

ARTICLE

TOWARDS A LEGAL REFORM OF RAPE LAWS UNDER INTERNATIONAL HUMAN RIGHTS LAW

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ABSTRACT

This Article studies the history and evolution of rape laws around the world and recommends prospective legal reforms to adequately punish sexual violence. Currently, there is a high rate of impunity in rape and sexual violence trials. This Article analyzes how current laws around the world hinder rape survivors' access to justice, due to cultural beliefs and gender stereotypes inherited from ancient laws that permitted rape. This Article also proposes ways in which international human rights law can serve as a legal tool to reform these deficient laws.

This study proposes two original recommendations. The first recommendation relates to the framework of International Human Rights Law and proposes that the international community create an international instrument that contemplates unifying standards on sexual violence and sets the obligations of the states to effectively prevent, prosecute and punish sexual violence. In particular, this instrument should redefine "consent" and the standards for enacting domestic laws and prosecuting rape and sexual violence. The second recommendation proposes the creation of a new legal presumption under domestic rape laws to credit sexual violence survivors' declarations on consent under specific circumstances.

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INTRODUCTION

Sexual violence is a global issue, as more than one in three women (35%) have suffered physical and/or sexual violence throughout their lives.¹ Among children there is an estimated sexual abuse rate of 20% in girls and 10% in boys worldwide.² Sexual violence disproportionately affects women, and it is perpetuated on the basis of stereotypical gender roles, which permeate all aspects of society.³

Despite the pervasiveness of sexual violence, criminal proceedings often result in impunity.⁴ This Article contends that impunity in sexual violence cases arises, in part, from inadequate criminal laws, which are the result of older laws that regarded women as property and accepted rape. Nowadays, many judicial systems around the world struggle with an inadequate proscription of rape, which reflects patriarchal beliefs deeply rooted in ancient and medieval laws.

This Article aims to address the ineffectiveness of rape laws worldwide, and it aims to address how International Human Rights Law (hereinafter “IHL”)—particularly the Convention on Elimination of All Forms of Discrimination against Women—can offer a solution for prospective reforms. IHL obligates nations to prosecute serious human rights violations, such as rape and sexual violence, and offer effective remedies for such crimes.

Since the lack of justice in sexual violence cases is a consequence of previous legal frameworks and social beliefs, states should undertake legal reforms to remedy impunity in crimes of sexual violence. This Article makes some suggestions for how domestic legislation of countries around the world should use international standards

1. World Health Organization, *Injuries and Violence: The Facts 2014* 11 (2014), https://apps.who.int/iris/bitstream/handle/10665/149798/9789241508018_eng.pdf?sequence=1.

2. *Id.* at 11.

3. *General Recommendation 19: Violence Against Women*, U.N. Committee on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/1992/L1/Add15, ¶ 6, 11 (1992) [hereinafter *General Recommendation 19*].

4. See Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence against Women Survey* (2006), <https://www.ojp.gov/pdffiles1/nij/210346.pdf>. According to this survey, in the United States, only 37% of reported rapes of women resulted in a criminal prosecution, with a 46.2% rate of convictions. This means that approximately 17% of these reported rapes result in convictions.

as a guide for legal reforms, and it also introduces a novel recommendation to presume the veracity of a survivor's testimony in specific situations.

This Article is divided into the following Sections: (I) the legal history of rape, which will examine the evolution of rape laws worldwide to understand current challenges in legislation on sexual violence around the world; (II) International Human Rights standards regarding laws on sexual violence, which will set out the criteria under IHRL for a legal reform to rape laws; (III) current challenges in rape laws worldwide, which will analyze the violation of those standards across the world regions and continents; and finally, (IV) recommendations for legal reforms on sexual violence.

I. THE LEGAL HISTORY OF RAPE

This Section studies the evolution of laws in nations across the globe as both a representation of the cultural visions and beliefs on the crime of rape and the role the law plays in the widespread impunity of the crime. The focus of this Section is on Western legal traditions, examining both Common Law in the U.K. and Civil Law in continental Europe, because many countries around the world have adopted these legal systems as a consequence of colonization. Indeed, European colonization played a major role in expanding medieval rape laws to the Americas, Africa, and Asia. Some rape laws from different non-Western legal traditions are also studied below, specifically from certain Asian, Latin American and Middle Eastern countries.

This Section is divided into four sub-sections: (I) ancient rape laws, beginning with the customary law of bride abduction to the fall of the Roman Empire; (II) medieval and colonial rape laws, mainly in Europe but also in the Eastern Roman Empire and in the early Chinese Empire; (III) modern rape laws; (IV) and the twentieth century and the rape law reforms.

A. ANCIENT RAPE LAWS

This Section focuses on some of the first customary and written laws in the world that addressed—and permitted—rape. Four main elements are found throughout the historical review of rape laws that remain embedded in current legislations and legal practice worldwide. The first element relates to the legal status of women; rape was permitted under many circumstances because women were the legal property of either their father or their husband, or because they served as a means of reproduction in their communities. The second element was the idea of virginity—or 'honor'—as the only societal value that women held, leading to the requirement of chastity to prosecute rape. The third element refers to equating a woman's virginity as the 'honor' of her family, which has justified preposterous historical practices, such as the marginalization of raped women and forced marriage between a survivor and her rapist. Current 'rape-marriage' laws are a product of these practices. Finally, the fourth element was the lack of recognition of male rape, which was a consequence of viewing rape as a crime against the property of men.

A heinous practice that has existed from primitive societies to current times was known as “bride abduction” or “bride capture.” Under the customary laws of the Paleolithic Age’s food gatherers,⁵ “bride stealing or capture” was a form of marriage.⁶ It consisted—and still does—of the abduction of a woman, her subsequent rape, and then the law (usually customary law) prescribed that she was officially married to her rapist.⁷ In England, this way of “acquiring” a woman was accepted until the fifteenth century.⁸ Currently, ethnic groups in rural Kyrgyzstan and other tribes in Central Asia still tolerate this practice, known to them as “*Ala-Kachuu*.”⁹ In 2013, approximately 16.3% of ethnic marriages in Kyrgyzstan were consolidated by bride abduction.¹⁰

Under ancient written laws, rape was first considered a property crime only if it was committed against virgins.¹¹ The most ancient writings that recount the laws and traditions of an antique civilization are the Ebla tablets of Assyria. These cuneiform tablets were written around 2400 to 2300 B.C. and narrate stories of daily life in three kingdoms of Northern Mesopotamia: Ebla in West Syria, Mari in the Middle Euphrates, and Nagar in the Khabur basin.¹² Some of these tablets refer to women as property, as they discuss “the bride price” required for kings to “take wives.”¹³ Since two of the attributes of property are the use and abuse of it, it is very likely that marital rape was not a crime under Ebla Law. The writings on these ancient tablets, which described women as property of their husbands, set the precedent for the annulment of women’s rights.

The first-ever written law barring rape is contained in the Code of the King Hammurabi of Babylonia in 1780 B.C.¹⁴ It prohibited rape as a property crime for the theft of a woman’s virginity pertaining to her husband or fiancée.¹⁵ Like the Ebla Tablets, under Hammurabi’s Law, women were also considered to be the property of men; thus, the rape of a woman by her husband was not prohibited. By comparison, the rape of a woman by her father was only punished with

5. The Paleolithic Age lasted from approximately 2.58 million to 11,700 years ago. See *Paleolithic Period*, ENCYCLOPEDIA BRITANNICA (Dec. 23, 2019), <https://www.britannica.com/event/Paleolithic-Period>.

6. A.S. DIAMOND, *PRIMITIVE LAW PAST AND PRESENT* 163 (Routledge Library, 1st ed. 1971).

7. See Charles Becker, Susan Steiner & Lin Zhao, *Forced Marriage: Models of Ala-kachuu*, ASS’N FOR COMPARATIVE ECONOMIC STUDIES 2 (Dec. 31, 2017), <https://www.aeaweb.org/conference/2018/preliminary/paper/kzeZfbd6>. The authors describe this practice as “non-consensual abduction of women into marriage.” *Id.* at 2.

8. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 17 (1976).

9. See Charles Becker, Susan Steiner & Lin Zhao, *supra* note 7, at 2–3.

10. *Id.* at 3.

11. See BROWNMILLER, *supra* note 8.

12. Lauren Ristvet, “Assyria” in *the Third Millennium BCE*, in *A COMPANION TO ASSYRIA* 1, 36, 44 (Wiley Blackwell, 2017).

13. *Taking a Wife*, in *ANCIENT SYRIAN WRITINGS: PRE-CLASSICAL AND CLASSICAL TEXTS* 1, 96 (2009) (translated by J. Taylor Alalakh).

14. ENCYCLOPEDIA OF RAPE, xiii (Greenwood Press, 2004).

15. CODE OF HAMMURABI, art. 130 (translated by L. W. King), available at <http://avalon.law.yale.edu/ancient/hamframe.asp>.

his exile for the crime of “incest,” not rape.¹⁶ The Hammurabi Code established the death penalty as punishment for the rape of a betrothed virgin.¹⁷ And when a married woman was raped, she was also considered guilty of adultery and was sentenced to death by being thrown into the river along with her assaulter. The husband could pardon his wife if he wished to do so.¹⁸

Around 1650 to 1500 B.C., the Code of the Nesilim, which was the Hittite Law, also treated women as property, referring to “the bride price,”¹⁹ like the Ebla tablets. Surprisingly, this Code used the term “willingly” to determine if punishment was warranted for sexual intercourse between men and women.²⁰ However, willingness was not the only factor used to establish whether punishment was adopted: the place where the rape occurred also defined whether the perpetrator remained unpunished or not. As the Code of the Nesilim explained, “If a man rape a woman in the mountain, it is the man’s wrong, he shall die. But *if he rape her in the house, it is the woman’s fault, the woman shall die*. If the husband find them and then kill them, there is no punishing the husband.”²¹

Under other ancient laws, single or widowed women had no legal protection against rape. For example, the Code of Assura (1075 B.C.) only prohibited the rape of married women.²² If a man raped a married woman, knowing that she was married, he was given the death penalty.²³ Whereas if a man raped a married woman not knowing that she was married, the law provided that he was not to be punished,²⁴ directly permitting rape.

