Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice

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I. INTRODUCTION

This briefing paper is intended to assist the efforts of judges, prosecutors, legislators, lawyers, law enforcement officials, human rights defenders and other actors to ensure effective criminal justice responses to sexual violence against women.[1]

Across jurisdictions, a series of harmful gender stereotypes and resulting assumptions and inferences continue to be reflected in substantive criminal laws, legal procedures and practices concerning sexual violence.

These laws, procedures and practices, which reflect harmful gender stereotypes and assumptions, undermine the effective investigation and prosecution of sexual violence against women and give rise to discrimination, infringements of human rights and the re-victimization of survivors.

Identifying the underlying harmful stereotypes and assumptions, and scrutinizing and reforming the laws and practices that embody them, is a crucial dimension of efforts to end sexual violence against women, and ensure freedom from discrimination and the equal realization of women's human rights, including, for example, the right to freedom from torture and ill-treatment and equal treatment before the law and courts.

As a contribution to these efforts, this paper seeks to highlight and explore a number of harmful gender stereotypes and assumptions and identify a variety of correlative legal rules and practices that incorporate them. It also seeks to provide an overview of State practice towards reform, and highlight emerging good practices.

WHAT ARE HARMFUL GENDER STEREOTYPES AND ASSUMPTIONS?

Stereotypes are often described as generalized or formulaic conceptions or presumptions that ignore individual characteristics or attributes and instead treat people as part of a category or group to which certain traits are associated.[2]

Gender stereotypes are a particular subset of generalizations regarding the characteristics of men and women. They can be descriptive, based on a view or perception of what men or women are like, or they can be prescriptive, based on an ideology of what they should be like. These gender stereotypes often provide the basis for related generalized 'assumptions' as to how men or women should or will behave in a range of circumstances.

In a complex and diverse world, recourse to stereotypes and assumptions is a somewhat inevitable facet of human behavior and indeed not all gender stereotypes and assumptions, are necessarily, inherently 'harmful'. However, gender stereotypes and assumptions are harmful where they serve to excuse and

[1] As will be outlined below in more detail sexual violence is any unwanted sexual act or activity. Men are often the victims of such violence. However the scope of this briefing paper is limited to sexual violence against women.

[2] Oxford English Dictionary: "Stereotypes are widely held but fixed and oversimplified images or ideas of a particular type of person." For a deeper discussion of stereotypes, and specifically gender stereotypes, see Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives,* University of Pennsylvania Press (2010), pp. 9-38. See also: Cusack, Eliminating Judicial Stereotyping, Equal Access to Justice for Women in Gender-Based Violence Cases, Paper, for OHCHR, 9 June 2014; Cusack, Gender Stereotyping as a Human Rights Violation, OHCHR Commissioned Report, October 2013. See also: Rikki Holtmaat, 'Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention,' in Benninger-Budel (ed), Due Diligence and Its Application to Protect Women from Violence (Leiden: Martinus Nijhoff, 2009).

justify abuses of human rights. In addition reliance on gender stereotypes and assumptions is harmful where it reinforces gender inequalities or leads to violations of human rights.

'Harmful' gender stereotypes and resulting assumptions and inferences manifest on a day-to-day basis throughout the world in a range of social contexts and human interactions. Where laws, regulations, policies, and justice-system practices embody them, they give rise to gender discrimination and undermine women's equal enjoyment of their human rights.

HARMFUL GENDER STEREOTYPES AND ASSUMPTIONS AND LAWS CONCERNING SEXUAL VIOLENCE AGAINST WOMEN

The global extent of sexual violence against women remains extreme.[3] Although clear and comprehensive statistics on the rates of sexual violence is often lacking,[4] data indicates that in many jurisdictions one in three women will face such violence in their lifetime, while in others the numbers increase to two in three. [5] Meanwhile, the extent to which sexual violence against women is reported to the authorities, effectively investigated and the perpetrators brought to justice remains notoriously low.[6] In a wide range of jurisdictions women often do not seek justice and legal accountability when they face sexual violence and where they do proceedings are regularly hampered by a series of obstacles.

The root causes of, and risk factors for, sexual violence against women are multiple and complex.[7] As are the wide range of holistic and integrated strategies and action steps needed to lower the rates of such violence, on the one hand, and ensure accountability of the perpetrators and access to justice by women, on the other. Ensuring that relevant criminal laws and procedures reflect the reality of the crimes, and are effective and appropriate is one facet of the measures required to prevent, address and redress such violence. It is critical to enable the holding of perpetrators to account including through prosecution in the criminal justice system. It is also a vital component of measures necessary to deter sexual violence and to end the cycle of discrimination against women that both results from, and is perpetuated by, such violence.

Yet, despite the importance of ensuring criminal laws and procedures are fit to deal effectively with sexual violence, and despite ongoing and worldwide reform efforts, in many jurisdictions laws and procedures continue to embody a wide range of discriminatory and inaccurate rules, concepts and practices.

Often these reflect a series of harmful gender stereotypes and related assumptions regarding male and female sexuality, sexual expression, and women's behavior and role in society. These in turn can result in a series of

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[3] See: Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non- partner sexual violence, WHO, Report 2013.
[4] See for example: European Council Conclusions on the Eradication of Violence Against Women, 8 March 2010, Para. 30; European Parliament resolution of 26 November 2009 on the elimination of violence against women, pp O; The study to identify and map existing data and resources on sexual violence against women in the EU, EIGE, 2013, pg. 11 and in general; Report of the Inter-American Commission of Human Rights on Access to Justice by Women Victims of Sexual Violence in Mesoamerica, 9 December 2011, Paras. 20, 160.
[5] Globally see: Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non- partner sexual violence, WHO, Report 2013; Violence against Women Prevalence Data: Surveys by Country, December 2012; For a cross section of data from European Union jurisdictions see: http://eige.europa.eu/content/sexual-violence-against-women-in-the-european-union.
[6] See for example, UN Women, Progress of the Worlds Women: In Pursuit of Justice, 2011, pg. 48 et. seq.
[7] See for a discussion WHO Information Sheet, Understanding and addressing violence against women: sexual violence, 2012.

inaccurate views regarding the scope, causes, context, responsibility for, and consequences of sexual violence. They can also reveal inherent distrust of the veracity of women's reports and claims of sexual violence, conceptions of women's sexuality as shameful or dangerous, and beliefs that men cannot control themselves or are easily provoked.[8]

When these harmful stereotypes and assumptions are reflected in laws or attitudes of judges, juries, prosecutors, investigators or law enforcement officials they often result in discrimination. Legal rules, concepts or practices based on them undermine efforts to ensure accountability and address impunity and can often lead to erroneous legal outcomes. They regularly result in the re-victimization of survivors, turning the investigation and prosecution of sexual violence from an exploration of the alleged perpetrator's conduct into a public humiliation of the victim, through interrogation of the victim, her character and reputation, what she wanted or thought, and what she did or did not do to resist.

Identifying these stereotypes and assumptions and scrutinizing and reforming relevant laws and practices are crucial to efforts to prevent, address and redress sexual violence against women. They are necessary to ensure States' compliance with their international human rights obligations.

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS TO PREVENT, ADDRESS AND REDRESS SEXUAL VIOLENCE AND ERRADICATE HARMFUL GENDER STEREOTYPES AND ASSUMPTIONS

Sexual violence is any unwanted sexual act or activity. It may take many forms and can be perpetrated by any person, male or female, regardless of their relationship to the victim and in any setting.[9] The focus of this briefing paper, however, is on sexual violence against women and laws, practices and procedures that impede accountability for it.

Sexual violence against women is a form of gender-based violence, and is recognized under international human rights law as discrimination against women.[10] International law defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[11]

Among other things sexual violence contravenes women's enjoyment of internationally guaranteed rights such as the rights to freedom from torture and

[8] See in general: *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008; Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press (2010); *Rape and Sexual Violence, Human Rights Law and Standards in the International Criminal Court*, Amnesty International, AI Index: IOR 53/001/2011 (2011), in general and in particular Section 5.

[9] See for example working definition used by WHO in: Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non- partner sexual violence, WHO, Report 2013

[10] Article 1 CEDAW; Articles 2 & 3, ICCPR and ICESCR; CEDAW, General Recommendation 19, Violence Against Women, U.N. Doc. CEDAW/C/1992/L.1/Add.15, (hereinafter CEDAW General Recommendation 19), paras. 1, 6, 7 and in general; CEDAW, General Recommendation 28, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GC/28, 2010 (hereinafter CEDAW General Recommendation 28), Paras. 19, 34; CESCR, General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2005/4, 11 August 2005, Para. 20 (hereinafter CESCR General Comment No.16), Para. 27; Article 3, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104. See also for a general discussion the Report of the Secretary General: In Depth Study on all Forms of Violence Against Women, 6 July 2006, U.N. Doc. A/61/122/add.1.

[11] Article 1 CEDAW.

ill-treatment,[12] personal security[13] and the highest attainable standard of health.[14]

Under international human rights law States are required to respect, protect and fulfill each of these rights. Additionally they are required to respect, protect and fulfil the right to equality before the law and the courts.[15] Together these requirements give rise to correlative duties on State authorities to take appropriate and effective measures to eradicate gender-based violence, including sexual violence against women. States must take effective measures to prevent, investigate and punish sexual violence by State and private actors, including intimate partners and family members.[16]

A series of rigorous and extensive steps are required by States to give effect to these obligations. These are outlined in a series of easily available materials and publications.[17] In summary they include the requirement that the authorities take a range of policy, legislative and other necessary measures to establish an effective and comprehensive framework for the prevention, investigation and punishment of sexual violence.[18] They also require that State officials, including the judiciary, prosecution, court services and law-enforcement, implement and apply this framework in practice.[19]

In turn these requirements necessitate specific action to ensure, among other things:

- That criminal laws, procedures and practice appropriately and adequately define and prohibit all forms of sexual violence and provide for the

[12] Article 7 ICCPR; Article 3, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104; CEDAW General Recommendation 19, Para. 7(b); Committee Against Torture, General Comment No.2, Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008 (hereinafter CAT General Comment No. 2.), Paras. 18, 22; Committee Against Torture, General comment No. 3, Implementation of article 14 by States parties CAT/C/GC/3, 13 December 2012 (hereinafter CAT General Comment No. 3), Paras. 32, 34; Human Rights Committee, General Comment No. 28, Article 3 (The equality of rights between men and women), HRI/GEN/1/Rev.9 (Vol. I), 29 March 2000, (hereinafter HRC General Comment No. 28), Para. 7.

