Moreover, the commentary's stipulation that expressions of non-consent must be "serious and strong," involving words, physical resistance, and ongoing rejection *until the last moment*, places an unrealistic and unjust burden on the victim.⁴⁰ This requirement completely disregards the complexities of trauma responses such as freezing or tonic immobility, where victims may be unable to verbalize or physically express resistance, while also perpetuating harmful myths about sexual violence.⁴¹ The expectation that victims must continuously resist or explicitly reject sexual advances to be considered non-consensual is antithetical to modern legal principles, which recognize that the absence of an explicit "no" never equates to a "yes." While not legally binding, this commentary's approach fails to protect victims adequately and does not reflect the principles of autonomy and respect that are central to modern definitions of consent.

Basic courts' interpretation

Despite the emphasis on consent in the legal framework, there are many challenges in the practical application of these laws. One of the biggest issues is that the legal system often relies on traditional ideas of resistance, where the absence of physical resistance or injuries can complicate the prosecution of rape cases. **This reliance on outdated notions places a burden on the victim to demonstrate that they did not consent, rather than on the accused to prove that they obtained clear, informed, and voluntary consent.** An examination of the Kosovo Judicial Council's publicly available judgments on rape, reveals some recurring themes which reflect this approach. These judgments have a lack of clear definitions of consent and a reliance on 'rape myths' that hinder the effective prosecution of rape cases and leave victims without justice. While these judgments are critiqued for their approach to consent, it is important to clarify that this brief *does not contest* whether the individuals involved were actually guilty or innocent. In the following paragraphs, specific examples from recent cases illustrate how these judicial interpretations have failed to protect victims and uphold the principles of consent enshrined in the law.

³⁵ Zhitija, H. (2014). In Salihu, I., Zhitija, H., & Hasani, F., Komentari Kodit Penal të Republikës së Kosovës,. GIZ, Prishtinë. P 610-611

³⁶ Id., p 608-612

³⁷ Ibid.

³⁸ Ibid.

³⁹ Im et al., supra note 6.p 1

⁴⁰ Zhitija, H., supra note 37

⁴¹ Dhingra & Persson, supra note 29 , p 60; Möller, A., Söndergaard, H. P., & Helström, L. (2017). Tonic immobility during sexual assault – A common reaction predicting post-traumatic stress disorder and severe depression. *Acta Obstetrica et Gynecologica Scandinavica*, 96(8), 932–938

First, one of the most prevalent patterns in these judgments is the reliance on physical resistance as the primary proof of rape. Moreover, the burden of proof is often placed entirely on the victim, effectively shifting the responsibility to prevent the crime onto the victim as well. In many cases, acquittals were granted due to the absence of evidence of physical resistance by the victims. Additionally, the courts frequently fail to address the concept of consent throughout the proceedings, except when outlining the legal basis for prosecuting rape. For instance, in 2023, a forensic expert testified that *“the expert concluded that a rape act did not occur, because if it did, many signs of exercising violence would exist”*.⁴² Similarly, in another 2023 case, the court ruled that rape did not occur on the grounds that rape victims typically show signs of physical violence or bodily injuries.⁴³ The court acknowledged only one exception from this ‘rule’: when a perpetrator threatens the victim with a weapon,⁴⁴ thus, dismissing every other reason why a rape victim might not physically resist. In a 2017 case, the court stated, *“it was not proved that the accused used coercion or violence against the victim”*.⁴⁵

Second, in one instance the court also introduced a wrongful threshold regarding the intensity of force used by the perpetrator and the intensity of resistance applied by the victim. In a 2017 case, the court elaborated on the need for physical force or violence to overcome the victim's resistance, stating that *“In terms of the intensity of the force or violence, it is required that it be such, suitable to break the resistance offered [by the victim] and expected by the perpetrator”*.⁴⁶ The court further defined coercion and resistance as *“...coercion used should be of that intensity as to overcome the resistance of the victim, and the resistance should be serious, true, continuous, and not just formal or hidden”*. This definition is extremely problematic as it suggests that only substantial, visible resistance is valid, dismissing subtler forms of non-consent. Once again, the court's narrow definition of coercion and resistance only perpetuates harmful myths about an idea of how victims should behave during sexual assaults.