In 621 B.C., the book of Deuteronomy in the Bible only barred rape against virgins. Additionally, raped virgins who were not betrothed were required to marry their rapists, whereas rapists only had to pay fifty shekels to the victims’ fathers.²⁵ Current “rape-marriage” laws seem to originate from this biblical provision. Indeed, this was the first written law that imposed marriage between a rape victim and her rapist.

16. CODE OF HAMMURABI, art. 154.

17. CODE OF HAMMURABI, art. 130. Article 130 stipulates: “130. If a man **violate the wife** (betrothed or child-wife) of another man, who **has never known a man**, and still lives in her father’s house, and sleep with her and be surprised, this man shall be put to death, but the wife is blameless.” (Emphasis added).

18. CODE OF HAMMURABI, art. 129.

19. CODE OF THE NESILIM, arts. 34, 36, *available at* <https://sourcebooks.fordham.edu/ancient/1650nesilim.asp>.

20. CODE OF THE NESILIM, arts. 190–91.

21. CODE OF THE NESILIM, art. 197. *See also* ENCYCLOPEDIA OF RAPE, *supra* note 14, at xiii.

22. *See* CODE OF THE ASSURA, arts. I.12, I.14, *available at* <https://sourcebooks.fordham.edu/ancient/1075assyriancode.asp>.

23. CODE OF THE ASSURA, art. I.12.

24. CODE OF THE ASSURA, art. I.14. The authors of the ENCYCLOPEDIA OF RAPE contend that the Code of the Assura allowed a husband to punish his wife when she was raped. ENCYCLOPEDIA OF RAPE, *supra* note 14, at xiii. However, a comprehensive look at the Code suggests that this is a misinterpretation of article I.14, which prohibits adultery. *See* CODE OF THE ASSURA, art. I.14. This article regulates the crime of adultery giving several hypotheses: if the man did not know that the woman was married or not, and the punishment for the adulterer woman. *Id.* Article I.12 of this Code already established that there should not be punishment against a raped married woman. CODE OF THE ASSURA, art. I.12.

25. *Deuteronomy* 22, 28–29.

On the other hand, if the rape victim was previously engaged, the Old Testament takes into account the location of the rape to decide whether both the victim and her rapist should be put to death. If the rape occurred in the “field,” the woman was blameless.²⁶ However, if the rape happened in the city, the woman was required to “cry out,” otherwise she would receive the same punishment as the offender.²⁷ According to the Bible, the logic behind this disturbing distinction is that if the girl cried out in the field, “there [would be] no one around to save her,” whereas if she did not cry out in the city, she must have desired sexual intercourse with the perpetrator.²⁸ Under these circumstances, marital rape was allowed, as well as rape against single non-virgins or widowed women.

In Ancient Greece, the word “rape” did not exist.²⁹ However, there were other legal terms that alluded to rape, particularly the word “violence,” when used to refer to a woman.³⁰ Although rape was forbidden against both men and women, the legal definition focused on the impact that rape had on the victim, particularly the shame and dishonor it caused.³¹ Rape in Ancient Greece was apparently classified as a civil offense, not as a criminal one, because the penalty was only monetary and the proceedings were regulated by private law.³² In fact, crimes like adultery or incest were considered worse than rape and were severely punished.³³ Also, in Ancient Greece, wartime rape was likely common practice, as “[a]ccording to legend, during the sack of Troy many Trojan women were raped by the victors.”³⁴ Thus, rape in Ancient Greece may have been acceptable in certain circumstances.

As for Ancient Roman rape laws, the very foundation of Rome exalts infamous myths of rape. In the words of scholar Ms. Nghiem L. Nguyen:

In Livy 1.1.8, the priestess Rhea Silva is raped by the god Mars and subsequently gives birth to Romulus, Rome’s founder. This rape seems to be particularly acceptable, and almost ennobled, because the mortal woman is raped by a superior god, and the rape begets Rome’s first king. In all these literary stories of rape, some greater political interest or benefit is always emphasized over the actual sexual violation of the woman. This idea of rape as political benefit will be a recurrent theme in Roman legislation on rape and sexual violence.³⁵

26. Deuteronomy 22, 25–26.

27. Deuteronomy 22, 23–24.

28. Deuteronomy 22, 27.

29. Susan Guettel Cole, *Greek Sanctions against Sexual Assault*, 79 CLASSICAL PHILOLOGY 97, 98 (1984).

30. *Id.*

31. *Id.* at 98–99.

32. *Id.* at 99.

33. *Id.* at 101.

34. Cyril J. Smith, *History of Rape and Rape Laws*, 6 INT’L B.J. 33, 33 (1975).

35. Nghiem L. Nguyen, *Roman Rape: An Overview of Roman Rape Laws from the Republican Period to Justinian’s Reign*, 13 MICH. J. GENDER & L. 75, 83 (2006).

The Roman historian Titus Livius Patavinus (known as “Livy” in English) also recounts the myth of the rape of Sabine women. He narrates that Romulus invited the neighboring tribe of Sabine for a religious festival and, given the absence of women, the Romans killed Sabine men and raped Sabine women.³⁶ This event is believed to be the predecessor of the institution of marriage in Roman law, as Sabine women eventually married their rapists.³⁷ Furthermore, one of the most notorious rapes of Roman times was that of Lucretia, who according to the myth, committed suicide to “absolve herself of all blame.”³⁸

Like Ancient Greece, Nguyen remarks that Roman law did not have a term for “rape,” but the idea of forcible intercourse could be found in the definitions of different legal terms such as adultery, seduction, attempted seduction, abduction, and ravishment.³⁹ However, this did not mean that rape was outlawed. In fact, whether rape was considered a crime depended on the victim’s social status.⁴⁰ As outlined by Ms. Nguyen, different criminal charges that accounted for rape could be brought by a freeborn Roman citizen, but they were mostly intended to preserve the victim’s chastity and honor.⁴¹

Chastity was viewed as a virtue in the legal system because it served the purpose of assuring that the sons of the *paterfamilias* were his legitimate heirs.⁴² Consequently, rape victims would be seen by their family and society as a source of shame and embarrassment.⁴³ As Ms. Nguyen explains, “The requirement of keeping their daughters and wives untainted for their reproductive capacity was so important that some families tried to dispose of rape victims, for they could not be trusted with their primary function of reproduction.”⁴⁴ As such, Nguyen claims that the legal regulations on the sexual behavior of women were aimed not at protecting them from sexual violence, but at preventing issues surrounding the inheritance rights of men.⁴⁵ Thus, there were many acts of sexual violence that were permitted under Roman law. For example, due their social status, rape of foreign born or slave women and prostitutes was not a crime.⁴⁶ Moreover, like in the previously mentioned ancient societies, marital rape was allowed under

36. Livy, *The Rape of the Sabines*, in THE HISTORY OF ROME (29 B.C.), available at https://creativetime.org/programs/archive/2007/sussman/press/roman_myth.pdf; see also History.com, *When Sexual Assault Made History*, HISTORY CHANNEL (Oct. 9, 2018), <https://www.history.com/news/sexual-assault-rome-slavery-columbus-jim-crow>.

37. Nguyen, *supra* note 35, at 82.

38. Livy, *The Rape of Lucretia*, in THE HISTORY OF ROME (29 B.C.), available at <https://sourcebooks.fordham.edu/ancient/livy-rape.asp>.

39. Nguyen, *supra* note 35, at 76.

40. *Id.*

41. *Id.* at 84.

42. *Id.* at 79.

43. *Id.* at 84.

44. *Id.*

45. *Id.* at 79–80.

46. *Id.* at 85.

Roman law, because a woman was the property of her husband, and this included “access to her body.”⁴⁷

Certain elements of Ancient Roman laws are crucial to the analysis of the evolution of current rape laws and legal practice. The still widespread practice of blaming the victim, for example, was a cultural and social effect of rape in ancient Roman society.⁴⁸ Ms. Nguyen sets forth how in the early Republic, the only defense that the alleged rapist had in the private vengeance system was “to claim an honest belief that the victim had consented.”⁴⁹ This form of legal defense placed the burden of proof and the blame of the act onto the victim.

Around the same time, in 200 B.C., the Manu Laws of India conceived of women as property of their father or their husband and even treated women as movable property.⁵⁰ Similar to Ancient Roman laws and the Hammurabi Code, Manu Laws proscribed rape as a violation against the husband’s right to his wife’s body. If the victim did not have a husband, however, rape was a crime of social dimensions, because the woman no longer preserved her chastity for a prospective husband.⁵¹ Thus, under Manu Laws, a rape victim was to be kept inside a house “smeared (with ashes), lying on a low couch, and receiving a bare maintenance only,”⁵² because she had become blemished. If she was raped by someone of her same caste, she had to comply with specific penalties, and if she was raped by someone of a lower caste, she was to be abandoned.⁵³

With the complex and tangled history of rape spanning thousands of years, there are three primary conclusions that can be gleaned from Ancient Rape Laws that will guide the analysis of current laws proscribing sexual violence. The first conclusion is that women were considered the property of men and their bodies were not their own, but merely vessels for reproduction which were owned by their husbands, fathers, or society. The view of women as objects has a direct impact in current legal challenges, such as the existing marital exemptions to prosecute rape in some countries.

The second conclusion is that chastity was considered the true value of women. This value of chastity emerged from the need of ancient societies to preserve their caste systems, insofar as they “needed” to ensure that children had a certain father who gave his social status to his heirs.⁵⁴ This system conceived of women as a means of reproduction for the human species, not as human beings themselves. Tragically, chastity as the foremost virtue of women has remained embedded in the social conscience until the present, and it persists as one of the main “rape

47. *Id.* at 77, 85.

