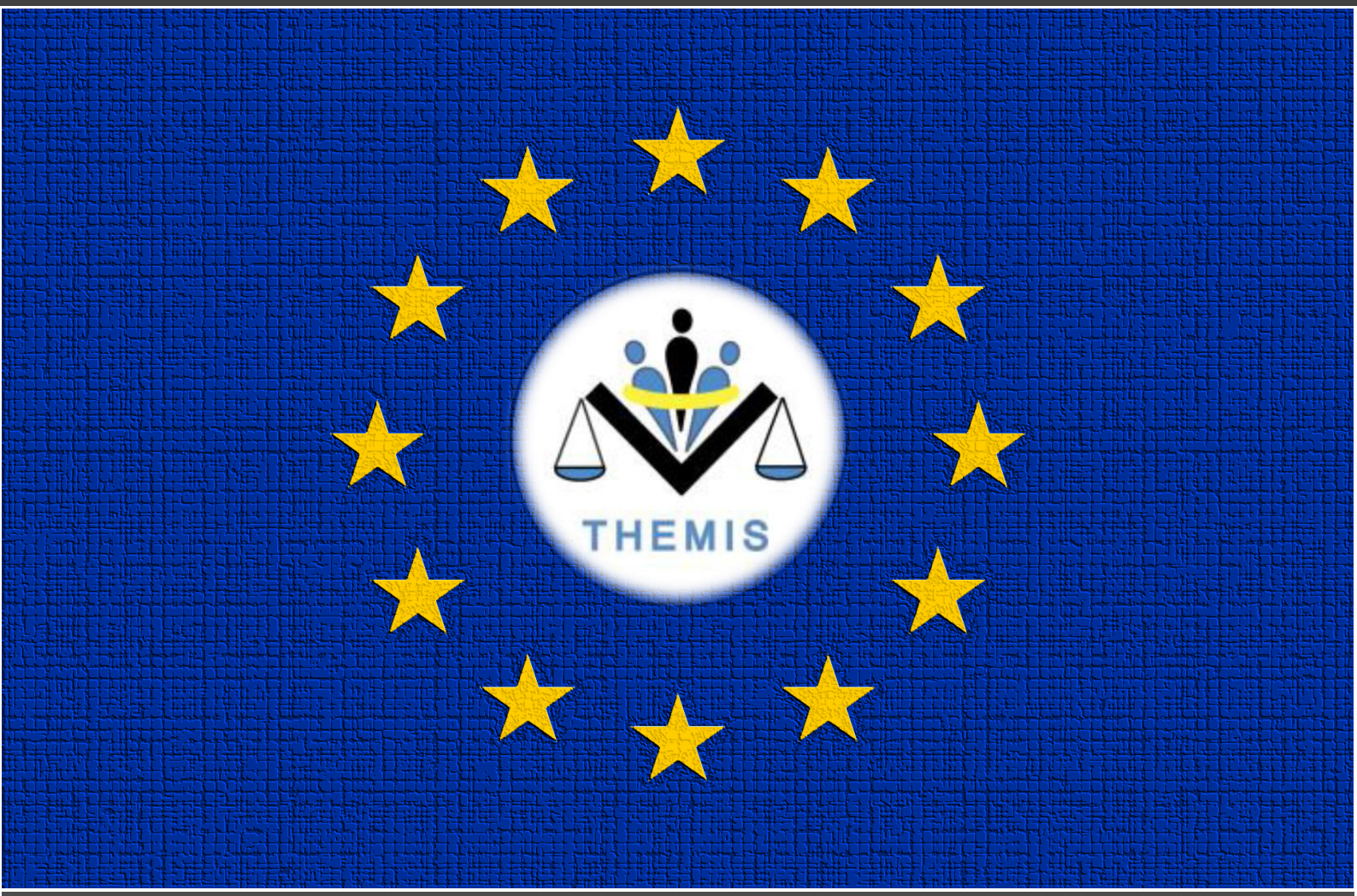

THEMIS 2019 COMPETITION

Semi-final A: EU and European Criminal Procedure

TOPIC:

EU's legislative compliance with the practical application in the EU Member States

TEAM DENMARK

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EU's legislative Compliance with the Practical application in the EU Member States

1. Introduction

Human rights, democracy and the rule of law are some of the key values of the European Union (EU). These values are crucial for the continuous cooperation within the EU since these values create a common standard for each EU Member State and Union citizen.