[13] Article 9 ICCPR; CEDAW General Recommendation 19, Para 7(d); Article 3, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104.

[14] Article 12, ICESCR; Article 12 CEDAW; CEDAW General Recommendation 19, Para. 7(g); CESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health, E/C.12/2000/4, 11 August 2000, Paras. 48 & 51 (hereinafter CESCR General Comment No. 14), Paras. 21, 51.

[15] Article 26 ICCPR; Article 15 CEDAW.

[16] CEDAW General Recommendation 19, Paras. 8-9, 24(a); CEDAW General Recommendation 28, Para. 19; CAT General Comment 3, Para. 18; HRC General Comment 28, Para.7; CESCR, General Comment No. 16, Para. 27. CAT General Comment 2, Para. 18. See also Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, (hereinafter HRC General Comment No.31) Para.8; Article 1, Declaration on the Elimination of Violence against Women, 20 December 1993, General Assembly Resolution A/RES/48/104; *Goekce v. Austria*, CEDAW Communication No. 5/2005, Views of 21 July 2004, UN Doc.CEDAW/C/39/D/5/2005; *Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005; A.T. v. Hungary, CEDAW Communication No. 2/2003, View of 26 January 2005, UN Doc. A/60/38 (Annex III); *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008; *Jallow v. Bulgaria*, CEDAW Communication No. 32/2011, Views of 23 July 2012, UN Doc. CEDAW/C/52/D/32/2011; *V.K. v. Bulgaria*, CEDAW Communication No. 20/2008, View of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008; *V.V.P v. Bulgaria*, CEDAW Communication No. 31/2011, Views of 12 October 2012, UN Doc. CEDAW/C/53/D/31/2011.

[17] For just some examples see: In-depth Study on all forms of violence against women, Report of the Secretary-General, July 2006, A/61/122/Add.1; Report of the UN Special Rapporteur on Violence against Women, The Due Diligence Standard, E/CN.4/2006/61, 20 January 2006; Report of the UN Special Rapporteur on Violence against Women, Eliminating Violence against Women, May 2013, A/HRC/23/49; UN Handbook for Legislation on Violence Against Women, 2010.

[18] Ibid.

[19] Ibid. See also more generally Human Rights Committee , Case of *Delgado Paez v. Colombia*, Communication No. 195/1985, 12 July 1990, Para.5.5; *Dias v. Angol*a, Communication No. 711/1996, 20 March 2000, Para.8.3; *Marcellana & Gumanoy v. Philippines*, Communication No. 1560/2007, 17 November 2008, Para.7.6.a.

imposition of effective, proportional and dissuasive sanctions and punishment.

- That States ensure that independent, impartial and effective investigations are promptly conducted into all allegations of sexual violence with a view to ensuring the fair and effective prosecution of alleged perpetrators.

- That investigatory, prosecutorial, judicial and courtroom procedures and practices respect and protect the dignity and rights of participants and do not result in re-victimization of survivors of sexual violence.

These duties are informed by the explicit obligation on States parties under Article 5 of the Convention on the Elimination of Discrimination against Women (CEDAW) to "take all appropriate measures" to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[20]

As such, eradicating reliance on harmful gender stereotypes and assumptions at each juncture of the criminal justice chain is a cross cutting component of steps towards compliance with the interrelated obligations on States to exercise due diligence to prevent, investigate, prosecute and punish sexual violence and to eliminate wrongful stereotypes. On the one hand it necessitates reform of legal rules, procedures and concepts concerning sexual violence so as to ensure they do not embody such stereotypes. On the other it necessitates attention to the conduct and attitudes of justice-sector personnel when dealing with sexual violence so as to guarantee harmful stereotypes and related assumptions do not taint legal practice and the conduct of investigations and court procedures. Indeed not only must States ensure that their laws do not embody harmful stereotypes but they must also take proactive legal measures to prevent and appropriately sanction harmful stereotyping.

International and regional human rights mechanisms have explicitly confirmed this and have provided some detailed guidance as to the kind of action necessary.[21]

For example, in its decision in *Vertido v. The Philippines*, the Committee on the Elimination of Discrimination against Women found that violations of CEDAW will occur where a State's laws, procedures and judicial conduct reflect harmful gender stereotypes concerning sexual violence. In that case the relevant violations resulted from a domestic Court's reliance on a series of harmful gender stereotypes and assumptions in a decision to acquit a man accused of rape.[22]

The Committee specified that, "all legal procedures in cases involving crimes of rape and other sexual offenses must be impartial and fair, and not affected by prejudices or stereotypical gender notions."[23] To this end it confirmed that:

[20] See: *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008.
[21] See for example: *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008; *V.K. v. Bulgaria*, CEDAW Communication No. 20/2008, View of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008 (although related to domestic violence); Inter-American Commission of Human Rights, Report on Access to Justice by Women Victims of Sexual Violence in Mesoamerica, 9 December 2011; European Court of Human Rights, *MC v. Bulgaria*, Application no. 39272/98, 4 December 2003, Para. 166.
[22] *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008.
[23] Ibid. Para. 8.9(b).

- **Legal definitions of sexual violence crimes, including rape, and of consent to sexual intimacy must not embody harmful stereotypes and assumptions**. For example, the Committee underlined that "there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence." It called on the State to "remove any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration."[24]

- **Judicial officers must not replicate or rely on harmful stereotypes and assumptions when dealing with allegations of sexual violence.** For example, the Committee held that, "the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence."[25] It also pronounced that an assumption such as that "an accusation for rape can be made with facility", in itself reveals a gender bias.[26]

- **Assessments of victim credibility must be free from harmful stereotypes and assumptions.** For example, the Committee held that, among other things, the State had failed to comply with Convention obligations, because it was "clear from the judgment that the assessment of the credibility of the author's [victim's] version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and "ideal victim" or what the judge considered to be the rational and ideal response of a woman in a rape situation."[27] It also found that Court relied on a range of "stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim."[28] These included misnomers based on the age of the perpetrator and the fact that the victim and perpetrator knew each other.

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS TO GUARANTEE FAIR TRIAL RIGHTS INCLUDING THE PRESUMPTION OF INNOCENCE AND THE RIGHT TO EXAMINE WITNESSES

It is a fundamental requirement of international human rights law that States ensure that all those charged with a criminal offence, including crimes of sexual violence against women, be afforded a fair trial.[29]

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[24] Ibid. Para. 8.9(b). Similar findings have been made by the European Court for Human Rights with the Court holding that "any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy." *MC v. Bulgaria*, Application no. 39272/98, 4 December 2003, Para. 166

[25] *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008, Para. 8.4.

[26] Ibid. Para. 8.5 This issue has also been addressed by the Inter-American Commission on Human Rights which has observed that "police, prosecutors, judges, lawyers and others involved in law enforcement and the administration of justice are influenced by stereotypes, practices, and assumptions, which detracts from the importance that acts of sexual violence deserve. For example, they may examine a case involving sexual violence by focusing on the woman's sexual history and life, the implication being that the victim may have somehow provoked or invited the acts committed against her, and the fact that she is not a virgin." It then specified that "allowing these stereotypes inside the judicial branch serves to legitimize and aids and abets impunity." Inter-American Commission of Human Rights, Report on Access to Justice by Women Victims of Sexual Violence in Mesoamerica, 9 December 2011, Para. 49.

[27] *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008, Para. 8.4

[28] Ibid. Para. 8.6.

[29] Article 14 ICCPR, Article 40 Convention on the Rights of the Child, Article 8 American Convention on Human Rights, Article 6 European Convention on Human Rights. See also: Human Rights Committee,

International human rights law and standards require that in the context of their efforts to investigate, prosecute and punish sexual violence against women States respect the rights of suspects and accused persons.

The state's corresponding duty to provide witness protection where necessary and to respect and protect the rights of victims and witnesses in a manner that is consistent with the rights of the accused and the requirements of a fair trial has also been increasingly highlighted in human rights standards and by human rights bodies.[30]

Two components of the right to a fair trial are of particular relevance in the context of the subject matter of this briefing paper:

- **Presumption of innocence:** Among other things, under international law, the right to a fair trial requires that everyone has the right to be presumed innocent, and treated as innocent, unless and until they are convicted according to law in proceedings which meet minimum prescribed requirements of fairness.[31] This means that the burden of proving the charge rests on the prosecution and a court may not convict unless guilt has been proved beyond reasonable doubt.

- **The right of the accused to examine witnesses and challenge adverse evidence:** In addition the right to a fair trial requires that those charged with a criminal offence have the right to examine, or have examined, witnesses against them, as well as the right to call and question defense witnesses.[32] The right to examine prosecution witnesses ensures that the defense has an opportunity to challenge the evidence against the accused. It reinforces the rights to the presumption of innocence and the rights to a defense and enhances the likelihood that the verdict will be based on all relevant evidence.[33] This right must be protected in a manner that complies with States' corresponding duties to provide witness protection where necessary and to respect and protect the rights of victims and witnesses. International law and standards oblige States to take a number of concrete steps to guarantee the rights of victims and witnesses and specific requirements often apply in situations involving victims of gender-based violence.[34]

General Comment No. 32, Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007 (hereinafter HRC General Comment No.32). For more detail and in depth analysis see: Amnesty International, Fair Trial Manual, 2nd Edition. pg. 125.

[30] E.g., Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principles 4 and 5 and Guideline 7 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems; Section P(f)(ii) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Articles 55-57 on the Council of Europe Convention on preventing and combating violence against women and domestic violence; See Amnesty International Fair Trial Manual, 2nd edition, Chapter 22.4-22.4.1, pp 166-168.

[31] Amnesty International, Fair Trial Manual, 2nd Edition, pg. Article 14(2) ICCPR, Article 40(2)(b)(i) Convention on the Rights of the Child, Article 7(1)(b) African Charter on Human and Peoples Rights, Article 8(2) American Convention on Human Rights, Article 6(2) European Convention on Human Rights. See also HRC General Comment No.32.