48. *Id.* at 87.

49. *Id.*

50. Kanad Sinha, *Be it Manu, be it Macaulay: Indian Law and the ‘Problem’ of the Female Body*, 5 J. INDIAN L. & SOC’Y 61, 65 (2007).

51. *Id.* at 74.

52. *Id.* (citing Brhaspati, in *THE MINOR LAW BOOKS* at XXIII.14 (Julius Jolly ed., 1969)).

53. *Id.* at 74–75.

54. See Nguyen, *supra* note 35, at 79.

myths” in trials. Until very recently, chastity remained a legal requirement for prosecuting rape and sexual violence in many countries. The sexual history or “promiscuity” of women is often questioned during rape trials, as if chastity were still a legal requirement to punish rape.

Lastly, the third conclusion relates to male rape. Except in Ancient Greece, ancient written laws, codes, and statutes did not proscribe male rape. Indeed, this conduct was not mentioned in ancient codes or statutes. This is likely due to the fact that rape was viewed as a crime against the property of men, and men were not considered anyone else’s property. As Section III illustrates, because of the lack of legal provisions protecting men, male victims do not have an effective remedy for the crime of rape. In China, for example, male rape was not criminalized until as recently as 2015.⁵⁵ Therefore, the lack of protection for male rape survivors has reverberating effects on their current access to justice.

In summary, ancient laws did not contemplate the crime of rape as sexual intercourse without consent. Rape was merely a property crime, akin to theft, and was not aimed at protecting women or men from sexual violence. Moreover, it reaffirmed that women were not subjects with rights, but objects of society. Ancient laws permitted rape, such as rape against non-virgins or single women, marital rape, and male rape.

B. MEDIEVAL AND COLONIAL RAPE LAWS

This section focuses on European medieval laws regarding sexual violence and colonial rape laws in Latin America, with some references to Chinese medieval laws. After the Middle Ages, European colonization disseminated medieval rape laws to the European colonies located throughout the world. Indeed, the Americas, the Ottoman Empire, the Asian colonies of the British Empire, and eventually Africa, would adopt medieval European rape laws.

medieval rape laws had a slow but significant evolution from ancient rapes laws, as they started to punish many more forms of sexual violence. However, medieval rape laws continued to protect the theft of a woman’s virginity. The Middle Ages began with the fall of the Western Roman Empire around 500 A.C.⁵⁶ After this event, Emperor Justinian enacted several reforms that improved the legal standards of sexual violence from those of the Western Roman rape laws, in which rape was not a crime per se. Specifically, he redefined the crime of *raptus* to include legal protection for women regardless of their social status, which meant that the rape of slaves and bride abduction were prohibited by law.⁵⁷ Women were no longer blamed for their illicit abduction and could even obtain compensation for the damage depending on their status.⁵⁸ Justinian also reiterated

55. Alyssa Abkowitz & Lilian Lin, *Male Rape Is Now a Crime in China After Criminal Law Revision*, WALL ST. J. (Nov 4, 2015, 2:42 PM), <https://blogs.wsj.com/chinarealtime/2015/11/04/male-rape-is-now-a-crime-in-china-after-criminal-law-revision/>.

56. *Middle Ages*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Middle-Ages> (last visited Apr. 17, 2021).

57. Nguyen, *supra* note 35, at 111.

58. *Id.*

Constantine laws that prohibited marrying a ravisher and established the penalty of exile to the parents that allowed or persuaded a rape victim to marry her aggressor.⁵⁹

Unfortunately, after the fall of Western Roman Empire in 476 A.C., Western Europe became fragmented. Despite the legislative reforms adopted earlier by Constantine, Feudalist laws rolled back to “rape-marriage” laws. In England, before the Norman Conquest of 1066, the only bar against rape was that of a high-born, propertied virgin living under the protection of a powerful Feudal Lord.⁶⁰ Although in the ninth century the earliest Common Law statutes established a sixty shillings compensation for the rape of a “woman belonging to the commons,” which could increase or decrease depending on the virginity and status of the woman.⁶¹ Meanwhile, rape among slaves was punished with castration.⁶²

Towards the end of the Middle Ages, England underwent a series of reforms that expanded what constituted the crime of rape. In 1275, King Eduard I enacted a statute prohibiting the practice of bride abduction and sexual violence against women (ravishment of a woman against their will).⁶³ At first, the penalty against these two offenses was a fine, and they were classified as a misdemeanor.⁶⁴ Rape was prohibited against virgins and non-virgins, although the penalty varied depending on the chastity of the victim.⁶⁵ It is worth noting that this criminalization did not encompass marital rape or male rape. And most indictments during this time were for rapes against wives and chaste daughters.⁶⁶ The rape of single women was rarely prosecuted, since the proceedings usually focused on the relationship of women to men.⁶⁷

In continental Europe, the legal system was based on customary law, which was transmitted orally and varied in each region.⁶⁸ Generally, under feudal laws, rape was only prohibited when a woman was proven to be chaste and when she had a high social status.⁶⁹ Marital rape was not outlawed, since a woman was also

59. *Id.*

60. BROWNMILLER, *supra* note 8, at 24.

61. Smith, *supra* note 34, at 38.

62. *Id.* at 191.

63. Emma Hawkes, *Preliminary Notes on Consent in the 1382 Rape and Ravishment Laws of Richard II*, 11 LEGAL HIST. 117, 118 (2007).

64. *Id.*

65. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Law*, 70 GEO. WASH. L. REV. 51, 63 (2002).

66. Hawkes, *supra* note 63, at 121.

67. *See id.* at 128.

68. *See* Pauline Guena, *Actuel Moyen Âge—Le viol au temps de saint Louis [Current Middle Age—Rape in Time of Saint Louis]*, NONFICTION (Sept. 28, 2017), <https://www.nonfiction.fr/article-9058-actuel-moyen-age-le-viol-au-temps-de-saint-louis.htm>.

69. *See* Iñaki Bazán, *Quelques Remarques sur les Victimes du Viol au Moyen Âge et au Début de l'Époque Moderne 3 [Some Remarks on Rape Victims during the Middle Ages and at the Beginning of Modern Era]*, in LES VICTIMES, DES OUBLIÉES DE L'HISTOIRE 1, 3–4 (Presses Universitaires de Rennes, 2000), available at <https://books.openedition.org/pur/18641>.

regarded as the property of her husband, and she was subjected to her family's marital arrangements.⁷⁰ The complaint for rape generally had to be brought by either a woman's father or her husband.⁷¹

In medieval times, virginity was associated with honesty.⁷² If a woman had an active sexual record, this obfuscated any claim that she might have had, because her sexual history made her less of an "honest" woman, corroding her credibility.⁷³ Vestiges of this archaic trend are still present in our current legal culture.

Pursuant to the *Siete Partidas* (Seven-Part Code) of King Alfonso X, it was a crime to "lie" with nuns, virgins, and widows, who live "honestly" in their house, by "flattering, deceit or force."⁷⁴ The Code also criminalized the bride abduction of virgins, because it caused "a major dishonor to the relatives of the forced woman, and moreover, these [abductions] constitute[d] a major audacity against the [Feudal Lord's] real estate . . ."⁷⁵ Thus, women were not only the property of their fathers or husbands but also of their Feudal Lords. This provision particularly denotes the permission of rape of non-virgins, or non-"honest" women, and legal rape by the Feudal Lord.⁷⁶ Indeed, in the Middle Ages the so-called *droit de seigneur* or *derecho de pernada* was commonly exercised, whereby a Feudal Lord could force a newlywed woman to "lie" with him on her wedding night.⁷⁷

Permissible rape was therefore carried out either by the Feudal Lord against his servants or by anyone against a non-virgin. Like in ancient times, the feudal society and laws regarded chastity as the primary virtue of women. Thus, there were even explicit laws, particularly the *fueros* (group of laws pertaining to each village) that explicitly permitted sexual violence against prostitutes.⁷⁸ There were very rare exceptions of some *fueros* that established a small monetary compensation for prostitutes, and in the Toledo village, the punishment for raping a "corrupted woman" was the death penalty.⁷⁹

As for colonial rape laws in other parts of world, European medieval laws forged the concept of "honor" in colonial Latin America, which played a major role in the conception of gender and in the social acceptance or condemnation of sexual violence. The honor of men was the reflection of their courage and their dominance over "their" women. On the other hand, for women, honor represented

70. *See id.* at 4.

71. *See id.* at 3.

72. *See id.* The word "honnêteté" can be translated as both honesty and integrity.

73. *Id.* at 3–6.

74. LAS SIETE PARTIDAS DE ALFONSO X EL SABIO, Partida VII, Title 19 [hereinafter SIETE PARTIDAS], available at <http://ficus.pntic.mec.es/jals0026/documentos/textos/7partidas.pdf>. Title 20, Law 3 of this Partida contemplates the death penalty for these acts. (Unofficially translated from Spanish).

75. SIETE PARTIDAS, Partida VII, Title 20, Law 1 (unofficial translation).

76. *See Bazán, supra* note 69, at 6 (working as a servant implied the acceptance of the master's sexual insinuations).

77. Norberto M. Fredotovich, *Historia del Abordaje de los Problemas Sexuales [History of the Approach to Sexual Issues]*, 70 REV. ARG. DE UROL. 80, 82 (2005).

78. Bazán, *supra* note 69, at 5.

79. *Id.*

shame and sexual restraint.⁸⁰ The failure of a man to react violently for an attack against his honor was construed as an inability to protect his female relatives, thus, signifying his permission for their rape.⁸¹

Rape was a legal offense to a woman's husband, father, or master, but not to the woman herself.⁸² In judicial proceedings, the defendants of rape would accuse the victim of being "a woman of the world," and, if she was single, the defendants would say that she called the attention onto herself.⁸³ As Professor Johnson explains, when defendants argued that a woman called attention to herself or was promiscuous, "Colonial courts found such defenses plausible, for they viewed complaints of sexual assault with suspicion. Women who accused men of assault, judges reasoned, had probably provoked them. Justice represented . . . "more a male than a 'moral' order."⁸⁴ Furthermore, litigation of such cases often brought dishonor to the family of the victim.⁸⁵ Rape survivors are still viewed as the cause of their assault in today's world or are regarded as "dishonest" in their accusations. Evidently, medieval European laws permeated the legal system and culture of the American colonies, since a woman's honesty and a woman's chastity were often linked.