The criminal justice cooperation in the EU creates many opportunities for each Member State. For example a strengthening of the possibility for investigation, prosecution and sanction. To ensure successful cooperation between all Member States within the EU, the States must work together under one set of "Game Rules". Each Member State has several international obligations, which they must comply with. One of the key obligations is compliance with the European Convention on Human Rights (ECHR). To ensure observance with the ECHR, and oversee the Member State's compliance with the ECHR, the European Court of Human Rights (ECtHR) has been established. The ECtHR has in relation to this developed the Doctrine of Positives Obligations, which will be analyzed deeper in the thesis. In the recent years, the ECtHR has issued more than 1,000 judgments per year[1]. Every Member State has acknowledged their obligation to comply with the ECtHR inventory. This means that the Member States need to adjust legislation and practice on an ongoing basis in order to meet the ECtHR 's decisions.

We consider it of interest to look into whether it is possible to reduce the need for ECtHR decisions, for example by guiding the EU Member States in their legislation and practice – perhaps through a stronger EU cooperation. Therefore, with this project, we will examine the possibility of ensuring better surveillance with EU Member States' application of criminal justice. Ultimately, limiting the need for ECtHR decisions will diminish the need for long trial procedures at the national courts, thereby reducing long burdensome processes for the parties, which in turn, currently can be a burden for all Union citizens and a significant challenge to the rule of law.

[1]Den Europæiske Menneskerettighedens Domstol . Published by Institut for Menneskerettigheder. Internetadresse: - https://menneskeret.dk/om-os/menneskerettigheder/menneskerettigheder-eu/europaeiske-menneskerettighedsdomstol - Vistited on 01.04.2019 (Internet)

1.1. Research question

Criminal law and procedure is no longer considered a "domaine réservé" of the sovereign nation states[2]. This concept is an outdated concept and in some respects, the national borders are becoming blurry. For this reason, it is important for the EU Member States to secure some common understanding of the law and regulation. This thesis evaluates the Member States' use of national criminal procedure within the framework of European criminal procedure. The purpose of this thesis is to look deeper into EU law and see how this can be implemented in the best possible way on a national basis. We will assess whether Danish regulation and case law is in accordance with the international obligations, that Member states are obligated to comply with. Overall, we will use this concrete analysis to contemplate on how the Member States in the EU can ensure to legislate and work within the positive obligations stated by the ECHR.

1.2. Scope

This report will have a limited scope by only focusing on the practical application of criminal justice and thereby not focusing on the legislative processes. To conceptualize this consideration accordingly, this report will focus on a concrete and current issue; rape. This is of high relevance due to the proposal of consent-based rape legislation.[3] This delineation has occurred due to the report's extent, but also in order to focus on a concrete present debate. For the sake of the dimensions, we will not be giving an account of the Danish legal reservation – this delimitation is chosen due to it being irrelevant for this specific topic since the European Convention on Human Rights was ratified by Denmark in 1953 and incorporated as Danish law in 1992. We will throughout this thesis only take EU Member States into account, and therefore not look into possibilities for all the other states that have ratified the ECHR. This delimitation is once again chosen due to the dimensions of this thesis, but also to take a starting point from the setting of this case competition; the EU countries.

1.3. The structure of the thesis

The thesis is subdivided into four major parts throughout six chapters.

First, the thesis examines Danish regulation in comparison to international law. This is done through an examination of international legislation, where the focus will be the European Convention on Human Rights (ECHR) and viewing it in connection with Danish regulation.

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[2] Satzger, Helmut: *International and European Criminal Law*, page 1. 1. udg. Hart Publishing, 2012. (Book)
[3] No ifs or buts: Consent-based rape legislation must apply across EU. Published by The Parliament Magazine. Internet: https://www.theparliamentmagazine.eu/articles/opinion/no-ifs-or-buts-consent-based-rape-legislation-must-apply-across-eu - Visited on. 29.03.2019 (Internet)

Second, the thesis presents Denmark's international obligations within the field of human rights and investigates the positive obligations in the ECHR article 3 and 8. Next, this part will present an analysis of one verdict from the ECtHR that creates a great understanding of the field of rape, and what obligations Denmark is to follow when analyzing a case in comparison with the ECHR.

Third, the thesis presents Danish regulation and case law. First, the thesis contains an account for the Danish Criminal Code Section 216; the provision criminalizing rape. Next, we have examined three verdicts rendered by the Danish Courts. It is hereby noted that the Danish case law gives us an insight into how the Danish criminal code section 216 on rape is used in practice in Danish case law.

Finally, the thesis includes a comparative analysis with a discussion of whether the Danish authorities fulfil the requirements of the Doctrine of Positive Obligations as developed by the EHCR art. 3 and 8, the decisions from the ECtHR This will lead to a further discussion on how the different Member States to the greatest possible extent can assure that national regulation complies with EU obligations. The discussion will disembogue into a conclusion of this thesis.