[32] Article 14(3)(e) ICCPR, Article 40(2)(b)(iv) Convention on the Rights of the Child, Article 8(2)(f) American Convention on Human Rights, Article 16(5) Arab Charter, Article 6(3)(d) European Convention on Human Rights, Section N(6)(f) Principles on Fair Trial in Africa, Article 67(1)(e) ICC Statute. See also: HRC General Comment No.32.

[33] Amnesty International, Fair Trial Manual, 2nd Edition, pg. 161.

[34] E.g., Articles 56-57 of the Council of Europe Convention on preventing and combating violence against women and domestic violence; Article 36(2) of the Council of Europe Convention on the protection of Children against Sexual Exploitation and Sexual Abuse; Articles 10-12 of the Council of Europe Convention on Action against Trafficking in Human Beings. See Amnesty International Fair Trial Manual, 2nd edition, Chapter 22.4-22.4.1, pp 166-168.

Ensuring that measures to eradicate harmful gender stereotypes from laws and practices concerning the prosecution of sexual violence build upon and complement measures to protect the rights of suspects and accused persons and the rights of victims and witnesses is vital. A failure to respect the rights of suspects and accused persons and the rights of victims and witnesses in a manner consistent with the rights to a fair trial and the right to equality before the law and courts will contradict the principles of justice and equality that are so imperative to States compliance with the obligation to ensure effective criminal law responses to sexual violence against women. The analysis throughout the following sections is informed by these requirements.

CRIMES OF RAPE & SEXUAL ASSAULT: PROBLEMATIC TERMINOLOGY & CLASSIFICATIONS

The way in which domestic legal systems name, define, categorize and treat various forms of sexual violence varies. Many delineate specific crimes of sexual violence based on the particular physical form the conduct takes or the sex of the victim.

For example, they may treat rape as a category of crime distinct from other forms of sexual or 'indecent' assault, and defined with reference to penetration or even more narrowly to vaginal penetration. In addition the laws of some countries define rape as being perpetrated by men against women.

These restricted definitions and distinctions in use of legal terminology concerning different forms of sexual violence are often problematic in a number of respects. They are often symbolic of an approach to sexual violence that treats the gravity of an instance of violence as deriving from the specific form it takes as opposed to the extent of the underlying violation of sexual autonomy. They also may reflect assumptions that rape necessarily involves vaginal penetration, or that men cannot be raped. Moreover in jurisdictions where rape is narrowly defined as being perpetrated by men against women, or as involving vaginal penetration, it is often also the case that other forms of sexual assault (including oral and anal penetration) are not effectively criminalized or subject to proportionate and dissuasive penalties.

As a result of these concerns a range of jurisdictions have sought to move away from such narrow constructs and definitions. While some have retained the separation between the crime of rape and sexual assault they have revised the definition of rape to include anal and oral penetration and to include male victims within its scope. Others have moved to take an even more inclusive approach, categorizing all forms of sexual violence as forms of sexual assault, and outlining a graded scale of penalties depending on the circumstances and conduct involved. This approach serves to recognize that all forms of sexual violence involve an essential violation of the victim's physical and mental integrity and sexual autonomy and that the seriousness of an individual instance of such violence is not definitively related to the specific physical form it takes.

Throughout this paper the use of terminology mirrors the most inclusive approach. Thus, the terms '**sexual assault'** and '**sexual assault crimes'** are used inclusively to refer to all forms of rape and sexual assault, including, but not limited to, vaginal, anal and oral penetration and sexual touching.

II. DOUBTING WOMEN'S TRUTHFULNESS: THE APPLICATION OF PROMPT COMPLAINT, CORROBORATION AND CAUTIONARY REQUIREMENTS

It is often believed that women fabricate allegations of rape and sexual assault. Underlying this may be general stereotypes to the effect that women are untruthful or related assumptions that due to shame and stigma women will not admit to having had consensual sex outside of marriage and thus will lie, saying such premarital or extramarital sex was non-consensual, or ideas that women easily make allegations of rape when they want to cause harm or seek revenge.

The inaccuracy of this belief is now verified by data that demonstrates that the percentage of women who fabricate sexual assault complaints is very low.[35] Moreover it is increasingly accepted and understood, that in fact allegations of sexual assault are not easy to make. Many judicial precedents now directly contradict the infamous statement of Lord Hale, a seventeenth century English judge who expressed the view that, "rape is an accusation easily made and hard to be proved, and harder to be defended by the accused, though never so innocent."[36] For example, as the South Africa Court of Appeal outlined, "few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn its back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed ad nauseam; she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a "soiled" wife."[37]

As outlined in the sub-sections that follow prompt complaint, corroboration and cautionary requirements are three examples of rules that rely on these beliefs. Many legal systems still apply these procedural and evidentiary rules to sexual assault crimes as opposed to other serious crimes against personal integrity. [38]

A. PROMPT COMPLAINT REQUIREMENTS

Prompt complaint requirements are procedural or evidentiary rules or practices related to the timeframe within which a complaint of sexual assault is made.

The most severe rule of this type is one that defines a much shorter time frame (or statute of limitations) for the commencement of proceedings concerning sexual assault crimes than for other serious crimes; if the timeframe is exceeded then proceedings are barred. In some countries, the statute of limitations on the prosecution of sexual assault crimes necessitates that a victim report the crime within a matter of days or weeks or else the prosecution will be barred. For example, Nepal applies a 35-day statute of limitations for the commencement of legal proceedings concerning the crime of rape.[39]

Other evidentiary rules or practices related to the time within which a victim of sexual assault reports the crime also impede bringing persons responsible for sexual assault to justice. For example in some countries whether or not a rape victim complains of the crime shortly after the incident is a relevant consideration

[35] See e.g. Victoria Law Reform Commission Sexual Offences Discussion Paper, 2001, p. 156.
[36] Matthew Hale, History of the Pleas of the Crown 635 (1st Am. ed. 1847), pp. 633–636.
[37] *S v. J* 1998 (2) SA 984 (South Africa Court of Appeals).
[38] For the history of these rules and a more in-depth analysis of the wrongfulness of the stereotypes they rely on, see Michelle J. Anderson, The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault, 84 B.U. L. Rev. 945, (2004).
[39] Nepal State Code (Muluki Ain), Chapter 14, No. 11.

in determining the guilt or innocence of the accused. This means that a delay on the part of the victim in reporting a rape can be, and often is admitted into court as evidence, part of the defense case with a view to undermining her credibility and the veracity or strength of the allegation of rape. Jurisdictions that admit evidence of a delayed complaint may allow, or sometimes even require, judges or juries to consider that a delay in reporting is a relevant factor when assessing the victim's credibility and the truthfulness of her allegation. For example, the Pakistan Supreme Court has reasoned that a delay of eight days in registering a complaint of rape is a valid consideration on which to base an acquittal. Although it did observe that sometimes delays are not fatal to the prosecution and that there is no "absolute or universal rule and the delay in each case has to be explained in a plausible manner and should be assessed by the Court on its own merits," it then went on to explain how the "case of an unmarried virgin victim of a young age, whose future may get stigmatized, if such a disclosure is made, if some time is taken by the family to ponder over the matter that situation cannot be held at par with a grownup lady, who is a divorcee for the last many years."[40]

UNDERLYING HARMFUL STEREOTYPES OR ASSUMPTIONS

No matter what their form, prompt complaint rules and practices in cases of sexual assaults against women are inconsistent with the prohibition of gender discrimination including the duty "not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence."[41] They embody the belief that "real" victims of sexual violence will report the violence quickly and give legal form to inaccurate and impermissible assumptions as to what is to be "expected from a rational and ideal victim,"[42] or what is considered "to be the rational and ideal response of a woman in a rape situation."[43]

These beliefs are incorrect. There is no evidence that delayed reports of sexual violence are less truthful. In fact statistics indicate that most crimes of sexual violence are never reported at all.[44] As the Supreme Court of California noted, "the overwhelming body of current empirical studies, data, and other information establishes that it is not inherently "natural" for the victim to confide in someone or to disclose, immediately following commission of the offense, that he or she was sexually assaulted."[45] Instead survivors are often afraid of reporting the crime because of stigma and shame. If the perpetrator is someone the survivor knows personally, as is often the case, it can be even more difficult to report the crime.[46]

REFORM MEASURES

Until recently prompt complaint requirements were common. However, there is increasing recognition of their discriminatory nature and a number of jurisdictions

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[40] *Mukhtar Mai et. al. v. Abdul Khaliq et. a*l., Criminal Appeals No.163 to 171 and S.M. Case No.5/2005 (Supreme Court of Pakistan 2011), p. 36-37.
[41] *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008, Para. 8.4
[42] Ibid. Para. 8.5
[43] Ibid.
[44] See, e.g., Claudia Garcia-Moreno et al., "Prevalence of intimate partner violence: findings from the WHO multi-country study on women's health and domestic violence," The Lancet, 368 (2006): 1260-9 (finding that in the 10 countries surveyed, 55% of women who experience gender-based violence never report it to legal officials); Victoria Law Reform Commission Sexual Offences Discussion Paper, 2001, p. 156.
[45] *People v. Brown*, 883 P.2d 949, 956 (Cal. S. Ct. 1994).
[46] Studies show that the closer the relationship a victim had with her attacker before the attack, the longer she will wait to report it, on average. Aviva Orenstein, "MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 Cal. L. Rev. 159, 201-02 n.158 (1997).

have taken steps to explicitly eliminate relevant rules and practices.[47]Different jurisdictions have taken different routes to reform.

For example, some jurisdictions have prohibited adverse inferences being drawn about the credibility of a victim of sexual assault or the veracity of his or her testimony as a result of the delay in reporting or the bringing of a complaint about an incident of sexual violence. For example, legislation enacted in 2003 in Lesotho states, "in criminal proceedings at which an accused is charged with an offense of a sexual nature, the court shall not draw any adverse inference only from the length of the delay between the commission of the sexual act and the laying of a complaint."[48]

Others have enacted legal provisions specifying that where issues of delay are raised during proceedings judges may explain to juries that there may in fact be good reasons for the delay in reporting. For example, New Zealand's 2006 Evidence Act states that if any evidence, comment, or question at trial suggests that there may have been a delay in reporting the crime, "the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence."[49]

Other jurisdictions both prohibit judicial warnings to the effect that a victim's delay in reporting is relevant to credibility, while also requiring that judges must both warn juries that a delay is not relevant to the credibility of complainant and in addition must inform the jury that there are good reasons why a complainant may delay.[50]

B. CORROBORATION REQUIREMENTS

Corroboration requirements that are only applicable to sexual assault crimes usually prohibit convictions of sexual assault solely on the basis of a survivor's testimony. Instead, in order for convictions to be considered safe, the law requires that there must always be some physical, medical, or forensic evidence or the testimony of additional witnesses that supports the survivor's account. In this way corroboration requirements distinguish victims of sexual assault crimes from survivors of other violent crimes, in relation to whose testimony such requirements do not apply.