Around the same time, in the early Chinese Empire, female chastity was also considered the foremost virtue of a woman, and it was the essential pillar of relations between men and women.⁸⁶ Although during the Ming Dynasty, which spanned from 1368 to 1644 A.D., China enacted criminal laws that prohibited rape.⁸⁷ However, with the issuance of the Qing Code in 1686, sexual offenses against women required a higher burden of proof.⁸⁸ Under the Qing Code,

For the crime of rape to be irrefutably established, the victim must provide evidence that she had struggled against her assailant throughout the entire ordeal. Such evidence must include: (1) witnesses, either eyewitnesses or people who had heard the victim's cry for help; (2) bruises and lacerations on her body; and (3) torn clothing. Moreover, when initially violence had been used, but subsequently the woman had submitted "voluntarily" to the act, the case was not

80. Geoffrey Spurling, *Honor, Sexuality, and the Colonial Church*, in *FACES OF HONOR: SEX, SHAME, AND VIOLENCE IN COLONIAL LATIN AMERICA* 44, 45 (Univ. of N.M. Press, 1998).

81. Lyman L. Johnson, *Dangerous Words, Provocative Gestures, and Violent Acts*, in *FACES OF HONOR: SEX, SHAME, AND VIOLENCE IN COLONIAL LATIN AMERICA* 105, 130–31 (Univ. of N.M. Press, 1998).

82. See Richard Boyer, *Honor among Plebeians*, in *FACES OF HONOR: SEX, SHAME, AND VIOLENCE IN COLONIAL LATIN AMERICA* 152, 152 (Univ. of N.M. Press, 1998).

83. *Id.*

84. *Id.*

85. *Id.*

86. Marietta Sze-chie Fa, *Rape Myths in American and Chinese Laws and Legal Systems: Do Tradition and Culture Make the Difference?*, 4 *Md. SERIES IN CONTEMP. ASIAN STUD.* 1, 65 (2007).

87. Vivien W. Ng, *Ideology and Sexuality: Rape Laws in Qing China*, 46 *J. ASIAN STUD.* 57, 57–58 (1987).

88. *Id.* at 58.

considered rape, but one of “illicit intercourse by mutual consent,” in which case the woman would be subject to punishment. Additionally, the modifier stipulated that, “when a man, having witnessed an illicit affair, proceeded to force himself on the woman, the incident could not be regarded as rape, because the woman was already a fornicator.”⁸⁹

Some believe that the reasons behind this provision relate to the high number of cases where the difficulty of proving rape resulted in acquittals regarded as “false accusations.”⁹⁰ The burden of proof imposed on rape survivors in Qing China seems unfeasible for many rape cases, especially those in which the coercion is not physical, such as when a rapist threatens the victim but there is no use of force. This kind of law creates two consequences under current laws: on the one hand, it imposes a heavy burden of proof on the survivor; on the other hand, it disregards scenarios where physical force is not used. Even though international legal standards currently prohibit the imposition of evidentiary requirements to prosecute and punish rape, the laws of many countries still require specific proof to punish sexual violence, similar to the Qing Code.

The rulers of the Qing and Han dynasties redirected their attention to female chastity as an important component of social hierarchy and stability.⁹¹ The conceptions of chastity were very similar to those of the European laws regarding “honesty,” which established an additional burden of proof on the victim.

As this Section shows, medieval and colonial rape laws did not represent a major change with respect to ancient written laws. Although some progress was made to punish sexual violence against women of all castes, no criminalization of marital and male rape was enacted during this time. Additionally, except for the Eastern Roman Empire, rape laws in Europe, Latin America, and China continued to emphasize the chastity of rape survivors, question the honesty of non-virgins, and place an additional burden of proof on the victim.

These patriarchal beliefs and gender stereotypes regarding how women ought to behave continue to have a direct impact on the present-day prosecution of sexual violence, as survivors around the world continue to be questioned about their sexual behavior. This issue will be addressed further in the study of “shield laws” as a legal response to protect rape survivors from a secondary victimization during criminal trials.

C. MODERN RAPE LAWS

This Section follows the evolution of rape laws during the Modern Era in Europe, the United States, and the former European colonies in the Arab world. During this period, sexual violence became more widely prohibited, and although

89. *Id.*

90. *Id.*

91. Sze-chie Fa, *supra* note 86, at 66.

chastity was no longer a legal requirement to prosecute rape, it remained proof of the victim's honesty when accusing an offender of sexual violence.

In 1861, England's Offense Against the Persons Act classified rape as a felony, punishable by death penalty.⁹² The jurist Sir Matthew Hale significantly changed rape law in modern England in the seventeenth century, defining it as "[t]he carnal knowledge of any woman above the age of ten years against her will and of a woman-child under the age of ten years with or against her will."⁹³ English laws of this time not only emphasized the prior sexual experience of the woman, but also the clear physical proof of her violation and prompt complaint of the alleged rape.⁹⁴ Otherwise, a false charge was presumed.⁹⁵

Following England's Common Law tradition, the United States (hereinafter "U.S.") colonies adopted the definition of rape from English law.⁹⁶ As scholar Michelle Anderson explains, "Under colonial law, rape would only be legally redressed if the complainant had modeled herself on an ideal of sexual virtue and feminine modesty."⁹⁷ Furthermore, as in medieval Europe, a charge of rape had to be brought by a woman's father or husband; otherwise, she would be considered unworthy of legal protection for being too "bold" or independent.⁹⁸ Independent or unchaste women could not win a rape case.⁹⁹ Also, race was a crucial factor in determining the "purity" of a woman. Black women, Native Americans, and other minorities were not considered "pure" enough to be protected from rape.¹⁰⁰ Even after American independence from England, the case law of the nineteenth century established that the aim of criminalizing rape was "to protect white female chastity . . . [and] to protect men from false accusers."¹⁰¹

For its part, France adopted a more progressive view of rape regarding the chastity requirement. With the issuance of the 1810 Napoleonic Code, the country criminalized the conduct: "[w]ho shall commit the crime of rape, or shall be guilty of any other attack upon the modesty, consummated or attempted, with violence, against an individual of either sex, shall be punished with solitary imprisonment."¹⁰² The shift of the Napoleonic Code is, perhaps, one of the biggest landmarks in legislation on rape, because the crime depicted in the Code resembles the present day legal conception of rape.

92. Smith, *supra* note 34, at 39.

93. Elizabeth Kolsky, 'The Body Evidencing the Crime': Rape on Trial in Colonial India, 1860–1947, 22 GENDER & HIST. 109, 110–11 (2010).

94. *Id.* at 111.

95. *Id.*

96. Anderson, *supra* note 65, at 64.

97. *Id.*

98. *Id.*

99. *Id.* at 67.

100. *Id.* at 68–69.

101. *Id.* at 69.

102. NAPOLEONIC PENAL CODE, BOOK THE THIRD OF CRIMES AND DELICTS AND OF THEIR PUNISHMENT, art. 331 (1810), available at https://www.napoleon-series.org/research/government/france/penalcode/c_penalcode3b.html [hereinafter Napoleonic Penal Code].

Nonetheless, the Napoleonic Code only criminalized the practice of bride abduction against minors. Article 357 even condoned such practice with a minor if the kidnapper married the “girl,” and her legal guardians did not ask the marriage to be declared void.¹⁰³ This provision has been widely spread through colonization around the world. In fact, some scholars argue that article 357 was the source of the current “rape-marriage” laws in Middle Eastern countries after French colonization.¹⁰⁴

However, other scholars are uncertain about the origins of rape-marriage laws in the Middle East. Indeed, the language of the latest Ottoman Penal Code included the word “rape” in the definition of bride abduction, whereas the Napoleonic Code did not.¹⁰⁵ Nevertheless, “[g]iven the common European heritage of Latin American countries, and influence upon their legal systems, the widespread existence of rape-marriage laws seems to hint at a common historical origin.”¹⁰⁶ Indeed, a similar provision was contained in the civil and criminal codes of Argentina, Bolivia, Brazil, Costa Rica, Guatemala, Nicaragua, Panama, Peru, Uruguay, and Venezuela.¹⁰⁷

A common characteristic that seems to be a feature of the Modern Era was the mistrust of the claimant’s accusation and the requirement of specific evidence, similar to the medieval laws in Ancient Europe and the Qing Code in China. In the eighteenth century, Islamic Law or *Shari’a*, for instance, required four eye-witnesses to prosecute rape or any form of illicit sex.¹⁰⁸ In the sixteenth century the Ottoman Empire’s law quickly forbade the practice of bride abduction of both men and women with a penalty of castration.¹⁰⁹ In general, the Ottoman criminal system began harshly penalizing rape, including male rape, and other sexual crimes during the modernization period in the sixteenth and eighteenth centuries.¹¹⁰

Even though the Ottoman Empire previously punished rape in all forms, Lebanon adopted the Napoleonic Code provision of the current “rape-marriage” laws in its 1911 penal code.¹¹¹ The United Kingdom also adopted the Ottoman “rape-marriage” provision in the penal codes of its Middle Eastern colonies after World War I, such as the British-drafted 1918 Baghdad Penal Code.¹¹² This legal

103. *Id.* art. 357.

104. Hibaaq Osman, *Laws that Allow Rapists to Marry Their Victims Come from Colonialism, not Islam*, INDEPENDENT (Dec. 29, 2017, 7:14 AM), <https://www.independent.co.uk/voices/rape-conviction-laws-marry-rapist-jordan-egypt-morocco-tunisia-came-from-french-colonial-times-a7872556.html>.