2. Danish law in relation to EU law

The ideas to found a European Union (EU) came shortly after World War II due to political interest in increased collaboration between the Western European states. Today the EU is not merely an economic union but also intends to "*ensure social progress and seek the constant improvement of the living and working conditions of their people"*[4]. There are 28 Member States of the EU, with Denmark being one of these. EU law is divided into primary and secondary law. The Treaties (primary legislation) constitute the basic rules for all EU actions and activities where the secondary legislation includes regulations, directives and decisions, and is based on the principles and objectives of the Treaties. Further, the EU Member States are bound to legislation, which the EU has ratified. An example of this is the ECHR, which will be the main topic in the further.

To obtain a deeper understanding of how Denmark practically implements the international conventions and EU legislation, we will first look deeper into the ECHR.

2.1 The history of the ECHR

The ECHR was drafted by The Council of Europe, however the background of the ECHR goes slightly further back. In 1948, the UN Universal Declaration of Human Rights was founded. The declaration was established after the Second World War based on a broad consensus that there was a need to avoid a war of a similar size and ferocity. However, the declaration was not legally binding for the states,

[4] Court of Justice, *Defrenne v Sabena* (1976) Case 43/75,

since it was created as a declaration of intent from the participating states. Individuals could therefore not invoke their rights and the states had no legal obligation to include human rights in their own laws. In other terms, there were no sanctions if the states violated the rights.

In 1949, eight Western European countries established The Council of Europe. The Council is based on the key principles of promoting democracy, human rights and the rule of law. Therefore, in 1950 the European states were the first to create a legally binding document regarding human rights, the ECHR. It was created as an international convention and not a declaration, which meant that the participating states could demand other member states to comply with the human rights obligations they had signed.

The protection of human rights thus became an important instrument in the work of preserving peace and safety in the world because the international community committed itself to intervene if other states failed to respect human rights. Thereby, the states broke the principle of not interfering in the internal political and legal affairs of other states.

As part of the Convention, the States established the ECtHR in 1959, located in Strasbourg. The ECtHR deals with two types of complaints; first, complaints where one Member State complains over another Member State's alleged violation of the ECHR (the so-called intergovernmental complaints) and, second, individual complaints where citizens can complain over Member States' violations of the ECHR. In practice, the far majority of complaints submitted are individual complaints.

Today the Council forms the framework between 47 sovereign states, with 28 of the states being the EU Member States. Membership of the Council is subject to ratification of the ECHR.

2.2 Danish law in relation to the ECHR

Denmark was part of the European Council from the beginning and therefore the ECHR was ratified by Denmark on September 3rd 1953. However, the ECHR was not formally incorporated as part of Danish law until April 29th 1992. The Act came into force on July 1st 1992, and is so far the only human rights convention incorporated into Danish legislation. With the incorporation, the ECHR has become part of Danish law and Danish courts thus have a duty to enforce it.[5]

[5] Den Europæiske Menneskerettighedens Domstol . Published by Institut for Menneskerettigheder. Internetadresse: - https://menneskeret.dk/om-os/menneskerettigheder/menneskerettigheder-eu/europaeiske-menneskerettighedsdomstol - Vistited on 01.04.2019 (Internet)

With Denmark incorporating the ECHR as a law in 1992, Denmark chose to introduce the ECHR as a general law, which means that the ECHR has a lower legislative hierarchical position compared to the Danish Constitution. The Danish Constitution has an unconditional priority over all legislation, also international law. Since the ECHR contains fundamental rights and by its nature requires state compliance, all other Danish laws must comply with the ECHR. This means that the Danish legislators must ensure that the national legislation does not violate any rights within the ECHR.

The ECHR can consequently not displace the Constitution. In practical terms, this means that the Danish parliament can choose to disregard the ECHR in the legislation, but never disregard the Constitution. However, in such case, it is important to state that if a Danish law conflicts with the ECHR, Denmark will be able to be convicted by the ECtHR, which Denmark does a lot to avoid. Another way of viewing the hierarchy is that the ECtHR stands over the Danish Supreme Court. As a starting point, all possibilities of national appeal must be exhausted before a case can come before the ECtHR. The ECtHR can then not overturn the national judgments but can award the individual compensation for conduct that does not comply with the ECHR[6].

Even though the Danish Constitution contains several fundamental rights, some human rights are not included in the Constitution but are found in the ECHR. There are also examples of the Constitution and the ECHR covering rights differently. Another very important difference between the Constitution's rights and the ECHR's rights is that the Constitution's rights in some cases only cover national citizens, while the ECHR in nature covers all people who are within an area which the state has control over. This means that areas that might otherwise be outside the protection of the rule of law are covered by human rights. Both the Constitution's rights and the rights of the ECHR are often cited as stated by parties in decisions ruled by Danish courts.