A range of jurisdictions continue to maintain these corroboration requirements. In some cases they are enshrined in legislation while in others they derive from judicial precedent.[51]

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[47] For jurisdictions that now explicitly require that judges no longer follow the prompt complaint rule, see, e.g., New South Wales Australia (Criminal Procedure Act 1986 § 294); Barbados (Sexual Offences Act Cap. 154 1992 § 29); Lesotho (Sexual Offences Act 2003 § 20); Namibia (Combating of Rape Act, No. 8 (2000) § 7); New Zealand (Evidence Act 2006 § 127); the Philippines (Anti-Violence against Women and their Children Act (2004) § 16); South Africa (Criminal Law (Sexual Offences and Related Matters) Amendment Act (2007) § 59); and the United Kingdom (Sexual Offences Act 2003 § 132(A)).

[48] Sexual Offences Act 2003 § 20 (Lesotho). Similarly, but in the context of domestic violence protective orders, the Philippine's legislation states that a court shall not deny an order based on the lapse of time between the violence at issue and the request for an order. Anti-Violence against Women and their Children Act (2004) § 16 (Philippines).

[49] Evidence Act 2006 § 127 (New Zealand).

[50] Sexual Offences Act Cap. 154 1992 § 29 (Barbados); Criminal Procedure Act 1986 § 294 (New South Wales, Australia).

[51] See, e.g., *R vs. Kaluwa* 1964-66 ALR (High Court of Malawi) (requiring corroboration for the testimony of a rape complainant); *Ogunbayo v the State*, SC 272/2005 (Supreme Court of Nigeria) ("Evidence of corroboration is not required as a matter of law, but it is required in practice."); *Mukhtar Mai et. al. v. Abdul Khaliq et. al.,* Criminal Appeals No.163 to 171 and S.M. Case No.5/2005 (Supreme Court of Pakistan) (citing lack of corroboration as reason to acquit); Sudan Evidence Act 1994 Art. 62 (requiring corroboration to prove adultery, with rape defined as the act of adultery without consent in the Crime Act 1991 Art. 149).

UNDERLYING HARMFUL STEREOTYPES OR ASSUMPTIONS

Corroboration requirements in sexual assault cases embody the skepticism with which women alleging sexual assault have historically been treated and reflect the inherent assumption that women fabricate claims of sexual assault. As the High Court of Australia noted, corroboration requirements rely on the view that "female evidence in such cases is intrinsically unreliable."[52]

There is no legitimate reason for the application of a different approach to corroboration with regards to the testimony of survivors of sexual violence than with regards to the testimony of victims of other crimes. As the Court of Appeal of Kenya observed, "there is neither scientific proof nor research findings that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences."[53]

As the Bangladesh High Court held, "the testimony of a victim of sexual assault is vital, and unless there are compelling reasons which necessitate corroboration of her statement, the court should find no difficulty in convicting an accused on her testimony alone if it inspires confidence and is found to be reliable."[54] To do so, the Court noted, would be to treat victims of sexual violence equally with other victims and witnesses of violent crimes, for whom decisions of credibility are made on a case by case basis and not subject to general rules.

The *per se* imposition of a requirement that a victim's testimony be corroborated in sexual assault cases is discriminatory and contradicts the duty of the authorities, outlined by the Committee on the Elimination of Discrimination against Women to ensure that "legal procedures in cases involving crimes of rape and other sexual offenses … be impartial and fair, and not affected by prejudices or stereotypical gender notions."[55]

Corroboration requirements also reflect often mistaken notions of how sexual assault occurs and what kind of conduct it involves. For example, it is often assumed that true allegations of any sexual assault crime will be easily 'corroborated' or substantiated by physical evidence because such crimes involve physical force or a physical struggle in which the victim or perpetrator suffers injury. However, as will be discussed in Section IV, these assumptions are inaccurate.[56]

REFORM MEASURES

Although at one time the corroboration requirement was a feature common to most jurisdictions,[57] a number of legal systems have taken steps to remove it.

In some jurisdictions, such as Bangladesh, France, India, Kenya, the Philippines, Sri Lanka, and certain U.S. states, this has occurred through judicial precedent holding that no such corroboration is required for conviction.[58]

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[52] Deane, J., *R v Longman* (1989) 168 CLR 79 (Australia).
[53] *Mukungu v. Republic*, [2003] 2 EA (Kenya Court of Appeal), at para 12.
[54] *Al Amin & Ors v. the State Bangladesh* (Bangladesh High Court) 51 DLR (1999) 154.
[55] *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008. Para. 8.9(b)
[56] Linda E. Ledray, U.S. Dept. of Justice, Sexual Assault Nurse Examiner SANE Development and Operation Guide 69-70 (1999) (collecting studies).
[57] See, e.g., Australia (*Kelleher v The Queen* (1974) 131 CLR 534, 542); Nebraska (*Stapleman v. State*, 34 N.W.2d 907 (1948)); Pakistan (*Najib Raza Rehmani v. The State*, PLD 1978 Supreme Court 200); United States Model Penal Code § 213.6(5) (1980).
[58] *Al Amin & Ors v. the State Bangladesh* (Bangladesh High Court) 51 DLR (1999) 154; Cass. Crim., 15 December 1999, No. 99-80.532 (France); *State of Punjab v. Gurmeet Singh*, 1996Cri LJ 1728 (India); *Andrew Apiyo Dunga v. Republic*, K.L.R. (2010) (Kenya); People of the Philippines v Feliciano "Saysot" Cias, G.R. No. 194379, 2011 (Supreme Court of the Philippines); Inoka Gallage v. Kamal

In others, reform has taken the form of legislative change. For example, Botswana, New Zealand, and the United Kingdom have removed corroboration requirements for sexual violence crimes from the legislation.[59]

Still other jurisdictions, such as Australia's New South Wales, Barbados, Canada, Ireland, and Tanzania, have gone further, enacting legislative provisions that explicitly provide that corroboration shall not be required.[60]

For example, the Tanzanian Evidence Act now states that, "after assessing the credibility of the evidence of…the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, [a court may] proceed to convict."[61] The Canadian criminal code now provides that for sexual offenses, "no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration."[62]

C. CAUTIONARY RULES

A third form of requirement that embodies the belief that women fabricate allegations of sexual violence is known as the cautionary rule or cautionary instruction.[63] This rule requires courts to treat the evidence of a survivor in a case concerning sexual violence with special caution and to take special care if grounding a conviction on the basis of such evidence alone. In cases tried by juries, the court must warn a jury to this effect.

The rule is specific to survivors of sexual violence, as opposed to other violent crimes.

It is still applied in a range of jurisdictions.[64]

A collateral effect of this rule is that even in places where corroboration requirements have been eliminated, courts remain reluctant to convict solely on the basis of the victim's testimony.[65]

UNDERLYING HARMFUL STEREOTYPES OR ASSUMPTIONS

Like corroboration requirements, cautionary rules embody the presumption that survivors of sexual violence belong to a particular class of witness that is inherently, and uniquely, suspect. This presumption was articulated by lawyers for the accused in one sexual assault case in Botswana, who argued that in failing to apply the cautionary rule, the trial court had incorrectly treated the evidence and the witnesses' credibility "as though it were any other case."[66]

Addararachchi and Another (Supreme Court of Sri Lanka 2002); 1 Sri LR 307 People v. Fierro, 606 P.2d 1291, 1293 (Colo. 1980) (Colorado, U.S.).

[59] Botswana Penal Code § 239; New Zealand Evidence Act 2006 § 121 (corroboration required only for the offenses of perjury, false oaths, and treason); 1994 Criminal Justice and Public Order Act § 33.

[60] New South Wales, Australia (Crimes Act of 1900 § 450(c)); Barbados (Sexual Offences Act Cap. 154 1992 § 28); Canada (Criminal Code, RSC 1985, c C-46 § 274); Ireland (Criminal Law (Rape) (Amendment) Act 1990 § 7); International Criminal Court (ICC Rules of Evidence and Procedure, Art. 63(4)); Tanzania (Sexual Offences Special Provisions Act 4 of 1998 § 27).

[61] Sexual Offences Special Provisions Act 4 of 1998 § 27 (Amending Tanzania Evidence Act § 127).

[62] Criminal Code, RSC 1985, c C-46 § 274 (Canada).

[63] For historical examples, see, e.g., California (People v. Benson, 6 Cal. 221, 223 (1856)); United States Model Penal Code § 213.6(5) (1988).

[64] See, e.g., Barbados (Sexual Offences Act Cap. 154 1992 § 28); Botswana (Tlhowe v The State 2008 (1) BLR 356 (CA)).

[65] Botswana, Tlhowe v The State 2008 (1) BLR 356 (CA).

[66] Ntloyakhumo and Another v. the State, 2004 (2) BLR 268 (HC).

Yet, as outlined previously, there is no basis for the belief that survivors of sexual violence fabricate allegations or are any more unreliable than survivors of any other violent crimes.

In some jurisdictions, this rule may also derive from another false assumption: that in sexual assault crimes judges and jurors may be inclined to convict on too little evidence. In such scenarios, the warning is intended to remind the court and jurors to be skeptical. However, once again, studies show that this is a mistaken belief; in fact courts and jurors often go out of their way to excuse the defendant's behavior.[67] Thus cautionary instructions further entrench pejorative beliefs that women alleging sexual assault are unreliable and untrustworthy.