105. *The Middle East’s “Rape-Marriage” Laws*, SELF SCHOLAR (July 18, 2012), <https://selfscholar.wordpress.com/2012/07/18/the-middle-east-s-rape-marriage-laws/>.

106. *Id.*

107. *Id.*

108. Cem Doğan, *Rape Crime and Ottoman Punitive Discourses in the Age of Modernization (1750–1918)*, 5 J. TURK & ISLAM WORLD SOC. STUD. 313, 320 (2015).

109. *Id.* at 324.

110. *Id.* at 325.

111. *The Middle East’s “Rape-Marriage” Laws*, *supra* note 105.

112. *Id.*

development through colonization remains an issue in several Middle Eastern countries' rape laws and in the current practices of bride abduction in countries across the world. Notably, despite the shift in the Napoleonic Code from rape as a crime against property to a crime against modesty, it still lacked gender perspective, as the element of consent is absent from the legal definition.

D. THE TWENTIETH CENTURY AND THE RAPE LAW REFORMS

The following Section highlights the progressive evolution of rape laws through legal reforms, which improved the criminalization of sexual violence in the twentieth and twenty-first centuries. However, the pathway to reforms has not been consistent throughout the world. This Section acknowledges that the U.S. and the U.K. are two examples of countries that have modified their legislation to adequately prosecute rape cases. In comparison, continental Europe, Latin America, and the rest of the world have been slow to push for legal reforms to achieve the punishment of all forms of sexual violence throughout the twentieth and twenty-first centuries. In many countries of the world, the pathway to reform rape laws is still ongoing. This Section focuses on the legal reforms undertaken in the U.S. and the U.K., and it studies the slow progress made in continental Europe and Latin America on the elimination of the chastity requirement in the prosecution of rape and the criminalization of marital rape and male rape.

The twentieth century began with a promising feminist movement, advocating for women's suffrage. Eventually, the second-wave feminist movement in the mid-1960s and 1970s would obtain legal reforms in a variety of issues regarding the status of women and their societal gender roles, such as the law's treatment of sexual violence.¹¹³ At last, some countries were beginning to scrutinize rape laws.

The U.S. is a country emblematic of rape law reforms because feminist scholars conscientiously studied and criticized the social and legal conceptions of rape and advocated for "shield laws."¹¹⁴ A "feminist classic" and widely read book on rape was Susan Brownmiller's *Against Our Will*, published in 1975.¹¹⁵ While this book is widely considered to have educated the public on the widespread acceptance of rape across numerous cultures, it primarily called the public's attention to the issue of sexual violence in the U.S.

Under traditional U.S. common law, rape was defined as "the carnal knowledge of a woman by a man not her husband, by force and without consent."¹¹⁶ This definition excluded male rape, marital or inter-partner rape, and coercion

113. See SECOND WAVE FEMINISM, in THE SAGE ENCYCLOPEDIA OF COMMUNICATION RESEARCH METHODS 1579 (SAGE Publications, 2017).

114. Anderson, *supra* note 65, at 80.

115. BROWNMILLER, *supra* note 8.

116. Donald Dripps, *Rape, Law and American Society*, in RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 224 (Routledge Taylor & Francis Group, Glass House Book, Clare McGlynn & Vanessa E. Munro eds., 2010).

other than physical or other kinds of forced sexual activities.¹¹⁷ Furthermore, from 1900 to 1975, the case law in every state allowed defendants in rape trials to introduce evidence regarding the unchaste conduct or the unchaste reputation of the victim.¹¹⁸

Despite the fact that lack of chastity was not a legal exemption or formal defense per se, it was used to raise two issues in trial: the victim's credibility and her consent.¹¹⁹ An unchaste woman was thought to have broken the mores of society by defiling her virginity, and thus she could also break social rules by lying about being raped.¹²⁰ Also, if the complainant had prior sexual experience, the courts would elaborate that she was more likely to have consented to sexual intercourse with the defendant.¹²¹ This rationale is a direct consequence of the former link between chastity and honesty in medieval and colonial laws.

The feminist movement advocated for the elimination of the unnamed chastity requirement in rape laws. Legislatures began to impose rape shield laws to restrict judges from admitting evidence regarding the private sexual lives of complainants. "By the early 1980s, almost every jurisdiction in [the U.S.] had passed some form of rape shield law."¹²² Currently, these rape shield laws vary from each state, some are restrictive while others permit a trial judge to admit evidence that they consider relevant to the defendant's case.¹²³ The U.S. Congress eventually enacted Federal Rule of Evidence 412, which prohibits the use of evidence of the victim's sexual behavior or their predisposition, unless it is directly relevant for the defense.¹²⁴

Additionally, during the 1970s and 1980s two other issues became the subject of rape law reforms: the corroboration and resistance requirements, as well as the inclusion of gender-neutral provisions of sexual assault, i.e., male rape.¹²⁵ Some jurisdictions began to substitute the legal category of rape for sexual assault to include homosexual rape¹²⁶ and other forms of violence such as anal and forced oral sex.¹²⁷

Despite this progress, a more controversial reform issue was marital rape. As early as the 1850s, feminist movements were advocating for a woman's right to self-ownership or self-possession, which included the right to refuse and not be forced into marital sex.¹²⁸ A well-known case during the struggle to abolish the

117. LARRY J. SIEGEL, *CRIMINOLOGY: THEORIES, PATTERNS AND TYPOLOGIES* 306 (10th ed. 1989).

118. Anderson, *supra* note 65, at 69.

119. *Id.* at 74–75.

120. *Id.* at 75.

121. *Id.*

122. *Id.* at 80.

123. SIEGEL, *supra* note 117, at 311.

124. FED. R. EVID. 412.

125. SIEGEL, *supra* note 117, at 311.

126. *Id.*

127. Jennifer A. Bennice & Patricia A. Resick, *Marital Rape: History, Research, and Practice*, 4 *TRAUMA, VIOLENCE, & ABUSE* 228, 230 (2003).

128. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 *CALIF. L. REV.* 1373, 1416–17 (2000).

marital rape exemption was that of *People v. Liberta*, in which the New York Court of Appeals found that the marital exemption for rape was unconstitutional.¹²⁹ The court stated that the original purpose of proscribing rape was to protect the chastity of women and their property value to their husbands and fathers.¹³⁰ This was also true according to the English medieval law from which the U.S. common law was adopted.¹³¹ Finally, on “July 5, 1993, marital rape became a crime in at least one section of the sexual offense codes in all [fifty] states.”¹³²

England had a similar path towards its legislative reforms. The second-wave feminist movement had raised concerns about English Rape Laws after the House of Lord’s judgement in *DPP v. Morgan*,¹³³ which stated that if a man had an honest belief, even if it was unreasonable, that a woman had consented to intercourse, then he was to be acquitted.¹³⁴ In spite of feminists’ protests, this remained the law for the next twenty-five years.¹³⁵ In response to the national outrage caused by the *Morgan* case, the English government set up “an advisory committee on the law of rape, which resulted in the Sexual Offences (Amendment) Act 1976.”¹³⁶ This was a rape shield law that eventually proved to be ineffective, as judges increasingly granted defendants greater faculties to introduce evidence of the sexual history of rape survivors.¹³⁷ On the other hand, in a decision in 1992, the House of Lords recognized the existence and prohibition of marital rape,¹³⁸ and, in 1994, the English Parliament enacted a law that criminalized male rape.¹³⁹

Unfortunately, continental Europe did not advance rape law reforms to the same extent as the U.S. and the U.K. in the twentieth century. Nonetheless, all European countries have repealed their “rape-marriage” laws and similar provisions that attenuated the penalty for rape. However, some European nations have only done so as recently Denmark in 2013, Bulgaria in 2015, and Greece in 2018.¹⁴⁰

For its part, Latin America encountered a powerful feminist movement during the 1980s that advocated for legal reforms regarding all forms of violence against

129. *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984).

130. *See id.* at 576.

131. *See id.* at 572.

132. Bennice & Resick, *supra* note 127, at 231.

133. *DPP v. Morgan* [1975] 2 WLR 913.

134. *Id.*; Clare McGlynn, *Feminist Activism and Rape Law Reform in England and Wales*, in *RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 139, 139 (Routledge Taylor & Francis Group, Glass House Book, Clare McGlynn & Vanessa E. Munro eds., 2010).

135. McGlynn, *supra* note 134, at 140.

136. *Id.* at 139–140.

137. *Id.* at 140.

138. *Id.*

139. *Id.*

140. Amnesty Int’l, *Right to Be Free from Rape: Overview of Legislation and State of Play in Europe and International Human Rights Standards*, AI Index EUR 01/9452/2018 1, 13 (Nov. 24, 2018), <https://www.amnesty.org/download/Documents/EUR0194522018ENGLISH.pdf>.

women.¹⁴¹ The marital rape exemption and rape-marriage provisions had been largely repealed in Latin America by 2012.¹⁴² Nonetheless, many Latin American countries, similar to European countries, criminalize violent rape instead of using a consent-based approach, as discussed in the following Sections. In Asia, China outlawed male rape as late as 2015.¹⁴³

The legal reforms reviewed in this Section illustrate that framing rape and sexual violence from the victim's perspective was a struggle that challenged the patriarchal roles and gender stereotypes embedded in Western cultures from the times of Hammurabi. Unfortunately, as the next sections highlight, despite the reforms of rape laws, the views of ancient and medieval laws remained enshrined in the legislation of many countries around the world and in the so-called "rape myths" that have permeated legal practice. Worldwide, rape law reforms have taken diverse paths, and some reforms are still to come. The following sections will analyze some of the most significant cases, where the law has not adapted to international standards.