3. Denmark's international obligations

As explained above, Denmark is bound in national law to follow the ECHR and obligated to follow the guidelines issued by the ECtHR. In relation to the legislation within the field of rape, there are two provisions that are central to look deeper into; the ECHR article 3 "Prohibition of torture" and article 8 "Right to respect for private and family life". The Member States must ensure that law provisions in

[6] En introduktion til menneskerettighedskonventionen i dansk ret. Published by Magasint Europa . Internetadresse: http://magasineteuropa.dk/introduktion-menneskerettighedskonventionen-dansk-ret/ - Visited on 01.04.2019 (Internet)

the national legislation comply with both articles, but at the same time also ensure that the actual application of the provision lives up to the principles issued by the ECtHR.

In this context, it is essential to emphasize the 'Doctrine of Positive Obligations', which is a doctrine developed by the ECtHR. We will be giving an account of this in the following.

3.1 Positive obligations

It follows from the preamble of the ECHR that the overall purpose of the ECHR is to ensure universal and effective recognition and compliance with the rights enshrined in the ECHR. Interpretation and application of the ECHR must take place in light of the principle of human dignity, which implies that all human beings are free and equal in dignity and rights. Basically, this means that the application must not lead to citizens being treated in breach of this principle.

The ECHR imposes several requirements. The requirements relate to both criminal law and the actual application hereof while applying both to the protection of perpetrators and victims. Traditionally, human rights in relation to criminal law have unilaterally focused on the protection of the perpetrator in relation to the abuse of state power. However, according to the ECHR and the ECtHR's perception of human rights in relation to criminal law, the rights are not only set in the world to protect citizens who have committed crimes against other citizens, but the rights must protect all citizens, i.e. both the perpetrator *and* the victim. Based on the above, the ECtHR has developed the doctrine of the positive obligations, which has the victim as the primary protection interest.
Article 1 of the ECHR is worded as follows:

> *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".*

Article 1 is central to the importance of the ECHR in relation to the Member States. It follows that the Member States are the primary subject matter to the ECHR. The State may incur liabilities for non-compliance with the ECHR, regardless of which public authority is the cause of violation of the Convention's rights. In other words, the state is responsible for its internal authority structure and internal division of tasks.

The wording "*secure"* emphasizes that the content of the ECHR is binding on the Member States. The wording is interpreted in practice broadly, but overall, it is a duty of the states to achieve the required protection and treatment of the rights through legislation, other forms of regulation and actual conduct.

The majority of the ECHR's rights are designed to include a negative obligation on the state, i.e. an obligation not to interfere with a right.

The ECtHR's development of the doctrine of the positive obligations is considered to be in line with the Court's dynamic interpretation and conception of the Convention as a "living instrument" in which the provisions must be interpreted according to present-day conditions to provide practical and effective protection against violations, thereby, not only provide citizens with a theoretical protection.

However, it is difficult to deduce anything specific about the content of the claims that the state is subject to the doctrine. The ECtHR assesses the extent of the positive commitments in each case and has not developed a general theory of positive obligations. In addition, it should be noted that the nature of the positive obligations varies considerably depending on the circumstances of each case. In the ECtHR's assessment of whether a Member State has lived up to the positive obligations in a specific case, several decisions show that a "fair balance" exists between the contradicting concerns of the individual, society and other individuals. From a criminal law perspective, this means that both the perpetrator and the victim must be taken into account in order for the ECtHR to assess whether a "fair balance" exists. It should be taken into account that the state has a margin of appreciation when nationally fulfilling the obligations under the ECHR.

It is important to be aware that the decisions of the ECtHR are settled by international law and not by national criminal law. The ECtHR is therefore not tasked with assessing whether the national authorities have correctly assessed the present case. The ECtHR has previously expressed this as (in relation to article 3 and 8):

> ""[…] *the Court's task is to examine whether or not 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. The Court* […] *cannot replace the domestic authorities in the assessment of the facts of the case, nor can it decide on the alleged perpetrators' criminal responsibility*."[7]

[7] M.C v. Bulgaria, premise 167 - 168

The ECtHR has on several occasions stated that the rape crimes constitute a serious violation of both article 3 and 8 and therefore leads to several positive obligations for the Member State. The detailed obligations that can be derived from the ECtHR's interpretation of the articles will be examined below.

