Global Campus Europe

NOVA UNIVERSITY LISBON

European Master's Programme in Human Rights and Democratisation
A.Y. 2024/2025

UNHEARD YESES, UNSEEN VIOLENCE:

Navigating Sexual Consent and Autonomy for Women with Disabilities

Author: Sarah Bomben
Supervisor: Nausica Palazzo

Word Count Declaration: 29743

ABSTRACT

This thesis examines the evolving legal definitions of sexual violence and consent, focusing on the critical intersection of gender and disability. It highlights the significant transition from force-based to consent-based legal frameworks, emphasising the adoption of affirmative consent models supported by international human rights instruments. However, the research uncovers a fundamental challenge: the criminalisation of sexual violence against women with intellectual disabilities often hinges on presumed incapacity to consent, rather than evaluating the actual absence of consent. This reliance on incapacity presumptions can result in both overly protective measures that restrict positive sexual autonomy and insufficient safeguards that fail to prevent exploitation. Using an interdisciplinary methodology that combines legal doctrine, feminist theory, human rights law, and disability studies, the thesis investigates how intersectional discrimination impacts the experiences of women with disabilities as they navigate consent and justice systems. Through comparative analysis of Italy, Germany, and Sweden—representing different legal consent models (traditional, “no means no", and “only yes is yes”)—the study evaluates how these frameworks balance protecting women with disabilities from sexual violence while recognising their sexual agency. The findings suggest that while affirmative consent models present the most inclusive approach, legal reform alone is insufficient to address these complex issues. Persistent stereotypes and rape myths continue to marginalize women with intellectual disabilities, and such discriminatory attitudes may resurface even under the most progressive laws. The thesis calls for comprehensive judicial training and accessible sexuality education specifically tailored to women with disabilities' needs, empowering them to understand, communicate, and exercise sexual consent, ultimately bridging the gap between legal principles and lived experiences.

ACKNOWLEDGEMENTS

First, I would like to sincerely thank my family and friends for the invaluable support they have given me throughout the process of writing this thesis. I am very grateful for every word of encouragement and advice you have offered. Thank you, Dad, for sparking my interest in human rights and for always believing in "doing the right thing". Thank you, Mum, for always showing me the power of kindness and for your unconditional love.

Then, I want to extend my special thanks to the people I met in Lisbon, with whom I spent most of my time while writing this thesis. You made this experience very special, and you made the most stressful times seem brighter. Thank you especially to Camilla for your never-ending patience and the countless hours you spent with me in the library and beyond.

I would also like to thank NOVA University for a very insightful semester. In particular, I would like to acknowledge Professor Nausica Palazzo for her supervision during the completion of this thesis and express my sincere gratitude to Professor Teresa Pizarro Beleza for the time and support she has provided throughout this process.

Finally, I want to express my heartfelt gratitude to the EMA Programme and its network. This year has been one of the most meaningful in my life, and the opportunity to be part of this programme came at a time when I truly needed it. I am, and will always be, fascinated by the outstanding support the EMA Team provided us during the semester in Venice and beyond. In this regard, I would especially like to mention EMA Programme Director Orla Ní Cheallacháin for her kind words and her availability. Being part of this network is something I am proud of and will always cherish.

TABLE OF ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CoE	Council of Europe
CRPD	Convention on the Rights of Persons with Disabilities
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
EDF	European Disability Forum
EPRS	European Parliamentary Research Service
FC	Facilitated Communication
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
IDF	Italian Disability Forum
IQ	Intelligence Quotient
OHCHR	Office of the United Nations High Commissioner for Human Rights
SV	Sexual Violence
UNGA	United Nations General Assembly
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
WHO	World Health Organization

TABLE OF CONTENTS

ABSTRACT i
ACKNOWLEDGEMENTS ii
TABLE OF ABBREVIATIONS iii
INTRODUCTION 1
1. THE ROLE OF CONSENT IN SEXUAL VIOLENCE 5
1.1 Defining Consent 5
1.1.1 The Evolution of the Concept of Consent: Historical, Theoretical, and Social Developments 5
1.1.2 Academic Debate in Defining Consent 9
1.1.3 Rape Culture and Rape Myths 12
1.2 The Role of International Human Rights Frameworks (CEDAW, ECHR and ECtHR jurisprudence, Istanbul Convention) 14
1.2.1 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 14
1.2.2 The ECHR Framework and the case law of the ECtHR 15
1.2.3 The Istanbul Convention 17
1.3 State Parties of the Istanbul Convention: three models 19
1.3.1 The Traditional Model 20
1.3.2 The “No Means No” Model 22
1.3.3 The “Only Yes is Yes” Model 25
1.4 Conclusion 27
2. THE INTERSECTION OF SEXUAL VIOLENCE AND DISABILITY FOR WOMEN 28
2.1 Intersectionality and Intersectional Discrimination: A Theoretical Framework 28
2.1.1 Historical Foundations of Intersectional Thought 29
2.1.2 Crenshaw’s Formal Theorisation 30
2.1.3 Contemporary Developments 31
2.2 Intersectionality and Women with Disabilities: The Emergence of Feminist Disability Studies 32
2.3 Human Rights Framework on Gender, Disability, and Sexual Violence 35

2.3.1 The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD): balancing autonomy and protection 35
2.3.2 Intersectionality in the Istanbul Convention 39
2.4 Violence Against Women with Disabilities as a Form of Intersectional Discrimination 40
2.5 Sexual Violence Against Women with Disabilities as a form of intersectional discrimination 43
2.6 Barriers to Ending the Cycle of Violence and Accessing Justice 45
3. CONSENT AND WOMEN WITH DISABILITIES 48
3.1 (In)valid Consent and Capacity 48
3.1.1 The Categorical Approach 50
3.1.2 The Functional Approach 53
3.2 Balancing Protection from Violence and Positive Sexual Autonomy 55
3.3 Creating an Inclusive Definition of Sexual Consent 56
4. DISABILITY, GENDER, AND CONSENT: COMPARATIVE PERSPECTIVES ON PROTECTION AND AUTONOMY 61
4.1 Italy and The Traditional Model 62
4.2 Germany and the “No Means No” Model 66
4.3 Sweden and The Affirmative Consent Model 70
4.4 Concluding Observations: Strengthening Protection and Future Directions 72
4.4.1. Training for Judicial Officials 72
4.4.2 Accessible Information and Comprehensive Education 73
CONCLUSION 75
REFERENCES 77

INTRODUCTION

Sexual violence is a pervasive human rights violation that affects individuals across social groups. However, women with disabilities face unique vulnerabilities that expose them to heightened risks (EDF, 2020) and systemic exclusion from justice (Maher et al., 2018).

Historically marginalised in both feminist and disability rights discourses, women with disabilities (Moras, 2013), particularly those with intellectual disabilities, are often denied sexual agency while simultaneously being left unprotected by legal frameworks that fail to address their specific needs (Women Enabled International, 2018). According to the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) under the Council of Europe (2023), in recent years, numerous state parties to the Istanbul Convention have made significant progress in addressing sexual violence, leading to improved protections for victims. Especially, several countries have adopted definitions of rape based on the absence of consent. These advancements are widely acknowledged as being driven by states' efforts to align with the standards set by the Istanbul Convention (Sosa and Mestre I Mestre, 2023). However, the debate on consent and valid consent tends to overlook the problematic position of women with disabilities, risking further marginalisation of this population.

The present research fills this gap by outlining an ideal model for protecting women with disabilities from sexual violence (SV). To do so, it first explores how the legal definition of sexual violence has evolved, particularly in European and common law jurisdictions, from a force-based model to a consent-based framework, reflecting a broader shift towards recognising individual autonomy and bodily integrity (Popova, 2019). It further examines how intersectional discrimination, particularly at the intersection of gender and disability, allows for highlighting the experiences of women with disabilities in navigating consent and explaining their unique vulnerability to sexual violence. Furthermore, central to this analysis is the question of whether an affirmative consent model can provide an effective balance between ensuring protection from abuse and upholding the right to sexual autonomy for women with disabilities. Examining the affirmative consent model from a disability perspective is essential because, despite being regarded as the most protective and progressive approach to sexual violence by international human rights frameworks (CoE, 2023), the experiences of women with disabilities may not align with its underlying assumptions. Their realities

must be considered when developing an inclusive definition of sexual consent. This research addresses that gap and finds that the key features of an inclusive model largely align with the principles of affirmative consent.

This thesis adopts an interdisciplinary approach, drawing on feminist and intersectionality theory, human rights law, and disability studies. It conducts a doctrinal analysis of applicable international instruments — primarily the Istanbul Convention and the Convention on the Rights of Persons with Disabilities (CRPD) — alongside national laws and relevant jurisprudence. The analysis encompasses landmark cases from the European Court of Human Rights, such as *M.C. v. Bulgaria* (2003), as well as national-level cases from both European and common law jurisdictions, including the *State v. Fourtin* (2012) and *State v. Stubblefield* (2015) cases from the United States. Additionally, the study engages with feminist and disability scholarship to critically assess theoretical models of consent. The comparative legal analysis focuses on three jurisdictions—Italy, Germany, and Sweden—that reflect different legal models ("traditional", "no means no", and "only yes is yes"). This comparative framework enables a nuanced exploration of how legal reforms can either reinforce or challenge systemic exclusion and gendered ableism.

This thesis focuses on the intersection of sexual violence, disability, and gender, primarily within the framework of heterosexual relationships. While the dynamics of consent and sexual violence in same-sex relationships are equally important, they fall outside the scope of this research due to space limitations and the need to maintain a focused analytical framework. Future research should address how consent, coercion, and capacity operate in non-heteronormative contexts, particularly for LGBTQ+ individuals with disabilities, to ensure a more inclusive understanding of sexual autonomy and vulnerability.

In greater detail, the thesis is structured in four chapters.

The First Chapter provides an overview of the historical and legal evolution of the concepts of sexual violence and consent. It examines the predominant legal approaches to criminalising sexual violence. It highlights the progressive shift from force-based definitions of rape to consent-focused frameworks, in line with international human rights standards and the recommendations of the Istanbul Convention (Featherstone et al., 2024). While endorsing GREVIO's position on the necessity of adopting an affirmative consent model—embodied in the "only yes is yes" standard—it argues that significant obstacles to achieving justice for victims of sexual violence persist. These challenges are

primarily rooted in the pervasive influence of rape culture, entrenched gender stereotypes, and enduring rape myths that continue to shape legal interpretations and societal attitudes (Popova, 2019).

The Second Chapter centres on a significantly overlooked group in discussions about sexual consent: women with disabilities. It posits that any meaningful engagement with the concept of consent must operate within an intersectional framework, acknowledging that overlapping identities—such as race, ethnicity, sexuality, age, and disability—deeply influence how individuals navigate sexual negotiation and autonomy (Featherstone et al., 2023), while focusing on the specific group of women with disabilities as a case study. Starting from the notion of intersectional discrimination, the chapter begins by exploring the distinct realities that women with disabilities confront regarding sexual violence. It investigates how this violence manifests, identifies the systemic and social factors that increase their vulnerability, and examines the notable obstacles they face in obtaining justice. This analysis is crucial for shedding light on the unique challenges these women face in understanding, expressing, and exercising sexual consent.

The Third chapter of this thesis examines the concept of consent through a disability lens, focusing specifically on its effects on women with intellectual disabilities. It emphasises the necessity of finding a careful balance between protection from sexual violence and the recognition of positive sexual autonomy. Positive sexual autonomy refers to the right to pursue, express, and enjoy consensual sexual relationships (Denno, 1997). In contrast, negative autonomy focuses primarily on protection from harm (McGregor, 2017). While negative autonomy ensures freedom from unwanted sexual contact or coercion, positive autonomy affirms an individual's right to make independent sexual choices and engage in intimacy on their terms.

Although women with intellectual disabilities face an increased risk of abuse (EDF, 2020), scholars have increasingly critiqued the overregulation of their sexual lives, arguing that it can undermine agency and reinforce stigma (Green, 2020). The analysis reveals that *legal debates have traditionally centred on questions of incapacity*, often conflating the inability to fully consent with the absence of consent (Fischel & O'Connell, 2012). This distinction is pivotal, as laws based on presumed incapacity tend to be both overprotective—suppressing autonomy—and underinclusive—failing to prevent exploitation. The section proposes a more inclusive framework for evaluating sexual consent—one that takes into account the intersectional forms of discrimination experienced by disabled women. Ultimately, it argues that the key characteristics of this inclusive consent framework align closely with the affirmative consent or "only yes means yes" model endorsed by the Istanbul Convention.

The Fourth Chapter includes a comparative analysis of three countries—Italy, Germany, and Sweden—each representing a different legal model of consent. It examines how these jurisdictions strive to balance protection from sexual violence with respect for the sexual autonomy of women with disabilities. While many legal systems incorporate presumptions about incapacity in cases of cognitive disability (Green, 2020), such presumptions can be excessively rigid, potentially denying agency even when the individual expresses a genuine desire for intimacy. The analysis underscores that meaningful protection must extend beyond legal reform. To effectively safeguard rights and autonomy, states must also invest in mandatory training for judicial officials and provide accessible, comprehensive sexuality education for women with disabilities.

This study's findings are important and timely since they bring to light the unique intersection of gender and disability in the law of consent in sexual violence, providing a critical evaluation of whether contemporary legal frameworks in Europe adequately balance protection from violence and personal autonomy in intimacy for women with disabilities.

1. THE ROLE OF CONSENT IN SEXUAL VIOLENCE

This chapter provides an overview of the evolution of the concept of sexual violence and consent. It analyses the primary approaches to criminalising sexual violence and highlights the positive shift from force-based to consent-based definitions, as recommended by human rights instruments and the Istanbul Convention. I endorse GREVIO's assertion regarding the necessity of implementing an affirmative consent standard ("only yes is yes" model) as a vital step forward. However, significant shortcomings in delivering justice to victims of sexual violence remain, mainly due to the persistent influence of rape culture, entrenched gender stereotypes, and widespread rape myths.

1.1 Defining Consent

This section explores the concept of consent in the context of sexual violence. It begins with a brief historical overview of the evolution of consent over time. It then outlines the ongoing controversies surrounding its definition, highlighting the complexities and challenges that persist within a consent-based framework of sexual violence. Finally, it examines the influence of rape culture and the persistence of rape myths, which continue to shape societal perceptions and legal interpretations of consent. This will establish a foundation for a more in-depth analysis of the characteristics and shortcomings of each model (section 1.3).

1.1.1 The Evolution of the Concept of Consent: Historical, Theoretical, and Social Developments

In Western legal tradition, rape has long been criminalised, but the definition of rape and what is considered unlawful have shifted significantly over time. Historically, rape laws were designed less to protect individual autonomy and more to uphold male-dominated institutions such as property rights, marriage, and morals (Featherstone et al., 2024). In the medieval period, for example, the term *raptus* referred to a property crime primarily against the victim's father (Walker, 2013). This reflected a view of women—especially daughters—as property, whose value depended on their virginity. Only virgins could be considered as being raped, as the act was regarded as damaging the father's property. A woman who was no longer a virgin was regarded as impure, less desirable for marriage, and less capable of securing a dowry for her family (Little, 2005). In this context, fathers were concerned with

their daughters' worth on the marriage market, while husbands were focused on exclusive sexual access to ensure legitimate heirs and inheritance. Consent was not central to how rape was defined at the time; when it was considered, it often referred to parental consent rather than the victim's own (Walker, 2013).

Over time, the legal requirement that a woman be a virgin to press rape charges was gradually lifted in many parts of the Euro-American legal tradition. However, rape continued to be treated primarily as a property crime, particularly one against men (Featherstone, 2017). The focus shifted to protecting the institution of marriage and upholding Christian moral values. These values reinforced the belief that male sexual desire—often described as uncontrollable "lust" (Little, 2005)—was natural and inevitable, while women were largely viewed as disinterested in sex. This positioned women as the moral gatekeepers of sexual behaviour. During this period, all extramarital sex was criminalised as impure and sinful, regardless of whether the woman had consented (Popova, 2019).

Marital rape, meanwhile, remained legally permissible under the doctrine of coverture in the English common law tradition. As articulated by Sir William Blackstone (1765), a married woman had no independent legal identity—her legal existence was "suspended" during marriage. Building on this, Sir Matthew Hale stated in *The History of the Pleas of the Crown* (1736) that a husband could not be guilty of raping his wife, as she had given irrevocable consent through marriage. This principle shaped case law such as *R v. Clarence* (1888), which upheld implied marital consent, even in cases involving harm. In the United States, similar doctrines persisted until the late 20th century, with courts only beginning to overturn the marital exemption in cases like *State v. Smith* (1981) and *People v. Liberta* (1984), which held the exemption to be unconstitutional.

Rape within marriage was not criminalised in most jurisdictions until the 1970s and 1980s (Featherstone, 2017), and in many places, proving non-consent remains particularly difficult in the context of intimate partner violence (WHO, 2021). In this context, a woman's consent was not treated as legally relevant, illustrating a broader disregard for female sexual agency. Instead, women were viewed primarily as objects of male desire and as vessels for honour or shame, rather than as individuals entitled to bodily autonomy and protection under the law (McGregor, 2017).

In the early modern period, ideas of consent gradually entered the legal framework, with rape defined as "carnal knowledge" of a woman "against her will" (Coke, 1680). At the outset, the notion of "will" evokes consent, but a victim's testimony was insufficient to prove the absence of consent, making it difficult to demonstrate a lack of consent (Featherstone et al., 2024). Women and children

were not considered reliable witnesses, as there was a widespread belief that both groups were less rational and trustworthy than men (Walker, 2013). To proceed with prosecution and conviction, courts required proof of the victim's verbal and physical resistance, witnesses to such resistance, injuries, distress, and prompt reporting of the assault to neighbours, family, and authorities. If these were absent, it was assumed that the woman had consented to the intercourse (Featherstone et al., 2024).

In the nineteenth century, both legal and cultural understandings of consent began to shift across Europe and its colonies, with increasing emphasis on the role of force in defining sexual violence. From the mid-century onward, there was a noticeable rise in the prosecution and conviction of rape cases across Europe, accompanied by a growing trend among states to codify sexual assault laws (Featherstone et al., 2024). Lawmakers and courts began to redefine the legal concepts of consent, moving away from the earlier requirement that a victim must resist to the best of her ability to prove non-consent. However, despite gradual legislative changes, prevailing cultural and judicial interpretations remained largely unchanged. Victims were still expected to demonstrate non-consent through bodily resistance, and the use of physical force by perpetrators remained a key element of the offence (Featherstone et al., 2023). Even when not legally required, courts and medical professionals often sought physical injuries as evidence of assault. These persistent myths regarding physical resistance continued to shape how consent was interpreted in both medical and legal contexts well into the twentieth century.

Throughout the twentieth century, gender relations and sexual politics began to shift, influenced in part by the global impact of two world wars. During World War II, sexual violence reached unprecedented levels: Nazi soldiers targeted Jewish women in concentration and internment camps. At the same time, Soviet and American troops committed acts of sexual violence against civilian populations, often to assert dominance and humiliate enemy forces. This increased awareness about the issue contributed to a growing public discourse around sexual violence in the postwar decades. Consequently, legal prosecutions for rape gradually increased across Western nations (Featherstone et al., 2024). However, these developments did little to dismantle deeply embedded myths about consent or significantly reform problematic rape laws.

In fact, despite heightened attention, rape remained underreported and inconsistently prosecuted. Within law enforcement, courtrooms, and public opinion, the belief that sexual violence must involve overt physical force—and require clear proof—persisted. Second-wave feminists identified these assumptions as central to rape myths (Brownmiller, 1975), which continued to

influence legal expectations. Demonstrating non-consent remained—and still remains—particularly difficult without physical injuries or third-party witnesses (Featherstone et al., 2023). Consequently, although legal definitions increasingly recognised consent, the practical application often remained unclear.

Thus, while the formal requirement of force was gradually removed from legal definitions, its cultural legacy persisted. Feminist activists during this period revealed how the legal system placed an excessive burden on victims to prove non-consent, standards not required in other crimes. They also documented the re-traumatisation of victims in court and advocated for key reforms, such as rape shield laws that limit questioning about a complainant's sexual history (Featherstone et al., 2023). Nevertheless, achieving structural change regarding the concept of consent has proved challenging. Although, in theory, consent became central to legal definitions of rape in Western contexts, proving it remained highly complex (Freedman, 2013). The prosecution had to demonstrate both that a sexual act had occurred and that the complainant did not consent. Furthermore, conviction depended on proving that the accused knew the complainant did not consent (Tadros, 1999).

In response to the limitations of twentieth-century consent laws, feminist activism began exploring how the concept of consent could be redefined and expanded, leading to the development of what is now known as affirmative or positive consent. Affirmative consent emerged as a way to address ambiguity in previous legal frameworks by requiring clear, active agreement at each stage of a sexual encounter (Featherstone et al., 2024). Often called the "enthusiastic yes", affirmative consent must be given freely, eagerly, and meaningfully. It can be communicated verbally or non-verbally, but must involve active participation from all parties involved (Featherstone et al., 2023). Importantly, silence, passivity, or a lack of resistance do not constitute consent (Reed et al., 2016). A person who is intoxicated, drugged, coerced, or emotionally frozen cannot provide valid affirmative consent. This model promotes open communication between partners, not only to ensure mutual agreement but also to create space for expressing boundaries and desires. Affirmative consent thus redefines sexual agency, especially for women, by recognising their ability to participate in and shape their sexual experiences actively (Featherstone et al., 2023).

Currently, there is widespread agreement that rape legislation should protect an individual's sexual autonomy and bodily integrity—that is, the right to decide freely when, with whom, and under what conditions they engage in sexual activity. These values are closely linked to the broader principle of human dignity (O'Malley & Hoven, 2019). In particular, there is general consensus that states have a duty to safeguard negative sexual autonomy, meaning the right not to participate in or

be subjected to unwanted sexual acts (McGregor, 2017). To promote a legal and cultural environment based on mutual respect and communication between sexual partners, many jurisdictions have adopted the principle of affirmative consent. Alongside these legal advances, an increasing number of countries have introduced mandatory sex education programmes focused on teaching consent, aiming to instil these values from an early age (Featherstone et al., 2023).

1.1.2 Academic Debate in Defining Consent

When discussing consent, it is important to consider the scholarly debates surrounding the theoretical definition of this concept and the resulting challenges in its application. This section will provide a brief overview of critiques and potential limitations of a consent-based approach to sexual violence, which will be examined further in section 1.3.

Firstly, the concept of consent covers a wide range of mental states, from genuine desire on one end to reluctant acquiescence on the other. Moreover, as some scholars have pointed out, in contexts characterised by systemic inequality, the presence of consent does not necessarily indicate an equal interaction. Instead, it may simply reflect what is tolerated or perceived as the least harmful option available to the consenting party, who may have limited control over the situation (De Vido & Frulli, 2023).

As discussed in the previous section, since at least the 1970s, feminist scholars have played a vital role in shaping the discourse around consent and promoting the concept of affirmative consent. Feminist activism has been crucial in driving both social and legal reforms related to sexual violence. However, feminist perspectives on consent are not uniform. Many scholars have highlighted significant conflicts and tensions that arise when attempting to define and apply the concept of consent, both in theory and practice.

The radical feminist tradition, which emerged in the late 1960s and reached its peak influence in the mid-1980s, focused on how social power structures systematically oppress women as a class. In the context of sexuality, many radical feminists argued that sex and violence—intercourse and rape—are so closely linked, both socially and legally, that the line between them often becomes blurred. Consent, they contended, does not occur within a context of equal power. Instead, social conditioning teaches girls and women that their role is to meet men's sexual expectations. At the same time, legal definitions of rape have historically normalised force and aggression as part of male

sexuality. In such an environment, genuine, uncoerced consent becomes difficult to distinguish—if not entirely meaningless (Popova, 2019).