II. INTERNATIONAL HUMAN RIGHTS STANDARDS ON LAWS CRIMINALIZING SEXUAL VIOLENCE AND RAPE

This Section compiles and analyzes international human rights standards on sexual violence, particularly standards regarding the criminalization of rape. However, international standards are fragmented regarding the criminalization of sexual violence because they developed incrementally as the issue has been raised through case law and a greater social awareness for gender-based violence. Thus, this Section studies standards established by the UN, and it studies the regional systems of human rights on sexual violence. In fact, regional systems have adopted binding international instruments on gender-based violence in the Americas, Africa, and Europe. Some systems, like the European system, have even consolidated specific standards regarding the definition of rape in domestic

141. Montserrat Sagot, *Los Límites de las Reformas: Violencia Contra las Mujeres y Políticas Públicas en América Latina [The Limits of Reform: Violence Against Women and Public Policy in Latin America]*, 120 REVISTA DE CIENCIAS SOCIALES DE COSTA RICA 35, 37–38 (2008).

142. See Ana Liz Chibán, *Violencia de Género y Reformas Penales en América Latina. La Regulación de la Acción Penal en los Delitos Sexuales [Gender-based Violence and Criminal Reforms in Latin America. The Regulation of Criminal Proceedings in Sexual Crimes]* (2013) (Tesis, Facultad de derecho, Univ. San Andrés), at 41, available at <http://repositorio.udesa.edu.ar/jspui/bitstream/10908/2467/1/%5BP%5D%5BW%5D%20T.%20AB.%20CHIBAN%2C%20ANA.pdf>. For example, Colombia repealed these laws in 1997, Chile in 1999, Peru in 1999, Brazil in 2005, Uruguay in 2005, Costa Rica in 2007, Venezuela in 2007, and Argentina in 2012. *Id.* Although the author contends that the marriage-rape provision of the Penal Code is still in force in Venezuela, the country's 2007 Law No. 38.668 explicitly prohibits marital rape, and thus it implicitly repealed marital exemptions and marriage-rape provisions. See article 15.7 of the *Ley Orgánica sobre el Derecho de las Mujeres a una Vida Libre de Violencia [Organic Law on Women's Right to a Life Free from Violence]*, published by the United Nations Population Fund, available at https://venezuela.unfpa.org/sites/default/files/pub-pdf/Ley_mujer%20%281%29_0.pdf.

143. Abkowitz, *supra* note 55.

legislations.¹⁴⁴ International standards can serve as criteria to reform rape laws around the world in order to provide survivors with an effective remedy against rape and sexual violence. This Section aims to set out the applicable law regarding the enactment and prosecution of sexual violence in domestic legislations worldwide.

First, this Section explains the historical development of international law addressing gender-based violence and compiles international legal standards on sexual violence and rape laws in three main areas: A) the consent-based approach to the legal definition of rape; B) the prohibition of discriminatory laws that allow rape; and C) the prohibition of evidentiary requirements to punish rape.

A. THE HISTORICAL DEVELOPMENT OF INTERNATIONAL LAW ADDRESSING GENDER-BASED VIOLENCE

The only universal treaty on women's rights is the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") of 1979.¹⁴⁵ The CEDAW has been ratified by 189 out of 207 countries.¹⁴⁶ Unfortunately, the CEDAW fails to address the issue of violence against women.¹⁴⁷ To remedy this omission, the CEDAW Committee asserted that gender-based violence is a form of discrimination against women, which is prohibited by the Convention.¹⁴⁸ Under this interpretation, states that ratified the CEDAW have the obligation to eliminate violence against women as a form of gender discrimination. In 1985, the U.N. recognized that:

Violence against women exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, sexually abused and raped. Such violence is a major obstacle to the achievement of peace and the other objectives of the Decade and should be given special attention. Women victims of violence should be given particular attention and comprehensive assistance. To this end, legal measures should be formulated to prevent violence and to assist women victims.¹⁴⁹

The U.N. then set out a series of soft-law instruments and mechanisms to address the issue of violence against women. In 1993, the Vienna Declaration

144. See Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, art. 36, May 11, 2011, C.E.T.S. 210 [hereinafter Istanbul Convention].

145. Convention on the Elimination of All Forms of Discrimination against Women, December 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

146. Office of the High Commissioner on Human Rights, *Status of Ratification Interactive Dashboard: Convention on the Elimination of All Forms of Discrimination against Women* (Feb. 9, 2021), <http://indicators.ohchr.org>.

147. Indeed, there is no mention of violence against women in the Convention, as it focuses on achieving gender equality and eradicating gender discrimination. See CEDAW, *supra* note 146.

148. *General Recommendation 19*, *supra* note 3, ¶ 1, 6.

149. World Conference on Human Rights, *Report of World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development And Peace*, ¶ 258, U.N. Doc. A/CONF.116/28/Rev.1 (July 15–26, 1985).

and Program of Action stressed the importance of working to eliminate violence against women in public and private life.¹⁵⁰ The General Assembly adopted the Declaration on the Elimination of Violence Against Women (“DEVAW”) in December 1993.¹⁵¹ The DEVAW defined violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”¹⁵² In March 1994, the U.N. Human Rights Commission created the mandate of the Special Rapporteur on Violence Against Women, its causes and its consequences.¹⁵³ In 1995, the Fourth World Conference on Women of Beijing focused on the issue of violence against women and adopted a program that, among other goals, endeavored to prevent and eliminate all forms of violence against women.¹⁵⁴

This DEVAW definition of violence against women encompasses all forms of sexual violence, including rape, marital rape, sexual abuse, and sexual harassment.¹⁵⁵ Under the DEVAW and the CEDAW, nations should adopt legal and other measures to prevent, criminalize, investigate, prosecute, and punish all acts of violence against women.¹⁵⁶ Corresponding to this obligation, survivors of sexual violence—and other forms of violence against women—have the right to an effective judicial remedy,¹⁵⁷ i.e., the right to non-discriminatory access to criminal justice.¹⁵⁸

The definition of violence against women and the corresponding prosecution obligation were adopted by different regional human rights treaties on violence against women. The 1994 Inter-American Convention on the Prevention,

150. World Conference on Human Rights, *Vienna Declaration and Program of Action*, ¶ 38, U.N. Doc. A/CONF.151/23 (June 25, 1993).

151. G.A. Res. 48/104, annex, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993).

152. *Id.* art. 1.

153. Human Rights Comm’n Res. 1994/45, U.N. Doc. E/CN.4/1994/132, ¶ 6 (Mar. 4th, 1994).

154. Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ¶ 29, U.N. Doc. A/CONF.177/20/Rev.1 (Sep. 4–15, 1995).

155. G.A. Res. 48/104, *supra* note 152, art. 2.

156. *General Recommendation 19*, *supra* note 3, ¶ 24(t).

157. See G.A. Res. 217A, Universal Declaration on Human Rights, art. 8, U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, art. 2(2), 999 U.N.T.S. 171 (Dec. 16, 1996); American Convention on Human Rights, art. 2, O.A.S.T.S. No. 36 (Nov. 22, 1969); African Charter on Human and Peoples’ Rights, art. 1, 1520 U.N.T.S. 217 (June 27, 1981); CEDAW, art. 2(b), *supra* note 152; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, 1465 U.N.T.S. 85 (December 10, 1984) [hereinafter Convention against Torture]; Inter-American on the Prevention, Punishment and Eradication of Violence against Women, art. 7(c), O.A.S.T.S. A No. 61 (June 9, 1994) [hereinafter Belem do Para Convention]; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, art. 2(1), (July 11, 2003) [hereinafter Maputo Protocol]; Istanbul Convention, *supra* 144, art. 4(1).

158. Cf. Karen Tayag Vertido v. The Philippines, Adoption of Views, Committee on the Elimination of all Forms of Discrimination against Women, U.N. Doc. CEDAW/C/46/D/18/2008, ¶ 8.9 (Jul. 16, 2010).

Punishment, and Eradication of Violence Against Women (“Belem do Para Convention”) reproduces Articles one and two of the DEVAW and enshrines the right of every woman to a life free from violence.¹⁵⁹ Both the Council of Europe’s Convention on Preventing and Combating Violence Against Women and Domestic Violence¹⁶⁰ (“Istanbul Convention”) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa¹⁶¹ (“Maputo Protocol”) added “economic harm” to the definition of violence against women as a form of gender-based violence.¹⁶² The following sections will delve into the specific standards on sexual violence and rape as a form of gender-based violence.

B. FREE CONSENT AS THE KEY ELEMENT FOR THE LEGAL DEFINITION OF RAPE

It seems self-evident that rape should be defined as sexual intercourse carried out without the consent of the victim. However, as observed in the previous section, historically, the legal definition of rape did not conceive the victim as a subject entitled to rights but, rather, as an object that was stolen from the patrimony of her husband, father, or society. Thus, many laws ignored—and still ignore—the will of the victim when addressing rape. This section addresses U.N. case law and regulation on sexual violence, as well as regional human rights law, specifically European, African, and Inter-American human rights law, all of which have adopted a standard requiring consideration of individual consent. Under current international standards, consent must be a key element to define and properly punish sexual violence.

The first thematic report addressing sexual violence of the Special Rapporteurship on Violence against Women was issued in 1997.¹⁶³ Human Rights independent expert for the U.N., Ms. Radhika Coomaraswamy, spotted the issue, noting that “[c]onsent has been defined as the legal dividing line between rape and sexual intercourse.”¹⁶⁴ Subsequently, she addressed the issue of who bears the burden of proof for consent. As seen in the historical overview, medieval and modern laws would place this burden on the victim, not on the prosecutor. Thus, Ms. Coomaraswamy noted that, by 1997, domestic courts worldwide still required evidence of physical violence for prosecutors to prove that there

159. Inter-American on the Prevention, Punishment and Eradication of Violence against Women, arts. 1, 2, 3, O.A.S.T.S. A No. 61 (June 9, 1994).