3.2 Article 3

Article 3 of the ECHR is worded as follows;

> *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

It is implied in article 3 in comparison with article 1 that the State has an obligation to take measures to ensure that individuals under the State's jurisdiction are not subjected to torture, inhuman or degrading treatment, including such treatment by private individuals. Rape is a serious violation of article 3 and therefore the Member States have a positive duty to ensure that national laws and case law provide effective protection against rape by other citizens. Furthermore, if a rape crime has already been committed, the states are subject to a positive duty to conduct public, effective investigation and prosecution for reasoned justification for rape, and it is not sufficient that the victim itself has the procedural access to take civil action.

3.3 Article 8

Article 8 of the ECHR is worded as follows;

> *"1.) Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *2.) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

The concept includes both a person's physical and mental integrity. The right to privacy includes a positive duty for the state to protect individuals from physical assaults by other individuals, but it is generally left to the state itself to assess which measures should be applied to ensure respect for the individual's privacy. The ECtHR has stated that rape threatens fundamental values and aspects of privacy and thus constitutes a major violation of the right to privacy under article 8. In the case of more serious violations of article 8, states are subject to a positive obligation to both impose effective and dissuasive penalties and to carry out effective investigation and prosecution in the cases.

To sum up, article 3 and 8 impose positive obligations on the member States in order to effectively protect citizens from rape by introducing effective penalties as well as effective and public investigation and prosecution for reasoned justification of rape. We will in the following look into the case M.C. v. Bulgaria since this case is considered of great importance when interpreting the field of rape.

3.4 ECtHR case law – M .C v. Bulgaria app no. 39272/98 of December 4th 2003

The case concerned a 14-year-old girl (applicant) who allegedly had her rights under article 3, 8, 13 and 14 of the ECHR violated. She claimed that her domestic state's law and practice hereof in relation to the investigation concerning the crime she (allegedly) had been victim of, did not fulfil the domestic state's positive obligation to provide effective legal protection against rape and sexual abuse.[8]

The applicant alleged that she had been raped the night of August 1st 1995, when she was 14 years old. The investigation concluded that there was insufficient proof of the applicant having been forced to have sex. The girl had been to a disco where she had met P, A and V.A. aged 20 and 21 years old. She drove with them to another disco. On their way back they stopped for a swim, but since the victim was not interested in swimming, she waited in the car. The victim submitted that while waiting in the car one of the men, "(…) ('P') *had persisted in kissing her while she had tried to push him back. He had then moved the car seat back to a horizontal position, grabbed her hands and pressed them against her back. The applicant had been scared and at the same time embarrassed by the fact that she had put herself in such a situation. She had not had the strength to resist violently or scream.*[9] *Her efforts to push P. back had been unsuccessful, as he had been far stronger. P had undressed her partially and had forced her to have sexual intercourse with him* (…)".[10]

According to P's statements, the two of them had sex in the car, but it was with the applicant's full consent.[11]

In her submissions to the investigator, the applicant stated that *"she had later come to suspect that the three men had planned to have sex with her and had invented the pretext of swimming to drive to a*

[8] M.C v. Bulgaria, premise 3
[9] M.C v. Bulgaria, premise 17
[10] M.C v. Bulgaria, premise 17
[11] M.C v. Bulgaria, premise 18

deserted area. In particular, she did not remember A. and V.A. being wet when they had come back to the car, although they had insisted on going to the reservoir for a swim"[12].

All three men refused the allegations of having committed rape against the girl, claiming that the intercourse had taken place with her consent. There was no "direct evidence" in the case that a rape had taken place, including no marks on the victim's body or any witnesses to the act.

The investigation extended over a long period, and at the end of its term, the prosecution decided that the case should be closed as it could not prove beyond any reasonable doubt that violence or threats of violence were used during the intercourse. The Public Prosecutor's Office placed particular emphasis on the fact that the victim had not made physical resistance or tried to get help from outsiders.

According to Bulgarian legislation in the field, someone can only be convicted of committing rape when the perpetrator has been aware that he was conducting sexual intercourse against her will and the exercising violence or threatened violence was made for the purpose of intercourse with the victim.

The applicant claimed to the ECtHR that the Bulgarian law and case law did not ensure effective protection against rape and sexual abuse since it was only in cases where the victim had made physical resistance that offenders were prosecuted. Furthermore, the applicant stated that the State had failed to properly investigate the case.[13]

Under the section *"The Modern Conception of the Elements of Rape and Its Impact on the Substance of Member States' Positive Bond to Provide adequate protection",* the ECtHR stated that every State is entitled to a certain margin of discretion in ensuring protection against rape, and therefore legally can take cultural and local conditions into account as well as incorporating traditional conditions. Furthermore, it is clear that the discretionary margin of the national authorities is limited by the specific requirements resulting from the ECHR. The ECtHR also pointed out that the interpretation of the requirements must take into account that the ECHR is a living instrument and it must thus be interpreted and applied in the light of *"*[...] *changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved* [...][14].