Catharine MacKinnon, a key figure in radical feminist thought, famously questioned in 1983 whether consent could ever be a meaningful concept for women, given the deep-rooted inequalities and constant threat of violence in heterosexual sex. She noted that legal frameworks interpret non-consent mainly as a man's use of force or a woman's resistance—reflecting a masculinist logic where women are not seen as harmed by sex and are thus presumed to have consented (MacKinnon, 1983).

In her more recent work, MacKinnon expanded this critique, arguing that the concept of consent is fundamentally flawed because it assumes equality between parties, which does not accurately reflect reality (MacKinnon, 2016). Rather than focusing solely on consent, she advocates criminalising sex that is exploitative through coercion or force, including not only physical violence but also psychological and social pressures that influence women's perceived choices. These can include fear of retaliation, damage to reputation, economic dependence, emotional manipulation, social conditioning to prioritise male desire, and internalised beliefs about submission and gender roles. For instance, a woman may "consent" to sex out of fear that refusing will lead to emotional abuse, social ostracism, or even violence, especially in intimate relationships or hierarchical settings (e.g., employer/employee, teacher/student). MacKinnon stresses that these dynamics often make the distinction between voluntary and involuntary participation in sex legally invisible. She sees coercion as not limited to overt threats or force but embedded in everyday power imbalances, particularly under patriarchy. As a result, she contends that concentrating solely on consent risks hiding the exploitative conditions often surrounding sex and does not provide sufficient protection to those who are structurally vulnerable to coercion.

Harvard scholar Janet Halley (2016) argues that consent-based norms alone are insufficient to foster meaningful social change, as they fail to tackle deeper structural issues related to patriarchy, racial inequality, sexuality, and class (Gruber, 2016). Laws shaped by what she calls "dominance feminists" (Halley, 2016) often tend to benefit those who already hold certain privileges, sometimes resulting in unintended negative consequences for marginalised groups.

In response to these concerns, other feminist thinkers have sought to broaden our understanding of consent. Yale scholar Joseph Fischel (2019), for example, argues that consent does not always mean desire or pleasure. He warns that the current focus on consent might cause individuals who have experienced bad or disappointing sexual encounters to reinterpret these as non-consenting and

thus criminal. Instead, he advocates for a more thoughtful and supportive approach to sex, which he describes as “best practices”, which encourages sexual education, access to resources, and a critical examination of issues such as gender roles, peer pressure, alcohol culture, and media messages.

Tina Sikka (2022) articulates a similar point. She suggests that the concept of affirmative consent assumes everyone possesses the same degree of personal freedom and agency, which is not always true. In her work, especially within the context of the #MeToo movement, she argues for a more compassionate and connected approach to sexuality. She proposes a model that combines pleasure with an ethic of care and mutual respect, where sexual experiences are not solely about avoiding harm but also about promoting autonomy, connection, and shared responsibility.

From a practical perspective, it has been noted that placing too much emphasis on consent may negatively impact the rules of evidence used in cases of rape allegations (De Vido & Frulli, 2023). The lack of consent can be demonstrated in different ways, and only the victim is truly positioned to confirm whether explicit approval for sexual activity was granted. Consequently, there is a risk that, during legal assessment, this element will be seen as requiring proof of clear and explicit refusal. In many cases, definitions of sexual assault that depend heavily on the absence of consent exacerbate the secondary victimisation of survivors, as prosecutors must prove beyond a reasonable doubt that the victim did not consent. In this context, the Special Rapporteur on violence against women (1994) pointed out that research from numerous jurisdictions shows that women who must prove they did not consent face major challenges. These challenges are especially significant when they cannot produce evidence of severe physical injury or when they have a prior acquaintance or sexual relationship with the accused.

Therefore, while celebrating the increasing emphasis on the importance of consent—and hopeful that younger generations may help change attitudes towards rape culture—scholars remain very aware of the enduring challenges surrounding sexual violence. In policing and legal settings, invoking a consent-based defence often depends on whether the complainant fits the image of a “perfect” or “ideal” victim. Challenging these and other rape myths has long been a key focus of feminist scholarship (Brownmiller, 1975; Estrich, 1987).

Together, these perspectives demonstrate that while consent is crucial, it should be part of a broader discussion on justice, power, and our relationships. Actual change requires not merely better laws but also a transformation in culture, attitudes and sexual ethics.

1.1.3 Rape Culture and Rape Myths

As the previous sections have demonstrated, a major critique of the concept of consent is that its practical application is often compromised by the broader social context in which it functions, a context that feminist scholars and activists refer to as "rape culture". Rape culture, or rape-supportive culture, describes a society shaped by beliefs, norms, and attitudes that allow sexual violence to persist and, in some cases, remain unpunished (Popova, 2019). At the core of this culture are rape myths and victim-blaming narratives, which range from explicit stereotypes to more subtle, everyday assumptions.

Rape myths are generally understood as prescriptive or descriptive beliefs about rape that serve to deny, minimise, or excuse sexual violence (Bohner et al., 1998). These myths distort the reality of sexual violence by promoting narrow ideas about what constitutes "real" rape and under what circumstances a case will be taken seriously (Popova, 2019). They often shift the focus to the victims' behaviour—how they dressed, whether they resisted, or how quickly they reported the assault—ignoring the complex ways trauma can manifest, including reactions that might seem counterintuitive, such as silence or delayed disclosure (Burrowes, 2013). Crucially, these are not just private beliefs; research shows that rape myths influence how key actors in the criminal justice system—police, lawyers, judges, and juries—interpret evidence and assess credibility (Burrowes, 2013).

Given the significant impact of these beliefs on the effectiveness of consent and legal outcomes, the following section will examine some of the most commonly discussed rape myths.

1.1.3.1 Commonly discussed rape myths

Rape myths and stereotypes may arise in rape cases regarding what constitutes "real" rape (including where and when it is expected to occur), the victim/survivor, and the offender. These myths create unrealistic and damaging expectations that often shape public perception, legal outcomes, and the treatment of survivors (Popova, 2019).

Several persistent rape myths continue to influence public perceptions of sexual violence, often distorting how and where such acts happen. One common belief is that "real" rape usually involves a stranger, occurs at night, and takes place in secluded outdoor areas. In reality, most sexual assaults are committed by someone the victim knows and often happen in familiar settings (Featherstone et al., 2023). Another widespread myth is that rape always involves physical force and visible injuries, ignoring the many cases where coercion, manipulation, or threats are used instead of overt violence

(UNODC, 2014). Harmful assumptions about consent also fuel the misunderstanding of sexual violence. For instance, some think that when a woman says “no”, she actually means “yes”, or that prior consent automatically equals ongoing consent, especially in intimate relationships (Crown Prosecution Service, 2021). This overlooks the principle that consent must be freely given, informed, and continuous. These myths not only promote victim-blaming but also set unrealistic standards for what constitutes “real” rape, leading to the dismissal or disbelief of many survivors’ experiences.

Moreover, both in public discourse and institutional settings, harmful myths persist about what a “real” rape victim looks and acts like. These beliefs often serve to discredit victims and shift blame onto them, even in courtrooms, where such stereotypes can influence how juries assess credibility (Ellison & Munro, 2009).

One of the most common myths is that genuine victims always physically or verbally resist their attacker, clearly expressing non-consent. In reality, many survivors freeze during an assault—a trauma response often mistaken for compliance (Popova, 2019). Another widespread belief is that victims who were drinking or using drugs are somehow responsible for the assault, as if intoxication excuses or invites sexual violence (Crown Prosecution Service, 2021). Myths also blame victims for dressing provocatively, acting flirtatiously, or having a sexual history, wrongly treating these factors as indicators of consent or dishonesty (Little, 2005). As mentioned, these stereotypes can significantly influence whether prosecutors pursue charges and how juries and judges interpret evidence (Burrowes, 2013). For example, visiting someone’s home on a first date is often wrongly equated with consent, and delayed reporting or emotional detachment is taken as a sign that the victim is lying. Survivors are expected to recall events in perfect detail, act visibly distressed, and cut off all contact with the perpetrator—standards that do not reflect the complex realities of trauma (Council of Europe, 2024). Such myths not only distort the truth about sexual violence but also contribute to ongoing stigmatisation and secondary victimisation of those who come forward (Crown Prosecution Service, 2021).

Another widespread category of rape myths concentrates on the perpetrators. These beliefs often reflect myths that blame victims, helping to reduce offender accountability and distort the understanding of sexual violence. One such myth suggests that rape is a spontaneous act of passion rather than a planned assertion of power, control, or entitlement. This framing downplays the gravity of the offence and shifts attention away from the perpetrator’s responsibility (Council of Europe, 2024). A particularly persistent stereotype is the idea that men have uncontrollable sexual urges, implying that women must manage male behaviour by avoiding actions that could be interpreted as

provocative. This myth not only justifies male aggression but also reinforces damaging gender norms that place the burden of sexual regulation on women (Crown Prosecution Service, 2021). Another common misconception is that only mentally ill or deviant individuals commit rape, which ignores the reality that offenders are often ordinary, well-known, and trusted by the victim (Popova, 2019). Moreover, the notion that young men should escape conviction for sexual assault because they "have their whole lives ahead of them" reveals a troubling tendency to prioritise the perpetrator's future over justice and accountability (Crown Prosecution Service, 2021). Collectively, these myths uphold a culture where sexual violence is excused, minimised, or left unpunished.

1.2 The Role of International Human Rights Frameworks (CEDAW, ECHR and ECtHR jurisprudence, Istanbul Convention)

At the domestic level, Member States have criminalised sexual violence using various definitions, while different international and regional bodies have established their own standards (EELN, 2021). This section explores how international human rights frameworks address sexual violence and consent issues.

1.2.1 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is the most relevant UN treaty regarding sexual violence. Article 2 of the convention requires state parties to condemn all forms of discrimination against women (Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979). The United Nations (UN) Committee on the Elimination of Discrimination against Women (CEDAW) states that gender-based violence, including sexual violence, constitutes a form of discrimination that hampers the enjoyment of several rights granted to civilians, such as the highest attainable standard of health, freedom from torture, equal protection under the law, liberty, and personal security. These rights are further safeguarded against interference by others acting in their private capacity (CEDAW, 1992). In essence, states are required to meet their obligations under the convention by implementing measures to prevent, investigate, and punish rape by non-state actors.

Moreover, in its General Recommendation No. 35 of 2017, the Committee emphasised that states must clearly define sexual assault, including rape, as offences against the right to physical, sexual, and psychological integrity, as well as personal security. It also noted that the definition of

sexual offences, such as rape within marriages or during acquaintance or dating relationships, relies on the absence of voluntary consent and considers coercive situations (CEDAW, 2017). Regrettably, there is no additional guidance provided on how to define consent.

1.2.2 The ECHR Framework and the case law of the ECtHR

This section examines the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR), which play a pivotal role in shaping the legal and interpretive framework for recognising sexual violence and rape as violations of human rights, whether perpetrated by state actors or private individuals (De Vido & Frulli, 2023). The ECtHR's case law is crucial, as it has established the absence of consent as the defining element in the determination of rape and sexual abuse.

Under the ECHR, a member state must adequately investigate, prosecute, and punish all forms of rape and sexual abuse (EPRS, 2024). In their 2002 Recommendation on the Protection of Women Against Violence, the Council of Europe (CoE) member states, acting through the Committee of Ministers, decided that national laws should "penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance" (Council of Europe (Committee of Ministers), 2002).

In applying the ECHR, the ECtHR has issued several important rulings on the issues of rape and sexual violence, confirming that contracting parties of the Council of Europe have not sufficiently investigated these cases. The ECtHR's case law is vital, as it establishes the legal and interpretive foundation for recognising sexual violence and rape as human rights violations, whether committed by state agents or private individuals (De Vido & Frulli, 2023).

In particular, the Court recognised for the first time in *M.C. v. Bulgaria* (2003) that lack of consent is a vital element in establishing the existence of rape and sexual abuse. In this case, the ECtHR addressed the case of a 14- year- old girl who was raped by two men. Although she cried during and after the assault and medical examinations confirmed physical trauma, the perpetrators were not prosecuted because she had not physically resisted or called for help. At the time, Bulgarian law required evidence of physical resistance to establish rape. The Court found that this approach failed to protect the applicant's rights under both Article 8, which safeguards the right to sexual autonomy and private life, and Article 3, which forbids inhuman and degrading treatment (EELN, 2021). It stated that "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" (*M.C. v. Bulgaria*, 2003, para. 166). The Court emphasised the universal shift towards recognising lack of consent as the key factor in defining rape and sexual abuse, acknowledging that victims—especially young girls—often do not resist due to fear, trauma, or dissociation. It found both the national investigation and Bulgarian legislation to be flawed, asserting that states are obliged to prosecute sexual violence even without physical resistance (De Vido & Frulli, 2023).

The Court maintains that authorities should assess evidence of consent or its absence based on all relevant circumstances, particularly when there is no direct proof of rape, such as calls for help or signs of violence and resistance. The strict requirement for proof of physical resistance risks allowing some forms of rape to go unpunished; therefore, the Court considers this approach less effective in safeguarding individuals' sexual autonomy (De Vido & Frulli, 2023). However, the Court generally refrains from providing detailed guidance on how states should fulfil their responsibilities, granting national authorities considerable discretion (EPRS, 2024).

Recent cases include *L. and Others v. France* (2025), where the ECtHR highlighted the importance of consent in prosecuting sexual violence, especially involving vulnerable victims such as minors. The case involved three young women who, as minors, endured repeated acts of rape and sexual abuse under different circumstances, including intoxication, coercion, and abuse of authority. Despite this, the French judicial system failed to prosecute the offenders properly, often classifying the acts as lesser offences or dismissing them due to lack of evidence of physical violence or resistance. The Court unanimously found violations of Articles 3 and 8 of the Convention, stating that France's criminal law system was inadequate for effectively punishing non-consensual sexual acts.

Building on prior case law, including *M.C. v. Bulgaria* (2003), the Court reaffirmed that states have a positive obligation to criminalise and effectively prosecute all non-consensual sexual acts, especially when victims are vulnerable due to age, intoxication, or coercion. It emphasised that demanding proof of physical resistance as a prerequisite for prosecution risks fostering impunity and undermining sexual autonomy. Additionally, the Court criticised France for lacking an explicit legal definition of consent in its criminal code, which led to inconsistent and insufficient judicial responses.

The Court also emphasised secondary victimisation and gender-based discrimination during the handling of these cases. In particular, the moralising and victim-blaming attitudes exhibited by

authorities towards the first applicant constituted a violation of Article 14 (prohibition of discrimination). Across all three cases, courts failed to properly assess the applicants' capacity to consent, especially considering their age and vulnerability. The judgment highlights the essential role of consent in sexual violence jurisprudence and reaffirms that justice systems must avoid stereotypical assumptions and uphold victims' dignity throughout legal proceedings.

Furthermore, in *X v. Cyprus* (2025), the ECtHR found violations of Articles 3 and 8 of the Convention due to authorities' serious failures in investigating an alleged gang rape. The applicant, a young British woman, initially reported being raped by multiple men but later retracted her statement after prolonged police questioning. The Court placed particular importance on the Cypriot authorities' failure to properly examine whether the applicant had consented to the sexual acts in question. Investigators overlooked crucial contextual factors, such as the fact that X had been drinking and traces of cocaine were found in her urine, both of which could have affected her capacity to give informed consent. Additionally, no weight was given to her clear refusal to engage in sexual activity with some of the suspects, nor to the fact that several men repeatedly entered her room against her wishes, disregarding her explicit requests for privacy. The Court observed that no effort had been made to establish whether the suspects had taken any steps to ensure X's consent; rather, evidence suggested they had simply assumed consent, expecting sex without verification. Although Cyprus had a legal definition of rape based on the absence of consent, the authorities focused on inconsistencies in X's testimony and failed to address the key question of whether genuine and voluntary consent was present. The Court criticised this approach, stressing that a proper investigation into sexual violence must prioritise the victim's capacity and freedom to consent, and that failure to do so risks secondary victimisation and undermines sexual autonomy.

1.2.3 The Istanbul Convention

The Istanbul Convention, officially known as the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, was adopted in 2011 and entered into force in 2014. It serves as the Council of Europe's specific legal instrument for addressing violence against women and domestic violence, recognising such violence as a human rights violation and a form of discrimination against women. Its definition encompasses all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life (Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence [Istanbul Convention], 2011). Moreover, the Convention

requires the establishment of specialised victim support services and provides a comprehensive framework for the prevention, criminalisation, and prosecution of sexual violence, including rape (De Vido & Frulli, 2023).

Concerning sexual violence and rape, Article 36 of the Convention forms the basis of such a framework. Comprising three paragraphs, this provision details different behaviours that qualify as sexual violence; it highlights the lack of consent as the key element of the offence and states that intimate partner and marital rape are prohibited and punishable under domestic criminal laws (De Vido & Frulli, 2023).

Paragraph 1 of Article 36 specifies the types of non-consensual sexual acts that states must criminalise to prevent certain forms of sexual violence from going unpunished. It adopts a broad perspective on the description of the actus reus, encompassing non-consensual acts such as vaginal, anal, or oral penetration with any body part or object, as well as other non-consensual sexual activities (Istanbul Convention, art. 36, para. 1(a)-(b)). It also considers as sexual violence situations where the perpetrator does not physically partake but coerces others into engaging in sexual acts (Istanbul Convention, art. 36, para. 1(c)). A more comprehensive approach becomes essential because many jurisdictions define rape narrowly, recognising only penile penetration of the vagina (De Vido & Frulli, 2023). Such a limited definition fails to account for other forms of sexual violence, like different types of penetration or scenarios where victims are compelled to perform sexual acts. Feminist scholars have criticised this restrictive view, pointing out that it describes sex solely in male genital terms and overlooks the wider range of sexual violations women often face (EELN, 2021). It also tends to underestimate the severe physical and psychological harm caused by other non-consensual sexual acts (De Vido & Frulli, 2023). Conversely, Article 36 addresses these shortcomings by adopting a broader understanding of sexual violence.

According to Article 36, the main legal element in the convention's definition of sexual violence is the absence of freely given consent resulting from an individual's free will. The significance of "consent" in the Istanbul Convention is further elaborated in paragraph 2 of the Article, which requires that the prosecution of sexual offences be based on a context-sensitive assessment of the evidence to determine, on a case-by-case basis, whether the victim provided their free consent to the sexual act. This provision acknowledges the risks of failing to prosecute certain forms of sexual violence if acts are criminalised solely when based on coercion, threats, or force rather than the lack of consent. Article 36 of the convention expands on the aforementioned case law of the European Court of Human Rights, emphasising that such strict approaches risk jeopardising

the adequate protection of an individual's sexual autonomy (*M.C. v. Bulgaria*, 2003). Consequently, Article 36 establishes the requirement to criminalise rape and all other non-consensual sexual acts. In this regard, the Explanatory Report to the Istanbul Convention (2011) emphasizes that states are required to appropriately punish and prosecute all non-consensual sexual acts, even in cases where the victim does not physically resist, aligning with modern standards and developments in this area.

1.3 State Parties of the Istanbul Convention: three models

As previously mentioned, the Istanbul Convention requires states to criminalise all forms of non-consensual sexual acts. Furthermore, it leaves it to states to define how lack of consent will be expressed in their laws, allowing "the Parties to decide on the specific wording of the legislation and the factors that they consider precluding freely given consent". Nonetheless, all non-consensual sexual acts must be criminalised (Explanatory Report to the Istanbul Convention, 2011).

In reality, the criminalisation of sexual violence, including rape, by States Parties to the Convention varies regarding definitions, the scope of protection, types of prohibited conduct, applicable sanctions, and the consideration of aggravating or mitigating circumstances. To date, a review of the monitoring activities from the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) suggests that four distinct approaches have emerged in the criminalisation of sexual violence, including rape (CoE, 2023). These are the traditional model, a two-tiered approach, the "no means no" model, and the "only yes is yes" model. The first requires the use of force, coercion, or vulnerability, while the second is based on a two-tiered approach, with a legal provision that necessitates the use of force, threat, or coercion while adding another offence that is based entirely on lack of consent. The third approach ("no means no" model) requires proof that the sexual act was committed against the will of a person. In the fourth approach, also known as "affirmative consent", the voluntary participation of both or all parties is necessary for sexual acts not to be criminalised (CoE, 2023).

This research will analyse the traditional model, the "no means no" model, and the "only yes is yes" model, outlining their key features and examining the obligations they impose on individuals who do not wish to engage in sexual activity. It will also explore the critiques these models have received and assess their potential shortcomings in effectively protecting women from sexual violence.

1.3.1 The Traditional Model

The traditional criminal law approach to sexual violence relies on force-based definitions, requiring the use of force, threats, coercion, or intimidation. This approach, known as the traditional model, reflects how laws and courts have historically defined sexual violence. As noted earlier, the core of wrongdoing in medieval times was an act with coercive impact; consequently, courts required that an offender use violence to commit the sexual act (Hörnle, 2019). The traditional legal approach primarily focused on the use of force or violence not to protect sexual autonomy but to uphold religious or moral standards related to sexual conduct and to preserve outdated notions of female honour (Dripps, 1992). Sexual offences were narrowly defined, usually relating only to vaginal intercourse, which was believed to threaten a woman's virginity and thus her reputation as an "honourable woman" (Hörnle, 2019). The law assumed that a woman of honour would resist such acts and therefore required proof that the perpetrator attempted to overcome physical resistance (Dripps, 1992).

Today, the basis of the force-based approach in the legal system is that substantial evidence of violence and resistance, or serious threats, is necessary to establish the offender's guilt beyond a reasonable doubt. Laws and judicial procedures have often acquitted offenders in the absence of such proof (EPRS, 2024). Criminal laws in many European countries, even after ratifying the Istanbul Convention, still rely on this model. Notably, Albania, Andorra, Bosnia and Herzegovina, Estonia, France, Georgia, Italy, the Netherlands, Norway, Poland, Romania, San Marino, Serbia, and Switzerland continue to define sexual offences with references to elements like force or coercion. Specifically, the use of violence or the threat of violence (as seen in France, Italy, and the Netherlands), acting against someone's will through force (as in Estonia), or imposing constraints (as in Romania) are all included in most force-based definitions (Council of Europe, 2023).

Limitations

Flaws of the traditional approach have been significantly highlighted, arguing that it fosters a context where victims of sexual violence are held responsible for the violence and offenders are exonerated (CoE, 2023). Firstly, as previously noted, such laws were not intended to protect sexual autonomy; instead, they were shaped by religious and moral rules (CoE, 2023). The notion that disregard for a woman's individual wishes would be the core basis for criminalising an act was not considered until the concept of autonomy was introduced (Dworkin, 1988). It was only then that the idea of criminal law protecting women's sexual agency began to emerge. Secondly, the traditional

model is seen as perpetuating the aforementioned rape myths and stereotypes regarding who the perpetrator is and how a rape victim is expected to behave before, during, and after a sexual attack (EPRS, 2021). A force-based definition, for instance, relies on the idea that "real rape" is typically committed by strangers in public places, in the dark, and often with a weapon (EPRS, 2021). In contrast, sexual encounters between a woman and a man who know one another beforehand are not regarded as rape. This is illustrated by surveys indicating that the public does not view a sexual act as constituting rape provided certain criteria are met, such as a prior relationship or friendly acquaintance between the victim and the perpetrator (Little, 2005).

However, the majority of rapes occur indoors, involve people known to the victim, and do not cause obvious harm, according to available data (UNODC, 2014). This event, known as acquaintance rape, is four times more likely to happen than being raped by a stranger (Warshaw et al., 2019). Nonetheless, victims of this latter type of crime are often not taken seriously, even by legal professionals (EPRS, 2021), which reflects the outdated belief that strangers pose the greatest threat to victims of rape (CoE, 2023). This has effectively relegated the majority of rapes to a realm beyond the reach of the law in the past (Möller et al., 2017).