160. Istanbul Convention, *supra* note 144, art. 3, ¶ a.

161. Maputo Protocol, *supra* note 158, art. 1, ¶ j.

162. See Istanbul Convention, *supra* note 144, art. 3, ¶ a; Maputo Protocol, *supra* note 158, art. 1, ¶ j.

163. Radhika Coomaraswamy (Special Rapporteur on Violence Against Women, Its Causes, and Consequences), *Report on Violence in the Community, Sexual Violence, Trafficking in Women and Women Migrant Workers*, U.N. Doc. E/CN.4/1997/47 (Feb. 12, 1997). The current Special Rapporteur on Violence Against Women, Ms. Dubravka Šimonovic, is drafting a thematic report entitled *Rape as a Grave and Systematic Human Rights Violation and Gender-Based Violence Against Women*, which will be issued in June 2021.

164. *Id.* ¶ 36.

was no consent. Because of this, she suggested a shift in the burden of proof, to require that the defendants prove that there was consent.¹⁶⁵

At this stage, it is essential to understand the difference between non-consensual sexual relations and the absence of physical violence. Currently, international standards recognize that there are coercive circumstances which do not involve physical violence, but that may force the victim to engage in sexual activity. Progressively, international law has evolved to correct this misconception, which is common to the definitions of rape in national legislations.

The first case before the CEDAW Committee that addressed the necessity to focus on individual consent, instead of the use of force in rape cases was *Karen Tayag Vertido v. The Philippines* of 2010.¹⁶⁶ Ms. Tayag Vertido lost consciousness during a sexual assault by a former colleague of hers, and when she regained consciousness, her colleague was raping her; she was finally able to push him away by pulling his hair.¹⁶⁷ After Ms. Tayag Vertido won an appeal against the dismissal of her case by a panel of prosecutors, a Court acquitted the defendant because it did not find Ms. Tayag Vertido's testimony to be credible.¹⁶⁸

Ms. Tayag Vertido filed a complaint before the CEDAW Committee arguing that the State Party had re-victimized her and had violated her right to non-discrimination by acquitting her rapist.¹⁶⁹ The Committee declared a violation of the state's obligations to provide a non-discriminatory judicial remedy, to repeal discriminatory laws, and to modify discriminatory cultural patterns.¹⁷⁰

. . . the Committee stresses 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 *With regard to the definition of rape, the Committee notes that the lack of consent is not an essential element of the definition of rape in the Philippines Revised Penal Code.*¹⁷¹

Indeed, the legal definition of rape under the cited Penal Code was the carnal knowledge “[t]hrough force, threat or intimidation,” among other circumstances disregarding the actual consent of the victim/survivor.¹⁷²

This is, in fact, the key point of discussion. When the law requires force, threat, or intimidation to define rape, it disregards the subjective component of the survivor's situation. What might constitute intimidating or coercive circumstances for

165. *Id.*

166. *Karen Tayag Vertido v. The Philippines*, *supra* note 158.

167. *Id.* ¶ 2.2.

168. *Id.* ¶ 2.5–2.8.

169. *Id.* ¶ 3.1.

170. *Id.* ¶ 8.9.

171. *Id.* ¶ 8.5, 8.7 (emphasis added).

172. *Id.* ¶ 8.7 (cited at n.7 of the CEDAW Committee's decision).

someone's sexual autonomy to be overcome, might not constitute coercive circumstances for another person. Some people might react violently at the risk of rape, while others might remain passive to avoid further harm. The law should focus on whether free consent is given, and it should not require specific circumstances or a specific reaction from the survivor to establish that rape has been committed.

Moreover, in the most recent general comment of the CEDAW Committee on violence against women, the Committee recommends the states Party to "[e]nsure that the definition of sexual crimes, including marital and acquaintance/date rape is based on lack of freely given consent, and takes account of coercive circumstances."¹⁷³ Thus, the Committee consolidated the consent-based standard of rape laws as applicable to all states Party to the CEDAW.

The U.N. Handbook for Legislation of Violence against Women recommends that the criminalization of sexual assault either require the lack of "unequivocal and voluntary agreement" (and suggests that the law demands the defendant a proof of the steps taken to ascertain actual consent) or acknowledge the existence of a "broad range of coercive circumstances" to establish rape.¹⁷⁴

For its part, the European system of human rights first construed rape as the result of coercive circumstances that can overcome a person's sexual autonomy in the case *M.C. v. Bulgaria* of 2003.¹⁷⁵ *M.C. v. Bulgaria* is truly a landmark decision on the element of consent in rape laws. The Istanbul Convention would subsequently adopt the language used by the European Court of Human Rights ("ECtHR") in this case to offer a comprehensive definition of rape.

The facts of the case consisted of two rapes committed against the complainant who, at the time of the rapes, was 14 years old. The complainant was deceived on two occasions by three men who drove her against her will to isolated places.¹⁷⁶ The first rape happened near a reservoir, where they drove her. After arriving, one of the men approached her in the car and had intercourse with her, to which he claimed she consented, despite the fact that she tried to push him and began to cry.¹⁷⁷ The second rape happened days later, when she followed one of the three men, thinking that he was going to protect her. He then assaulted her. She declared that she begged him to stop. He claimed that the sex was consensual.¹⁷⁸ Both times, the complainant did not resist physically, arguing that she did not feel strong enough to repel the attack.¹⁷⁹

173. *General Recommendation 35: On Gender-Based Violence Against Women, Updating General Recommendation No. 19*, CEDAW, U.N. Doc. CEDAW/C/GC/35, ¶ 33 (Jul. 14, 2017) [hereinafter *General Recommendation 35*].

174. U.N. DEP'T OF ECON. & SOC. AFFAIRS, DIV. FOR ADVANCEMENT OF WOMEN, HANDBOOK FOR LEGISLATIONS ON VIOLENCE AGAINST WOMEN, at 26 (2010).

175. *M.C. v. Bulgaria*, 40 Eur. Ct. H.R. 20 (2004).

176. *Id.* ¶¶ 15–30.

177. *Id.* ¶¶ 15–19.

178. *Id.* ¶¶ 28–31.

179. *Id.* ¶¶ 17, 30.

Ultimately, the claimant and her family decided to report the case to the authorities, despite the victim's mother accepting an offer of marriage from the first perpetrator, made in an effort to repair the damage caused to her.¹⁸⁰ The Office of the Prosecutor assessed the criminal report and decided to close the case for lack of evidence of resistance by the complainant. The complainant appealed the decision, which led to the prosecutors hiring a group of forensic psychiatric experts to determine the credibility of the complainant's testimony. Despite the experts giving complete credibility to the testimony, the prosecutors decided to keep the case closed, because the law required that use of force or threats to occur during the attack for the complainant to have a valid claim.¹⁸¹ Because of that decision, the victim filed a complaint before the European System of Human Rights, alleging the violation of laws prohibiting torture and the violation of her rights to privacy and family life, with the aim of achieving an effective remedy. She also sought the declaration of the violation of her rights to equality and non-discrimination due to the closure of the investigation on rape.¹⁸²

The ECtHR undertook a comparative analysis of rape laws throughout Europe in assessing how the issue should be addressed. The Court emphasized the states' obligations under the European Convention on Human Rights to enact criminal laws to effectively punish rape.¹⁸³ It noted that while most of the European countries of civil law tradition enshrined a definition of rape that required the use or threat of violence, the subsequent case law amplified those provisions and encompassed non-consensual sexual relations through coercive circumstances.¹⁸⁴ The Court recognized that there was an evolving legal approach to respect each individual's sexual autonomy and the ways in which different persons experience rape.¹⁸⁵ Finally, the Court declared that Bulgaria had violated the duty to prosecute acts of torture, as well as the right to privacy and family life, by its lack of assessment of all the surrounding circumstances and victim's perspective in the investigation of rape.¹⁸⁶

... the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring *the penalization and*

180. *Id.* ¶¶ 38–43.

181. *Id.* ¶¶ 47–64.

182. *Id.* ¶ 3.

183. *Id.* ¶ 153.

184. *Id.* ¶¶ 159–61.

185. *Id.* ¶¶ 164–66.

186. *Id.* ¶¶ 110, 187.

*effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.*¹⁸⁷

This important standard set out by the ECtHR was adopted by the Istanbul Convention in 2011. According to the Explanatory Report to the Convention, the definition of sexual violence followed the standard of the *M.C. v. Bulgaria* judgment.¹⁸⁸ The drafters of the Istanbul Convention also took into account that the ECtHR definition of rape required that the prosecution of sexual assault cases include a context-sensitive assessment on a case-by-case basis to determine whether the victim had freely consented.¹⁸⁹ The result of this discussion was the enactment of article 36 of the Istanbul Convention, which provides:

1. Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalized:
 - a. Engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
 - b. Engaging in other non-consensual acts of a sexual nature with a person;
 - c. Causing another person to engage in non-consensual acts of a sexual nature with a third person.
2. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances . . .¹⁹⁰

The Istanbul Convention is the only binding instrument that requires a consent-based definition of sexual violence in the enactment of rape laws. This is a progressive approach that should be replicated by other countries around the world for rape to be adequately prosecuted. For its part, the African system of human rights has adopted important guidelines that, despite not being legally binding, provide an authoritative interpretation of the states' obligations in prosecuting rape under the Maputo Protocol.¹⁹¹ The definition of sexual violence contemplated in these Guidelines alludes to non-consensual sexual acts and specifically states that psychological pressure or coercive circumstances are factors that can overcome the free consent of a person.¹⁹²

The jurisprudence of the Inter-American system of human rights is even more firmly in defense of the rights of victims, as it defines sexual violence as "actions with a sexual nature committed with a person *without their consent*, which besides including the physical invasion of the human body, may include acts that

187. *Id.* ¶ 166 (emphasis added).

188. Council of Europe, *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, ¶ 191, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383a>.

189. *Id.* ¶ 192.

190. Istanbul Convention, *supra* note 144, art. 36 (emphasis added).

191. *Guidelines on Combating Sexual Violence and its Consequences in Africa*, African Comm'n H.R., Foreword (adopted Nov 5., 2017).

