

Due Diligence in the Protection of Women's Human Rights:  
Re-Visiting *M.C. v. Bulgaria*

Lisa Kelly

## ABSTRACT:

The European Court of Human Rights' 2004 decision in *M.C. v. Bulgaria* contributed to a growing international consensus around the definition of sexual violence and the importance of effective rape legislation and enforcement practices. In holding Bulgarian authorities accountable for having placed an "undue emphasis on 'direct' proof of rape" in the form of physical resistance, the Court rejected traditional characterizations of sexual violence as requiring external evidence of threats or violence beyond the victim's lack of consent. While this contribution to efficacious human rights jurisprudence on sexual violence should not be understated, the Court's narrow analysis of Bulgaria's positive obligations under Articles 3 and 8 of the European Convention did not engage the underlying social conditions that perpetuate such violence. Although the Court found that Bulgaria had a positive duty to ensure "the effective protection of the individual's sexual autonomy," its articulation of the content of that duty reflected a misplaced reliance on solely criminal law measures. This paper argues that while the criminal law may in some instances serve remedial, punishment and incapacitation functions, it should not be presumed by itself to fulfil states' obligations to protect persons from private acts of sexual violence. Rather, to fulfill their due diligence obligations to take all appropriate measures to prevent gender-based violence, states have a responsibility to undertake positive reforms in the social, cultural, and judicial realms. Advancing this more robust sense of state responsibility is essential in order to harness necessary state resources to challenge the harmful gender stereotypes and patriarchal privileging of male sexuality that perpetuates gender-based violence.