Moreover, myths attribute rape accusations to a supposed desire for revenge (EPRS, 2021), reflecting the common belief that false rape allegations are easy to make yet challenging to disprove (Lonsway et al., 2009). This mistrust is seen in the expectation that women must show physical injury for their claims to be taken seriously. Susan Brownmiller (1993) argues that this widespread fear—that women commonly and maliciously fabricate rape claims—stems from the deeply rooted male belief that women are inherently untruthful. Yet, this fear appears unfounded: considering that four out of five rapes are never reported, it is clear that rape is far from being "an accusation easily made" (Little, 2005).

Furthermore, demanding that victims always resist and physically fight back during sexual violence creates significant issues, as it sustains a myth about how a "real" victim of violence should react. In light of landmark cases like *M.C. v. Bulgaria* and the increasing awareness of how victims typically respond to trauma, this expectation has been recognised as flawed. Research indicates that many rape victims experience a response known as "frozen fright" or "tonic immobility", where they are psychologically and physically unable to resist (Möller et al., 2017). This reality is ignored by traditional definitions of rape that rely on force, which exclude many situations where sexual acts occur against the victim's will. These include not only cases where the victim is in immediate danger

but also those involving power imbalances or ongoing abuse, which can incapacitate the victim's ability to respond (EPRS, 2024).

Given all these factors, it appears that laws concerning the use of force or coercion demonstrate greater concern for the accused than for the victim (CoE, 2021) and establish more stringent guidelines for evidence and criminal proceedings regarding sexual offences, which frequently excuse or justify the offender (Lonsway et al., 2009).

1.3.2 The "No Means No" Model

The "no means no" approach to consent has been adopted, among other countries, by Austria and Germany (Council of Europe, 2023). Feminist initiatives against sexual violence in the late 1980s and early 1990s led to this approach, which emphasises individual agency and the negotiation of consent. Growing awareness of "acquaintance rape" and "date rape", defined as unwanted, non-consensual sexual contact between individuals who already know one another somewhat or who may have emotional or sexual interest in each other, served as the incentive for these efforts (Popova, 2019).

In her 1987 book Real Rape, Susan Estrich introduced what has come to be known as the "no means no" model, arguing that a verbal refusal alone should be sufficient to establish the absence of consent. She contends that requiring victims to physically resist places an unreasonable burden on them, compelling women to risk further harm even when the perpetrator's intentions are already apparent. Furthermore, Estrich emphasises that this expectation enforces a male-centric standard of response to assault, ignoring the fact that many women react to sexual violence with fear or shock rather than physical resistance (Estrich, 1987). This model has faced criticism because, as Estrich posits, it is a highly expressive approach that depends on explicit verbal refusal. In this approach, non-consent is only recognised when "the woman says no" (Estrich, 1987). While this provides clarity by removing the need to interpret non-verbal cues or ambiguous signals, it risks ignoring situations where verbal refusal is not possible or safe. This limitation is significant, as research shows that both men and women often rely on non-verbal behaviour to communicate consent or refusal (Villalobos et al., 2014). For example, one study found that many women considered behavioural cues the main way to decline sex (Gårdving, 2010). Therefore, the "no means no" model has been criticised for narrowing the scope of how women can, and frequently do, express non-consent.

The normalisation of female passivity further deepens misconceptions about consent, making it harder to recognise passive signs of non-consent, such as remaining still, not reciprocating physical affection, or using indirect verbal cues. Requiring clear evidence that the act happened "against the will of a person" means the "no means no" model may not cover situations where victims do not actively resist but do not consent. As Gerstmann (2018) argues, this approach leaves significant gaps in protecting victims of sexual violence. A key critique is that the model often interprets passivity as consent, overlooking the experiences of individuals who show peritraumatic reactions—psychological or physiological responses that occur during the traumatic event. Research shows that reactions like dissociation and temporary paralysis are common among rape victims (Anderson, 2005), yet they are often misunderstood or dismissed within the "no means no" framework.

Practically, as GREVIO reported, scholars have argued that this approach effectively shifts the burden onto the victim to actively resist or prevent sexual advances, rather than on the perpetrator to seek clear, affirmative consent before sexual activity (CoE, 2021). This risk tends to focus criminal proceedings on examining the victim's behaviour—verbal or non-verbal—rather than critically evaluating the actions and intent of the accused.and lack of consent. According to GREVIO, the "no means no" approach is based on the assumption that sexual activity is considered consensual unless one of the parties explicitly says "no" (CoE, 2023). This framework criminalises sexual acts that happen against an individual's will. The level of resistance, whether expressed verbally or through non-verbal actions, is used to determine whether the victim consented. Since, under this model, consent is presumed unless it is clearly withdrawn by the victim (either through words or behaviour), the prosecution bears the burden of proving beyond a reasonable doubt that the act was committed against the complainant's will. This means the prosecutor must persuade the judge or jury that the complainant communicated their unwillingness to engage in sexual activity, making this known to the accused. Such communication might involve verbal objections or obvious non-verbal cues such as physical resistance, crying, or attempts to leave. Therefore, if the prosecution cannot demonstrate that the victim expressed a refusal, whether through words or conduct, a crucial element of the offence is deemed unproven, and the accused cannot be held criminally liable (CoE, 2023).

Limitations

While this model signifies progress compared to traditional approaches that heavily relied on stereotypes, it is crucial to remain aware of the ongoing influence of societal biases and rape myths in applying the "no means no" consent framework. This model often neglects the complex contextual

and personal factors that can hinder individuals from clearly expressing non-consent (Featherstone et al., 2024).

Furthermore, the model ignores the impact of gendered expectations on how consent and non-consent are communicated and perceived. Traditional norms about sexuality often depict men as sexually assertive and women as reserved or passive, especially in intimate situations. These ingrained stereotypes can distort the recognition of non-consent, even when explicit refusals are acknowledged. Consequently, more subtle forms of sexual coercion, such as pressuring a partner by making them feel guilty for not wanting to engage in a sexual act, may go unnoticed or unpunished since they conform to outdated gender role stereotypes (Warshaw et al., 2019).

The normalisation of female passivity further reinforces misconceptions around consent, making it challenging to identify passive indications of non-consent, such as remaining still, failing to reciprocate physical affection, or using indirect verbal cues. By requiring evidence that clearly demonstrates the act occurred "against the will of a person", the "no means no" model may fail to encompass situations where victims do not actively resist yet do not consent. As Gerstmann (2018) argues, this approach leaves significant gaps in protection for victims of sexual violence. A key critique is that the model often interprets passivity as consent, thereby overlooking the experiences of individuals who exhibit peritraumatic reactions. These psychological or physiological responses occur during, rather than after, the traumatic event. Research indicates that such reactions, including dissociation and temporary paralysis, are common among rape victims (Anderson, 2005), yet they are frequently misunderstood or dismissed within the "no means no" framework.

In practical terms, as GREVIO reported, scholars have argued that this approach effectively places the burden on the victim to actively resist or prevent sexual advances, rather than on the perpetrator to obtain explicit, affirmative consent before engaging in sexual activity (CoE, 2021). These dynamic risks shifting the focus of criminal proceedings toward scrutinising the victim's behaviour—verbal or non-verbal—rather than critically examining the actions and intent of the accused.

Such emphasis on how the victim communicated non-consent and her behaviour can undermine her access to justice by reinforcing damaging rape myths. These standards often reflect misguided beliefs—for example, the notion that a woman's "no" may not truly mean "no"—thereby casting doubt even on clear verbal or non-verbal refusals. As Little (2005) argues, such myths can

dangerously distort legal interpretations of sexual violence, leading to outcomes that fail to adequately reflect the realities of coercion and trauma.

1.3.3 The "Only Yes is Yes" Model

According to GREVIO, the states that have adopted the "only yes is yes" approach include Belgium, Denmark, Finland, Iceland, Malta, Monaco, Portugal, Slovenia, Spain, and Sweden. In its baseline evaluation reports, GREVIO notes that this approach more closely aligns with the spirit of the Convention as a whole and with the overarching objective of enhancing prevention, protection, and prosecution (CoE, 2023).

The "only yes is yes" model of consent—also called "affirmative consent" or "enthusiastic consent"—developed as a response to both the radical feminist critique and the limitations of the "no means no" framework (Popova, 2019). By requiring a clear, affirmative expression of willingness, this approach aims to fill the gaps left by models that rely on resistance or a "no". It shifts the responsibility onto the initiator, usually men, to ensure not just that their partner has not refused, but that they actively and willingly consent to sexual activity (Popova, 2019).

In fact, this approach defines consent to sexual activity as affirmative and freely given, emphasising the necessity of a clear expression of agreement—whether verbal or non—verbal-between individuals, based on genuine free will. A key idea in this framework is that the difference between sex and rape depends on whether both parties truly want to engage in the act, moving the focus from requiring a refusal to needing an explicit "yes". According to this standard, passivity, silence, lack of protest, or absence of resistance cannot be interpreted as consent (Gerstmann, 2018). The core principle is that the alleged victim no longer needs to prove resistance or verbal refusal to demonstrate non- consent. Any sexual act or touching that occurs without the recipient's clear and prior agreement is considered sexual assault. Furthermore, affirmative consent must be maintained throughout the sexual encounter and can be withdrawn at any time (Reed et al., 2016).

Supporters of affirmative consent argue that this standard helps safeguard individuals reporting sexual assault from unfair suspicion regarding their motives or character. Advocates also claim that affirmative consent provides special protections for women, who are often socialised to adopt passive roles in sexual encounters, compared to men, who are generally encouraged to be assertive or aggressive (Gerstmann, 2018). The shift from the "no means no" model to the "only yes is yes" standard reflects a broader cultural and legal change in society—and the justice system—about

understanding sexual consent. This new approach emphasises that sex should be a mutually desired act, entered into willingly by all parties involved. Affirmative consent not only sets clearer expectations for individuals regarding sexual behaviour but also assists those investigating and prosecuting sexual violence by establishing more explicit criteria for consent (CoE, 2023).

However, critics highlight the practical challenges and risks of such an approach, questioning whether it is realistic—or even desirable—to legally require an explicit model of sexual communication.

For instance, critics of affirmative consent argue that defining any sexual touching without prior consent as sexual assault could result in scenarios where the accused are punished unless they can prove they obtained consent. They contend this risks undermining the presumption of innocence and unfairly shifting the burden of proof onto the accused, effectively making them prove their innocence instead of being presumed innocent until proven guilty (Gårdving, 2010).

Conversely, defenders of affirmative consent argue that this standard does not shift the burden of proof or change procedural rules; rather, it clarifies the legal definition of consent in sexual offence cases. Under affirmative consent, the prosecution still needs to prove beyond a reasonable doubt that the accused engaged in sexual acts without the complainant's consent, usually through the complainant's testimony. The main difference is rejecting the assumption that silence, passivity, or lack of physical resistance implies agreement. This approach emphasises that consent must be affirmative—expressed through clear words or actions—and that an accused cannot rely on the absence of objection as a defence. While this standard requires individuals to seek explicit consent before engaging in sexual activity, it does not exempt the state from its evidential burden. Instead, it enhances protection for bodily autonomy while upholding the core requirement that the prosecution must demonstrate non-consent in court (Gerstmann, 2018; CoE, 2024).

Moreover, the "only yes is yes" approach emphasises an affirmative response, whether verbal or non-verbal. Critiques have been aimed at this model due to potential issues that both types of expression might involve. On one hand, some critics have pointed out the ambiguity in interpreting non-verbal cues as affirmative consent, which can lead to inconsistent legal judgements (Ferzan, 2016). On the other hand, it is also argued that requiring verbal expressions of consent does not match the real-life realities of sexual interactions. As discussed earlier, extensive empirical evidence indicates that affirmative consent standards often do not reflect how most people actually navigate sexual encounters. Research shows that consent is often communicated and understood through

subtle, non-verbal cues, while explicit verbal communication—whether to initiate, clarify, or decline sexual activity—is less common (Villalobos et al., 2014). Critics therefore contend that this standard, by mandating explicit consent at every stage, may interfere with natural sexual interactions and fail to capture the nuanced ways in which people communicate consent (Gerstmann, 2018).

Furthermore, some critics warn that the affirmative consent model could lead to overreach by criminalising otherwise consensual encounters simply because explicit verbal consent was not obtained, even when both parties were willing participants (Gerstmann, 2018). Moreover, Ferzan (2016) argues that the model places excessive emphasis on external expressions of consent, such as specific words or actions, while ignoring whether the accused reasonably believed that consent existed. By focusing too narrowly on affirmative signals, the model risks penalising individuals who lack the mens rea traditionally required for criminal liability. This, she argues, could result in punishing people who are not morally culpable, thus undermining fundamental principles of fairness in the justice system. Similarly, Janet Halley (2016) has expressed concerns about such a model, warning that it could unintentionally criminalise a wide range of sexual interactions, including those that were merely unsatisfactory rather than coercive. She suggests that by aligning with more conservative forces, feminists risk endorsing a framework that might weaken a sex-positive culture. She maintains that these standards risk establishing a new, inconsistently applied moral code—one that could be repressive and reinforce traditional gender roles by promoting narratives that place responsibility solely on men while depicting women as passive or helpless.

1.4 Conclusion

While affirmative consent policies aim to shift focus towards the actions of the perpetrator and away from victim-blaming, critics argue that these measures alone are insufficient to address the broader issue of sexual violence. Cowling (2016) highlights that the widespread occurrence of unreported and unprosecuted rape indicates that a more robust prosecution system is unlikely to solve the problem by itself. Furthermore, as Vandervort (2013) observes, despite reforms like affirmative consent, deeply rooted myths and stereotypes remain, often leading to scrutiny of the victim's behaviour and whether their response fits expectations of a "real" victim. Additionally, affirmative consent frameworks continue to be influenced by unequal power dynamics, especially those based on gender. Not everyone has equal ability to give or withhold consent; women and other marginalised groups remain vulnerable to coercion, pressure, or violence, even within these supposedly protective models (Featherstone et al., 2023).

2. THE INTERSECTION OF SEXUAL VIOLENCE AND DISABILITY FOR WOMEN

This chapter will concentrate on an important demographic that has been traditionally overlooked in discussions of sexual consent: women with disabilities. It will argue that intersectionality as a theoretical framework must be foregrounded in discussions surrounding consent, as intersecting factors such as race, ethnicity, sexuality, age, and disability significantly influence sexual negotiations.

The chapter first explains the notions of intersectionality and intersectional discrimination. Building on the concept of intersectional discrimination, it will analyse the reality of women with disabilities in relation to sexual violence, exploring how such violence occurs and the factors that render women with disabilities more vulnerable to abuse. It then highlights the challenges they may face when seeking justice following instances of violence. Understanding these patterns of vulnerability and barriers to justice is vital, as it emphasises the difficulties women with disabilities encounter in freely forming and expressing consent.

2.1 Intersectionality and Intersectional Discrimination: A Theoretical Framework

Understanding the specific challenges faced by women with disabilities in the context of sexual violence and the articulation of consent demands an intersectional approach. Intersectionality theory challenges earlier frameworks that isolate a single axis of power by focusing on one category of identity while neglecting others that simultaneously shape lived experiences and contribute to overlapping systems of oppression. To address the suffering resulting from the intersection of different types of oppression, intersectionality emphasises the importance of acknowledging multiple, coexisting axes of identity and discrimination (Crenshaw, 1991; Kaushik & Walsh, 2018).

Intersectionality, as a theoretical framework, enables the analysis of how overlapping identities—such as gender, disability, and race—compound discrimination and create unique forms of disadvantage. This analysis introduces the concept of intersectional discrimination, which refers to the specific, compounded inequalities faced by individuals when multiple marginalised identities

interact. These intersecting forms of oppression not only increase the risk of violence for women with disabilities but also cause significant barriers to justice and protection. As previously discussed, conventional frameworks for consent often fail to fully capture the complexity of victims' lived experiences—failures that become even more evident when multiple axes of identity are involved. This subchapter introduces intersectional discrimination as a necessary foundation for examining these realities and sets the groundwork for a more inclusive and nuanced understanding of consent in the following sections.

Instead of viewing different forms of discrimination as separate or merely additive, intersectionality advocates for a multidimensional understanding of identity and oppression. As Chow (2016) explains, intersectional discrimination occurs when multiple forms of oppression intersect and overlap, producing a unique and compounded experience that cannot be reduced to the sum of its parts (p. 458). This form of discrimination differs from multiple discrimination, where different types of bias occur in separate contexts, and additive discrimination, where different oppressions accumulate but do not fundamentally interact. Therefore, intersectionality offers a more nuanced and accurate perspective for understanding how power and inequality are experienced in the real world.

2.1.1 Historical Foundations of Intersectional Thought

While U.S.-based legal scholar Kimberlé Crenshaw is widely recognised for formally theorising intersectionality in the late 1980s, the foundational ideas underlying this framework have much deeper historical roots. These roots trace back to 19th-century movements and activism, such as Sojourner Truth, who sought to amplify the marginalised voices of African American women within feminist movements (Ruiz et al., 2021). Sojourner Truth, a black woman born into slavery, exposed the fact that, although patriarchy affects all women, ethnic minority women experience inequality based on gender, race, and class in her well-known speech, "Ain't I a Woman". Delivered in 1851 at the Women's Convention in Akron, Ohio, Sojourner Truth's speech was a powerful critique of both racism and sexism. Frequently cited as a foundational example of intersectionality, the speech revealed the intertwined nature of racial and gender oppression long before the term "intersectionality" was coined (Crenshaw, 1989). Truth's story continues to serve as a vital precedent in discussions of intersectionality, illustrating the deep connection between racial and gender-based inequalities and emphasising the importance of addressing these forms of oppression in relation to one another (Smiet, 2020).

Building on these earlier insights, the Combahee River Collective emerged as a vital link between 19th-century activism and modern intersectional theory. Founded in 1974, the group published its manifesto in 1977 in response to the failure of earlier feminist and civil rights organisations to address the unique needs of Black lesbians. By supporting their male counterparts, the Combahee River Collective (2014) adopted a stance distinct from that of white feminists. Living in a world shaped by white hegemonic masculine ideologies, Black women must also navigate gendered relationships with black men, placing them in an especially complex position. As they work alongside black men to combat racism, they also face sexism, revealing the layered and intersecting challenges they encounter (Ruiz et al., 2021). The group coined the term "identity politics", a concept that Crenshaw (1989) also uses to explain the idea of intersectionality. Given that previous movements had failed to prioritise the specific and urgent needs of Black women, the Combahee River Collective focused explicitly on ending their own oppression as Black women. They emphasised that identity politics offers radical possibilities when fighting for one's own oppression rather than someone else's. Their discussions of sexism and racism, alongside the heterosexism and classism they experienced as Black women who identified as lesbians, laid the groundwork for their further development of intersectionality (Ruiz et al., 2021).

2.1.2 Crenshaw's Formal Theorisation

Drawing on these historical foundations, Kimberlé Crenshaw, a prominent figure in gender and racial justice, formally introduced the concept of intersectionality. As a theoretical framework, intersectionality highlights how overlapping systems of oppression, such as racism, sexism, homophobia, and ableism, interact to produce distinct and compounded forms of discrimination (Gabos, 2020). Crenshaw (1989, 1991) specifically emphasised the experiences of Black women from marginalised socio-economic backgrounds, arguing that their identities and struggles cannot be understood in isolation from one another. She critiques traditional, single-axis frameworks for analysing discrimination—those that examine race, gender, or class separately—as inadequate to capture the complex and intersecting realities faced by individuals situated at multiple axes of marginalisation.

In her groundbreaking article *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* (1989), she used this term to describe how Black women experience violence while navigating American legal and social structures. Moreover, to illustrate how discrimination based on race and gender fuels the structural and societal violence that Black women endure, Crenshaw employed the metaphor of traffic at an intersection, where harm can originate from multiple directions simultaneously.

Discrimination, she argued, can flow in one direction or another, much like traffic at an intersection; when an accident occurs at such an intersection, cars coming from various directions (and occasionally from all of them) may be the cause. Likewise, if a Black woman is harmed because she is in the intersection, it may stem from racial or sexual discrimination (Crenshaw, 1989). As she later sustained, such a metaphor highlights how racism and sexism operate together to shape the realities of Black women, whose voices are often unheard (Crenshaw, 1991).

Crenshaw contends that feminist theory has often failed to incorporate the intersection of race and gender in its analysis, mainly focusing on the experiences of white, middle-class women while overlooking the realities faced by Black women (Crenshaw, 1989). Additionally, she criticises how antidiscrimination law fails to address intersecting forms of discrimination based on race and gender. Legal frameworks tend to generalise group experiences, often concentrating only on the most privileged members of those groups, without recognising the distinct realities faced by more marginalised subgroups. Consequently, women from minority groups are pushed to the margins because their unique circumstances do not conform to the dominant legal narratives concerning discrimination (Crenshaw, 1991).

2.1.3 Contemporary Developments

In 1990, Patricia Hill Collins published the influential work Black Feminist Thought, which, alongside Kimberlé Crenshaw's contributions, significantly advanced the understanding of intersectionality and its significance in legal theory. Collins broadened the theoretical framework for understanding Black women's experiences through an intersectional perspective. This work provides a comprehensive analysis of the social, political, and economic dimensions of Black women's lives, contributing to the development of a new feminist theory centred on intersectionality and social inequality (Collins, 1991).

Intersectionality as a theory highlights how various oppressive systems interact to influence an individual's well-being (Cho et al., 2013). These multiple unjust systems shape how people navigate social and personal structures, as well as their position within society (Kaushik & Walsh, 2018). According to Jennifer Nash (2019), intersectionality has several genealogies within both Black feminist and women of colour feminist traditions, making it part of a cohort of terms that describe the interconnectedness of oppressive systems.

In 2020, Patricia Hill Collins and Sirma Bilge published Intersectionality, a more recent work that encourages reflection on the limited progress made in addressing intersectionality within both social and legal spheres. The authors emphasise that individuals' personal experiences and identities—such as race, gender, and sexual orientation—are interconnected and mutually influence each other. Intersectionality offers a framework for understanding that people's social positions are not uniform but vary significantly depending on these intersecting factors (Collins & Bilge, 2020).

Consequently, intersectionality theory challenges earlier theoretical approaches that isolate a single axis of power by focusing solely on one category of identity while ignoring others that simultaneously shape lived experiences and contribute to overlapping systems of oppression. To address the suffering caused by the intersection of different forms of oppression, intersectionality theory stresses the importance of recognising multiple axes that coexist (Crenshaw, 1991; Kaushik & Walsh, 2018). Over time, intersectionality has become increasingly popular as a concept, analytical method, and theory across diverse academic disciplines. As a theory, intersectionality broadens our perspective by providing a deeper understanding of lived experiences. However, it has also faced scholarly criticism. For example, Bowleg (2012) argues that intersectionality theory cannot be regarded as a traditional testable theory, as it lacks core components or variables that can be operationalised and empirically assessed. Instead, she views intersectionality as a conceptual framework or a perspective that can inform research.

2.2 Intersectionality and Women with Disabilities: The Emergence of Feminist Disability Studies

Building on the broader framework of intersectionality and the understanding of intersectional discrimination as the simultaneous and inseparable operation of multiple systems of oppression, this section addresses the specific experiences of women with disabilities. This group is often overlooked in both feminist and disability discourses.

Anglo-Saxon disability rights campaigners have challenged dominant biomedical ideas about disability since the 1960s. The biomedical model views disability primarily as a medical issue within the individual—characterised by impairments or deficits that require treatment or rehabilitation. In contrast, these activists highlighted a rights-based and social understanding of disability, rejecting the notion that disadvantages come solely from individuals' impairments (Radrigán, 2023). They promoted personal autonomy, freedom of choice, and genuine control over decisions that affect their lives. Importantly, they insisted on an inclusive community existence—marked by full self-

determination and mutual interdependence (United Nations Committee on the Rights of Persons with Disabilities, 2017).