Third, another troubling finding is the failure to recognize fear as a basis for considering an act as rape. In a 2019 case, the court did not acknowledge fear as a legitimate reason for the victim's inability to resist. The victim stated, *“I did not want sexual relations with him but I did not have the power to protect myself because I was afraid of [the accused]”*.⁴⁷ However, the court remarked that *“it is a matter of discussion whether sexual intercourse from fear constitutes rape”*.⁴⁸ This failure to recognize that consent cannot be valid when given out of fear reflects a misunderstanding of sexual violence phenomenon. Additionally, **such an interpretation contradicts the definition of consent enshrined in the Code**, which explicitly states that no consent is obtained where the agreement of the victim was secured through fear, even in the absence of force.⁴⁹

Fourth, a related issue is the misinterpretation of coercion and consent. In a 2018 case, the victim mentioned that the perpetrator(s) did not use physical violence when they raped her.⁵⁰ Despite proof of sexual intercourse through DNA evidence, the court focused on the lack of

⁴² Case No. 2022:216914, Basic Court Ferizaj (2023), Document No. 04802657, accessible [here](#).

⁴³ Case No. 2019:265761, Basic Court Prishtina (2023), Document No. 04636267, accessible [here](#).

⁴⁴ Ibid.

⁴⁵ Case No. P.nr. 306/2008, Basic Court Prishtina (2017), accessible [here](#).

⁴⁶ Case No. P.nr. 79/2017, Basic Court Prizren (2018), accessible [here](#).

⁴⁷ Case No. 2018:019003, Basic Court Peja (2019), Document No. 00199246, accessible [here](#).

⁴⁸ Ibid.

⁴⁹ Criminal Code of the Republic of Kosovo, Article 227, paragraph 1.3., supra note 5.; Criminal Code of the Republic of Kosovo (2012), Article 228, paragraph 1.3., Official Gazette of the Republic of Kosovo, No. 04/L-082.

⁵⁰ Case No. 172/2008, Basic Court Prishtina (2018), accessible [here](#).

significant injuries, noting only a "redness in her spine" as evidence.⁵¹ This focus on physical injuries as a determinant of rape overlooks the central issue of consent throughout the prosecution process. The court's reliance on physical evidence to determine whether coercion occurred fails to recognize that coercion does not always result in visible injuries, and the absence of such injuries should not negate the possibility of rape. This approach overlooks the psychological and emotional coercion that can compel a victim to submit without physical resistance.

Why are these interpretations problematic?

First, **the challenge of proving non-consent in rape cases where physical resistance is absent, is a big issue that weakens the effectiveness of many legal systems**, including Kosovo's. As courts in Kosovo often place a disproportionate emphasis on physical evidence, such as visible injuries, to substantiate a victim's testimony. While acknowledging that physical evidence can be compelling, this reliance proves problematic because it excludes many instances of rape that do not result in physical injuries or where such proof is impossible to obtain. Several situations can be used to illustrate this issue.

For instance, as explained, victims may be unable to physically resist their attacker. When the legal system fails to recognize this, it risks dismissing valid cases of sexual violence simply because the victim did not or could not fight back. Moreover, there are situations where visible injuries are not present, either because the assault did not involve physical violence or because the nature of the assault left no marks. Some of these situations may include (but are by no means limited to) cases where coercion, manipulation, or threats were used rather than physical force. To demonstrate, a study conducted with 850 cases in Germany, showed that extragenital injuries were present in only 61 percent of cases, while anogenital injuries were present in only 25 percent of cases.⁵² Yet, the absence of injuries does not diminish the severity of the crime or the reality of the lack of consent. Additionally, the delay in reporting sexual violence, which is common due to the stigma, fear, and psychological trauma associated with rape, can further complicate the gathering of physical evidence. When a victim comes forward after such a delay, the lack of physical proof can lead to the wrongful conclusion that the sexual act was consensual, hence, denying justice to the victim.