These assumptions have been identified and discussed by Courts in a number of jurisdictions. For example, the Supreme Court of Appeal of South Africa found the cautionary rule to be based on "irrational and outdated perceptions… It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable."[68] The Court of Appeal of England and Wales has also held that there is no basis for cautionary instructions, "simply because the witness is a complainant of a sexual offense…There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable."[69] The Supreme Court of California similarly reasoned that the "instruction now performs no just function, since criminal charges involving sexual conduct are no more easily made or harder to defend against than many other classes of charges, and those who make such accusations should be deemed no more suspect in credibility than any other class of complainants."[70]

REFORM MEASURES

In abolishing the cautionary rule some jurisdictions, such as Canada, New Zealand, and the United Kingdom, have deleted legislative provisions that set out cautionary rules, rather than explicitly legislating that it is no longer applicable.[71]

Other legal systems have been more prescriptive, including a specific legislative prohibition of recourse to cautionary rules where they are applied simply because the case involves sexual violence. For example, Namibian legislation states, "No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence."[72] Australia's Victoria state, Ireland, Lesotho, South Africa, and the United States' Pennsylvania state have also explicitly prohibited cautionary instructions based solely on the fact that the crime concerned involves sexual violence.[73]

[67] Michelle J. Anderson, The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault, 84 B.U. L. Rev. 945, 980 (2004).
[68] *S v J* 1998 (2) SA 984 (SCA)(South Africa).
[69] *R v Makanjuola, R v Easton* [1995] 3 All ER 730 (CA) (United Kingdom).
[70] *People v. Rincon-Pineda*, 14 Cal.3d 864, 883 (1975).
[71] Canada (Criminal Law Amendment Act, 1974-75-76, § 8, Chp. 93); New Zealand (Evidence Act 2006 § 122); United Kingdom (Criminal Justice and Public Order Act 1994 § 32(1)).
[72] Combating of Rape Act, No. 8 (2000) § 5 (Namibia).
[73] Crimes Act 1958 § 61(1)(a) (Victoria); Criminal Law (Rape) (Amendment) Act 1990 § 7 (Ireland); Sexual Offences Act 2003 § 18 (Lesotho); Criminal Law (Sexual Offences and Related Matters) Act (2007) § 60 (South Africa); 18 Pa. C.S.A. § 3106 (West 2002) (Pennsylvania). See for a discussion Canadian HIV/AIDS Legal Network, Respect, Protect, Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Vol. I: Sexual and Domestic Violence (2009), p. 18; United Nations Division for the Advancement of Women, Handbook for Legislation on Violence Against Women (2010), ST/ESA/329, p. 43; U.N. General Assembly, "Strengthening Crime Prevention and Criminal Justice Responses to Violence Against Women, A/65/457, 31 March 2011. 15(e).

III. PREMISING CREDIBILITY ON CHASTITY: FAILURES TO RESTRICT THE ADMISSIBILITY OF SEXUAL HISTORY EVIDENCE

As anyone who has followed a high-profile sexual assault trial knows, the focus often shifts from the alleged perpetrator to the complainant. Evidence is often introduced concerning the survivor's sexual history and extent of her sexual experience prior to the incident. More often than not the purpose is to undermine her credibility and trustworthiness and thereby generally call her allegation of assault into question, implying that she in fact consented to the sex.

In some jurisdictions, legislative provisions explicitly provide for the admission of evidence concerning the "immoral" character of a sexual assault victim, where "immoral character," is interpreted to mean sexual experience outside of a marital relationship. For example, in Pakistan evidence rules specify that where a man is being prosecuted for sexual assault the credibility of the victim may be called into question by showing that she "was of generally immoral character."[74]

In other jurisdictions, although there is no express legislative provision for the introduction of such evidence, in practice evidence of the victim's sexual history is presumed relevant and therefore admissible.

UNDERLYING HARMFUL STEREOTYPES OR ASSUMPTIONS

These practices and provisions are based on the belief that a woman's sexual history is always a relevant consideration in assessing her credibility and in determining whether or not sex between her and the accused was consensual.[75] They stem from prescriptive codes of moral behavior and the stereotype that women are or should be chaste and they embody a range of related assumptions and value judgments concerning women's sexuality.

Rules or practices in which evidence of the victim's sexual history is presumed to be relevant and therefore admissible in cases of sexual assault reflect the view that women who have had sex outside of a marital relationship and/or with multiple partners are not credible or of dubious character and therefore may easily make false allegations of assault whereas women who are sexually inexperienced or have only had sex within their marriage are more trustworthy. In some social contexts these beliefs reflect the view that women should not have sex outside of marriage at all; in others they reflect the view that women should not have multiple sexual partners. In such cases where the woman has broken one social custom in the past by having sex, it is assumed that she will be more comfortable breaking others, i.e. by lying under oath.

In addition they reflect a view that women who have had sex outside of marriage, or with more than one partner, are more likely to consent to any or all sexual contact. In the words of the British House of Lords it reflects, "the assumption

[74] Pakistan The Law of Evidence Order (Qanun-e-Shahadat), 1984, § 151(4); See also the Nigeria Evidence Act § 211. Similarly, until recently, in India the Evidence Act stated, "When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character." Indian Evidence Act 1872 § 155. However this has been removed from the law recently by the India Criminal Law (Amendment) Act 2013 § 25 (amending § 53 of the Indian Evidence Act of 1872).

[75] For more in-depth discussions on this stereotype, see, e.g., Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and A New Rape Shield Law, 70 Geo. Wash. L. Rev. 51, 103 (2002); Leon Letwin, "Unchaste Character," Ideology, and the California Rape Evidence Laws, 54 S. Cal. L. Rev. 35, 60 (1980); Susan Estrich, Rape, 95 Yale L.J. 1087, 1098 (1986).

too often made in the past that a woman who has had sex with one man is more likely to consent to sex with other men."[76]

The unrestricted admissibility of evidence regarding a victim of sexual violence's sexual history is discriminatory and harmful. The fact that a woman has consented to sex previously is irrelevant to whether she is more or less likely to have consented in the incident in question. The fact that a woman has had sex on previous occasions has nothing do with her credibility or whether or not she is more or less likely to falsely allege that she has been the victim of sexual assault. As the Canadian Supreme Court has stated, "The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness."[77]

The admissibility of evidence regarding sexual history is not merely irrelevant and potentially traumatizing to the complainant, it is also prejudicial. Judges or jurors may become preoccupied with the victim's prior behavior, rather than focusing objectively on the credibility of her testimony and other evidence in the given case.[78] As the Indian Supreme Court held, "Even if the prosecutrix, in a given case, has been promiscuous in her sexual behavior earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma…should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court."[79]

Rules or decisions on admissibility of evidence that are based on harmful beliefs about the relevance of a victim's prior sexual conduct give rise to particularly problematic outcomes when a woman has engaged in sex work. As the Supreme Court of Massachusetts observed, "Surely, a jury, no matter how much effort the judge makes to purge their mindsets by admonitory instructions, are more likely to conclude that the impeaching [prostitution] convictions show that the complainant should not be believed, not because she is untruthful, but, because she has been, and thus continues to be, indiscriminate in sexual relations."[80] Moreover, studies have shown pervasive false myths and prejudices surrounding sex workers (such as beliefs that sex workers cannot be sexually assaulted or that they are not harmed if they are sexually assaulted) will wrongly sway the jury.[81]

REFORM MEASURES

In order to eliminate the significant influence that the above-mentioned stereotypes and assumptions can have on legal proceedings concerning sexual assault crimes, a number of jurisdictions have taken steps to restrict the admissibility of evidence of a victim's sexual history. As outlined briefly in the introduction, the right to a fair trial includes the right of the accused to examine or have witnesses examined and to challenge adverse evidence; it requires that the defense has an opportunity to challenge the evidence against the accused.

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[76] *R v A* (no. 2) [2001] UKHL 25 (United Kingdom).
[77] *R v. Seaboyer* (1991) 83 DLR (4th) 193 (Canada Supreme Court).
[78] Paul Poullard, Judgments About Victims and Attackers in Depicted Rapes: A Review, 31 Brit. J. Soc. Psychol. 307, 310,329 (1992); M.D. Pugh, Contributory Fault and Rape Convictions: Loglinear Models for Blaming the Victim, 46 Soc. Psychol. Q. 233, 233-42 (1983); L'Armand & Pepitone, Judgments of Rape: A Study of Victim-Rapist Relationship and Victim Sexual History, 8 Personality and Soc. Psychology Bull. 134, 136 (1982); Borgida & White, Social Perceptions of Rape Victims, 2 Law & Hum. Behav. 339 (1978).
[79] *State of Punjab v. Gurmit Singh* (AIR 1996 SC 1393) (India Supreme Court).
[80] *Commonwealth v. Houston*, 722 N.E.2d 942, 948 (Mass. 2000) (U.S.).
[81] Jody Miller & Martin D. Schwartz, Rape Myths and Violence Against Street Prostitutes, 16 Deviant Behav. 1, 1 (1995)).

However in all cases the questioning must be relevant, and further limitations on the manner and scope of such questioning in cases of gender-based violence may be permissible, if sufficiently counter-balanced by procedures to protect defense rights.