[12] M.C v. Bulgaria, premise 21
[13] M.C v. Bulgaria, premise 111-113
[14] M.C v. Bulgaria, premise 155

The ECtHR stated that it is known that victims of rape do not necessarily make physical resistance because of *"[...] a variety of psychological factors or because they fear violence on the part of the perpetrator [...]"*. The ECtHR criticized the authorities of Bulgaria for putting too little emphasis on the psychological factors in the case, especially in the light of the vulnerability seen in young people and the particular psychological circumstances associated with rape, as seen in the following:

> "[...] *the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. 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.* [...]"[15].

Concerning the wording of the provision of the Bulgarian Criminal Code regarding rape crimes, the ECtHR noted that the wording did not include a requirement of physical resistance from the victim. Furthermore, the ECtHR found that Bulgaria defined rape in a way that did not differ from the wording of other Member States' legislation in this area. The ECtHR did furthermore not point anything out regarding Bulgaria's general treatment of rape cases. The ECtHR acknowledged that the Bulgarian authorities in the specific case had faced a difficult task, as it was a matter of *"[...] two conflicting versions of the events and little "direct" evidence [...]"*[16]. The ECtHR stated that in cases with conflicting explanations, the authorities are required to carry out a "*context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances*".[17]

The ECtHR noted that it may be difficult to provide evidence of non-consent in rape cases where there is no direct evidence such as marks of violence or witnesses statements, however there is a duty of the authorities to *"[...] explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centered on the issue of non-consent".*[18]

The ECtHR finally concluded that Bulgaria had violated its positive obligations under article 3 and 8 and stated:

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[15] M.C v. Bulgaria, premise 166
[16] M.C v. Bulgaria, premise 176
[17] M.C v. Bulgaria, premise 177
[18] M.C. v. Bulgaria premise 181

"[...] in the present case there has been a violation of the respondent State's positive bond under both Articles 3 and 8 of the Convention. [...]

In conclusion, the ECtHR came up with several general statements in the case, which are important in connection with the detailed determination of the state's positive obligations in the field of rape. To sum it up, the ECtHR found that states should ensure that (i) the Member States conduct criminalization and effective prosecution of any sexual act committed without consent, even if the victim has not made physical opposition, (ii) in cases where there is no or only little direct evidence must carry out a "context-sensitive assessment" of the evidence in the case, and (iii) the criminalization of rape must reflect a contemporary view of gender equality and safeguard the individual's sexual autonomy. [19]

4. Danish regulation; law and case

After looking into the regulation and case law within this field from the ECHR and the ECtHR, the thesis will in the following examine the state of law in Denmark.

4.1 Section 216 of the Danish Criminal Code

Rape is a criminal offence in Denmark which is criminalized in the Danish Criminal Code Section 216 that states:

"1) Any person, who enforces sexual intercourse by violence or under threat of violence, shall be guilty of rape and liable to imprisonment for any term not exceeding eight (8) years. The placing of a person in such a position so that the person is unable to resist the act shall be equivalent to violence.
[...]. *"*[20]

Section 216 of the Danish Criminal Code is crystal clear; rape is a serious crime in Danish legislation. It is our view that the Danish legislation in this field is compatible with the ECHR. A potential dilemma begins to unfold when all the nuances and character of the rape cases meet the legal system.

In a Danish study of human rights and rape cases in Denmark, "*Var det voldtægt?*"[21][22], an interesting observation is stated:

[19] M.C v. Bulgaria, premise 187
[20] Section 216 of the Danish Criminal Code
[21] In English: "Was it rape?"
[22] Report: Var det voldtægt? https://www.ft.dk/samling/20061/almdel/sou/bilag/246/363930.pdf

> *"In order to examine the reported rape, the police and prosecution have to make a series of assessments, which often rest uneasily with the demands of objectivity and rationality posed by the system. The daily practice of implementing and negotiating the rules reveal an array of potential problems in the rape cases, e.g. determining whether the sexual encounter was entered into voluntarily or by force, determining the credibility of both the accused and the victim, judging the likeliness of the explanations given by the parties etc. Ultimately, the subjective reasoning and assessment by the prosecutor in question determines the outcome of the reported rape. These assessments are thus inevitable but nevertheless they introduce an element of arbitrariness and uncertainty as to how and on what grounds a decision is reached."*[23]

The above is specific within a Danish context, but it is our opinion that this is representative to all Member States of the EU.

4.2 Danish case law

To gain a deeper understanding of how the Danish regulation works in practice we have looked into a few cases; the High Court of Eastern Denmark's ruling of August 15th 2016 (Case U.2016.3880), the High Court of Eastern Denmark's ruling of march 8th 2017 (Case S-3171-16) and the High Court of Eastern Denmark's ruling of September 4th 2017 (Case S-884-17).