This reliance on physical evidence fails to account for the varied ways in which sexual violence occurs, creating an environment where cases that do not meet the narrow criteria of physical resistance and injury are systematically overlooked. This leads to wrongful acquittals and a sense of injustice for victims, while perpetuating outdated views of rape rooted in myths about how victims "should" respond during an assault. By focusing too much on physical proof, the justice system marginalizes many victims' experiences, further traumatizes them, and discourages others from coming forward, ultimately failing to protect the most vulnerable and to recognize the full realities of sexual violence.

Second, **the negative effects extend beyond individual cases to the broader population, contributing to a societal mindset that discourages reporting gender-based violence**. Rape and other forms of sexualized violence are already underreported in Kosovo due to stigma,⁵³ and when courts apply such approaches, survivors may be further demotivated to come forward. The stigma surrounding sexual violence is deepened when victims fear that their cases will not be

⁵¹ Ibid.

⁵² Fryszler, L. A., Hoffmann-Walbeck, H., Etzold, S., Möckel, M., Sehouli, J., & David, M. (2020). Sexually assaulted women: Results of a retrospective analysis of 850 women in Germany. *European Journal of Obstetrics & Gynecology and Reproductive Biology*, 250, 117-123.

⁵³ Interview with Medica Gjakova NGO Representative, conducted on 12 August 2024.

taken seriously, particularly if they cannot provide physical proof of non-consent.⁵⁴ This creates a chilling effect, where victims who cannot demonstrate physical resistance may feel powerless to seek justice.⁵⁵ It is crucial that the judicial system not only encourages reporting through awareness campaigns but also sets the right precedents, ensuring that all victims feel supported and understood by the legal institutions designed to protect them.

Last, **each of these judgments represents systemic failures to apply a victim-centered approach in prosecuting rape cases, and a violation of human rights.** Despite Kosovo's constitutional obligation to interpret human rights in accordance with the decisions of the ECHR,⁵⁶ the examples mentioned clearly demonstrate non-compliance with the standards set forth in the *M.C. v. Bulgaria* case, as introduced at the beginning of this brief. While it is evident that first instance courts in Kosovo often fall short in applying these ECHR standards, the Constitutional Court of Kosovo has, in contrast, maintained a strong record of adhering to ECHR principles.⁵⁷ However, even if the Constitutional Court were to fail in upholding these standards, Kosovo could face significant legal challenges if it were to join the Council of Europe (CoE). In such a scenario, Kosovo's citizens would have the right to sue the state for these violations, after exhausting domestic remedies. Above all, according to the ECHR, such failures constitute a clear violation of human rights, highlighting the urgent need for them to be addressed.

VI. Challenges and solutions in proving lack of consent

Now that it is established that physical resistance should not be the primary factor in determining whether a sexual act was consensual, concerns may arise regarding the difficulty of proving rape cases. This reality presents significant challenges in proving lack of consent, particularly when considering that forensic reports focus primarily on documenting physical injuries. As previously discussed, many rape victims may not exhibit such injuries due to the nature of the assault or delays in reporting the crime. In those cases, the only evidence for the prosecution becomes the victim's testimony.⁵⁸ Here, another challenge arises as the legal framework in Kosovo imposes strict limitations on securing convictions based solely on a victim's testimony. The criminal procedure code explicitly prohibits convicting someone based only on such testimony,⁵⁹ requiring additional evidence to corroborate the victim's account. This creates a potential gap in the justice system, where non-consensual sexual activity may go unpunished without witnesses or physical evidence to support the victim's claims.