Some legal systems have adopted short legislative provisions that specify that evidence of a victim's sexual history shall not be admitted in sexual assault proceedings. For example, Canada's legislation provides that: "evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief."[82]

Legislation in the Democratic Republic of the Congo states: "the credibility, honor or sexual availability of a victim or witness may under no circumstances be inferred from their previous or later sexual behavior, and no proof regarding such behavior may be introduced to exonerate the accused."[83] The International Criminal Court's Rules of Evidence and Procedure states that, "a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness."[84]

Other jurisdictions, such as Denmark, Ireland, New Zealand, the Philippines, and the United Kingdom, have sought to limit the admissibility of sexual history evidence while retaining provision for judicial discretion to determine relevance and materiality of such evidence on a case-by-case basis.[85] For example, the Philippines's legislation states, "in prosecutions for rape, evidence of complainant's past sexual conduct, opinion thereof or of his/her reputation shall not be admitted unless, and only to the extent that the court finds, that such evidence is material and relevant to the case."[86] In these instances, leaving the decision on admissibility (based on materiality and relevance) with the court is often explained with reference to the need for caution in drawing a line between prohibiting illegitimate, irrelevant evidence based on harmful assumptions and allowing the introduction of relevant evidence necessary to preserve an accused's right to a fair trial. Indeed some courts have ruled that an accused's right to a fair trial is violated if no discretion at all is left to the judge to admit evidence that might in certain cases be relevant.[87]

However, research indicates that where broadly framed judicial discretion to admit sexual history evidence is preserved, judges may not give the evidence the careful scrutiny it deserves and continue to admit irrelevant, discriminatory evidence.[88]

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[82] Criminal Code, RSC 1985, c C-46 § 276 (Canada).
[83] Law Amending the Code of Penal Procedure (2006), art. 1 (D.R.C.).
[84] ICC Rules of Evidence and Procedure, Rule 71. See also U.N. Mechanism for International Criminal Tribunals, Rules of Procedure and Evidence (2012), Rule 118; United Nations Transitional Administration in East Timor Special Panel for Serious Crimes Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, Rule 34.3.
[85] Administration of Procedure Act § 185(2) (Denmark); Criminal Law (Rape) Act 1981 § 3 (Ireland); Evidence Act 2006 § 44 (New Zealand); Republic Act No. 8505 (1998) § 6 (Philippines); *R v A (no. 2)* [2001] UKHL 25 (United Kingdom).
[86] Republic Act No. 8505 (1998) § 6 (Philippines).
[87] See e.g. UK: R v A (no. 2) [2001] UKHL 25. See the Introduction for a brief overview of the right to a fair trial and relevant sources.
[88] See, e.g., Victoria Law Reform Discussion Paper (2001), p. 139; Liz Kelly, J. Temkin, and S. Griffiths, Section 41 : an evaluationof new legislation limiting sexual history evidence in rape trials, U.K. Home Office Report 20/06, p. 74; A. McColgan, "Common law and the relevance of sexual history evidence," Oxford Journal of Legal Studies 16 (1996): 275–308; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (Australia), Chapter 5: Sexual Offences Against the Person, Report, 1999, pp. 239– 241.

As a result, a number of jurisdictions have enacted legislation that generally excludes sexual history evidence but expressly identifies strict and narrow circumstances in which such evidence may be admissible.[89] For example, legislation in Malaysia explicitly prescribes when sexual history evidence may be allowed, specifying that a judge may find it admissible if: "(a) it is evidence that rebuts, or a question which tends to rebut, evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution; (b) it is evidence of, or a question on, specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or (c) it is evidence of, or a question on, sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where that evidence or question relates to the consent that the accused alleges he believed was given by the complainant."[90]

[89] Sexual Offences Act (2006) Cap. 80 § 34(1) (Kenya); Combating of Rape Act, No. 8 (2000) § 18 (Namibia); New South Wales Criminal Procedure Act 1986 § 293 (Australia); Sexual Offences Act 2003 § 26 -27 (Lesotho).
[90] Act 56, Evidence Act 1950 (Consolidated) § 146(A) (Malaysia).

MEDICAL EVIDENCE AND 'VIRGINITY' OR 'FINGER' TESTING

An extreme form of evidence related to a victim's sexual history is the practice of admitting results of "finger testing." The tests involve assessing how many fingers can easily be entered into the victim's vagina.

In some jurisdictions, such "tests" have been routinely performed on women following allegations of sexual assault and, spurious though they are, admitted as a form of medical evidence.

In many countries these examinations are known as the 'two fingers test.' They are also often referred to as virginity testing. The findings are usually admitted as evidence in court and are relied on by the defense to undermine a claim of sexual assault. For example if two fingers easily pass into a woman's vagina it is argued that she is not a virgin and is accustomed to sexual penetration. Arguments may then be made that she is immoral and her credibility cannot be trusted, or that she most likely consented to the sex because she has had sex before.[91] If two fingers do not pass, arguments will often be made that no penetration could have occurred and there was no assault.[92]

The WHO has clarified that there is no medical or legal value[93] in tests such as these and describes such testing as a form of sexual violence.[94] Courts have echoed these findings. For example, the Supreme Court of India has observed that such tests are hypothetical and subjective, and their results should not be used against sexual assault victims in court.[95]

The harmful assumptions underlying such testing cannot be overstated. Even if such tests were determinative of sexual experience, as discussed above, a woman's prior sexual experience is irrelevant to her credibility and whether or not she is more or less likely have consented in the instant case. Such tests also perpetuate the mistaken belief and assumption that sexual assault necessarily involves vaginal penetration.

[91] Teja alias Tejveer Singh alias Tej Pal v. N.C.T. Govt. of Delhi (State), MANU/DE/2457/2009, paras. 4.11 and 4.12 (India).
[92] Mohammed Jaffar alias Jaffar alias Munna son of Umar Mogal v. The State of Maharashtra and the Inspector of Police, MANU/MH/0448/2007, paras. 6 and 7 (India).
[93] WHO, "Guidelines for medico-legal care of victims of sexual violence," p.7.
[94] Ibid.
[95] Narayanamma v. State of Karnataka with State of Karnataka v. Muniyappa and others, (1994) 5 SCC 728, para. 4(iv) (supreme Court of India).

IV. PRESUMING WOMEN WILL FIGHT BACK: REQUIRING EVIDENCE OF PHYSCAL FORCE OR A STRUGGLE

Across jurisdictions criminal proceedings concerning sexual assault regularly involve considerations of whether physical force or violence, or threat thereof, formed part of the alleged incident. These considerations manifest differently in different jurisdictions.

For example, in some legal systems, such as Colombia, Indonesia, Jordan, Kazakhstan and Pakistan, physical force or violence, or threats thereto, forms part of the legislative definition of crimes of sexual assault or rape. [96] As a result, physical force or violence, or threats thereto, is an element of the crime without which the crime is not considered to have taken place.

In other countries, although legislation itself does not define sexual assault crimes with reference to physical force or violence or threats thereto, in practice significant weight will nonetheless be placed on whether there is evidence of force by the accused and/or resistance by the victim when determining credibility, seeking corroborative evidence, and determining the likelihood of consent. In such jurisdictions, the defense will regularly argue that a lack of such evidence, particularly with regard to physical resistance by the victim, means sex was consensual.

UNDERLYING HARMFUL STEREOTYPES AND ASSUMPTIONS

These legislative provisions and practices reflect a range of harmful assumptions about the nature of sexual violence and what a women's proper reaction to non-consensual sexual contact should be. In the words of the Committee on the Elimination of Discrimination against Women they represent inflexible assumptions as to "what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence."[97] They embody the belief that women will or should always, physically resist sexual assault and that if sex is truly non-consensual, a woman will fight back and physically defend herself and the perpetrator will have to use physical force or the threat of violence to overcome her.

These assumptions obscure the reality that fear, shock and power dynamics influence the behaviour of survivors of sexual assault crimes in many different ways and that coercion will often involve many forms of non-violent threats, intimidation and duress. Survivors in many instances may therefore not physically resist sexual assault and perpetrators may not always have recourse to violence or threats thereof. [98] As the International Criminal Tribunal for Rwanda noted, "threats, intimidation, extortion and other forms of duress that prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances."[99]As the European Court of Human Rights outlined, "any rigid approach to the prosecution of sexual offences, such as requiring proof of

[96] See, e.g., Colombia Law 599/2000, art. 205 (although some lesser sexual offenses with less severe punishments do not require force); Indonesia Penal Code 1999 Art. 285 ("force or threat of force"); Jordan Penal Code Art. 292(1) ("forced sexual intercourse"); *Mukhtar Mai et. al. v. Abdul Khaliq et. al*., Criminal Appeals No.163 to 171 and S.M. Case No.5/2005 (Supreme Court of Pakistan 2011), p. 42 (Acquittal partly based on lack of marks of physical resistance).
[97] Ibid. Para. 8.4.
[98] CEDAW: *Karen Tayag Vertido v The Philippines* (18/08), CEDAW/C/46/D/18/2008 (2010), at para 8.5; Inter-American Court of Human Rights *Case of Fernández Ortega et al. v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 30, 2010 (Series C No. 215), para. 115; European Court of Human Rights, *M.C. v Bulgaria,* 39272/98 (2003), para 166.
[99] *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-T, Sept. 2 1998, at 688.

physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy."[100] As the Committee on the Elimination of Discrimination against Women has specified there should be, "no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence."[101]

REFORM MEASURES

In order to eliminate reliance on these harmful assumptions, many jurisdictions, such as Argentina, Barbados, Canada, China, Chile, Costa Rica, Kenya, Namibia, Nepal, Nicaragua, the Russian Federation, South Africa, and the U.K. have revised their legislation to remove references to force or violence requirements and to elaborate definitions of sexual assault crimes that do not require proof of physical force as an element of the crime.[102]

However because of the pervasiveness of assumptions underlying force or violence requirements, it may not only be necessary to remove express references to force or violence in legislative definitions of sexual assault, but also to include explicit specification that neither proof of physical resistance on the part of the victims or the use or threat of violence or force on the part of the accused is necessary to demonstrate an absence of consent.[103]

A number of jurisdictions, such as Barbados, India, Ireland, New Zealand, Sri Lanka, and Tanzania as well as the International Criminal Court, have taken this step and have explicitly supplemented their definitions of rape with a provision stating that resistance is not necessary to prove an absence of consent.[104] For example, India's recent legislation now excludes a previous explanation after the definition of rape that "a woman who does not physically resist the act of penetration shall not by the reason only of that fact be regarded as consenting to the sexual activity."[105] Tanzania's legislation provides that, "evidence of resistance, such as physical injuries to the body, is not necessary to prove that sexual intercourse took place without consent."[106]

[100] ECtHR, *M.C. v Bulgaria,* 39272/98 (2003), para 166.
[101] *Vertido v. The Philippines,* CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008, Para. 8.5
[102] See, e.g., Argentina (Penal Code § 119); Canada (Criminal Code, RSC 1985, c C-46 § 273(1)); China (Republic of China Criminal Code Art. 236); Chile (Penal Code Art. 361); Costa Rica (Criminal Code (as updated by 2002 Law No. 4573) Art. 156); Kenya (Sexual Offences Act (2006) Cap. 80 § 3(1)); Namibia (Combating of Rape Act of Namibia 8 (2000)); Nepal (State Code (Muluki Ain), Chapter 14, No. 1); Nicaragua (Código Penal De La República De Nicaragua, art. 195); Russian Federation (The Criminal Code of the Russian Federation 64_FZ 1996 Art. 131); South Africa (Criminal Law (Sexual Offences and Related Matters) Act (2007) § 2); United Kingdom (Sexual Offences Act 2003 (UK) § 1 and 74).
[103] United Nations Division for the Advancement of Women, Handbook for Legislation on Violence Against Women (2010), ST/ESA/329, p. 26.
[104] See, e.g., Barbados (Sexual Offences Act Cap. 154 1992 § 3.1); International Criminal Court (ICC Rule 70(c)); India (Criminal Law (Amendment) Act 2013 § 375); Ireland (Criminal Law (Rape) (Amendment) Act 1990 § 9); New Zealand (Crimes Act 1961 § 128A (1)); Sri Lanka (Penal Code Cap. 19 § 363 Explanation ii); Tanzania (Sexual Offences Special Provisions Act 4 of 1998 § 5).
[105] India Criminal Law (Amendment) Act 2013 § 375.
[106] Sexual Offences Special Provisions Act 4 of 1998 § 5 (Amending Tanzania Penal Code § 130(4)(b)).