4.2.1 Case U.2016.3880

In the ruling of August 15 2016, three young men were charged under section 216, of, among other things, having had intercourse with a 17-year-old girl (V) who, as a result of drinking alcohol and/or due to lack of insulin was in a state or situation in which she was unable to oppose the action.

The district court judge declared:

> *"*[...] *the victim did not clearly oppose the actions and since there is no medical information on V's appearance and condition while being affected by alcohol, the court finds it predominantly suspicious that V due to her alcohol intake or for other reasons was in a state where she was unable to oppose attempts of intercourse, and other sexual relations* [...] ".[24]

On this basis, the district court stated that it was hesitant to conclude that the defendants "[...] *had to realize or accept the possibility that V was in such a state* [...]" and on this basis, the court acquitted the three defendants.

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[23] Report: Var det voldtægt? https://www.ft.dk/samling/20061/almdel/sou/bilag/246/363930.pdf, page 156
[24] Case U.2016.3880, our translation and underlining.

The case was appealed to the High Court that reversed the ruling. The three defendants were found guilty of sexual assault under section 216. Despite this, the grounds of the City Court still seem to indicate that case law require the victim to have resisted for mens rea to be stated.

4.2.2 Case S-3171-16

In a ruling of March 8th 2017, a 29-year-old man was acquitted of sexually assaulting a 17-year-old girl under section 216. In this case, the victim's sister and her boyfriend had slept on a mattress next to the bed, where the defendant and the victim lay when the assault took place. A DNA investigation was carried out which proved that the defendant's DNA was found in the victim's vagina. The defendant refused to have had any form of sexual physical contact with the victim.

In the ruling's explanatory statement six of the judges declared:

> *"The victim did not shout, nor did she otherwise seek help from her sister and her boyfriend in an attempt to prevent the rape as she has explained and which, according to her own explanation, continued for a certain period of time. She also explained that she did not resist, but stiffened and therefore did not consider trying to get out of bed. At the same time, she explained that she repeatedly said no. V neither had damage or marks after retention or the like. According to testimony, none of the persons present were affected by alcohol or drugs. Under these circumstances, the High Court finds that it has not been proven that V stated against any sexual acts in such a way that the accused had reason to believe that she was willing to do so ".*[25]

It appears that the High Court placed decisive importance on the fact that the victim did not resist, even though she had explained that she "stiffened" due to an earlier incident of the same nature, in the ruling outlined above. The High Court also found that the victim had not tried to prevent the rape she was subjected to.

In regards to the DNA, the High Court must have neglected the defendant's statement and taken into account that there had been sexual activity between the defendant and the victim, otherwise the DNA trace could not be explained. Nevertheless, according to the High Court, the defendant was acquitted due to the lack of resistance from the victim.

[25] Case S-3171-16, our translation and underlining.

4.2.3 Case S-884-17

In the ruling of September 4th 2017, a 21-year-old man was acquitted of sexual assault under section 216. The defendant and the victim had met each other in a bar and went to the restrooms together. In the restroom, they had initiated oral sex, but when the defendant had begun sexual intercourse, the victim had said "No, no, no" and "Stop"[26].

The District Court aquitted the defendant with a ruling of 2-1. The case was appealed, and the High Court did not find that the victim's verbal opposition the brief intercourse, , could have led to a different result than acquittal. The High Court thus seems to assume that the victim's verbal resistance is not sufficient in all cases, and that the victim must therefore have made physical resistance.

As seen above, the three Danish verdicts are in some respects quite in accordance with the ruling M.C v. Bulgaria. This is rather interesting, since Denmark in general does a lot to follow the ECHR and will do much to avoid being involved in ECtHR cases.

5. Discussion

5.1 Anticipation of a future solution

In the previous parts of the report, we have examined and dealt with the practical handling of rape in case law – both on the national level and within the ECtHR. In this section, we will open a more general discussion on the possibilities for strengthening the national practical administration of criminal justice.

In the light of the previous paragraphs, it is our opinion that it is not the actual legislation that is the main problem concerning compliance with the international obligations of the Member States, but the practical application of the legislation within the Member States. In our report, we have taken a particular focus in Denmark's relationship to the ECtHR, but it is our clear opinion that this is representative of all Member States of the EU. Our proposal for future solutions is thus aimed at a common challenge in all EU Member States.