The ECHR in *M.C. v. Bulgaria* explicitly addressed this issue by stating that the absence of physical evidence cannot imply consent. **The court emphasized that legal authorities should assess all surrounding circumstances of the alleged crime, rather than focusing solely on direct evidence of rape.**⁶⁰ This means that authorities are obliged to explore every relevant fact, including the victim's psychological state, the power dynamics involved, and any indirect evidence that might indicate coercion or non-consent. The court's decision in this case highlights the importance of a victim-centered approach, which shifts the burden of proof away from the victim and places greater responsibility on the accused and the investigative authorities.

⁵⁴ Ibid.

⁵⁵ Gbahabo & Duma, supra note 33

⁵⁶ Constitution of the Republic of Kosovo, Article 53, supra note 6.

⁵⁷ Balkans Group. (2023). Kosovo and the Council of Europe: The Accession Roadmap. Balkan Policy Research Group.

⁵⁸ Aurrekoetxea-Casaus, M. (2021). *Consent in Sexual Assault: Reflections on the Role of Testimonial and Expert Evidence*.

⁵⁹ Criminal Procedure Code Article 257 para 1

⁶⁰ *M.C. v. Bulgaria* supra note 17, Para 177

One potential solution for addressing cases where little or no physical evidence exists is **to place more emphasis on psychological expert testimony**. These experts can provide observations into the victim's or perpetrator's mental state, which can be crucial in proving that rape occurred. A study conducted in Turkey on spousal rape cases found that in two-thirds of the cases, no prosecution could have been made without psychiatric evaluations, as these were the only evidence.⁶¹ Of the 27 cases studied, all presented psychiatric findings related to the assault, underscoring the critical role of psychological assessments, while only one-third of the case studies had physical evidence as well.⁶² Similarly, another study highlighted the importance of psychological evidence in sexual assault cases where physical evidence is lacking.⁶³ The study discusses how expert psychological testimony can substantiate claims of trauma and non-consent, offering critical support to the victim's account.⁶⁴ Thus, both researches suggest that incorporating psychological assessments into rape cases more effectively could help to ensure that justice is served, even when there is no physical proof. This approach could be particularly valuable in Kosovo, where, according to the analyzed judgments, psychological evaluations are almost always completely overlooked.

On another note, in common law jurisdictions, there has been an important shift towards prioritizing victim testimony in rape cases, reflecting a recognition of the complex nature of rape. Historically, these legal systems imposed a corroboration requirement on the victim's testimony, driven by the pervasive myth that rape accusations, particularly those made by women, were often false.⁶⁵ The effect was that, in rape cases, a victim's testimony could not be used as the sole evidence to convict a defendant.⁶⁶ This requirement was largely based on the unfounded belief that women were more likely to lie about being raped, a stereotype that has been deeply ingrained in legal and societal frameworks for centuries.⁶⁷ However, from the late 20th century onwards, many countries began to move away from this requirement, driven by feminist legal scholarship that worked to debunk these myths and advocate for a more equitable justice system.⁶⁸

The elimination of the corroboration requirement did not, however, leave defendants unprotected against unjust convictions. For example, in an opinion in a case in Ohio, a judge noted that even when the victim's testimony is treated as central to the case, the defendants are still safeguarded by the core principles of the criminal justice system, such as the presumption of innocence, the right not to incriminate oneself, and the right to effective counsel.⁶⁹ These protections ensure that the system moves towards recognizing the validity of a victim's

⁶¹ Karbeyaz, K., Çelikel, A., & Ortanca, I. (2017). Can spousal sexual assault cases be detected without any psychiatric findings? *Adli Tıp Bülteni*, 22(1), 40-44. <https://doi.org/10.17986/blm.2017127140>

⁶² Ibid.

⁶³ Aurrekoetxea-Casaus, M. (2021). Consent in Sexual Assault: Reflections on the Role of Testimonial and Expert Evidence. *Journal Name Not Provided*, 7. <https://doi.org/10.36648/2471-9854.21.7.99>

⁶⁴ Ibid.