V. PERPETUATING PRESUMPTIONS OF WOMEN'S PASSIVE SEXUALITY: DEFINITIONS OF CONSENT

Across jurisdictions the presence or absence of an adult woman's consent to sex is a central component in any determination of whether a sexual assault crime has occurred.

However in many legal systems, legislative or jurisprudential ambiguity as to legal concepts and definitions of consent results in court room proceedings shifting from a focus on the actions and state of mind of the accused to an interrogation of the victim's state of mind and what she did and did not do during the incident.

Courts have often placed undue emphasis on considerations as to whether the victim was sexually promiscuous, dressed in a sexually provocative way, engaged in some sexual conduct, flirting or kissing with the accused or simply 'wanted' sex because she did nothing to stop it.

UNDERLYING HARMFUL STEREOTYPES AND ASSUMPTIONS

Underlying these common lines of argument is the stereotype that women are, or should be, sexually passive and a range of related presumptions that women are generally sexually available and willing to receive men's advances unless they clearly and explicitly communicate that they are not. They also include assumptions that women like to be "seduced" and that through their conduct they will implicitly communicate that they 'want' sex even though they say no or resist in other ways.

These beliefs undermine the position of women as autonomous human beings who can and do make active decisions about when and with whom to share sexual intimacy. As the Canadian Supreme Court found, the belief that women have the burden of actively showing non-consent rather than that men have the responsibility to ascertain consent, "denies women's sexual autonomy and implies that women are walking around this country in a state of constant consent to sexual activity."[107]

Furthermore, as the Sri Lankan Supreme Court held that "there is a difference between consent and submission to sexual intercourse. Every consent involves submission but the converse does not follow and a mere act of submission does not involve consent."[108] India's Punjab-Haryana High Court held that, "a mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent" as understood in law. Consent, on the part of a woman as a defense to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent."[109]

[107] *R. v. Ewanchuk* [1999] 1 S.C.R. 330, 372 (Supreme Court of Canada).
[108] Inoka Gallage v. Kamal Addararachchi and Another (Supreme Court of Sri Lanka 2002) 1 Sri LR 307.
[109] Rao Harnarain Singh v. the State A.I.R. 1958 Punj. 123, 7.

REFORM MEASURES

In recent years a range of jurisdictions have moved to redress the harmful reliance on these assumptions in criminal proceedings.[110]

Some jurisdictions have sought to do this through requirements that focus deliberations on whether the accused took enough reasonable steps to ascertain consent, rather than on whether the complainant took enough reasonable steps to demonstrate non-consent. For example, the Supreme Court of Canada has held that "the accused cannot rely on the complainant's silence or ambiguous conduct to initiate sexual contact. Moreover, where a complainant expresses non-consent, the accused has a corresponding escalating obligation to take additional steps to ascertain consent."[111] Meanwhile U.K. legislation provides that belief in consent, "is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents."[112]

Other jurisdictions have moved away from using a consent-based definition of sexual assault crimes altogether, towards one that considers whether the sexual contact took place under coercive circumstances. This has been described as involving "a shift of focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties on the occasion in question."[113] Legislation in Namibia and Lesotho provide examples of the coercive circumstances model, defining coercive circumstances with a non-exhaustive list of circumstances that are coercive.[114]

Some jurisdictions have taken a dual approach. For example although Argentina, Canada, New Zealand, and South Africa retain a consent-based approach, their legislation also includes a non-exhaustive list of circumstances under which no consent can be found to exist, such as instances of abuses of power.[115]

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[110] Their reforms align with CEDAW Committee recommendation that legislation dealing with sexual violence either, "require the existence of unequivocal and voluntary agreement and require proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting, or require that the act take place in coercive circumstances and include a broad range of coercive circumstances." *Karen Tayag Vertido v the Philippines*, Communication No. 18/2008, UN Doc CEDAW/C/46/D/18/2008, 1 September 2010, para. 8.9.

[111] *R. v. Ewanchuk* [1999] 1 S.C.R. 330, 378 (Supreme Court of Canada).

[112] Sexual Offences Act 2003 (UK) § 1.

[113] South African Law Commission, Project 107: Sexual Offences, Discussion Paper 85, Sexual Offences: The Substantive Law (1999), p. 146.

[114] Citation; Sexual Offences Act 2003 § 2 (Lesotho).

[115] Argentina (Penal Code § 119); Canada (Criminal Code, RSC 1985, c C-46 § 273.1); New Zealand (Crimes Act 1961 § 128A); South Africa (Criminal Law (Sexual Offences and Related Matters) Act (2007) § 2); United Nations Division for the Advancement of Women, Handbook for Legislation on Violence Against Women (2010), ST/ESA/329, p. 26; Canadian HIV/AIDS Legal Network, Respect, Protect, Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Vol. I: Sexual and Domestic Violence (2009), p.9.

CLAIM OF IMPLIED OR HONEST BELIEF IN CONSENT

In jurisdictions which retain a "consent-based" approach the accused may argue that they honestly, albeit mistakenly, believed the victim was consenting. This is sometimes referred to as the "defense" of honest belief of consent or implied consent.[116] Essentially the claim goes towards demonstrating that the defendant did not intend to engage in non-consensual sex and therefore the *mens rea* requirement of the relevant crime cannot be fulfilled.

In order to ensure that the admissibility of these defenses do not result in reliance on harmful gender stereotypes or assumptions a number of jurisdictions have specified that a subjective belief of consent on the part of the accused must have been reasonable in the given circumstances. For example, the South African Law Commission noted that allowing a purely subjective defense without subjecting it to any objective criteria, "allows men to adhere to old-fashioned views about sexual behavior and female sexuality. It leaves the way open for an accused to rely on notions such as "no really means yes" or that women enjoy being seduced and ravished."[117] Similarly the Victoria Law Reform Commission found that a subjective honest belief in consent defense, "supports the attitude that a person is entitled to have sex, unless the other person actively indicates they do not wish to do so. This places the onus on a person approached for sex to indicate lack of consent, instead of requiring the initiator to ascertain whether the other person is consenting…. A mental element of rape in which an accused can be acquitted where he held an honest belief in consent runs the real risk of affirming and legitimizing such myths and stereotypes."[118]

Ensuring protection from discrimination requires that at the very least such defenses be grounded on what was objectively reasonable in the circumstances and not simply on the accused's subjective belief. For example, Canada's legislation states that a defendant's belief in consent is not a defense where 1) the defendant's belief arose from his self-intoxication or from willful or reckless blindness or 2) where the defendant "did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."[119]

However other jurisdictions have gone further and no longer allow the introduction of these defenses at all. For example, in New South Wales, Australia, where recklessness satisfies the *mens rea* requirement for a rape conviction, the Court of Appeal held that, "where consent to intercourse is withheld, a failure by the accused to avert at all to the possibility that the complainant was not consenting, necessarily means that the accused is 'reckless' as to whether the other person consents."[120]

[116] See, e.g., United Kingdom (*DPP v. Morgan* [1975] 2 W.L.R. 913).
[117] South African Law Commission, Project 107: Sexual Offences, Discussion Paper 85, Sexual Offences: The Substantive Law (1999), p. 150.
[118] Victoria Law Reform Commission, Sexual Offenses: Final Report, p. 409-410.
[119] Criminal Code, RSC 1985, c C-46 § 273.2 (Canada).
[120] *R v Kitchener* (1993) 29 NSWLR 696, 703.

VI. WOMEN SHOULD OBEY THEIR HUSBANDS: MARRITAL RAPE EXCEPTIONS

In several jurisdictions, across a variety of regions, sexual violence that occurs between married men and women does not constitute a criminal offence. In some legal systems marriage of the victim and accused is a defense to allegations of sexual assault crimes. In others rape or other sexual assault crimes are explicitly defined as something that occurs between a man and a woman who is not his wife.

For example, India's legislation explicitly states, "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."[121] Indonesia's legislation defines rape as forced sexual intercourse "outside of marriage," thereby excluding criminalization of rape between spouses.[122] Legislation in Jordan, Nigeria, and Tanzania similarly define rape as occurring between a man and a woman who is not his wife.[123] The High Court of Malawi has held that "a wife cannot lawfully refuse her husband intercourse."[124] Some States, such as Barbados, India, and Tanzania criminalize rape between spouses only if they are separated or divorced.[125]

STEREOTYPE

Marital rape exceptions have frequently been justified on the basis that sex between a man and his wife at the instigation of a husband is an element of a marriage contract and as such when women consent to marry they give their ongoing consent to all sex with their husband at any time. The defense of marriage in sexual violence cases is also reflective of an approach to marriage within which the woman is considered to be the property of the male partner and within which she does not have a distinct legal status and identity. In this context, whether or not married women always want to have sex with their husbands is deemed irrelevant.