5.1.1 Strengthening EU vs. trust in the EU

National law is at the same time a symbol of national identity and justice. Any cede of sovereignty in regards to national law as a result of international changes constitutes a possible threat to the national

[26] Case S-884-17, our translation.

culture of justice. Cooperation in the EU is based on the support from the Union's citizens. Any change in cooperation must thus ensure balance between the trust of Union citizens and the power of submission to the EU for effective enforcement. Recent years have shown that there are extremely strong political forces in the EU, who argue for less power to the EU. It is therefore not an easy task to give the EU the necessary power to control the practical application of law by member states.

5.1.2 A new system of an expert group to prepare reports

This thesis' main research question concerns strengthening of the use of national criminal procedure by the Member States within the framework of the European criminal procedure.

In this context, it is relevant to note that even though The Council of Europe has the main monitoring responsibility of the ECHR, it is interesting to look deeper into whether the EU should play a greater role. Our proposal is therefore a new EU initiative to strengthen compliance with the rights guaranteed by the ECHR and the positive obligations developed by the ECtHR.

We would prefer the EU to take a more proactive role in relation to comply with the ECHR, and to make the EU focus more on the national criminal process within the 28 Member States. Our proposal for a solution is establishing an independent 'EU expert body', aiming on evaluating and guiding the Member States in order to monitor the practical use of the ECHR and the Positive Obligations devolved by the ECtHR. This new 'EU body' would first of all have a preventive effect with advising the Member States on understanding and using the case law from ECtHR, and at the same time have a deterrent effect by continuously evaluating the Member States, and perhaps by publishing a report in a common database. The new EU body should also prepare several studies on the practical application of criminal law by Member States. These studies must be conducted centrally by the EU and managed by this new body.

The new EU body must firstly have the task of focusing the studies on specific focus points. This can, for example, in the context of this report be the national criminal procedure concerning rape. Another example could be a focus on prison terms in the Member States.

It is our opinion that the EU body should not itself conduct investigations. We imagine that an expert group will be set up during each study. In this respect, it is important that the expert groups themselves are independent and it is the same expert group that examines all countries. The members of an expert

group could perhaps be practitioners from the Member States, researchers, judges, and if legally possible, we would like the Chairman of the group to be an ECtHR judge.

Based on the studies, reports should be prepared to provide indicative proposals for improvements to national criminal systems. The study reports should include an objective view of the individual Member States' concerns regarding a specific focus area. For example, the criminal proceedings concerning rape cases. The reports should only be informative and guiding for the Member States. It is our opinion that the solutions presented in the reports are an important element for success, because these can serve as inspiration for the Member State itself, but also for other Member States.

It is our hope and belief that the reports will motivate the Member States to focus on the national criminal process on an ongoing basis. The new EU body is not supposed to take over the ECtHR role, but ideally, minimize the number of cases at the court by issuing more general opinions that can guide Member States in their application of ECHR in national law.

6. Conclusion

The purpose of this report was to determine how the Member States fulfil the requirements of the ECHR and the Doctrine of Positive Obligations as developed by the ECtHR and discuss future solutions in relation to ensuring a greater compliance in the criminal procedure.

Firstly, it can be concluded that the Member States are obligated to comply with the legislation set forth by the ECHR along with the Doctrine of the positive obligations both in their legislation but also in the practical application.

The ECtHR came up with several general statements in their ruling in M.C v. Bulgaria regarding the national authorities’ procedure in rape cases.

The ECtHR found that states should ensure that (i) the Member States conduct criminalization and effective prosecution of any sexual act committed without consent, even if the victim has not made physical opposition, (ii) in cases where there are no or only little direct evidence, the Member States must carry out a "context-sensitive assessment" of the evidence in the case, and (iii) the criminalization

of rape must reflect a contemporary view of gender equality and safeguard the individual's sexual autonomy. [27]

The report has focused on the Danish criminal procedure regarding rape, however it is our opinion that this assignment's considerations apply to a large number of the EU Member States. In order to investigate the purpose of the report we took a deeper look in to Danish case law to determine whether the Danish authorities act within their obligations set forth by ECtHR. It can be concluded that the actual wording of the Danish law regarding the criminalization of rape seems to be in accordance with ECHR article 3 and 8.

However, the challenges are seen in the practical application of the law. An example of this is the ruling M.C. v. Bulgaria that states that no requirement for resistance can be applied, according to the interpretation of the ECHR article 3 and 8. However, it is evident that in the Danish verdicts such a requirement is stated by the court. It can therefore be concluded that in practice, Denmark does not comply with the positive obligations stated by ECtHR.

It is therefore necessary to take a closer look at what the EU Member States can do in the future in order to ensure better compliance with the ECHR. Our solution is that the EU should prepare several reports on the practical application of criminal law by Member States. To produce these reports several studies must be conducted centrally by EU and managed by a new EU body.

[27] M.C v. Bulgaria, premise 187

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