These movements advocated for developing support systems that would enable individuals with disabilities to fully exercise their rights and participate equally in all aspects of life. Their efforts influenced the development of what is now known as the social model of disability, which shifts the focus from impairments to the external barriers—such as inaccessible environments, discriminatory attitudes, and exclusionary systems—that limit participation (Radrigán, 2023). This model represented a significant shift away from deficit-based thinking and established the foundation for modern disability rights frameworks.

During the 1990s, critical feminist perspectives within disability movements started to challenge and reveal the male-centred (or androcentric) narratives that had long dominated discussions about disability. These mainstream discourses often ignored or downplayed the specific experiences of women with disabilities, especially those affected by inequality, gender-based violence, and the medicalisation of their bodies (Morris, 1996). In response to this silencing, a new academic and activist field called Feminist Disability Studies emerged. This offered a dual critique—targeted, on one side, at Disability Studies and, on the other, at Feminist Studies.

In particular, concerning Feminist Studies, they argue that they have historically prioritised the experiences of non-disabled women (Garland-Thomson, 2002). Scholars Linda Steele and Leanne Dowse (2016) criticise certain branches of feminism for neglecting the intersectional violence faced by women and girls with disabilities and highlight a paradox within some feminist thought. While feminism has traditionally opposed the medicalisation and pathologisation of women (e.g., being labelled irrational or overly emotional), some feminist arguments have also relied on excluding women with disabilities to reinforce their stance. In other words, by emphasising the rationality and capability of (usually privileged, non-disabled) women, traditional feminist claims may have marginalised disabled women, particularly those with psychosocial or intellectual disabilities. These women are often regarded as subaltern, even within feminist and disability rights circles, meaning their voices are undervalued or silenced, especially in comparison to women with physical or sensory disabilities (Moras, 2013).

For this research, it is important to recognise that one reason women with disabilities have historically been excluded from mainstream feminist discourse lies in the perception that their claims for rights diverge from those of non-disabled women. This perceived difference can be better

understood through the lens of bodily representation and the distinct stereotypes constructed around women's bodies, which vary depending on whether a woman has a disability. At the heart of this disparity is the dichotomy between being viewed as a "sexual object" and being seen as "asexual". Non-disabled women have traditionally been portrayed in media and commercial contexts in ways that objectify their bodies, reducing them to objects of male desire. As a result, feminist movements have often focused on issues related to bodily self-determination, such as the right to express sexuality freely, live without violence, access abortion, and use contraception. Conversely, women with disabilities are frequently regarded as deviating from the norm of what is considered "sexually desirable", making their bodies socially invisible or unrepresentable (Garland-Thomson, 2002). These deeply rooted stereotypes contribute to their marginalisation within feminist discourse. This results in a divergence of priorities: while mainstream feminism often aims to challenge social roles such as motherhood and caregiving as forms of oppression, women with disabilities frequently fight for recognition and access to these very roles and rights.

Furthermore, Feminist Disability Studies builds on key insights from intersectional feminism to deepen the understanding of how gender and disability interact within systems of power and identity (Radrigán, 2023). First, it emphasises that categories such as "disability" and "gender" are not fixed or biologically determined but are socio-historically constructed, shaped by cultural, political, and institutional influences. Second, the field addresses the ontological tensions that emerge when these categories are treated as defining traits, which can essentialise individuals and limit the complexity of their lived experiences. Third, Feminist Disability Studies critically examines how multiple systems of oppression—such as patriarchy and ableism—operate interconnectedly to produce interdependent and simultaneous experiences of marginalisation, while also highlighting spaces of resistance (Evans, 2017). Central to this approach are areas such as representation, the body, identity, and activism, which serve as focal points for exploring issues like the assumed unity of the category "woman", the privilege of normative embodiment, the medicalisation of disabled bodies, sexuality, and the social construction of identity. Through this multidimensional framework, Feminist Disability Studies challenges exclusionary narratives and advocates for more inclusive feminist and disability discourses (Garland-Thomson, 2002).

In this way, Feminist Disability Studies align with the broader intersectional critique developed by legal scholar Kimberlé Crenshaw, which emphasises how traditional frameworks often marginalise those whose identities intersect across multiple axes of oppression. Specifically, the feminist disability movement echoes the concerns of American philosopher Elizabeth V. Spelman (1988), who criticised mainstream feminist thought for focusing primarily on white, middle-class

women, rendering other women "inessential" and excluding them from full participation and rights. Intersectionality, as a theoretical framework, helps reveal how these exclusions operate—not only along lines of race or class, but also along lines of ability. Feminist Disability theorists therefore reject the assumed homogeneity in feminist discourse, where women with disabilities are given no voice, and advocate for a more inclusive and multidimensional approach, one that recognises how systems of oppression interact and intensify each other in the lives of marginalised women, particularly those with disabilities.

2.3 Human Rights Framework on Gender, Disability, and Sexual Violence

2.3.1 The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD): balancing autonomy and protection

The adoption of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) marked a pivotal shift in recognising and addressing the specific forms of violence faced by girls and women with disabilities. By drawing on existing frameworks such as violence against women and gender-based violence, the CRPD Committee extended these concepts to the realities of disabled women worldwide, shedding light on patterns of abuse that had long remained unseen (Radrigán, 2023). The importance of recognising the particular position of women with disabilities was especially clear from the outset of the preparatory work for the CRPD. In December 2003, the Chair of the Ad Hoc Committee's Working Group, tasked with drafting the text of the United Nations Convention, issued the document Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. This draft acknowledged that women and girls with disabilities face multiple forms of discrimination and that addressing this reality would require gender-specific measures, including protective actions, to ensure their equal enjoyment of all human rights and fundamental freedoms (UN Enable, 2003).

Furthermore, Article 6 of the Convention explicitly addresses the fundamental human rights of women with disabilities and aims to combat the discrimination they encounter daily, both as women and as individuals with one or more disabilities. As such, it reflects the intersection of gender and disability.

During the negotiation phase of the Convention, supporters of a provision specifically aimed at protecting the rights of women with disabilities—including South Korea, many African nations, non-governmental organisations, and the Special Rapporteur on Disability of the Commission for Social

Development—emphasised the need to provide them with special protection. They argued that, within the broader category of "persons with disabilities", women with disabilities represent a social group particularly vulnerable to marginalisation. They especially highlighted that these women face multiple forms of discrimination daily, not only due to their disabilities but also based on their gender (UN Enable, 2004).

Organisations such as the Landmine Survivors Network and the World Blind Union have also expressed strong support for including a dedicated article addressing the rights of women with disabilities, emphasising that this group encounters distinct forms of discrimination. These organisations agreed with proposals highlighting that the rights of women with disabilities are often overlooked and that they constitute one of the most socioeconomically disadvantaged populations. Consequently, during negotiations, the prevailing stance was to incorporate a specific article and to include multiple references to women with disabilities throughout the convention's text to enhance their legal protection as comprehensively as possible.

The CRPD Committee reaffirms this stance in General Comment No. 3 (2016) on women and girls with disabilities. Article 6 is a cross-cutting provision relevant to all other articles of the Convention. Therefore, States parties are reminded of their obligation to embed the rights of women and girls with disabilities across all implementation measures. Crucially, this includes adopting positive measures to address multiple discrimination and ensure that women and girls with disabilities can fully enjoy their human rights and fundamental freedoms on equal terms with others (UNCRPD, 2016).

Furthermore, the CRPD Committee (2016) highlights that discrimination against women and girls with disabilities manifests in various forms, each significantly undermining their human rights and freedoms. These include direct discrimination, indirect discrimination, discrimination by association, denial of reasonable accommodation, and structural or systemic discrimination.

Direct discrimination occurs when women with disabilities are treated less favourably than others because of their gender or disability, even in situations that are not directly comparable. For example, dismissing testimonies by women with intellectual or psychosocial disabilities in court due to assumptions about their legal capacity denies them justice and effective remedies. Indirect discrimination involves seemingly neutral laws or practices that have a disproportionately negative impact on women with disabilities. An example is healthcare facilities without accessible gynaecological examination beds. Discrimination by association affects women in caregiving roles,

such as mothers of children with disabilities, who may be overlooked for jobs because of stereotypes about their availability. Denial of a reasonable accommodation occurs when necessary adjustments, those needed to ensure equal access, are refused. For instance, when a woman with a disability cannot undergo a mammogram because the health facility is inaccessible. Structural or systemic discrimination entrenched in institutional practices and social norms, reinforced by harmful gender and disability stereotypes, often shows up in the lack of tailored services or policies for women with disabilities. It is also worsened by societal perceptions that infantilise or devalue them. For example, women with disabilities frequently face disbelief or dismissal when reporting violence, especially to police, prosecutors, or judges.

These forms of discrimination are exacerbated within patriarchal models that reinforce segregation and isolation, intensifying their vulnerability to exploitation and abuse. In all these cases, harmful cultural traditions and stereotypes intersecting gender and disability contribute to a systemic failure to protect and empower this population.

As previously mentioned, although Article 6 of the CRPD specifically addresses the intersection of gender and disability, the Convention overall contains numerous references emphasising the need to ensure that women and girls with disabilities fully and equally enjoy all human rights and fundamental freedoms, thereby strengthening their protection across various provisions (Convention on the Rights of Persons with Disabilities, 2006). In its Preamble, the Convention affirms that people with disabilities face multiple and more severe forms of discrimination, based on, among other listed factors, gender. It also recognises that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, maltreatment, and abuse, as well as being neglected, mistreated, exploited, or forgotten. In light of these circumstances, the Convention stresses the importance of integrating a gender perspective into all efforts to promote the full realisation of human rights and fundamental freedoms for persons with disabilities (UNCRPD, 2006).

For the purposes of this research, it is also crucial to consider Articles 12, 16, and 23 of the Convention. Article 12 affirms the right of persons with disabilities to enjoy equal recognition before the law. This provision encompasses several key elements: recognition as persons before the law (Paragraph 1), equal entitlement to legal capacity (Paragraph 2), and the duty of the state to ensure appropriate support for individuals in exercising that capacity. Legal capacity, as understood here, includes both the entitlement to hold rights and the ability to act on them (McSherry, 2012). This is significant for this research, as recognising someone’s capacity to consent to sexual activity

acknowledges their legal agency—an essential component of the equal legal capacity guaranteed under Article 12.

Article 16 focuses on the right not to be subjected to exploitation, violence, and abuse. While this right applies to all persons with a disability, regardless of gender, it assumes particular significance for women with disabilities. States Parties must consider gender differences when developing all measures—whether legislative, administrative, social, educational, or otherwise—to protect persons with disabilities from all forms of exploitation, whether occurring within the home or outside it. Protective services, along with those related to physical, cognitive, psychological recovery, rehabilitation, and social reintegration, should be specifically tailored or adapted to address the unique needs associated with both age and gender. Real-world experience highlights the importance of this provision, which demands specific and enhanced protection for women and children with disabilities. Within the already vulnerable group of persons with disabilities—who are at an increased risk of discrimination, abuse, and violence—women and minors face an even greater and more urgent danger of exploitation and mistreatment (Human Rights Watch, 2010). This issue will be explored further in the section dedicated to abuse and violence against women with disabilities. Nonetheless, given the evidence presented above, it is essential to emphasise the significance of the final paragraph of this provision. It urges States Parties to implement effective legislation and policies—particularly those targeting women and children—to ensure that cases of exploitation, violence, and abuse against persons with disabilities are adequately identified, investigated, and, where appropriate, prosecuted (CRPD, 2006).

Furthermore, Article 23 of the CRPD is relevant to the discussion of sexual consent and disability. Paragraph 1 urges states to take meaningful steps to eliminate discrimination against persons with disabilities in all aspects of marriage, family life, and intimate relationships. This obligation should be understood as including the domain of sexual relationships, requiring that individuals with disabilities are neither excluded nor restricted in their capacity to engage in consensual sexual activity. Achieving equality in this area involves recognising and respecting their legal capacity to consent to sex, which is a vital expression of sexual agency.

Sexual agency is not yet firmly recognised in international human rights discourse (Arstein-Kerslake & Flynn, 2016). However, the principles embedded in the CRPD—particularly those related to legal capacity (Article 12) and non-discrimination in intimate relationships (Article 23)—offer a strong foundation for its recognition. Simultaneously, the need to protect women from sexual abuse (Articles 6 and 16) requires legal systems to provide robust safeguards. Balancing these priorities

involves creating rape and sexual offence laws that both protect and empower, ensuring women with disabilities are not only shielded from harm but also supported in exercising their rights to sexual autonomy and decision-making.

2.3.2 Intersectionality in the Istanbul Convention

The Istanbul Convention represents one of the most comprehensive international instruments for addressing gender-based violence against women, and its commitment to intersectionality is one of its most progressive features. While the Convention mainly targets gender-based violence, it recognises that women do not experience such violence in isolation. Instead, various factors, including disability, can increase the risk of violence and shape its specific forms.

Article 4(3) of the Convention explicitly forbids discrimination on multiple grounds. It requires that protective measures be applied equally, without discrimination based—among other factors—on sex, health status, or disability. By including this paragraph, the Convention's drafters highlighted that addressing discrimination on a single ground is insufficient to reflect the complex realities of inequality faced by women and the diverse forms of violence they experience. Instead, a comprehensive understanding of discrimination—one that considers how different grounds intersect and influence each other—is vital. This provision underpins the integration of an intersectional approach across the Convention's four pillars: prevention, protection, prosecution, and policy coordination.

Several other provisions of the Convention acknowledge the potential impact of intersecting grounds of discrimination by emphasising the "specific needs of persons made vulnerable by particular circumstances" (Article 12(3)) and the "specific needs of vulnerable persons" (Article 18(3)). Beyond these explicit references, the Convention also incorporates obligations that implicitly demand sensitivity to the diverse situations of women. For example, the duty to ensure that victims receive adequate and timely information in a language they understand (Articles 19, 24, and 56) requires consideration of factors such as linguistic diversity, literacy, disability, cognitive capacity, and age.

Importantly for this research, in their publication *The Istanbul Convention from an Intersectional Perspective*, Lorena Sosa and Ruth Mestre I Mestre (2023) contend that intersectionality is not merely about recognising individual or group identities. Instead, it involves confronting the structural power relations—such as ableism, racism, heteronormativity, and class

inequality—that shape women's experiences of violence and their access to justice and protection. Intersectionality reveals how these interconnected systems produce qualitatively different experiences of violence and why uniform, one-size-fits-all solutions often fall short.

Monitoring activities by GREVIO, the body responsible for overseeing the Convention's implementation, have demonstrated that many states still approach vulnerability through a narrow focus on groups, which can lead to stigmatisation of women or oversimplification of the issue. Sosa and Mestre I Mestre (2023) argue that an effective intersectional response requires shifting from this group-based approach to a structural analysis of how inequalities are produced and maintained within institutions and policies.

2.4 Violence Against Women with Disabilities as a Form of Intersectional Discrimination

The World Health Organization (WHO) estimates that, globally, more than a billion people live with some form of disability, and that this number is increasing due to population growth, medical advances, and the ageing process. It also highlights significant disparities in the prevalence of disability between men and women in both developing and developed countries; the male disability prevalence rate is 12 per cent, whereas the female prevalence rate is 19.2 per cent (WHO and the World Bank, 2011).

The intersectional discrimination faced by women with disabilities is particularly harmful because it is almost always invisible, hidden, and occurs within contexts of (alleged) care and support. More broadly, it happens within relational environments where women—due to their disability—are seen as incapable of making autonomous decisions, unreliable, and unfit to manage their emotional and sexual lives independently. It is within these contexts that discrimination against women with disabilities takes root, both as women and as persons with disabilities (United Nations General Assembly, 2017). This discrimination manifests in various forms, most notably through violence.

Disability does not exempt a woman from experiencing gender-based violence (Nosek et al., 2001). In fact, statistics show that this form of violence is often more widespread. It is estimated that there are 300 million women with disabilities—whether physical, sensory, or intellectual—worldwide, making up about 10% of the global female population (Human Rights Watch, 2010). Focusing on the European Union, women with disabilities make up 16% of the total female population and 60% of the 100 million people with impairments (EDF, 2020). This suggests

approximately 60 million women with impairments. Among these, it is estimated that up to 40% have experienced or will experience violence. This amounts to a very high figure: 16 million women with disabilities in Europe who are victims of violence (Eurostat, 2015). EDF (2020) also reports that women with disabilities are two to five times more likely than other women to face violence. Furthermore, when violence occurs against women with disabilities, it tends to be repeated and last longer compared to gender-based violence experienced by women without disabilities (Sherry, 2016).

On one side, violence is rooted in the broader context of gender-based violence, which stems from a patriarchal social structure that positions women as naturally subordinate to men. Within this framework, violence acts as a method of reaffirming hierarchical gender relations whenever threats to the existing order arise. The core dynamic—whether the target is a woman with a disability or not—is always driven by an imbalance of power between men and women. This imbalance appears through roles that subordinate women to their partners or, more generally, to those who commit violence. In this context, women with disabilities are likely to face violence mainly because of their gender (Milazzo, 2016).

Additionally, these women experience discrimination and violence on the grounds of disability. While the patriarchal system often denies women full participation in many areas of life, it simultaneously elevates the roles of mothers and wives for women without disabilities. In contrast, women with disabilities are seldom associated with sexuality or reproductive capacity, as the fields of sexuality and disability are marked by deeply rooted prejudices and social barriers (Women Enabled International, 2018). Despite persons with disabilities having the right to freely enjoy and access their sexual and reproductive health, rights, and services as outlined in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), their sexual rights and needs remain largely unrecognised and systematically violated (Humanity & Inclusion, 2022). Society frequently portrays the sexuality of people with disabilities as either absent or problematic—something to be controlled or suppressed. This systematic denial persists even though persons with disabilities have the same sexual and reproductive health needs as those without disabilities, yet they encounter numerous obstacles in accessing these fundamental rights (Bhattarai et al., 2023).

Young women and girls with disabilities, in particular, often face stereotypes that portray them as either completely asexual or excessively sexualised. Additionally, dominant beauty standards have historically excluded them, fostering deep feelings of undesirability and low self-esteem. This perception can also justify violence against them, as they are frequently indirectly taught to be compliant. The vulnerability of women with disabilities is compounded by the fact that they are nearly

40% more likely to face abuse in adulthood, while children with disabilities are up to four times more likely to be abused (Seidu et al., 2024). Another stereotype is that these women lack the capacity for autonomous decision-making (United Nations General Assembly, 2017). As a result, they often do not receive education about emotional and sexual relationships. The absence of sexual education is particularly concerning given their increased risk of sexual assault and abuse, yet students in special education classes are often denied the opportunity to participate in sex education at all. Beyond educational exclusion, persons with disabilities encounter additional barriers such as inaccessible services and information, societal misconceptions, negative attitudes from healthcare providers, and fear of abuse and violations of their reproductive rights when seeking services, as many have been subjected to involuntary sterilisation (United Nations, 2018). Consequently, they struggle to recognise or establish boundaries around their physical and psychological intimacy.

Therefore, violence against women with disabilities highlights the intersecting forms of discrimination these women face, as they are often placed in situations that make them more vulnerable compared to those without disabilities. This increased vulnerability may arise from the need for assistance due to partial or complete lack of autonomy (as the following sections will explore), or from stereotypes related to disability (Nosek et al., 2001).

While the current data certainly helps in better understanding the scope of the phenomenon and highlights the need for targeted intervention strategies, there remains a lack of precise information—both regarding the specific types of disabilities experienced by victims of violence and concerning women who live in conditions of heightened marginalisation and social exclusion, such as those affected by poverty or cultural disadvantage (Human Rights Watch, 2010). Women with disabilities who find themselves in such contexts are, in fact, much more vulnerable targets of gender-based violence (Nosek et al., 2001).

This lack of data is attributed to the widespread belief that people with disabilities in general—and thus women with disabilities—constitute a single, homogeneous group. In reality, however, this population is highly diverse, characterised by a rich variety that warrants in-depth analysis to fully understand its different languages and needs. Scientific studies on gender-based violence against women with disabilities, which have explored the experiences of women with widely varying types of disabilities, have uncovered equally diverse risk factors and types of violent behaviour by offenders, depending on the specific disability involved (Anyango et al., 2023). The violence faced by women with physical disabilities differs from that encountered by women with sensory disabilities

and is again distinct from the violence affecting women with intellectual and/or psychosocial disabilities.

A thorough understanding of the different types of disabilities is therefore essential for comprehending the various forms of violence perpetrated and for developing truly effective strategies to restore and protect the rights that have been violated. Human Rights Watch (2010) emphasises that although inclusive interventions are indeed carried out, they still tend to exclude certain categories of persons with disabilities. Applying the same interventions to people with intellectual, sensory, or physical disabilities may not be inclusive at all; rather, it can lead to further discrimination—this time among persons with disabilities themselves.

Despite the lack of precise and current data, research consistently emphasises one key point: when being a woman and having a disability intersect, the risk of experiencing violence rises significantly. This violence happens within a broader context of increased vulnerability, where the compounded impact of gender and disability heightens the risk and repercussions of abuse (Balderston, 2013).

2.5 Sexual Violence Against Women with Disabilities as a form of intersectional discrimination

Although women with disabilities face various forms of violence—including physical, psychological, and economic—this research will focus specifically on sexual violence.

Sexual violence is a pervasive and profoundly damaging form of gender-based violence that disproportionately affects girls and young women with disabilities. This violence is influenced by the intersection of gender and disability, which often makes victims more vulnerable, invisible, and reliant on others. Girls with disabilities face considerably higher risks of sexual abuse than both girls without disabilities and boys with disabilities (Devries et al., 2014). The increased risk stems not only from physical or cognitive impairments but also from systemic factors such as isolation, lack of support, and dependence on caregivers or institutional staff.

The literature highlights that sexual violence against women with disabilities is often linked to their “dehumanization” (Sherry, 2016), as well as to a perpetrator’s desire for domination and control over them (Petersilia, 2001). All women have vulnerabilities that can be exploited to establish control and authority, but disability adds an extra layer of vulnerability. Thus, women with disabilities

experience these types of abuse, similar to women in general, alongside disability-specific forms of abuse that are often not recognised as harmful (Nosek et al., 2001).

In its 2012 thematic study on violence against women and girls with disabilities, the UN Office of the High Commissioner for Human Rights (OHCHR) stated that the forms of sexual violence experienced by girls and young women with disabilities are diverse and often linked to their increased dependency and marginalisation. These include unwanted touching, forced sexual acts, sexual exploitation, and invasive procedures disguised as care, such as forced sterilisation or overmedication with sedatives. As EDF (2020) reports, sterilisation of women with disabilities without their knowledge or consent is a common form of violence; 6 out of 10 women with intellectual disabilities report experiencing sexual abuse, and 34% of women with a health condition or disability have experienced sexual violence by a partner in their lifetime. In many cases, this violence is normalised or overlooked due to misconceptions about the sexuality and autonomy of individuals with disabilities.

The settings in which sexual violence occurs reflect the diverse environments in which girls and women with disabilities live their lives—environments that are often presumed to be safe. Homes, schools, medical centres, psychiatric institutions, group homes, and other residential facilities are among the most common sites of abuse. Perpetrators are frequently individuals in positions of power or trust, including family members, personal caregivers, teachers, healthcare professionals, and institutional staff. Abuse often takes place during routine care activities such as bathing, dressing, or administering medication, at times when the victim is particularly vulnerable (Women Enabled International, 2018).