In this way marital rape exceptions deny women's autonomy, reinforce gender hierarchies and entrenched gender roles and concepts of male and female sexuality. They reinforce the wrongful notion that sexual assault is only wrong because sex outside of marriage impeaches family honor as opposed to constituting a serious abuse of women's physical and mental integrity. In the words of the British House of Lords the "proposition…that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time" is one that "in modern times any reasonable person must regard…as quite unacceptable."[126]

REFORM MEASURES

Although previously marital rape exceptions were a common feature across jurisdictions,[127] a number of States have moved to eradicate them through

[121] Indian Penal Code 1860, § 375.
[122] Indonesian Penal Code 1999 Art. 285.
[123] Jordanian Penal Code Art. 292(1); Nigerian Criminal Code Act (1990) § 6; Tanzanian Sexual Offences Special Provisions Act 4 of 1998 § 5.
[124] *R. v. Mwasomola* 4 ALR (Mal) 572 (High Court of Malawi).
[125] Barbados Sexual Offences Act Cap. 154 1992 § 3(4).
[126] *R v R* [1992] 1 AC 599 (U.K. House of Lords).
[127] See, e.g., *R v. Kowalski* [1988] 86 Crim. App. 339 (U.K.)(refusing to recognize rape within the marital bond); United States Model Penal Code § 213.1 (2001); Frazier v. State, 86 S.W. 754 (Tex. 1905) (Texas, U.S.).

legislative reform. This practice aligns with the jurisprudence of international courts. For example, the European Court of Human Rights has held that abolishing the marital exception comports not only with "a civilized concept of marriage but also, and above all, with the fundamental objectives of … respect for human dignity and human freedom."[128]

Some jurisdictions have abolished the exception by removing relevant provisions providing for a marital exception from their law, thereby leaving the definition of rape broad enough to cover marital rape.[129]

Others, such as Australia's New South Wales and Victoria states, Canada, Indonesia, Ireland, Lesotho, Namibia, New Zealand, and South Africa have adopted legislation that explicitly provides that marriage between the accused and the victim is not a bar or defense to a prosecution for sexual assault.[130] For example, Namibia's legislation states, "No marriage or other relationship shall constitute a defense to a charge of rape under this Act."[131] Others, such as Colombia, France, and Nicaragua have gone so far as to make rape that occurs between spouses (intimate partners) an aggravated offense.[132]

Because of enduring assumptions that non-consensual sex cannot occur within a marriage or criminal liability cannot attach, it may be important not only to remove explicit marital exceptions from the law and ensure the definition of sexual assault is broad enough to encompass marital relationships, but also to enact explicit legislation providing that marriage or other intimate relationship is not a defense.[133] Such explicit provision may also be necessary to clear up confusion in some jurisdictions as to whether the silence of criminal legislation on the matter means that marital rape is not a crime, particularly where old common law judicial precedents may still be considered to apply.[134]

[128] *CR v. UK*, European Court of Human Rights (ECHR), judgment of 22 November 1995, Publications of the European Court of Human Rights, Series A, No 335-C, para. 42.
[129] Criminal Justice and Public Order Act, 1994 § 147 (U.K.).
[130] Crimes Act 1900 § 61T (New South Wales, Australia); Crimes Act 1958 § 62(2) (Victoria, Australia); Criminal Law Amendment Act, S.C. 1980-81-82, c. 125, § 6 (Canada); Elimination of Violence in Household Act (2004), Article 5(c) (Indonesia); Criminal Law (Rape)(Amendment) Act 1990 § 5 (Ireland); Sexual Offences Act 2003 § 3(3) (Lesotho); Combating of Rape Act No. 8 of 2000, § 3 (Namibia); Crimes Act 1961 § 128(4)(New Zealand); Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007, § 56(1) (South Africa).
[131] Combating of Rape Act No. 8 of 2000, § 3 (Namibia).
[132] Colombia Law 599/2000, art. 211(5); Nicaragua Penal Code Art. 195(10); French Criminal Code art. 222-24.
[133] See, e.g., United Nations Division for the Advancement of Women, Handbook for Legislation on Violence Against Women (2010), ST/ESA/329, p. 26; Canadian HIV/AIDS Legal Network, Respect, Protect, Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Vol. I : Sexual and Domestic Violence (2009), p. 15; K. Alexa Koenig, R. Lincoln, and L. Groth, The Jurisprudence of Sexual Violence, Human Rights Center University of California Berkeley (2010), p. 47-48.
[134] For example see analysis of situation in Botswana in Women's Access to Justice: Identifying the Obstacles and Need for Change, International Commission of Jurists, 2013

VII. SEXUAL VIOLENCE AND LOSS OF HONOR: MARRIAGE EXCEPTIONS AND MORALITY CRIMES

In a range of jurisdictions a variety of different legal provisions and practices treat sexual assault crimes as infringements of family or community honor as opposed to crimes against an individual's physical and mental integrity and autonomy. This approach manifests in diverse ways and takes more or less extreme forms in different contexts.

For example, in some jurisdictions, such as Denmark, Ethiopia, Jordan, and Indonesia, sexual offences are classified in criminal laws as crimes against honor or public morals.[135] This means they are placed in a different section of the criminal code than crimes such as physical assault or murder, which are categorized as crimes against the person.

In more extreme manifestations, some jurisdictions allow prosecutions or sentences for sexual assault to be suspended if the alleged perpetrator marries the victim. For example, some States have provisions in place that allow a prosecutor to drop a rape case or provide that the court may suspend the sentence if the perpetrator marries the victim, because this is seen as restoring the victim's honor.[136] Bahrain, Jordan, Lebanon, and the Philippines still allow exemptions for rapists who marry their victims.[137] Denmark's legislation still allows a reduction or waiver of punishment for rapists who marry their victims.[138]

In some jurisdictions **victims** of sexual assault are subjected to severe re-victimization by being prosecuted for morality crimes, such as adultery or extramarital sexual relations (known as *zina* crimes under Sharia law). This practice is not uncommon in jurisdictions such as Afghanistan, Sudan, and the United Arab Emirates.[139] In some instances, a victim's allegation of rape or resultant pregnancy may be treated as a confession to the crime of extramarital sex.[140]

UNDERLYING HARMFUL STEREOTYPES AND ASSUMPTIONS

These practices reflect an approach to sexual violence that is not concerned with the infringement of a woman's physical or mental integrity but instead with what is perceived as a loss or violation of family or community honor. Instead of promoting concern for the dignity, wellbeing, and rights of the woman, the approach reflects the belief that women's involvement in extramarital sex is dishonorable. This approach considers that sexual violence is problematic because it is a dishonorable act of extramarital sex, rather than a violent act of non-consensual sex. This in turn embodies beliefs that women should be chaste and are valuable only as virgins or the property of men or of their families.

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[135] Denmark Penal Code Chapter 24; Ethiopia Criminal Code Title IV Chapter I; Jordan Penal Code Title VII Chapter I; Indonesia Criminal Code Chapter XIV.
[136] See, e.g., Lebanon Penal Code Art. 522; Peru Penal Code 1991 art. 178; Turkey Penal Code 1926 Art. 433-34.
[137] Bahrain Penal Code Art. 353; Jordan Penal Code No. 16, art. 308; Lebanon Penal Code Art. 522; Philippines Anti-Rape Law of 1997 Act No. 8353, Amending Revised Penal Code, Act No. 3815, Art. 266-C.
[138] Denmark Penal Code § 227.
[139] See, e.g., Human Rights Watch, "I Had to Run Away," (2012), p. 67 et. seq. for several such cases occurring in Afghanistan; Sudan Criminal Act 1991 (Art. 145 punishes adultery (zina), and Art. 149 defines rape as the act of adultery without consent, which can mean rape complainants can be prosecuted for adultery); United Arab Emirates Penal Code art. 356.
[140] Abira Ashfaq, Rape and Reform in Pakistan, World War Four Report, http://ww4report.com/node/3494.

It also reflects commonly held beliefs that it is women's wrongful conduct that attracts the attention of men and results in sexual violence. As such women who are sexually assaulted are to blame and have brought shame upon themselves and their families. Finally, but not least, when states enforce these legal responses this has the effect of subjecting survivors of rape to further acts of rape (if they are forced to marry their rapist) or the shame and humiliation of criminal prosecution. The state therefore inflicts further pain and suffering on the victim of rape, in violation of her right not to be subjected to torture and cruel, inhuman or degrading treatment or punishment.

REFORM MEASURES

In the past many jurisdictions classified sexual violence crimes as crimes of honor, rather than crimes of violence against the person.[141] However this is now changing as States revise sexual violence legislation to focus on the violation of the victim's integrity and autonomy, rather than a violation of honor or morals. For example, Turkey amended its Penal Code in 2004, changing the classification of sexual offences from crimes against society and crimes against moral customs to crimes against individuals and crimes against sexual inviolability.[142] Colombia's criminal code also now classifies sexual violence crimes as crimes against liberty and integrity.[143]

So too have States moved to remove legal provisions that serve to excuse or absolve sexual assault crimes where the alleged perpetrator subsequently marries the victim. For example several countries, such as Brazil, Ethiopia, Peru, and Turkey, have removed legislative provisions allowing suspension of sentence if a perpetrator marries his victim.[144] Egypt ended this practice through a Presidential Act in 1999.[145]

Meanwhile, a small group of States that previously prosecuted victims of sexual assault outside of marriage for moral crimes, such as extramarital sex, have moved to explicitly legislate that such crimes do not apply in situations of sexual assault. For example, in 2006 Pakistan put in place legislative provision explicitly specifying that charges of *zina* crimes of fornication may not be leveled against sexual assault complainants.[146]

[141] See, e.g., Brazil Penal Code 1940 Title IV; Sudan Criminal Act 1991 Art. 145 et. seq.; Turkey Penal Code 1926.
[142] Pinar Ilkkaracan, Reforming the Penal Code in Turkey: The Campaign for the Reform of the Turkish Penal Code from a Gender Perspective (2007), p. 26.
[143] Colombia Criminal Code, Title IV.
[144] Law No. 11106/2005, amending Penal Code Article 107 (Brazil); Proclamation No.414/2004, repealed Penal Code Art. 599 (Ethiopia); Law No. 26770, Apr. 7, 1997, art. 2 repealed Penal Code 1991 art. 178 (Peru); Penal Code 2004, removing art. 433 and 434 of the 1926 Penal Code (Turkey).
[145] Presidential Act #14 of 1999 (confirmed by Parliament), published in the Official Gazette, 22 April 1999, p. 2 (Egypt).
[146] Protection of Women (Criminal Laws Amendment) Act, 2006 203(c)(6) (Pakistan).

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