⁶⁵ Falk, P. (2014). "Because Ladies Lie": Eliminating Vestiges of the Corroboration and Resistance Requirements from Ohio's Sexual Offenses. *Cleveland State Law Review*, 62(2), 343-371.; Liu, M. X., & Creel Benton, A. K. (2021). Beyond belief: How the "corroboration rule" in Malawi obstructs justice for victims of sex crimes and discriminates against women and girls on the basis of sex—a call for legislative change. *Columbia Journal of Gender and Law*, 40(3), 408-471.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Falk, supra note 67, pp 345-346

⁶⁹ *State v. Economo*, 666 N.E.2d 225 (Ohio 1996), Nugent, J., dissenting, as cited in: Falk, supra note 67

testimony, while the rights of the accused remain intact, hence, preventing unjust convictions. These rights are likewise enshrined in Kosovo's constitution, making this argument applicable to our legal context as well.

While Kosovo's legal system is based on civil law, which places a greater burden of proof on the prosecution compared to common law systems,⁷⁰ there is still much to learn from these best practices. Incorporating elements such as testing of the victim's testimony for credibility and placing it at the center of the prosecutorial process could help bridge the gap. Although the burden of corroboration cannot be entirely waived, adopting a victim-centered approach, as mandated by the Istanbul Convention, which Kosovo is constitutionally obliged to align with,⁷¹ and ECHR case law, could shift the mentality and allow for proving rape and lack of consent even in the absence of physical evidence.

VII. Conclusion

The key findings of this paper show that current judicial practices often rely on outdated notions, such as the requirement of physical resistance to prove non-consent. This reliance can lead to the unjust dismissal of cases where victims were unable to resist due to psychological or physiological responses to trauma, such as freezing or tonic immobility. Therefore, the legal system's failure to recognize the various ways victims may respond to trauma can result in wrongful interpretations of consent and the dismissal of legitimate cases. This gap points to an urgent need for legal standards to evolve in line with neuroscientific findings, ensuring that the realities of sexual violence are fully understood in courtrooms. Moreover, it necessitates enhanced training and capacity building for legal authorities to ensure that these findings and research are fully considered in their decision-making processes.

As this paper shows, the key takeaway from the *M.C. v. Bulgaria* case is the necessity of viewing sexual violence cases considering modern international standards, with the goal of establishing a criminal-law system that effectively punishes all forms of rape and sexual abuse. Continuing to rely on outdated notions of physical resistance as a requirement for proving non-consent leaves Kosovo out of step with contemporary standards that prioritize gender equality and victim safety. Adopting these modern approaches, besides being a legal obligation enshrined in Article 53 of the Constitution, it is also a proactive measure to ensure justice for all victims of sexual violence.

To address these issues, the paper recommends reforming legal definitions to reflect a broader understanding of consent, emphasizing affirmative, voluntary, and informed agreement without the need for physical resistance. Additionally, adopting a victim-centered approach and incorporating psychological expert testimony could help ensure that justice is served even in cases lacking physical evidence. By aligning with international human rights standards, Kosovo can improve its legal response to sexual violence, providing a fair approach that prioritizes the safety and dignity of all victims.

⁷⁰ Clermont, K., & Sherwin, E. L. (2002). *A Comparative View of Standards of Proof*. *American Journal of Comparative Law*, 50, 243-275.

⁷¹ Amendment No. 26, *supra* note 14

Policy Analysis

Policy Analysis in general is a policy advice paper which particularly aims to influence the key means through which policy decisions are made in both local and central levels of government. The purpose of Policy Analysis is to address, more in-depth, a particular problem, to examine the arguments related to a concerned policy, and to analyze the implementation of the policy. Through Policy Analysis, Group for Legal and Political studies seeks to stimulate wider comprehensive debate on the given issue via presenting informed policy-relevant choices and recommendations to the key stakeholders and parties of interest.



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