In the previously mentioned thematic study, the OHCHR (2012) emphasised that the lack of sexual education for women and girls with disabilities, wrongly perceived as non-sexual beings, contributes to sexual violence committed against them, as they are unable to distinguish inappropriate or abusive behaviours. Furthermore, social isolation and stigma frequently associated with disability can undermine women's emotional defences by reducing self-esteem and removing practical and emotional support systems that are typically protective elements. Moreover, disability diminishes physical defences by making it harder to escape and creating dependence on others for basic daily tasks, which increases the risk of sexual abuse and neglect that most women without disabilities do not experience. In addition to physical harassment and rape, sexual abuse can also occur when these behaviours are coupled with offers of aid or threats to withhold necessary care and support (Nosek et al., 2001).

Certain forms of disability can heighten exposure to specific types of abuse. For instance, girls with intellectual disabilities may struggle to recognise or report abuse, and perpetrators might exploit their impairments by manipulating them or presuming they will not be believed (Jones et al., 2012). Deaf or blind girls may experience greater social isolation, making it easier for abusers to act without detection. Autistic girls or those with multiple impairments may lack access to sexual education or support networks, further exacerbating their vulnerability (Caldas & Bensy, 2014).

Risk factors are further intensified in contexts involving multiple layers of marginalisation. Girls and young women with disabilities who belong to racial, ethnic, or religious minorities, who are impoverished, or who identify as LGBTQ+ are at particularly high risk of sexual exploitation. In humanitarian and conflict settings, breakdowns in community structures and oversight result in heightened exposure to sexual violence and trafficking, disproportionately affecting girls with disabilities (Handicap International, 2015).

The widespread and pervasive vulnerability described highlights the need for greater visibility of girls and women with disabilities in broader discussions on sexual violence. It also requires recognition of the specific types and situations of abuse they face—not only as a matter of justice but also as an important step towards targeted prevention and support methods (EDF, 2020). The report by the UN Special Rapporteur on the rights of persons with disabilities about the sexual and reproductive health and rights of girls and young women with disabilities emphasised the increased dangers they encounter, criticising how sexual assault is often underreported (United Nations General Assembly, 2017). Women with disabilities are more likely to be raped because men see them as less capable of defending themselves or seeking justice for violence. Sadly, in many instances, these beliefs are accurate (Human Rights Watch, 2010).

2.6 Barriers to Ending the Cycle of Violence and Accessing Justice

Barriers to justice for survivors are profound and persistent. Sexual violence against girls with disabilities is significantly underreported and prosecuted due to a combination of internal and external barriers (Maher et al., 2018).

One of the most important internal barriers faced by women with disabilities in accessing justice is a lack of awareness of their rights and how to effectively claim them. This is especially true for women with psychosocial disabilities, who are often subjected to stigma, insults, or dismissals because of their condition (WEI, 2018). Additionally, many women with disabilities rely heavily on

family members or caregivers for daily support, which can make it particularly difficult to escape abusive environments. This dependence increases their vulnerability and restricts their capacity to seek help or protection. Many fear retaliation, the threat of being institutionalised, or losing vital support systems such as assistive devices and caregiving arrangements (Curry et al., 2011).

External barriers refer to the environment surrounding women who are victims of violence, such as structural obstacles. These include the lack of accessibility and appropriate procedural accommodations, like sign language interpretation, alternative forms of communication, and age- and gender-sensitive support services. Such deficiencies often lead to significant physical and communication barriers within the legal system, hindering young women and girls with disabilities from seeking and receiving justice (Maher et al., 2018). Courts' failure to make processes disability-sensitive further contributes to a justice system that is not only inaccessible but also often hostile towards survivors with disabilities (Ortoleva, 2011).

Rape myths significantly restrict these women's access to justice, particularly when combined with stereotypes directed towards women with disabilities. As highlighted in the First Chapter, the adversarial nature of the criminal justice system heavily depends on socially constructed notions of credibility and expectations of how an "ideal" victim should present their testimony. Women with disabilities are often perceived as inherently less credible, not based on their testimony's content, but due to prejudicial assumptions linked to their identity (Williams & Jobe, 2025). For example, courts frequently question whether women with intellectual disabilities can understand the oath when testifying and dismiss the testimony of blind witnesses as incapable of accurately perceiving and recounting the sequence of events (UNGA, 2017).

Furthermore, their behaviour and communication styles, shaped by disability-related traits, often fail to conform to normative expectations of how a "credible" victim should behave. This mismatch leads police and legal professionals to dismiss their cases prematurely, believing they are unlikely to succeed in court (Human Rights Watch, 2018). This results in what Fricker (2009) calls "testimonial injustice", where these women are disbelieved or disregarded. Stigma and harmful stereotypes related to their sexuality also play a considerable role. Women with disabilities are often seen either as hypersexual and eager to engage in sexual activity or as asexual, lacking sexual desire and attractiveness. These conflicting and damaging assumptions foster a wider culture of victim-blaming and disbelief, with women either blamed for their assault or not regarded as "real" potential victims. Consequently, many women internalise blame for their assaults and are denied the

opportunity to pursue justice, perpetuating a cycle of invisibility and impunity (Williams & Jobe, 2025).

3. CONSENT AND WOMEN WITH DISABILITIES

This chapter explores the issue of consent from a disability perspective, examining how this concept affects women with disabilities and emphasising the need to balance protection from sexual violence with their right to positive sexual autonomy. Although this group is more vulnerable to sexual violence, contemporary legal scholars also criticise the excessive regulation in this area, arguing that it undermines the agency and dignity of people with disabilities. By failing to address the right issues and contexts, current law risks leaving individuals with mental disabilities more vulnerable to sexual violence and less empowered to exercise sexual agency.

The chapter also examines the complex issue of determining sexual consent in cases of sexual violence involving individuals with intellectual disabilities. It points out that historically, the law has mainly focused on whether the person is assumed unable to give consent and on how to assess such incapacity. However, it argues that this debate overlooks an important distinction: incapacity to consent and non-consent are not the same. While the former involves a categorical distinction, the latter relates to relational conduct (Fischel & O'Connell, 2012). It further emphasises that laws based on this alleged incapacity are both ineffective and excessively broad, as they fail to prevent sexual violence while also restricting the positive sexual autonomy rights of these women.

Based on this, it considers which characteristics the process of determining sexual consent for women with disabilities should include to reflect the intersectional forms of violence they face. It contends that, to combat intersectional discrimination, this process must strike a balance between protection from sexual violence and support for positive sexual autonomy. After outlining these characteristics, it notes that they are consistent with the Only Yes is Yes model upheld by the Istanbul Convention.

3.1 (In)valid Consent and Capacity

Stuart P. Green (2020) argues that sexual consent is both morally and legally valid when it meets key conditions: it must be given voluntarily, knowingly, and competently. This implies that even if someone says "yes" to sex (or appears to consent), we must consider whether that "yes" genuinely meets these conditions to be deemed valid in a legal or ethical context.

Regarding women with intellectual disabilities, Alan Wertheimer (2003) contends that consent is morally transformative—making otherwise impermissible actions morally acceptable—only if the individual giving it is suitably competent, possessing the necessary emotional and cognitive abilities. He stresses that competence is vital because genuine autonomy requires a person to understand and respond to the reasons given by her situation. Without the capacity to grasp long-term consequences, control emotions, or act according to her deeply held values and preferences, a person's consent cannot be regarded as truly autonomous. This requirement is rooted in both respect for autonomy and concern for well-being: decisions made without adequate competence may not reflect the person's true interests and could result in harm. By examining several hypothetical cases, he argues that if some individuals with intellectual disabilities understand the basic nature of sexual acts, do not experience harm, and derive pleasure from these interactions, then their consent may be seen as valid. However, he also states that, in some cases, the very lack of capacity that protects the individual from psychological harm can undermine their ability to give valid consent, since these individuals cannot assess long-term consequences or recognise manipulation. While recognising the importance of positive sexual autonomy, he concludes that sexual consent from these individuals should only be considered valid if there is no clear evidence of harm or inability to comprehend the act. If this is not the case, then the actions are impermissible.

The concept of incapacity or inability to give sexual consent addresses a critical issue, as it considers cases of various victims who, without this debate, might be more vulnerable to sexual violence. This includes individuals who are unconscious for various reasons, such as intoxication, sleep, or being in a Persistent Vegetative State (PVS). However, it is essential not to generalise. When incapacity is attributed to intellectual disabilities, the situation becomes more complex (Green, 2020). These incapacities differ significantly from those associated with, for example, being in a PVS. A person with these disabilities is still capable of some thinking, reasoning, feeling, responding, and communicating. The reason incapacity due to intellectual disability appears to be a more complicated category than sleep or unconsciousness is that fact finders must apply a range of mainly vague legal formulas and rely on contested expert testimony to resolve the issue. These considerations raise important questions about how capacity and the ability to consent are assessed, and what the potential consequences of such determinations could be for the criminalisation of sexual activity and the sexual autonomy of women with intellectual disabilities.

3.1.1 The Categorical Approach

This approach establishes strict liability offences that automatically presume individuals with certain disabilities cannot consent to sex, regardless of context or personal ability.

Some jurisdictions have created separate strict liability offences that automatically classify sexual activity with individuals who have specific disabilities as a crime. These laws consider such individuals inherently incapable of providing sexual consent, regardless of their actual capacity, apparent willingness, or the belief of the other party that consent was genuine. An example of this is Article 519 of the Italian Penal Code (prior to the 1996 reform), which automatically regarded sex with a person with mental illness as rape. Another example is section 5 of the Criminal Law (Sexual Offences) Act 1993 in Ireland and Section 179 of the German Criminal Code (prior to its repeal in 2016), which criminalised sexual activity with persons deemed "mentally impaired".

This approach usually questions whether there are preexisting threshold conditions that automatically presume non-consent, regardless of the specifics of each case. Instead of allowing a case-by-case assessment of whether the victim genuinely consented, it establishes that individuals with certain levels of mental disability are incapable of consenting to sexual acts (O'Malley & Hoven, 2019).

Green (2020) argues that this approach works relatively clearly and effectively for cases involving individuals who are asleep or unconscious. Recognising someone as being in such a state generally does not require complex assessments or specialised legal interpretations. These situations typically lack moral ambiguity, as unconsciousness or sleep makes a person unable to consent in a clear and objective manner. Therefore, sexual acts with individuals in these states are widely understood as inherently non-consensual, and perpetrators who are or should be aware of the victim's condition are justifiably held accountable.

In contrast, cases involving individuals with long-term or permanent cognitive impairments present a more complex challenge. Cognitive disability is not an all-or-nothing condition—it varies in degree and nature. Treating all sexual acts involving such individuals as inherently criminal risks denying their sexual agency altogether. This approach, as Denno (1997) describes, may lead to legally enforced celibacy, where the law prevents sexual expression even for those capable of giving informed, voluntary consent. According to Green (2020), this assumption of incapacity can unjustly exclude people with disabilities from experiencing intimacy and personal autonomy.

Consent is not regarded as a valid defence for this type of offence, which is why it is classified as a strict liability offence (Arstein-Kerslake & Flynn, 2016). The sole defence available to the accused is to demonstrate that, at the time of the act, they were unaware that the other person had a cognitive impairment. This legal provision is inherently discriminatory towards individuals with cognitive disabilities, as it presumes—without exception—that their capacity for decision-making regarding sexuality is fundamentally and uniformly impaired. Scholars like Denno (1997) argue that expanding blanket protections in cases of sexual assault might unintentionally result in these individuals being regarded as legally incapable of consenting to any sexual activity, thereby limiting their positive sexual autonomy. Similarly, Arstein-Kerslake and Flynn (2016) contend that these approaches lead to laws that are overly broad, unjustly prohibiting wanted sexual relations. They argue that by prioritising negative sexual autonomy (the right to be free from unwanted sexual contact) over positive sexual autonomy (the right to pursue consensual sexual experiences), they overlook the significance of sexuality to individual well-being.

A concrete example of this can be found in the case of Anna Stubblefield. As Daniel Engber (2015) explained, Anna Stubblefield was a philosophy professor with a scholarly interest in disability rights. She became involved with a man identified in legal proceedings as D.J., a 30-year-old with cerebral palsy and severe physical and communication impairments. Stubblefield met D.J. through his brother, one of her students and one of D.J.'s legal guardians. D.J. was non-verbal, unable to control his bodily movements, and had been classified by state authorities as having a significantly low Intelligence Quotient (IQ), suggesting a diagnosis of intellectual disability. After spending time with D.J., Stubblefield believed that his intellectual impairment was misdiagnosed because of his inability to communicate conventionally. She began using facilitated communication (FC), a controversial and scientifically disputed method (Schlosser et al., 2014), claiming it revealed his cognitive ability. About two years after they met, Stubblefield and D.J. disclosed to his family that they had developed a romantic and sexual relationship, and that Stubblefield planned to leave her husband to be with him. D.J.'s family, doubtful of FC's legitimacy and uncertain whether D.J. could consent, contacted authorities and initiated criminal proceedings.

During the trial, the court excluded FC evidence, ruling it inadmissible under scientific standards (Harris, 2022). This exclusion significantly weakened Stubblefield's defence, which depended on FC to prove both D.J.'s capacity to consent and his actual consent to the relationship (Sherry, 2016). Without FC evidence, the case was reduced to Stubblefield's own account contrasted with testimony from D.J.'s family and medical experts, who argued that his disability prevented him from giving sexual consent. D.J. did not testify himself, and his appearance in court was limited to a

single moment during the prosecution's opening statement, probably intended to visually underscore his severe disability (the court emphasised his need for diapers, his inability to walk or speak, and drooling) (Mintz, 2017). Ultimately, the jury decided that D.J. lacked the capacity to consent and convicted Stubblefield on two counts of sexual assault of a person with an intellectual or mental incapacity under New Jersey law (Harris, 2022).

Although it concerns a man with disabilities, this example helps understand how laws view sexuality, consent, and capacity in cases of severe disability. Due to D.J.'s communication challenges, there is ongoing debate over whether harm occurred or if, as Stubblefield argued, he was capable of engaging in an intimate relationship (Kulick & Rydström, 2015). Critics of the verdict contend that criminalising sexual relationships with individuals like D.J. effectively strips these individuals of any chance for sexual agency or romantic intimacy (Green, 2020). On the other hand, if the court's assessment of his incapacity was correct, the legal system aimed to safeguard a highly vulnerable person from exploitation. Therefore, the case highlights the intricate ethical and legal issues involved in regulating sexuality when cognitive disability and communication difficulties are present, demonstrating both the potential for protection and the unjust denial of autonomy (Kittay, 2016).

This approach has faced significant criticism from authors such as Michael Gill (2010), who argues that the widespread belief that people, especially women, with intellectual disabilities are inherently incapable to consent to sexual activity is less reflective of their actual cognitive abilities and more a product of societal constructions of disability and competence. In fact, this presumption of incapacity is rooted in cognitive ableism—a framework that defines legitimacy and autonomy based on normative standards of rationality, verbal communication, and decision-making. Within this paradigm, individuals who do not conform to these norms are automatically viewed as lacking the competence to make informed choices, including regarding their own bodies and relationships (Series, 2015). This perception is particularly evident in the case of women, whose sexuality has historically been subject to control and infantilisation. As noted, women with disabilities are often portrayed as either asexual and childlike or, conversely, hypersexual and in need of containment, both of which undermine their sexual agency. These cultural narratives depict vulnerability not as something that can be addressed through support and education but as a fixed condition that disqualifies women with intellectual disabilities from giving consent altogether. As a result, legal and institutional systems frequently adopt a protectionist stance that supersedes the voices and choices of disabled women, reinforcing exclusion under the guise of safeguarding (Friedman, 2017).

The fight for recognising the sexual agency of people with disabilities can be backed by international treaties, notably the CRPD. Indeed, the fact that these laws often disproportionately target individuals with cognitive disabilities by creating barriers that prevent their engagement in sexual activity seems inconsistent with international law.

3.1.2 The Functional Approach

This approach assesses an individual's actual cognitive and communicative abilities to determine their capacity to consent, aiming to balance protection and autonomy without relying on diagnostic labels.

Today, criminal laws in this area adopt a more functional approach. This does not depend on diagnostic labels (such as intellectual disability); rather, it evaluates the person's actual abilities concerning the decision to engage in sexual activity. This is usually carried out through capacity tests, and incapacity to consent is generally identified when the individual cannot understand the nature and consequences of the act, evaluate relevant information to decide whether to engage in the act, or communicate consent effectively. These capacity assessments seek to strike a balance between safeguarding vulnerable individuals and respecting their autonomy, and they are commonly used in common law jurisdictions (O'Malley & Hoven, 2019). Such an approach may generate controversy for being both too narrow and too broad—excluding some individuals who should be protected while including others who may not require such protection.

In the article *Disabling Consent*, Joseph Fischel and Hilary R. O'Connell (2015) criticised this approach, drawing on the case of State v. Fourtin (2012). In this case, the Connecticut Supreme Court overturned the conviction of Richard Fourtin, who had been found guilty in 2008 of sexually assaulting L.K., a young woman with severe physical and intellectual disabilities. L.K., the daughter of Fourtin's then-girlfriend, has cerebral palsy and hydrocephalus, is nonverbal, uses a wheelchair, and communicates via a messaging board. The trial jury concluded that L.K. was "helpless" (Tepfer, 2012) and thus unable to consent to sexual activity. However, the Connecticut Appellate Court reversed this decision, asserting that L.K. had a documented ability to communicate discomfort through actions such as biting, kicking, and scratching—indicating her capacity to resist and, primarily, to communicate her lack of consent to sexual intercourse at the time of the alleged assault. Consequently, she was not helpless under the law. The Connecticut Supreme Court upheld the appellate ruling, concluding that no reasonable trier of fact could find L.K. physically helpless, effectively invalidating the original conviction.

Fischel and O'Connel (2012) criticised the case for its narrow interpretation of helplessness. Such frameworks do not protect individuals with disabilities—unless their functional and physiological state is nearly indistinguishable from being unconscious, asleep, or severely intoxicated. More troublingly, if a person with disabilities attempts to resist an assault through actions such as kicking, biting, or scratching, these efforts may be interpreted not as indicators of non-consent but as evidence of the individual's capacity to consent. In this way, resistance is paradoxically construed as proof of legal competence rather than a sign of distress or lack of consent. The court's decision exposes a deeply troubling paradox: victims like L.K. are considered to have such significant impairments that requiring proof of force may seem unnecessary to establish non-consensual sexual contact, yet they are not viewed as impaired enough to meet the legal definition of helplessness. As a result, L.K. falls through the cracks of both general and status-based protections: her condition renders traditional force-based standards inapplicable, while her limited ability to resist excludes her from being classified as legally helpless. This legal limbo leaves her without a clear pathway for justice, illustrating how such frameworks can fail to account for the lived realities of disabled individuals.

Conversely, Denno (1997) argues that overly broad interpretations of the criteria for sexual consent have too quickly labelled individuals with intellectual disabilities as incapable of consenting. She maintains that such assessments often place excessive emphasis on factors like IQ and mental age, setting the standard for valid consent unrealistically high.

In her study of various court cases involving people with mental disabilities, Jasmine E. Harris (2022) partially challenges this view, revealing what courts consider to be the critical functional capacities needed to consent to sex. Specifically, she identifies five categories of evidence:

(1) diagnostic-based;

(2) receipt of welfare benefits/economic or social supports;

(3) functional capacities;

(4) aesthetics/physical; and

(5) sexual knowledge/understanding.

She argues that, while some forms of evidence—such as whether the individual has received sex education, understands the biological aspects and consequences of sex, and can communicate

their decisions—are directly relevant to assessing capacity, others reflect problematic moral judgments. Such evidence risks overregulation and raises constitutional concerns by allowing bias to influence determinations of legal capacity.

Therefore, while the data show that courts routinely review a mixture of evidence of IQ, mental age, and adaptive evidence in evaluating a victim's incapacity to consent, it also reveals that no single form of evidence dominates. This lack of a consistent legal or political consensus on the knowledge or cognitive functions required for a person's sexual decisions to be deemed valid highlights a flaw in this approach, as courts or practitioners could revert to prejudiced assumptions, reintroducing harmful myths and stereotypes.

Moreover, in his analysis of court cases, leading scholar Jonathan Herring (2012) argued that while such an approach concentrates on the individual and their actual understanding of sex, it overlooks an important factor: the circumstances in which the sexual act occurred. He contends that the question of whether someone has the capacity to consent cannot be considered in isolation, as this can only be properly addressed in relation to a specific alleged perpetrator and in a particular context.

3.2 Balancing Protection from Violence and Positive Sexual Autonomy

The previous sections have outlined a dilemma. On one side, the data indicate that women with such intellectual disabilities are significantly more likely to be victims of sexual violence and other crimes than those without these disabilities. They are often taught from a young age to be compliant, and because of their disabilities, they frequently are not believed. As a result, such individuals have long been seen as needing special legal protection. On the other side, respect for the rights of people with these disabilities and recognition of them as sexual beings has highlighted the question that some laws may be overly protective.

Efforts to protect individuals with disabilities from unwanted sexual encounters—upholding their right to negative sexual autonomy—can sometimes unintentionally restrict their ability to make autonomous choices about consensual sexual relationships or their positive sexual autonomy (Green, 2020). As many disability rights activists have argued, capacity is a concept that is often weaponised against people with disabilities (Women's Health East, 2025). Legal frameworks frequently operate on the assumption that individuals with intellectual disabilities are inherently vulnerable when expressing their sexual needs and desires (McCarthy & Thompson, 1996), whereas many disability rights advocates have long challenged such assumptions, arguing against excessive and unwarranted intrusions into their sexual autonomy (Women's Health East, 2025). People with disabilities can give

consent and deserve the same sexual rights as others. Assuming that women with disabilities lack awareness of their own desires or are incapable of understanding sexual activity undermines their autonomy and fundamental rights. Any framework for defining consent that considers capacity without actively incorporating the perspectives and lived experiences of this population will inevitably fail to protect and respect their sexual agency.

Criminal laws must strike a delicate balance: they should protect vulnerable individuals from abuse and exploitation without completely stripping them of their right to sexual self-determination. While the goal is to prevent harm, overprotection can lead to a denial of agency and fulfilment. This has consistently presented challenges for lawmakers.

Although it is undeniable that women with disabilities are at an increased risk of sexual abuse, previous sections have shown that this often stems from systemic issues such as limited access to information, social isolation, dependence on others for daily needs, and enduring societal myths about intimacy and relationships. To offer meaningful protection against sexual abuse, laws should target these underlying issues. Conversely, laws that restrict or prohibit the sexual expression of people with disabilities often worsen existing stigma, hindering the development of inclusive and preventative approaches that respect autonomy and promote well-being.

These considerations raise questions about the most appropriate way to assess consent in the case of women with intellectual disabilities.

3.3 Creating an Inclusive Definition of Sexual Consent

The functional approach is regarded as a step forward from the categorical criminalisation of sexual acts involving people with disabilities; however, it remains insufficient. It does not address the factors that increase the risk of sexual abuse for women with disabilities, which are mainly situational and relational factors. Furthermore, as the previous sections have demonstrated, the abuse of these women primarily occurs at the hands of caretakers, family members, and in situations of high dependency. Therefore, when assessing sexual consent for women with intellectual disabilities, it is vital to recognise situations where there is a distinct power imbalance between the parties involved. In such cases, the more vulnerable person may wish to refuse participation in a sexual act, but doing so might threaten something they are rightfully entitled to or genuinely require (O'Malley & Hoven, 2019). Women with disabilities frequently live in dependent circumstances, which can make them feel unable to refuse sexual activity out of fear of losing essential daily support. Although some

women without disabilities may also depend on others, this condition disproportionately affects women with disabilities, highlighting the intersectional discrimination they face.

For this reason, determining consent in cases of sexual violence against women with disabilities should prioritise the preferences and expressed wishes of the victims, adopting a relational and case-by-case perspective. It should not focus solely on the presence of a disability but instead evaluate the existence of unequal power dynamics, manipulation, or exploitation. Only a disability-neutral, case-by-case, and relational approach can truly address the reality of women with disabilities and treat them equally with others.

Firstly, Arstein-Kerslake and Flynn (2015) advocate for a disability-neutral approach to consent to sexual activity that avoids treating persons with disabilities as categorically incapable of consent solely based on their diagnosis or status. Instead, it emphasises whether any individual, regardless of disability, has the capacity to understand and make a decision in a specific context. In this context, disability-neutral means that the law creates no special provisions for people with disabilities and treats them, within criminal law, the same as everyone else.

Secondly, when assessing consent, courts should adopt a relational approach. This will address cases of power imbalance and dependency, as it considers the particular situation of the individual and their specific relationship with the alleged perpetrator. Various scholars have endorsed this approach, although they refer to it by different names.

In her work, Denno (1997) advocates for a "contextual approach" that considers an individual's adaptive functioning within the specific circumstances of the sexual encounter, rather than relying solely on diagnostic labels. Similarly, Benedet and Grant (2013) argue that incapacity should be defined situationally, using a functional framework that both protects individuals in exploitative power dynamics and supports women's sexual self-determination. Herring (2012) critiques the narrow question courts often address—focusing primarily on whether there was a verbal "yes" or "no", rather than examining the context in which that response was given. Suzanne Doyle (2010) reinforces this critique, noting that legal assessments of consent frequently rely on an idealised notion of an isolated, entirely rational individual. This framework, she argues, is flawed for everyone, including individuals with mental disorders, because it overemphasises rationality and comprehension as the sole markers of autonomous decision-making. She contends that, particularly in matters of sexuality, women with intellectual disabilities often adopt subservient roles—especially in relation to men—and are more vulnerable to coercion due to limited or entirely absent internalised

"scripts" for navigating sexual situations. As a result, they may struggle to withhold consent when someone else initiates sexual activity. These dynamics emphasise the need to assess sexual consent not in abstract or purely cognitive terms, but within the specific relational and situational context in which the encounter occurs.

A broader, more nuanced approach to consent is necessary—one that draws on the concept of relational autonomy (Fischel & O'Connell, 2015). This requires examining the broader context in which the act occurred, with particular attention to various factors that warrant careful consideration. First, scholars and legal practitioners must conceptualise consent within its broader social and relational framework. A woman's consent to sexual activity should be interpreted in light of prevailing patriarchal structures and the specific dynamics of the relationship in question. This perspective resists reducing sex to a discrete, static act, such as penetration, with a binary "yes" or "no" applied. Respecting autonomy entails enabling women to articulate the sequence of events preceding the sexual encounter and situating their experiences within the relevant social and interpersonal context. What a woman consents to often extends beyond the mere physicality of the act; it encompasses layers of meaning shaped by her social and relational circumstances (Herring, 2012). Therefore, when courts pose the question of whether an individual possessed the capacity to consent to sex, they must recognise that the answer cannot be separated from the context in which the act occurred.

Second, Fischel and O'Connell (2015) argue that it is essential to assess sexual relationships as dynamic interactions between two individuals—focusing not only on whether one party understood the mechanics of sex or verbally said "yes", but also on how the encounter was negotiated, perceived, and experienced by both parties. Courts should consider whether the interaction reflected mutual respect and autonomy, whether it was caring or exploitative, and whether it provided pleasure and emotional safety to both individuals. Questions such as whether the person felt secure, valued, and engaged in a reciprocal relationship are more meaningful than a narrow focus on cognitive understanding alone. Framing consent in this relational and contextual way allows us to recognise that even individuals with significant mental disabilities may be capable of autonomously consenting to sexual activity when it occurs within a nurturing, non-exploitative, and mutually affirming relationship.

Green (2020) also advocates for an approach that considers both the capacities of individuals with mental disabilities and the specific circumstances surrounding the sexual encounter. However, he points out that adopting this perspective requires a fundamental conceptual shift. Framing this

situational analysis as merely an extension of the traditional inquiry into capacity constitutes a categorical error. Instead of simply expanding the assessment of capacity, this shift reorients the analysis entirely—from evaluating whether someone has the capacity to consent to examining the nature and validity of consent itself.

The Stubblefield case offers a compelling example for applying a more nuanced model of consent. The court, adhering to New Jersey's statutory framework, adopted a categorical, per se approach that equated D.J.'s intellectual disability with conditions like unconsciousness or sleep (Mintz, 2017). This interpretation, however, oversimplified the complexities involved. A more suitable approach would have evaluated not only whether D.J. understood the nature and consequences of the sexual act, recognised the significance of choosing to engage in it, assessed the risks and benefits, or could communicate his decision (Murphy & O'Callaghan, 2004). It would have also considered the potential for D.J. to derive pleasure from the encounter, the likelihood of harm, and the specific nature of the relationship between D.J. and Stubblefield. This relationship raises conflicting issues: on one hand, her apparent affection for D.J. might suggest a consensual dynamic; on the other, her role as a teacher and mentor introduces a troubling power imbalance (Sherry, 2016). The approach proposed aligns less with the rigid standard applied to individuals who are unconscious and more with the fact-specific standard used in cases involving alleged coercion or deception (Benedet & Grant, 2013). While cognitive capacity remains a critical element, the central question should be whether, in the actual circumstances, the individual gave valid and autonomous consent. Mental disability, in this model, would not automatically nullify the possibility of consent.

A clear legislative example of this model is found in Senator Katherine Zappone's Private Members Bill (Ireland, 2014), which proposed the repeal of section 5 of the Criminal Law (Sexual Offences) Act 1993. That section established a strict offence of engaging in sexual activity with a "mentally impaired" person, regardless of consent. The proposal replaced the existing provision with a disability-neutral offence centred on the abuse of a position of dependence or trust for sexual purposes. It recognised that individuals with cognitive disabilities can give valid consent, replacing automatic incapacity with an individualised assessment of understanding and voluntary agreement. This legislative proposal embodies the core of a disability-neutral model: recognising that people with disabilities, like all others, are entitled to sexual autonomy and legal protection without being automatically deemed incapable of consent.

This research contends that a disability-neutral and relational approach closely aligns with the affirmative consent standard promoted by the Istanbul Convention. As Fischel and O'Connell (2015)

emphasise, this model considers the specific situational and circumstantial factors surrounding a sexual encounter. Similarly, the meaning of "affirmative consent" must be shaped by the particularities of each case. For example, a "yes" obtained through coercion or threats cannot constitute genuine affirmative consent. Likewise, whenever an individual with intellectual disabilities responds to all social interactions with a smile, even when such interactions are harmful, affirmative consent must involve clearer and more substantial communication than merely a smile. By allowing the "affirmative" element of consent to adapt to the individual's capacities and context, this standard effectively includes persons with intellectual disabilities rather than excluding them through rigid statutory categories. Eliminating disability-based distinctions in sexual offence law reduces the risks of both under-protection (assuming some are not helpless enough) and over-protection (assuming others are categorically incapable of consent). In doing so, it also challenges and helps dismantle the deep-seated social stigma and marginalisation embedded within the law (Fischel & O'Connell, 2015).

When supporting such a model, it is crucial to consider how introducing an affirmative consent standard might affect the outcomes of cases like Fourtin. If the core of sexual assault law in Connecticut and other jurisdictions shifted from proving force to establishing consent, could Fourtin have been successfully prosecuted under the general statute? What if the law recognised L.K. as a woman with full agency rather than as an almost-but-not-quite incapacitated individual? Furthermore, what if the legal framework recognised unwanted sexual contact, not solely physically forced sex, as constitutive of sexual assault?

Under the subsections of the statute charging Fourtin, the legal focus rested on proving "helplessness" to demonstrate an inability to communicate nonconsent. This legal framing diverted attention from whether L.K. consented to, or even desired, the sexual contact, instead emphasising her disabilities and perceived incapacity. Had the essential element of sexual assault been the absence of affirmative consent rather than the victim's inability to communicate refusal, Fourtin's actions might have been more clearly recognised as criminal. Importantly, no party in the proceedings ever claimed that the sexual encounter was consensual or that L.K. showed any interest, although Fourtin initially denied any sexual contact at trial.

In conclusion, this research advocates for legal frameworks that recognise nuance, incorporating safeguards that both protect and empower vulnerable individuals without entirely excluding them from sexual intimacy. Affirmative consent offers an effective balance between safeguarding women with disabilities and respecting their autonomy, whilst also addressing the realities of coercion and power imbalances that these women often face.

4. DISABILITY, GENDER, AND CONSENT: COMPARATIVE PERSPECTIVES ON PROTECTION AND AUTONOMY

This chapter presents a comparative analysis of three state parties to the Istanbul Convention—each embodying one of the three legal models of consent discussed in Chapter 1: the traditional model, the "no means no" model, and the "only yes means yes" model. The analysis examines how each jurisdiction aims to balance protecting women with disabilities from sexual violence and safeguarding their right to sexual autonomy.

In practice, most legal systems go beyond general definitions of sexual assault by referencing specific circumstances where consent is presumed to be absent, especially in cases involving severe cognitive impairments. While these legal presumptions seek to shield vulnerable individuals, they often raise complex ethical and legal issues. A key tension arises when individuals with intellectual disabilities express a genuine desire for sexual contact, yet the law enforces an automatic ban based on presumed incapacity. In such cases, legal frameworks must recognise that sexuality is essential for individual well-being and quality of life, and that rigid categorical exclusions can undermine, rather than support, the rights they intend to protect.

As this chapter will demonstrate, many jurisdictions allow some flexibility in applying criminal sanctions to sexual activity involving individuals with cognitive disabilities. However, the level and effectiveness of this flexibility vary considerably across legal systems.

To provide both concrete protection from abuse and the meaningful realisation of sexual autonomy for women with disabilities, legal reforms need to be supported by broader structural changes. These include mandatory training for judicial officials on disability rights and communication, as well as accessible, comprehensive sexuality education tailored to women with disabilities' needs. Without these additional measures, even the most progressive consent laws risk falling short of their transformative potential.

4.1 Italy and The Traditional Model

The traditional model requires victims to demonstrate that they resisted or were physically overpowered by the aggressor. It is evident how this presents particular problematic for women with disabilities, who may be unable to physically resist. However, as outlined in GREVIO's 4th general report (CoE, 2023), countries that adopt the traditional model have introduced limited circumstances where the absence of consent is a key element of sexual violence and rape. Specifically, they have included instances of invalidated consent within their definitions of rape where the victim is helpless due to personal circumstances. This helplessness is typically associated with unconsciousness caused by alcohol or drugs, or results from specific conditions such as illness, mental disability, or detention.

The case of Fourtin and this analysis demonstrate that maintaining the traditional definition of consent, while treating disability as a special category within sexual assault law, is not a feasible solution, as it can be both under-protective and overly protective. To balance adequate protection for women with disabilities with respect for and recognition of their sexual agency, countries that persist with the traditional model of consent have pursued various approaches.

An example of this is Italy. According to the 2019 GREVIO Baseline Evaluation Report on Italy, the current definition of the offence of sexual violence in Italian criminal law stems from Law No. 66/1996, which defines sexual violence as a crime against personal freedom, moving away from the previous definition that framed it as a crime against public morality (CoE, 2019). Particularly relevant in the context of violence against women with disabilities is Article 609-bis, paragraph 2. The first paragraph of this provision, in line with the traditional model, defines sexual violence as coercing someone to perform or undergo sexual acts through violence or threats. In contrast, the second paragraph does not require violence or threats; instead, it states that the same penalty applies to anyone who induces another to perform or undergo sexual acts by exploiting the victim's physical or psychological inferiority at the time of the act. Because this is a comprehensive formulation, it clearly covers conditions such as intellectual disabilities, which, in theory, no longer need to exhibit signs of physical resistance or threats to prove they did not consent (Asprone, 2015).

Despite this positive aspect, the Italian Disability Forum (2023) argues that, although women with disabilities are more exposed to sexual, physical, and psychological violence, they are not specifically mentioned in Law n°66/1996. Instead, it only provides for a general aggravation of punishment for violence committed against persons with disabilities, regardless of gender (Associazione Da Donna a Donna, 2013). It has been contended that this lack of legislative reference

is the root cause of a complete absence of information regarding violence and abuse experienced by women with disabilities in Italy (The International Disability Alliance, 2017).

It is worthwhile to analyse this provision both from the perspectives of protection and the right to sexual autonomy. From a protection point of view, the phrase "physical and psychological inferiority" appears to address the power imbalance and dependence that characterise some women with disabilities. Importantly, the concept of inducement plays a central role. Unlike traditional legal definitions that depend on proof of physical force or threats, inducement shifts the focus to recognising the exploitation of vulnerability as a form of coercion (Viganò, 2002). This is especially significant when individuals are unable to clearly refuse or resist due to cognitive or physical limitations. By addressing inherent power imbalances—such as those in caregiver-dependent relationships or psychological dependency—the law acknowledges that consent may be compromised not only by violence but also by manipulation or trust-based coercion. In doing so, the idea of inducement supports a more inclusive and affirmative model of consent, highlighting the importance of meaningful, autonomous participation (Riverditi, 2018).

On the other hand, national experts questioned the effectiveness of such an approach in protecting women with disabilities from sexual violence. They argued that the high standard of proof and inconsistent interpretation of non-consensual features by courts can lead to secondary victimisation (EELN, 2021). When judicial systems do not apply clear, consistent standards for assessing consent, they risk reinforcing damaging rape myths that, as observed in Chapter I, are particularly upheld by the traditional model. These myths disproportionately impact women with disabilities. For example, stereotypes portraying women with disabilities as either asexual and incapable of desire or overly compliant and unaware of boundaries can distort how their actions—or inactions—are perceived in legal proceedings. In situations where a woman does not physically resist or cannot verbally communicate refusal due to cognitive or communicative impairments, courts may wrongly infer consent, dismissing the real harm she has suffered (Balloni et al., 2012).

From the perspective of positive sexual autonomy, this provision, although driven by the legitimate aim of providing adequate protection against sexual abuse and violence for individuals in situations of heightened vulnerability, potentially conflicts with the right to sexuality of persons with intellectual disabilities (Rotelli, 2016).

In response to such criticism, some scholars argue that, compared to previous legislation, this provision marks a genuine step forward in recognising the right to sexuality for persons with

disabilities. Martorana (2019) claims that, following the 1996 reform, a process of profound rethinking by the legal system has commenced, to the extent that one can assert the right to sexuality for persons with disabilities has been almost fully recognised. Indeed, Article 519 of the Criminal Code, repealed by Law No. 66 of 15 February 1996, stated in its third paragraph that anyone engaging in carnal relations with a person with a mental illness committed rape, thereby effectively prohibiting any non-auterotic sexuality for individuals with intellectual disabilities. Article 519(2) and (3) established an irrebuttable legal presumption of sexual violence in cases where sexual intercourse involved a person considered mentally ill and, as a result, in a state of physical or psychological inferiority (Riverditi, 2018). Although supposedly aimed at protecting persons with disabilities, this provision ultimately proved to be stigmatising and repressive. By making the presumption unchallengeable, the law effectively discouraged individuals with disabilities from expressing consensual and informed sexual agency. Legally, Article 519(2) and (3) conveyed the message that persons with disabilities—particularly those with intellectual or psychosocial impairments, but arguably including those with physical disabilities—lacked the capacity for self-determination concerning sexuality (Rotelli, 2016).

Therefore, it is important to note that Italy now employs a disability-neutral approach. Following the 1996 reform, criminal law no longer includes special provisions for persons with disabilities; instead, it treats them equally with others (Arstein-Kerslake & Flynn, 2016). Judges now conduct a case-by-case assessment of an individual's capacity to consent to sexual activity, basing their evaluation on the person's actual abilities rather than the existence of a disability (Boccaletti, et al., 2019).

However, despite removing this automatic presumption and adopting a disability-neutral law with Law no. 66/1996, the realisation of the right to sexuality remains particularly challenging from a legal perspective. It is the judge's responsibility in each case to determine whether inducement and abuse of the person's vulnerability actually occurred (Liccardo et al., 2015). This task—balancing the protection of the sexual rights of persons with disabilities and punishing conduct that constitutes abuse—is highly complex, requiring careful interpretation and application. Even members of the judiciary acknowledge the significant challenges in adjudicating such cases, as establishing whether the other party exploited the vulnerability of the individual with a disability is inherently difficult. This complexity raises the risk of either failing to recognise abuse or, conversely, unduly restricting the individual's rights to sexual self-determination (Liccardo et al., 2015).

Judgment no. 44978 of the Italian Supreme Court from 22 December 2010 exemplifies such a dilemma. In convicting the defendant of sexual violence against a person with a disability, the Court emphasised that the consensual nature of the relationship must be excluded when the victim's intellectual impairment prevents them from resisting the other person's overpowering behaviour. In this case, the Court found that the victim had the intellectual capacity of a twelve-year-old and a biological age of twenty-five, alongside personality traits such as passivity, extreme submissiveness, and an inability to express disagreement. The judges concluded that she was not capable of giving valid consent to sexual activity. Any consent the disabled person may have provided was deemed vitiated by the manipulative conduct of the other party, who was aware they were taking advantage of a situation of vulnerability (Cassazione Penale, 2010).

This ruling reveals a real risk: that the essential protection of disabled individuals could become a denial of their rights. Specifically, it threatens the denial of the right to sexual self-determination—a key aspect of personal autonomy and human dignity. Legal scholars emphasise that merely having a right is not enough without its practical exercise. Even when an adult is under guardianship or declared legally incapacitated, this does not nullify their fundamental rights, including the right to make autonomous decisions about their sexual and intimate lives (Glen, 2020).

The right of a person with an intellectual disability to express their sexuality must not—and cannot—be denied, as they remain full holders of legal capacity. Nor should their general ability to exercise this right be questioned, as doing so risks making the right illusory in practice. Without meaningful opportunities to exercise it, the right to sexuality becomes a hollow formality, and the sexual autonomy of persons with disabilities risks turning into a form of "disabled sexuality" (Liccardo et al., 2015). The role of the guardianship judge—indeed a complex and sensitive one—is to assess, on a case-by-case basis, whether the individual is consciously and autonomously engaging in a sexual relationship with a specific partner. This assessment should be supported by input from professionals who work closely with the person. What must be avoided is the application of overly rigid legal standards that forcibly transform a deeply personal and subjective aspect of human life into fixed legal categories that fail to respect its complexity and individuality (Rotelli, 2016).

Furthermore, the Italian Supreme Court's judgment no. 18513/2015 demonstrates the difficulty courts face in determining whether the other party has exploited the vulnerability of a person with a disability. In this case, the Court held that the mere existence of an intellectual or cognitive impairment does not, in itself, invalidate a person's capacity to give valid consent to sexual activity. Instead, it emphasised the need for a case-by-case assessment of the individual's actual ability to

understand and voluntarily engage in the sexual act (Vallini, 2015). Notably, the Court criticised the lower judiciary for ignoring the victim's prior consensual sexual experience, which indicated a level of sexual autonomy inconsistent with presumed incapacity. Moreover, the judgment highlighted a fundamental error in conflating the sexual act itself with the inducement, as the lower courts failed to assess whether the accused had engaged in manipulative behaviour prior to the act that would have compromised the validity of the victim's consent. The Court clarified that to prove abuse of vulnerability under Article 609-bis(2)(1) of the Italian Criminal Code, the prosecution must establish that the defendant was aware of the victim's impairment and intentionally exploited that condition to obtain sexual acts through manipulation, coercion, or deception, thereby vitiating genuine consent (Cassazione Penale, 2015). Such abuse must be proven with specific evidence of exploitative conduct preceding the act, not presumed merely from the existence of a disability (Lancioni, 2015).

This decision reflects a more nuanced and rights-based approach, aligning with the principles of the UNCRPD by reaffirming that individuals with disabilities retain their sexual rights and legal capacity, and that protection must not come at the expense of autonomy.

4.2 Germany and the "No Means No" Model

While the previous model requires physical resistance, the "no means no" model recognises the absence of consent when a person clearly expresses refusal, shifting the focus from force to the victim's verbal or non-verbal objection. Both models can be problematic, depending on the specific circumstances of the victims as well as the factual circumstances of the aggression. As discussed in Chapter 1, the "no means no" model can be criticised for being too narrow, especially in cases where the victim is unable to express non-consent due to factors such as unconsciousness, deep intoxication, or cognitive or communicative impairments. In such circumstances, a clear verbal rejection is unlikely, but this does not necessarily mean the law fails to provide protection. Similar to the traditional model, many countries adopting the "no means no" approach address these cases through supplementary provisions that recognise incapacity as a condition under which valid consent cannot be given (Green, 2020).

Germany exemplifies this approach through its 2016 reform of sexual offence legislation, which preceded its ratification of the Istanbul Convention. The reform introduced a consent-based framework that criminalises any sexual act committed against the recognisable will of the victim. While the offence of sexual coercion remains within Section 177 of the German Criminal Code, it is now regarded as an aggravating factor rather than the primary offence. Article 177 is now the

principal provision addressing sexual violence and reflects many of the standards outlined in the Istanbul Convention. The law states that performing sexual acts against the clear and recognisable will of another constitutes a criminal offence, punishable by imprisonment.

However, it is not sufficient for the victim to secretly disagree with the perpetrator's sexual advances; the absence of consent must also be understandable to a hypothetical reasonable observer. It remains unclear to what extent this observer is presumed to understand the victim's personal ways of expression. Nonetheless, the legislature seems to assume that only non-verbal cues generally understood as signs of refusal, such as shaking the head or physically pushing the perpetrator away, qualify as recognisably indicating a lack of consent (O'Malley & Hoven, 2019). Furthermore, the law considers individuals who are unable to give or communicate consent due to psychological or physical limitations, affirming that such individuals are deemed to lack the capacity to provide valid consent. These offences carry similar penalties, highlighting the legal system's recognition of the necessity to protect particularly vulnerable individuals.

In its baseline evaluation report of Germany, GREVIO expressed support for the country's adoption of a consent-based legal definition of rape and sexual violence (CoE,2022). The group noted positively that this legislative reform was accompanied by extensive public awareness campaigns, which sparked national debate on the subject. Following these efforts, a noticeable increase in reports to law enforcement concerning offences against sexual autonomy was recorded. Although it remains uncertain whether this rise directly resulted from the shift from a force-based to a consent-based legal standard or from the public discourse surrounding the reform and increased societal awareness, GREVIO viewed the overall impact of the reform as encouraging. This development is seen as a step towards the broader change envisaged by Article 36 of the Istanbul Convention—namely, improving access to justice for survivors of sexual violence occurring without overt force or threats.

Nonetheless, GREVIO emphasised that the effectiveness of these legal provisions will largely depend on how diligently prosecutors and judges enforce them. Furthermore, the organisation raised concerns about the current framing of rape and sexual assault in German law (as acts committed against the recognisable will of the victim). According to GREVIO, this formulation does not fully meet the standards set by Article 36, particularly paragraph 2, which stipulates that consent must be given freely, voluntarily, and in consideration of the context. As a result, GREVIO recommended that Germany further refine its legal definition of consent to achieve complete alignment with the Istanbul Convention and to reflect a "yes means yes" approach.

In response to this, it is interesting to analyse why the drafters of the core offence description in section 177(1) of the German Criminal Code did not adopt the terminology from the Istanbul Convention (non-consensual acts), and how criminal law in Germany addresses women with mental disabilities. According to Tatjana Hörnle (2023), one reason relates to translation. Specifically, the alternative phrasing "ohne Einwilligung" (meaning "without consent") would have implied stricter cognitive requirements for consent, potentially suggesting that a person must have a high level of understanding or mental capacity to give valid consent. This raised concerns that such a model could be interpreted in ways that exclude or disadvantage certain individuals, particularly those with limited cognitive abilities. Therefore, the "no means no" option was seen as a more workable and inclusive approach within the German legal and linguistic context.

Hörnle (2023) continues to argue that the second reason is that the drafters aimed to create a more precise and legally operable definition suitable for national criminal law. While the Convention provides broad policy guidance, translating it into statutory law requires greater specificity. The term "non-consensual" is regarded as too vague for legal application without further clarification, particularly given the complexities of proving the absence of consent in various real-life situations. For instance, under a "no means no" model, the law must consider scenarios where a victim cannot articulate non-consent due to unconsciousness, fear, or incapacity. To address this, Section 177(2) provides detailed offence descriptions to encompass such presumptive non-consensual circumstances. In contrast, an "only yes means yes" or affirmative consent model—like that implied by the Istanbul Convention—would cover more of these cases within a single core offence description, as it emphasises the presence of explicit, affirmative consent rather than requiring evidence of rejection. The German approach opted for a structured legal framework with multiple subsections rather than relying on a broad, undefined concept of "non-consensual" to ensure legal certainty and comprehensive protection. Sexual assault laws must be somewhat more complex if the core offence description requires that the offender acts against the discernible will of the other person. In some situations, communicating an adverse will is impossible or unnecessary because offenders are well aware that sex is unwanted. Section 177(2) of the German Criminal Code was designed to capture such cases.

Indeed, a significant reconsideration was made during the 2016 reform of German sexual offence law regarding how to address situations involving individuals with severe cognitive or mental impairments, whether permanent or temporary. Prior to the reform, Section 179 of the German Criminal Code (now repealed) criminalised sexual acts with individuals who were seriously ill, heavily intoxicated, or had disabilities that incapacitated them from resisting (Kölbel, 2021). This

provision was ultimately abolished for several reasons. Firstly, it drew a problematic distinction between two categories of victims—those considered ill or disabled and those not—while also assigning a lesser punishment to offences against the former group, which raised concerns of discrimination. Secondly, the prior law left ambiguous whether and how individuals with severe mental disabilities could express a valid desire for sexual activity, potentially denying them sexual autonomy (Green, 2020).

In order to achieve a balance between autonomy and protection, the current German law has adopted a more radical approach by abandoning the requirement for a minimum level of cognitive capacity to engage in sexual activity. Instead, it centres the assessment on the individual's actual, demonstrable expression of approval. According to the documentation for the 2016 reform, sex should be permitted even when a person lacks the ability required for autonomous decision-making; in these cases, German law currently employs an affirmative consent model: zustimmung, or factual approval, is important (Hörnle, 2023). The new law recognises three specific circumstances: a person with a significant mental disability, including extreme intoxication (i) voiced "no" or nonverbal indicators of rejection; (ii) stayed silent or acted ambivalently; and (iii) declared her desire to have sex. According to section 177(1), the first constellation is a typical instance of sexual assault. According to section 177(2), the second is sexual assault if the perpetrator exploited the victim's vulnerability (but not if both partners in a sexual encounter are equally disabled or both heavily intoxicated). In the third version, if the more competent person determines that the impaired person communicates a desire for sexual interaction, she does not break any laws (Hörnle, 2023).

Even if the accused knew about and exploited their "partner's" disability, the focus now shifts to the other person's actual needs and goals. Therefore, in these situations, the concept of consent is reduced to the assertion of actual approval (Kölbel, 2021). From a moral point of view, the actions of the individual without a mental disability may still be morally reprehensible because they were self-centred, manipulative, and disregarded others' welfare, and the offender should be held responsible for their exploitative behaviour. However, Hörnle (2023) argues that criminal laws requiring nearly equal levels of cognitive and other skills impose the (too high) cost of preventing specific individuals from engaging in sexual encounters they desire. Additionally, Michelle Dempsey (2023) contends that moral judgements should not be directly mirrored in criminal laws.

Furthermore, regarding punishment, Section 177(5) of the German Criminal Code sets a higher penalty range, from a minimum of one year to a maximum of fifteen years' imprisonment, if the victim's inability to respond to sexual assault was caused by illness or disability. Thus, the law

differentiates between victims who were unconscious (for example, following a stroke) or had severe mental disabilities, and those who were asleep, under general anaesthesia, or unconscious due to intoxication. According to Hörnle (2023), this distinction is questionable since in all these cases, the offenders violate sexual autonomy.

To summarise, German law criminalises the act of the perpetrator abusing the fact that another person is incapable of forming or expressing his or her will against sexual acts. If the other person's capacity is merely limited, rather than entirely lacking, sexual acts are permissible, but the actor must first ensure that the other person agrees to each act. This framework aims to find a reasonable balance between the right to sexual fulfilment and the need to protect against sexual exploitation (O'Malley & Hoven, 2019).

However, during the drafting of the new criminal code, the majority of the reform panel even supported repealing Section 177(2) No. 2, arguing that individuals with mental disabilities, regardless of their cause, should not be treated differently. They contended that maintaining such a distinction could violate the principle of non-discrimination.

In conclusion, to achieve a balance between protection and autonomy, the German model shifts its focus from a minimum cognitive threshold to factual, expressed approval; however, this also risks being underinclusive if such approval results from manipulation. A potential solution is to require not just verbal consent, but an active expression of genuine personal desire (Hörnle, 2023).

4.3 Sweden and The Affirmative Consent Model

In 2018, Sweden revised its legal definition of rape, expanding it to encompass any act of penetration committed without the victim's voluntary consent. Before this reform, Swedish law required that rape involve force, threats, or situations where the victim was unable to resist—such as being asleep, intoxicated, ill, or otherwise in a particularly vulnerable state (CoE, 2023). The legal change was driven by widespread public outrage after several high-profile cases of sexual violence where the accused were acquitted, most notably the widely discussed 2013 case involving a 15-year-old girl gang-raped by six teenage boys. Although initially convicted, the perpetrators were later acquitted on appeal because the court concluded that the girl was not in a sufficiently "incapacitated state" under the law at the time (Nilsson, 2019). This case sparked national outrage and highlighted the shortcomings of existing legislation, which did not explicitly require consent as the basis for

lawful sexual activity. Such cases increased public pressure for reform, ultimately leading to the adoption of a consent-based legal standard in Sweden (Nilsson, 2019).

Scholars often describe Sweden's approach as a modified affirmative consent model—captured by the phrase "only yes means yes", albeit with certain legally recognised exceptions (Wegerstad, 2021). To establish criminal liability for rape under Swedish law, the prosecution must demonstrate that the individual did not voluntarily engage in the sexual act. Although the law does not fully define voluntariness, the statute delineates specific circumstances in which consent is deemed invalid: (1) when participation results from assault, violence, or threats involving criminal acts, legal prosecution, or the dissemination of harmful information about another person; (2) when the perpetrator takes undue advantage of the victim's especially vulnerable state, such as unconsciousness, sleep, extreme fear, intoxication, illness, physical injury, psychological disturbance, or any comparable circumstance; or (3) when the victim is coerced into participation through severe abuse of a position of dependency by the perpetrator. This definition, in principle, should address the specific situation of women with intellectual disabilities.

In its baseline evaluation report of the country, GREVIO emphasises that the revised rape legislation in Sweden places responsibility on the perpetrator to ensure all sexual acts are entered into voluntarily (CoE, 2019). As outlined in the first chapter, this legal and conceptual shift is essential to moving away from judicial interpretations that have traditionally focused on rape myths and the victim's behaviour, including factors such as appearance or conduct before, during, and after the incident. This is particularly crucial when addressing women with disabilities who have suffered sexual violence, as they are especially influenced by rape culture.

EPRS (2024) noted that, on the one hand, the introduction of the new legislation has coincided with a substantial increase in rape convictions—by 75% in 2019 compared to the previous year. On the other hand, it emphasised that courts have encountered several difficulties in applying the law in practice. One of the main points of contention during the legislative debate was how to define and interpret non-voluntary participation and cases of invalid consent. The law, as it is currently framed, entrusts judges with evaluating the specific circumstances of each case to determine whether the complainant's involvement was genuinely voluntary. Reviews of case law suggest that, in convictions for rape, it has generally been evident that the victim did not intend to take part in the act—either because she was caught off guard, failed to give any indication of consent, or responded passively due to a state of paralysis.

Additionally, cases of negligent rape often involve more ambiguous circumstances, especially regarding how to interpret a lack of response or non-resistance. These judgments highlight a range of interpretive challenges, and in many cases, the outcome was not immediately clear (Brå, 2020).

For these reasons, GREVIO stressed that, to ensure the effective implementation of this paradigm shift, it is essential to invest in judicial training, public education, and ongoing opportunities for professional dialogue and awareness-raising among members of the judiciary (CoE, 2019).

4.4 Concluding Observations: Strengthening Protection and Future Directions

4.4.1. Training for Judicial Officials

The previous sections have established that, even when a more inclusive model of consent is used, courts may encounter challenges in interpreting legal provisions related to consent. In a context shaped by rape myths and stereotypes about women with disabilities, this can result in secondary victimisation and disbelief on one side, or over-protection and restriction of autonomy on the other.

To address the intersectional discrimination these women may encounter in their pursuit of justice, it is clear that the professional training of all individuals within the expertise network crucial for safeguarding the rights of women with disabilities plays a vital role. Judicial officials should be equipped with the appropriate skills to recognise and interpret provisions in a manner adapted to the specific circumstances of each woman with a disability. This includes recognising her unique cultural, familial, and geographic background, as well as the particular nature of her disability, which may differ substantially from other women, disabled or not, who have experienced violence. Such training must extend beyond general principles to effectively respond to the complex and individualised experiences of disabled women facing violence.

This type of training is an essential tool for challenging stereotypes and prejudices in rape trials (Sosa and Mestre i Mestre, 2022). In accordance with the Istanbul Convention, such training should shift the focus away from fixed identity groups (such as migrant women, women with disabilities, lesbian or transgender women, older women, etc.) and instead centre on the underlying grounds of discrimination—such as migration status, disability, sexual orientation, gender identity, and age—and the broader systems of oppression they reflect, including racism, ableism, lesbophobia, transphobia, and ageism.

To effectively safeguard the positive autonomy of women with disabilities, it is crucial that judges, when exercising their necessary discretion, possess not only the appropriate legal competence but also the sensitivity, which is primarily acquired through adequate and multidisciplinary training, to avoid basing their evaluation solely on the presence of a disability. Instead, they must be capable of recognising and appropriately weighing the individual's remaining capacities, including their potential to actively contribute—sometimes decisively—to the criminal justice process. This approach ensures that the person is not passively excluded but instead meaningfully included in legal proceedings, in line with a rights-based and person-centred view of justice.

Navigating and coordinating the various legal provisions is challenging, and resisting the tendency to automatically apply certain measures regardless of the specific characteristics of the individual case is not straightforward. This again emphasises the urgent need for targeted training for justice professionals—particularly judges—so they are prepared to respond thoughtfully rather than reflexively.

4.4.2 Accessible Information and Comprehensive Education

Removing legal obstacles and re-establishing a non-discriminatory situation in this field is necessary, but it may not be sufficient. Given that the heightened vulnerability of women with disabilities to sexual violence primarily arises from structural inequalities and a widespread lack of information about their rights and sexuality, additional measures, policies, and programmes should be designed by prioritising the voices and concrete needs of people with disabilities. Indeed, a simple reform in criminal codes does not address the underlying issue behind violence, which is building the capacity to engage in consensual sexual relationships and distinguish between consensual and non-consensual relations. In General Comment No. 3 (2016) on women and girls with disabilities, the CRPD Committee emphasised that women with disabilities are often denied access to information and communication, including comprehensive sexuality education, because of harmful stereotypes that depict them as asexual and, therefore, not requiring such knowledge. Furthermore, when such information is available, it is often not provided in accessible formats.

Accordingly, states have a responsibility to ensure the delivery of comprehensive sexuality education specifically designed for women and girls with disabilities, with a strong emphasis on the concept of consent. This education can enhance women's ability to make sexual decision-making and expand the contexts in which they are recognised as capable of making autonomous choices. This, in turn, allows individuals with intellectual disabilities to exercise their sexual and reproductive rights

more fully. Furthermore, a consent-focused educational approach provides women with the knowledge necessary to identify abuse and assert their rights, thereby promoting greater protection and empowerment of this marginalised group.

As Martin Lyden (2007) confirms, the capacity to consent to sexual activity is not a fixed trait but a dynamic state that can evolve over time. Although a woman with intellectual disabilities may initially be considered incapable of consenting to sex due to knowledge deficits, with access to appropriate training, education, counselling, and social experiences, these deficits can be addressed. As a result, she may later be recognised as having the capacity to consent. This perspective highlights the transformative potential of comprehensive sexual education, not only as a tool for protection but also as a means of empowerment that can enable women with disabilities to participate more fully in intimate relationships with dignity and autonomy.

Furthermore, another study by Glynis Murphy and Ali O'Callaghan (2004) also demonstrated that the capacity to consent to sexual relationships, however defined, is not a static phenomenon. There was clear evidence in this study that sex education was associated with higher levels of knowledge and lower levels of vulnerability among people with intellectual disabilities. Using a functional approach, the study showed how participants who had received sex education scored significantly higher on measures assessing both basic and advanced sexual knowledge, including topics like contraception, sexually transmitted diseases, and consent. Furthermore, those who had prior sex education were better able to recognise and interpret situations involving consent and abuse, indicating a greater capacity to protect themselves from exploitation. Based on these findings, the authors emphasised the importance of ongoing sex education programmes to support the autonomy and safety of individuals with intellectual disabilities.

Moreover, a study conducted in Ireland by Dukes and McGuire (2009) found that individually tailored sexual education for individuals with intellectual disabilities not only enhanced their understanding of sex, sexuality, and sexual safety but also significantly improved their capacity to make informed decisions related to sexuality.

This research highlights how sexuality education advances knowledge about sex while also fostering sexual autonomy as a critical decision-making capacity. When combined with appropriate legal reforms, this approach positively supports both the negative and positive dimensions of sexual autonomy for women with intellectual disabilities.

CONCLUSION

This thesis has critically examined the evolving legal conceptualisations of sexual violence and consent, especially through the perspectives of disability and gender. It began by tracing the transition from force-based definitions of rape to models focused on consent in line with international human rights standards such as the Istanbul Convention. While moving towards an affirmative consent approach marks notable progress in recognising sexual autonomy, the research uncovers ongoing limitations in delivering substantive justice, particularly for women with disabilities. Using intersectionality as an analytical framework, the study shows how women with disabilities face compounded forms of discrimination that increases their risk of sexual violence and hampers their ability to give and communicate sexual consent. Legal and societal systems often either overprotect, denying agency, or underprotect, leaving these women vulnerable to abuse. In particular, the traditional emphasis on incapacity rather than non-consent fails to capture the nuanced realities of sexual agency among women with intellectual disabilities.

After examining the characteristics of the determination of consent deemed necessary to balance the negative and positive sexual autonomy of women with disabilities, this thesis argues that the affirmative consent standard, as outlined in the Istanbul Convention, is the most inclusive approach for them.

Through a comparative analysis of Italy, Germany, and Sweden—representing the traditional, the “no means no”, and the affirmative consent models respectively—this research evaluates how effective various legal approaches in achieving a balance between protection from abuse and the right to consent. It finds that while legal reform is crucial, it alone is not enough.

Women with disabilities face distinctive barriers to justice in sexual violence cases, often rooted in deep-seated stereotypes and a limited understanding of their lived experience within the judicial system. To bridge the gap between theory and practice, targeted multidisciplinary training for judicial officials is vital, preparing them to respond to the specific needs of each woman. Such training must go beyond legal basics, challenge ingrained prejudices, and promote rights-based, person-centred approaches.

Furthermore, comprehensive and accessible sexuality education designed for women with disabilities is essential. It empowers them to understand and assert their consent, strengthening both their autonomy and protection against abuse. Evidence shows that such education significantly improves knowledge, decreases vulnerability, and supports the developing capacity to consent, especially for women with intellectual disabilities.

REFERENCES

Anderson, M. J. (2005). Negotiating sex. *Southern California Law Review*, *78*(1), 101-138. https://ssrn.com/abstract=782367

Anyango, C., Goicolea, I., & Namatovu, F. (2023). Women with disabilities' experiences of intimate partner violence: A qualitative study from Sweden. *BMC Women's Health*, *23*(1), 381. https://doi.org/10.1186/s12905-023-02524-8

Arstein-Kerslake, A., & Flynn, E. (2016). *Legislating consent: Creating an inclusive definition of consent to sex* (SSRN Scholarly Paper No. 2779393). Social Science Research Network. https://papers.ssrn.com/abstract=2779393

Asprone, E. (2015). Non è sufficiente la condizione di disabilità per aversi violenza sessuale su persona disabile. *Gazzetta Forense*. https://www.gazzettaforense.com/2015/05/20/diritto-penale-non-e-sufficiente-lesistenza-della-condizione-di-disabilita-per-aversi-violenza-sessuale-su-persona-disabile/

Associazione Da Donna a Donna. (2013). *Scheda sintetica legge n. 66/1996 "Norme contro la violenza sessuale"*. http://www.asdadonna.org/wordpress/wpcontent/uploads/2013/04/scheda_legge_66_1996.pdf

Balderston, S. (2013). Victimized again? Intersectionality and injustice in disabled women's lives after hate crime and rape. In M. T. Segal & V. Demos (Eds.), *Advances in gender research* (Vol. 18, pp. 17–51). Emerald Group Publishing Limited. https://doi.org/10.1108/S1529-2126(2013)000018A005

Balloni, A., Bisi, R., & Sette, R. (2012). *Gender-based violence, stalking and fear of crime: Country report Italy*. EU-Project JLS/2007/ISEC/415. https://gendercrime.eu/pdf/gendercrime_country_report_italy_english.pdf

Benedet, J., & Grant, I. (2013). A situational approach to incapacity and mental disability in sexual assault law. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.2201883

Bhattarai, S., Saugat, P. K., Kakchapati, S., Poudel, S., Baral, S. C., & Marston, C. (2023). Barriers and facilitators to sexual and reproductive health rights for persons with disability in Nepal: A scoping review. *medRxiv*. https://doi.org/10.1101/2023.04.19.23288803

Blackstone, W. (1765). *Commentaries on the laws of England*. William & Mary Law School Scholarship Repository. https://scholarship.law.wm.edu/oldelawebookes/31/

Boccaletti, L., Palermo, A., Milianta, S., & D'Amico, D. (2021). State of the art and recommendations for the Italian context. In *Preventing and responding to sexual violence against women with disabilities: State of the art and recommendations in five EU countries* (pp. 9-14). INTRAS Foundation. https://www.intras.es/sites/default/files/archivos/articulos/executive_summaries_en.pdf

Bohner, G., Siebler, F., Sturm, S., Effler, D., Litters, M., Reinhard, M.-A., & Rutz, S. (1998). Rape myth acceptance and accessibility of the gender category. *Group Processes & Intergroup Relations*, *1*(1), 67–79. https://doi.org/10.1177/1368430298011006

Bowleg, L. (2012). The problem with the phrase women and minorities: Intersectionality—an important theoretical framework for public health. *American Journal of Public Health*, *102*(7), 1267–1273. https://doi.org/10.2105/AJPH.2012.300750

Brå - Brottsförebyggande Rådet. (2020). *The new consent law in practice*. https://bra.se/english/publications/archive/2020-07-01-the-new-consent-law-in-practice

Brownmiller, S. (1975). *Against our will: Men, women, and rape* (1st Ballantine Books ed.). Fawcett Columbine.

Burrowes, N. (2013). *Responding to the challenge of rape myths in court*. NB Research. http://www.nb-research.co.uk/index.php/projects-2/

Caldas, S. J., & Bensy, M. L. (2014). The sexual maltreatment of students with disabilities in American school settings. *Journal of Child Sexual Abuse*, *23*(4), 345–366. https://doi.org/10.1080/10538712.2014.906530

Cassazione Penale, Sez. III, sent. n. 44978 (Italy Dec. 22, 2010).

Cassazione Penale, Sez. III, sent. n. 18513 (Italy May 5, 2015).

Cho, S., Crenshaw, K. W., & McCall, L. (2013). Toward a field of intersectionality studies: Theory, applications, and praxis. *Signs: Journal of Women in Culture and Society*, *38*(4), 785–810. https://doi.org/10.1086/669608

Chow, P. Y. S. (2016). Has intersectionality reached its limits? Intersectionality in the UN human rights treaty-body practice and the issue of ambivalence. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.2753549

Coke, E. (1680). *The third part of the Institutes of the laws of England concerning high treason, and other pleas of the crown and criminal causes* (Vol. 4). https://irlaw.umkc.edu/coke_institutes_lawes/4

Collective, T. C. R. (2014). A Black feminist statement. *WSQ: Women's Studies Quarterly*, *42*(3), 271–280.

Collins, P. H. (1991). *Black feminist thought: Knowledge, consciousness, and the politics of empowerment*. Routledge.

Collins, P. H., & Bilge, S. (2020). *Intersectionality*. John Wiley & Sons.

Council of Europe. (1950). *Convention for the protection of human rights and fundamental freedoms, as amended by protocols Nos. 11 and 14*. European Treaty Series No. 5.

Council of Europe. (2002). *Recommendation CM/Rec(2002)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*. https://search.coe.int/cm?i=09000016805e2612

Council of Europe. (2011). *Council of Europe Convention on preventing and combating violence against women and domestic violence*. https://rm.coe.int/168008482e

Council of Europe. (2019). *GREVIO baseline evaluation report: Sweden*. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). https://rm.coe.int/grevio-inf-2018-15-eng-final/168091e686

Council of Europe. (2020). *GREVIO baseline evaluation report: Italy*. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). https://rm.coe.int/grevio-report-italy-first-baseline-evaluation/168099724e

Council of Europe. (2022). *GREVIO baseline evaluation report: Germany*. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). https://rm.coe.int/report-on-germany-for-publication/1680a86937

Council of Europe. (2023). *4th GREVIO activity report: Focus section – Approaches taken in states parties to the Istanbul Convention on the criminalisation and prosecution of sexual violence, including rape*. https://hudoc.grevio.coe.int/eng#_ftn27

Council of Europe. (2024). *Good practice guidelines for the investigation and prosecution of sexual violence offences based on lack of consent*.

Cowling, M. (2016). *Making sense of sexual consent*. Routledge. https://doi.org/10.4324/9781315249995

Crenshaw, K. (1989). Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. In *Feminist legal theories*. Routledge.

Crenshaw, K. (1991). Mapping the margins: Intersectionality, identity politics, and violence against women of color. *Stanford Law Review*, *43*(6), 1241–1299. https://doi.org/10.2307/1229039

Criminal Law (Sexual Offences) Act, 1993 (Ireland).

Crown Prosecution Service. (2021). Rape and sexual offences – Chapter 4: Tackling rape myths and stereotypes. https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-4-tackling-rape-myths-and-stereotypes

Curry, M. A., Renker, P., Robinson-Whelen, S., Hughes, R. B., Swank, P., Oschwald, M., & Powers, L. E. (2011). Facilitators and barriers to disclosing abuse among women with disabilities. *Violence and Victims*, *26*(4), 430–444. https://doi.org/10.1891/0886-6708.26.4.430

Davis, K. (2008). Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful. *Feminist Theory*, *9*(1), 67–85. https://doi.org/10.1177/1464700108086364

De Vido, S., & Frulli, M. (Eds.). (2023). Group of experts on action against violence against women and domestic violence. In *Preventing and combating violence against women and domestic violence* (pp. 728–729). Edward Elgar Publishing. https://doi.org/10.4337/9781839107757.ch72

Denno, D. (1997). Sexuality, rape, and mental retardation. *University of Illinois Law Review*, *1997*, 315-433.

Devries, K. M., Mak, J. Y., Bacchus, L. J., Child, J. C., Falder, G., Petzold, M., Astbury, J., & Watts, C. H. (2013). Intimate partner violence and incident depressive symptoms and suicide attempts: A systematic review of longitudinal studies. *PLoS Medicine*, *10*(5), e1001439. https://doi.org/10.1371/journal.pmed.1001439

Dripps, D. A. (1992). Beyond rape: An essay on the difference between the presence of force and the absence of consent. *Columbia Law Review*, *92*(7), 1780–1809. https://doi.org/10.2307/1123045

Dukes, E., & McGuire, B. E. (2009). Enhancing capacity to make sexuality-related decisions in people with an intellectual disability. *Journal of Intellectual Disability Research*, *53*(8), 727–734. https://doi.org/10.1111/j.1365-2788.2009.01186.x

Dworkin, G. (1988). *The theory and practice of autonomy*. Cambridge University Press. https://doi.org/10.1017/CBO9780511625206

EDF. (2021). *EDF annual report 2020*. European Disability Forum. https://www.edf-feph.org/publications/edf-annual-report-2020/

Ellison, L., & Munro, V. E. (2009). Reacting to rape: Exploring mock jurors' assessments of complainant credibility. *British Journal of Criminology*, *49*(2), 202–219. https://doi.org/10.1093/bjc/azn077

Engber, D. (2015). The strange case of Anna Stubblefield. *The New York Times*. https://www.nytimes.com/2015/10/25/magazine/the-strange-case-of-anna-stubblefield.html

Estrich, S. (1987). *Real rape*. Harvard University Press.

European Disability Forum. (2020). Women and gender equality. https://www.edf-feph.org/women-and-gender-equality/

European Network of Legal Experts in Gender Equality and Non-Discrimination. (2021). *Criminalisation of gender-based violence against women in European states, including ICT-facilitated violence: A special report*. European Commission, Directorate General for Justice and Consumers. https://data.europa.eu/doi/10.2838/960650

European Parliamentary Research Service. (2024). *Definitions of rape in the legislation of EU Member States: In depth analysis*. Publications Office. https://data.europa.eu/doi/10.2861/860654

Eurostat. (2024). Population by sex, age and disability status [Dataset]. https://doi.org/10.2908/HLTH_DPEH005

Evans, E. (2017). Disability and intersectionality. In *The disability rights movement* (pp. 145–168). Bristol University Press. https://www.researchgate.net/publication/337587563_Disability_and_intersectionality

Featherstone, L. (2017). 'That's what being a woman is for': Opposition to marital rape law reform in late twentieth-century Australia. *Gender & History*, *29*(1), 87–103. https://doi.org/10.1111/1468-0424.12281

Featherstone, L., Byrnes, C., Maturi, J., Minto, K., Mickelburgh, R., & Donaghy, P. (2024). *The limits of consent: Sexual assault and affirmative consent*. Springer Nature Switzerland. https://doi.org/10.1007/978-3-031-46622-9

Featherstone, L., Maturi, J., & Byrnes, C. (2023). Consent: Feminist approaches to sexual agency and sexual violence. *Australian Feminist Studies*, *38*(118), 373–382. https://doi.org/10.1080/08164649.2023.2473241

Ferzan, K. K. (2016). *Consent, culpability, and the law of rape*. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3332&context=faculty_scholarship

Fischel, J. J. (2019). *Screw consent: A better politics of sexual justice* (1st ed.). University of California Press. https://doi.org/10.2307/j.ctv9zchhg

Fischel, J. J., & O'Connell, H. R. (2015). Disabling consent, or reconstructing sexual autonomy. *Columbia Journal of Gender and Law*, *30*(2), 428–528. https://doi.org/10.7916/cjgl.v30i2.2735

Freedman, E. B. (2013). *Redefining rape: Sexual violence in the era of suffrage and segregation*. Harvard University Press. https://doi.org/10.2307/j.ctt6wpm5m

Fricker, M. (2007). *Epistemic injustice: Power and the ethics of knowing*. Oxford University Press.

Friedman, C., & Owen, A. L. (2017). Sexual health in the community: Services for people with intellectual and developmental disabilities. *Disability and Health Journal*, *10*(3), 387–393. https://doi.org/10.1016/j.dhjo.2017.02.008

Gabos, E. (2020). *The intersectionality of the Committee on the Elimination of Discrimination Against Women*. https://scholarshare.temple.edu/items/5b00482a-2342-4e12-bbfd-6305732c58b0

Gårdving, S. (2010). *Consent in rape law - A comparison of three models*. LUP Student Papers. https://lup.lub.lu.se/student-papers/search/publication/1670616

Garland-Thomson, R. (2002). Integrating disability, transforming feminist theory. *NWSA Journal*, *14*(3), 1–32. http://www.jstor.org/stable/4316922

Germany. (1871). *Strafgesetzbuch (StGB)* [Criminal Code]. https://www.gesetze-im-internet.de/stgb/

Gerstmann, E. (2018). *Campus sexual assault: Constitutional rights and fundamental fairness* (1st ed.). Cambridge University Press. https://doi.org/10.1017/9781108671255

Gill, M. (2010). Rethinking sexual abuse, questions of consent, and intellectual disability. *Sexuality Research and Social Policy*, *7*(3), 201–213. https://doi.org/10.1007/s13178-010-0019-9

Glen, K. B. (2020). Not just guardianship: Uncovering the invisible taxonomy of laws, regulations and decisions that limit or deny the right of legal capacity for persons with intellectual and developmental disabilities. *Government Law Review*, *13*(1). https://www.albanygovernmentlawreview.org/article/24017-not-just-guardianship-uncovering-the-invisible-taxonomy-of-laws-regulations-and-decisions-that-limit-or-deny-the-right-of-legal-capacity-for-persons

Green, S. P. (2020). *Criminalizing sex: A unified liberal theory* (1st ed.). Oxford University Press. https://doi.org/10.1093/oso/9780197507483.001.0001

Gruber, A. (2016). *Consent confusion*. Colorado Law Scholarly Commons. https://scholar.law.colorado.edu/faculty-articles/11/

Hale, M. (1736). *Historia placitorum coronæ: The history of the pleas of the crown*. E. Rider. https://archive.org/details/bim_eighteenth-century_historia-placitorum-coro_hale-matthew-sir_1736_2/page/n543/mode/2up

Halley, J. (2016). The move to affirmative consent. *Signs: Journal of Women in Culture and Society*, *42*(1), 257-279. https://doi.org/10.1086/686904

Handicap International. (2015). Disability in humanitarian context: Views from affected people and field organisations. *ReliefWeb*. https://reliefweb.int/report/world/disability-humanitarian-context-views-affected-people-and-field-organisations

Harris, J. E. (2022). Sexual consent and disability. *Disability Law Journal*, *2*(1), 1-54.

Herring, J. (2012). Mental disability and capacity to consent to sex: A Local Authority v H [2012] EWHC 49 (COP). *Journal of Social Welfare and Family Law*, *34*(4), 471–478. https://doi.org/10.1080/09649069.2012.753733

Hess, A. (2014). “No means no” isn’t enough. We need affirmative consent laws to curb sexual assault. *Slate*. https://slate.com/human-interest/2014/06/affirmative-consent-california-weighs-a-bill-that-would-move-the-sexual-assault-conversation-beyond-no-means-no.html

Hörnle, T. (2019). #MeToo—Implications for criminal law? *Bergen Journal of Criminal Law & Criminal Justice*, *6*(2), 115–135. https://doi.org/10.15845/bjclcj.v6i2.2720

Hörnle, T. (2023). The new German law on sexual assault. In T. Hörnle (Ed.), *Sexual assault* (1st ed., pp. 141–162). Oxford University Press. https://doi.org/10.1093/oso/9780198863397.003.0008

Hughes, R. B., Lund, E. M., Gabrielli, J., Powers, L. E., & Curry, M. A. (2011). Prevalence of interpersonal violence against community-living adults with disabilities: A literature review. *Rehabilitation Psychology*, *56*(4), 302–319. https://doi.org/10.1037/a0025620

Hull, A. G., Bell-Scott, P., & Smith, B. (Eds.). (1982). *All the women are white, all the blacks are men, but some of us are brave: Black women’s studies*. Feminist Press.

Human Rights Watch. (2010). *Human rights for women and children with disabilities*.

Human Rights Watch. (2018). *Invisible victims of sexual violence*. https://www.hrw.org/report/2018/04/03/invisible-victims-sexual-violence/access-justice-women-and-girls-disabilities

Humanity & Inclusion. (2022). *Sexual and reproductive health and rights for all: Disability inclusion from theory to practice* (Guidelines No. 1288). https://www.hi-us.org/sn_uploads/document/1288_HI_Guidelines_17_10_22_DIGITAL.pdf

Italian Disability Forum. (2023). *Implementation of the Istanbul Convention in Italy: Upcoming recommendations of the Committee of the Parties in respect of Italy – Shadow report to the Istanbul Convention monitoring mechanism*. https://www.edf-feph.org/publications/

Italy. (1930). *Codice penale* [Penal Code]. https://www.normattiva.it

Jones, L., Bellis, M. A., Wood, S., Hughes, K., McCoy, E., Eckley, L., Bates, G., Mikton, C., Shakespeare, T., & Officer, A. (2012). Prevalence and risk of violence against children with disabilities: A systematic review and meta-analysis of observational studies. *The Lancet*, *380*(9845), 899–907. https://doi.org/10.1016/S0140-6736(12)60692-8

Kaushik, V., & Walsh, C. A. (2018). A critical analysis of the use of intersectionality theory to understand the settlement and integration needs of skilled immigrants to Canada. *Canadian Ethnic Studies*, *50*(3), 27–47.

Kittay, E. F. (2016). The ethics of care, dependence, and disability. *Ratio Juris*, *24*(1), 49-58.

Kölbel, R. (2021). "Progressive" criminalization? A sociological and criminological analysis based on the German "no means no" provision. *German Law Journal*, *22*(5), 817–832. https://doi.org/10.1017/glj.2021.31

Kulick, D., & Rydström, J. (2015). *Loneliness and its opposite: Sex, disability, and the ethics of engagement*. Duke University Press.

L. and Others v. France, Nos. 46949/21, 24989/22 & 39759/22 (ECtHR Apr. 24, 2025).

Lancioni, S. (2015). Bene riconoscere la libertà sessuale, ma quel linguaggio… *Gruppo Donne UILDM*. https://gruppodonne.uildm.org/bene-riconoscere-la-libert%C3%A0-sessuale-ma-quel-linguaggio

Liccardo, T., Ricciardi, A., de Conciliis, S., & Valerio, P. (Eds.). (2015). *Affettività, relazioni e sessualità nella persona con disabilità tra barriere familiari e opportunità istituzionali*. Fridericiana Editrice Universitaria.

Little, N. J. (2005). From no means no to only yes means yes: The rational results of an affirmative consent standard in rape law. *Vanderbilt Law Review*, *58*(4), 1321-1364.

Lyden, M. (2007). Assessment of sexual consent capacity. *Sexuality and Disability*, *25*(1), 3–20. https://doi.org/10.1007/s11195-006-9028-2

MacKinnon, C. A. (1983). Feminism, Marxism, method, and the state: Toward feminist jurisprudence. *Signs: Journal of Women in Culture and Society*, *8*(4), 635-658. https://doi.org/10.1086/494000

MacKinnon, C. A. (2016). Rape redefined. *Harvard Law & Policy Review*, *10*, 431-477.

Maher, J., Spivakovsky, C., McCulloch, J., McGowan, J., Beavis, K., Lea, M., Cadwallader, J., & Sands, T. (2018). *Women, disability and violence: Barriers to accessing justice: Final report*. ANROWS.

Martorana, C. (2019). Tra gli ostacoli del corpo – Il diritto alla sessualità dei disabili nell'ordinamento italiano. *LoveGiver*. https://www.lovegiver.it/tra-gli-ostacoli-del-corpo-il-diritto-alla-sessualita-dei-disabili-nellordinamento-italiano/

M.C. v. Bulgaria, No. 39272/98 (ECtHR Dec. 4, 2003). https://hudoc.echr.coe.int/fre?i=001-61521

McCarthy, M., & Thompson, D. (1996). Sexual abuse by design: An examination of the issues in learning disability services. *Disability & Society*, *11*(2), 205–218. https://doi.org/10.1080/09687599650023236

McGregor, J. (2017). *Is it rape?: On acquaintance rape and taking women's consent seriously*. Routledge. https://doi.org/10.4324/9781315251806

McSherry, B. (2014). Legal capacity under the Convention on the Rights of Persons with Disabilities. *Journal of Law and Medicine*, *22*(1), 22-33.

Milazzo, A. (2024). Gender-based violence, power and norms. *World Bank Blogs*. https://blogs.worldbank.org/en/developmenttalk/gender-based-violence-power-and-norms

Mintz, K. (2017). Ableism, ambiguity, and the Anna Stubblefield case. *Disability & Society*, *32*(10), 1666–1670. https://doi.org/10.1080/09687599.2017.1356058

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 Obstetricia et Gynecologica Scandinavica*, *96*(8), 932–938. https://doi.org/10.1111/aogs.13174

Moras, R. (2013). Feminism, rape culture, and intellectual disability: Incorporating sexual self-advocacy and sexual consent capacity. In M. Wappett & K. Arndt (Eds.), *Emerging perspectives on disability studies* (pp. 189–207). Palgrave Macmillan US. https://doi.org/10.1057/9781137371973_9

Morris, J. (1996). *Encounters with strangers: Feminism and disability*. The Women's Press.

Murphy, G. H., & O'Callaghan, A. (2004). Capacity of adults with intellectual disabilities to consent to sexual relationships. *Psychological Medicine*, *34*(7), 1347–1357. https://doi.org/10.1017/S0033291704001941

Nash, J. C. (2018). *Black feminism reimagined: After intersectionality*. Duke University Press.

Nilsson, G. (2019). Towards voluntariness in Swedish rape law: Hyper-medialised group rape cases and the shift in the legal discourse. In *Rape in the Nordic countries*. Routledge.

Nosek, M. A., Foley, C. C., Hughes, R. B., & Howland, C. A. (2001). Vulnerabilities for abuse among women with disabilities. *Sexuality and Disability*, *19*(3), 177–189. https://doi.org/10.1023/A:1013152530758

O'Malley, T., & Hoven, E. (2019). Consent in the law relating to sexual offences. In K. Ambos, A. Duff, J. Roberts, T. Weigend, & A. Heinze (Eds.), *Core concepts in criminal law and criminal justice* (1st ed., pp. 135–171). Cambridge University Press. https://doi.org/10.1017/9781108649742.005

Ortoleva, S. (2011). Inaccessible justice: Human rights, persons with disabilities and the legal system. *ILSA Journal of International & Comparative Law*, *17*(297), 281-320. https://ssrn.com/abstract=2127888

People v. Liberta, 64 N.Y.2d 152 (1984).

Petersilia, J. R. (2001). Crime victims with developmental disabilities: A review essay. *Criminal Justice and Behavior*, *28*(6), 655–694. https://doi.org/10.1177/009385480102800601

Popova, M. (2019). *Sexual consent* (Vol. 1). The MIT Press.

R v. Clarence, 22 Q.B.D. 23 (Eng. 1888).

Radrigán, C. L. (2023). Disability and intersectionality: The construction of vulnerability in sexual and reproductive matters. In M. Bach & N. Espejo-Yaksic (Eds.), *Legal capacity, disability and human rights* (pp. 49–64). Intersentia. https://doi.org/10.1017/9781839704284.005

Reed, A., Bohlander, M., Wake, N., & Smith, E. (Eds.). (2016). *Consent: Domestic and comparative perspectives*. Routledge. https://doi.org/10.4324/9781315573472

Riverditi, M. (2018). Disabilità e diritto penale. *Questione Giustizia*, *3*, 88-103.

Rotelli, A. (2016). I diritti della sfera sessuale delle persone con disabilità. *Questione Giustizia*, *2*, 250-257.

Ruiz, A. M., Luebke, J., Klein, K., Moore, K., Gonzalez, M., Dressel, A., & Mkandawire-Valhmu, L. (2021). An integrative literature review and critical reflection of intersectionality theory. *Nursing Inquiry*, *28*(4), e12414. https://doi.org/10.1111/nin.12414

Schlosser, R. W., Balandin, S., Hemsley, B., Iacono, T., Probst, P., & von Tetzchner, S. (2014). Facilitated communication and authorship: A systematic review. *Augmentative and Alternative Communication*, *30*(4), 359–368. https://doi.org/10.3109/07434618.2014.971490

Seidu, A., Malau-Aduli, B. S., McBain-Rigg, K., Malau-Aduli, A. E. O., & Emeto, T. I. (2024). Sexual lives and reproductive health outcomes among persons with disabilities: A mixed-methods study in two districts of Ghana. *Reproductive Health*, *21*(1), 1-16. https://doi.org/10.1186/s12978-024-01810-4

Series, L. (2015). Relationships, autonomy and legal capacity: Mental capacity and support paradigms. *International Journal of Law and Psychiatry*, *40*, 80-91.

Sherry, M. (2016). *Disability hate crimes*. Routledge. https://doi.org/10.4324/9781315577371

Sherry, M. (2016). Facilitated communication, Anna Stubblefield and disability studies. *Disability & Society*, *31*(7), 974–982. https://doi.org/10.1080/09687599.2016.1218152

Sikka, T. (2022). Sex, consent and justice: A new feminist framework. In *Sex, consent and justice*. Edinburgh University Press. https://www.degruyterbrill.com/document/doi/10.1515/9781474479226/html

Smiet, K. (2020). *Sojourner Truth and intersectionality: Traveling truths in feminist scholarship*. Routledge. https://doi.org/10.4324/9780429424120

Sosa, L., & Mestre I Mestre, R. M. (2022). *Ensuring the non-discriminatory implementation of measures against women and domestic violence: Article 4, paragraph 3, of the Istanbul Convention*. Council of Europe Publishing. https://edoc.coe.int/en/violence-against-women/11029-ensuring-the-non-discriminatory-implementation-of-measures-against-women-and-domestic-violence-article-4-paragraph-3-of-the-istanbul-convention.html

Sosa, L., & Mestre I Mestre, R. M. (2023). The Istanbul Convention from an intersectional perspective. In S. De Vido & M. Frulli (Eds.), *Preventing and combating violence against women and domestic violence* (pp. 4–21). Edward Elgar Publishing. https://doi.org/10.4337/9781839107757.ch01

Special Rapporteur on Violence against Women, Its Causes and Consequences. (1994). *Preliminary report* (UN Doc. E/CN.4/1995/42). United Nations.

Spelman, E. V. (1988). *Inessential woman: Problems of exclusion in feminist thought*. Beacon Press. http://archive.org/details/inessentialwoman0000spel

State v. Smith, 426 A.2d 38 (N.J. 1981).

Steele, L., & Dowse, L. (2016). Gender, disability rights and violence against medical bodies. *Australian Feminist Studies*, *31*(88), 187–202. https://doi.org/10.1080/08164649.2016.1224054

Sweden. (1962). *Brottsbalken (BrB)* [Swedish Penal Code]. https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/brottsbalk-1962700_sfs-1962-700

Swedish National Council for Crime Prevention (Brå). (2020). *The new consent law in practice: An updated review of the changes in 2018 to the legal rules concerning rape*. https://bra.se/download/18.62c6cfa0174b948cb41ff/1604657669557/2020_17_The_new_consent_law_in_practice.pdf

Tadros, V. (1999). No consent: A historical critique of the actus reus of rape. *Edinburgh Law Review*, *3*(3), 317–340. https://doi.org/10.3366/elr.1999.3.3.317

Tepfer, D. (2012). Supreme Court sets accused rapist free. *Greenwich Time*. https://www.greenwichtime.com/local/article/supreme-court-sets-accused-rapist-free-3910669.php

The International Disability Alliance. (2017). *Global report on the participation of organisations of persons with disabilities (DPOs) in voluntary national review (VNR) processes*. https://www.internationaldisabilityalliance.org

United Nations. (1979). *Convention on the Elimination of All Forms of Discrimination against Women*. https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women

United Nations. (2006). *Convention on the Rights of Persons with Disabilities*. https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf

UN Committee on the Elimination of Discrimination Against Women. (1992). *CEDAW General Recommendation No. 19: Violence against women*. https://www.refworld.org/legal/resolution/cedaw/1992/en/96542

United Nations Committee on the Rights of Persons with Disabilities. (2016). *General comment No. 3 (2016) on Article 6: Women and girls with disabilities* (CRPD/C/GC/3). https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no3-article-6-women-and-girls

United Nations Committee on the Rights of Persons with Disabilities. (2017). *General comment No. 5 (2017) on Article 5: Living independently and being included in the community* (CRPD/C/GC/5). https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no5-article-19-right-live

UN Committee on the Elimination of Discrimination Against Women. (2017). CEDAW General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19. *International Human Rights Law Review*, *6*(2), 279–305. https://doi.org/10.1163/22131035-00602003

United Nations. (2017). *Sexual and reproductive health and rights of girls and young women with disabilities* (A/72/133). Office of the High Commissioner for Human Rights. https://www.ohchr.org/en/documents/thematic-reports/a72133-sexual-and-reproductive-health-and-rights-girls-and-young-women

United Nations. (2018). *The UN flagship report on disability and development 2018: Realizing the SDGs by, for and with persons with disabilities*. United Nations Department of Economic and Social Affairs. https://social.desa.un.org/publications/un-flagship-report-on-disability-and-development-2018

UN Enable. (2003). *Chair's Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*. https://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm

UN Enable. (2004). *Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*. https://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm

UN. Office of the High Commissioner for Human Rights. (2012). *Thematic study on the issue of violence against women and girls and disability: Report of the Office of the United Nations High Commissioner for Human Rights*.

UNODC. (2015). *Handbook on effective prosecution responses to violence against women and girls*. United Nations Office on Drugs and Crime. https://doi.org/10.18356/1816801a-en

Vallini, A. (2021). Violenza sessuale su disabile psichica: da provarsi l'approfittamento della disabilità nel caso concreto. *Altalex*. https://www.altalex.com/documents/2015/05/14/violenza-sessuale-su-disabile-psichica-da-provarsi-l-approfittamento-della-disabilita-nel-caso-concreto

Viganò, F. (2002). *La tutela penale della libertà individuale. Vol. 1: L'offesa mediante violenza*. Giuffrè Editore.

Villalobos, J. G., Davis, D., & Leo, R. A. (2014). *His story, her story: Sexual miscommunication, motivated remembering, and intoxication as pathways to honest false testimony regarding sexual consent* (SSRN Scholarly Paper No. 2480049). Social Science Research Network. https://papers.ssrn.com/abstract=2480049

Walker, G. (2013). Everyman or a monster? The rapist in early modern England, c.1600–1750. *History Workshop Journal*, *76*(1), 5–31. https://doi.org/10.1093/hwj/dbs051

Warshaw, R., Steinem, G., Tillet, S., & Koss, M. P. (2019). *I never called it rape: The Ms. Report on recognizing, fighting, and surviving date and acquaintance rape* (Updated ed.). HarperPerennial.

Wegerstad, L. (2021). Sex must be voluntary: Sexual communication and the new definition of rape in Sweden. *German Law Journal*, *22*(5), 734–752. https://doi.org/10.1017/glj.2021.32

Wertheimer, A. (2003). *Consent to sexual relations*. Cambridge University Press.

Williams, H., & Jobe, A. (2025). Testimonial injustice: Exploring 'credibility' as a barrier to justice for people with learning disabilities/autism who report sexual violence. *Disability & Society*, *40*(4), 1061–1083. https://doi.org/10.1080/09687599.2024.2323455

Women Enabled International. (2022). Fact sheet: The right of women and girls with disabilities to be free from gender-based violence. https://womenenabled.org/reports/wei-fact-sheet-gbv/

Women's Health East. (2025). *Get the Go Ahead*. https://gtga.org.au/

World Health Organization, & World Bank. (2011). *World report on disability*. https://www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability

World Health Organization. (2021). *Violence against women prevalence estimates, 2018: Global, regional and national prevalence estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women: Executive summary*. https://apps.who.int/iris/handle/10665/341337

X v. Cyprus, No. 40733/22 (ECtHR Feb. 27, 2025).