192. *Id.* at 14, § 3.1. (a).

do not imply penetration or even any physical contact whatsoever.”¹⁹³ The Inter-American Court of Human Rights also stressed that sexual violence is a representative form of gender-based violence.¹⁹⁴

Under the regional treaties on violence against women, the States Parties have the obligation to enact laws aimed at preventing and punishing all forms of violence against women.¹⁹⁵ Therefore, the states should adopt the authoritative interpretations on the definition of sexual violence, in order to adequately implement the regional conventions and protocols.

In conclusion, international human rights law has created a legal standard through soft and hard law instruments. States should adopt a legal definition of rape that is based on the individual consent of the victim/survivor and not the use of force or threats, as this approach aims to take into consideration the individual’s sexual autonomy. Moreover, laws should consider that sexual violence is driven by power relationships and not by mere sexual desire.¹⁹⁶ Because of that consideration, a consent-based approach to rape addresses the power relationships more adequately, as it assesses the context of the sexual assault and the victim/survivor’s perspective.

C. THE PROHIBITION OF DISCRIMINATORY LAWS THAT ALLOW RAPE

Under international human rights law, there is an obligation to adopt domestic legislation in order to give effect to the rights enshrined in the international treaties that the states have ratified.¹⁹⁷ Thus, any law that allows or has the effect of allowing a human rights violation is a breach of a state’s international obligations. Both the U.N. treaty bodies and the regional systems for the protection of human rights have extensively defined the prohibition of laws that allow rape under certain circumstances. Thus, the prohibition of rape in the law includes:

- The criminalization of marital and inter-partner rape.¹⁹⁸
- The criminalization of male rape¹⁹⁹ through a gender-neutral definition of the crime of rape.

193. *Miguel Castro-Castro Prison v. Peru*. Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 160, ¶ 306 (Nov. 25, 2006) (emphasis added).

194. *See id.* ¶¶ 224–25; *Mujeres Víctimas de Tortura Sexual en Atenco v. México*. Preliminary Objection, Merits, Reparations and Costs, Judgment. Inter-Am. Ct. H.R. (Ser. C) No. 371, 7 (Nov. 28, 2018), available at https://www.corteidh.or.cr/docs/casos/articulos/resumen_371_esp.pdf.

195. *See* *Belem do Para Convention*, *supra* note 157, art. 7(c); *Maputo Protocol*, *supra* note 157, art. 2(1); *Istanbul Convention*, *supra* note 144, art. 4(1).

196. World Health Organization, *Guidelines for Medico-Legal Care for Victims of Sexual Violence* 9–10 (2003).

197. *See* *International Covenant on Civil and Political Rights*, art. 2(2), Dec. 16, 1966, 999 U.N.T.S. 171; *American Convention on Human Rights*, art. 2, Nov. 22, 1969, O.A.S.T.S. No. 36; *African Charter on Human and Peoples’ Rights*, art. 1, June 27, 1981 1520 U.N.T.S. 217; *CEDAW*, *supra* note 145, art. 2(b); *Convention against Torture*, art. 2, December 10, 1984, 1465 U.N.T.S. 85; *Belem do Para Convention*, *supra* note 157, art. 7(c); *Maputo Protocol*, *supra* note 157, art. 2(1); *Istanbul Convention*, *supra* note 144, art. 4(1).

198. *General Recommendation 35*, *supra* note 173, ¶ 29(e).

199. *General Comment No. 2: Implementation of article 2 by States parties*, U.N. Committee against Torture, U.N. Doc. CAT/C/GC/2, ¶ 22 (Jan. 24, 2008).

- The legal prohibition of forced marriages, including child marriage²⁰⁰ and ‘rape–marriage’ laws.²⁰¹

Regarding the criminalization of marital and inter-partner rape, all countries represented at the U.N.’s 1995 Women’s Conference voted for a resolution holding that wives have the right to refuse the sexual demands of their husbands and forbidding marital rape as an act of violence against women.²⁰² The CEDAW Committee has recommended that some states, like Ethiopia, criminalize marital rape in order to fulfill its obligations under the Convention on Elimination of all Forms of Discrimination against Women.²⁰³ The Istanbul Convention establishes the obligation for countries to enact laws criminalizing sexual violence committed by a former and current spouse or partner.²⁰⁴ The Guidelines on Combating Sexual Violence and its Consequences in Africa also classify marital rape as a form of sexual violence.²⁰⁵ The Belem do Para Convention similarly stresses that violence against women can occur “within the family or domestic unit or within any other interpersonal relationship . . . including, among others, rape, battery and sexual abuse.”²⁰⁶

The criminalization of male rape was one of the main legal reforms that many countries undertook during the twentieth century,²⁰⁷ continuing into the twenty-first century in countries like the Democratic Republic of Congo (“D.R.C.”)²⁰⁸ and China.²⁰⁹ The Committee against Torture has noted that “[m]en are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse.”²¹⁰ It has stressed that states should take measures to punish those violations.²¹¹ The U.N. Human Rights Committee has also issued recommendations to investigate and punish male rape.²¹²

200. *General Recommendation 35*, *supra* note 173, ¶ 29(c)(i); *see also* Coomaraswamy, *supra* note 164, ¶ 37.

201. *General Recommendation 35*, *supra* note 173, ¶ 29(c)(i)–(ii).

202. G.A. Res. 50/203, annex, I Beijing Declaration, art. 113(a) (Sept. 15, 1995).

203. CEDAW Committee, *Concluding Observations on the Eighth Periodic Report of Ethiopia*, U.N. Doc. No. CEDAW/C/ETH/CO/8, ¶ 24(b) (Mar. 14, 2019).

204. Istanbul Convention, *supra* note 144, art. 36(3).

205. *Guidelines on Combating Sexual Violence and its Consequences in Africa*, *supra* note 191, at Guideline 3.1(b).

206. Belem do Para Convention, *supra* note 157, art. 2(a).

207. *See* Coomaraswamy, *supra* note 164, ¶ 34 (“[L]egal focus has shifted from the traditional man-against-woman approach towards a gender-neutral definition of the crime.”).

208. *Loi No. 06/018 du 20 Juillet 2006 Modifiant et Completant le Decret du 30 Janvier 1940: Portant Code Penal Congolais*, Journal Officiel, No. Sp. 61, art. 2 (Jul. 20, 2006).

209. 中华人民共和国刑法修正案(九) [Amendments to the Criminal Law of the People’s Republic of China], *translated in* LAW INFO CHINA, ¶ 13, 2015, P.R.C. LAWS No. 30 (China) (amending art. 237).

210. *General Comment No. 2: Implementation of Article 2 by States Parties*, *supra* note 200, ¶ 22.

211. *Id.*

212. *Lumbala v. Democratic Republic of Congo, Adoption of Views*, Human Rights Committee, ¶ 8, U.N. Doc. CEDAW/CCPR/C/115/D/2214/2012(Nov. 5, 2015).

Finally, laws that allow forced marriages are prohibited, as they tend to tolerate rape. Forced marriages are legal unions in which one or both of the parties have not personally expressed their free consent.²¹³ This encompasses rape-marriages, child marriages, exchange or “trade-off” marriages, dowries or “bride prices” servile marriages, and levirate marriages.²¹⁴ All of these types of marriages are considered harmful practices, rooted in patriarchal norms that discriminate against women and are, thus, proscribed by the CEDAW²¹⁵ and international human rights law.²¹⁶

Rape-marriage laws, also known as “marry-your-rapist” laws, state that a man charged with rape will go unpunished if he marries the victim/survivor. This is a perpetuation of the ancient practice of bride abduction, in which the victim is usually kidnapped by the “groom” and his friends or brothers, with the permission of his parents or the “mother-in-law.”²¹⁷ Once the victim is in the “groom’s” house and raped, the female relatives of the abductor are in charge of persuading her to consent to a marriage by wearing a white scarf.²¹⁸ Rape-marriage laws allow rapists to go unpunished if they marry their victim, which creates conditions for family members—both relatives of the “bride” and the “groom”—to persuade the victim to marry her rapist, believing that her “honor” has been “tainted.”²¹⁹

On this issue, the CEDAW Committee has recommended that states repeal rape-marriage laws.²²⁰ These laws deprive women of an adequate remedy for the violation of their rights, which is *per se* a violation of the states’ obligations to adopt legislative measures to ensure the effectiveness of human rights. These laws follow the same logic as the Deuteronomy law, in which a raped woman has lost her value and marrying her will be the remedy to her exclusion from society. The rape marriage-laws not only deny the victim/survivor her right to access

213. CEDAW & Committee on the Rights of the Child, *Joint General Recommendation on Harmful Practices No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child*, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18, ¶ 22 (Nov. 14, 2014).

214. *Id.*; see also CEDAW Committee, *Concluding Observations on the Seventh Periodic Report of Angola*, U.N. Doc. CEDAW/C/AGO/CO/7, ¶ 23(a)–(d) (Mar. 14, 2019).

215. *Concluding Observations on the Seventh Periodic Report of Angola*, *supra* note 214, ¶ 24(a).

216. Article 37 of the Istanbul Convention requires states to criminalize forced marriages. Istanbul Convention, *supra* note 144, art. 37. Also, as set out previously, human right treaties require states to enact laws that give effect to human rights. *Id.* The prohibition against discrimination has been recognized by one of the regional tribunals on human rights as *ius cogens* or a peremptory norm of international law binding in every state. See *Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 79* (Feb. 24, 2012).

217. See Becker, *supra* note 7, at 3–4.

218. *Id.* at 4.

219. See EQUALITY NOW, THE WORLD’S SHAME: THE GLOBAL RAPE EPIDEMIC, HOW LAWS AROUND THE WORLD ARE FAILING TO PROTECT WOMEN AND GIRLS FROM SEXUAL VIOLENCE 1, 17 (2017), https://d3n8a8pro7vhm.cloudfront.net/equalitynow/pages/308/attachments/original/1527599090/EqualityNowRapeLawReport2017_Single_Pages_0.pdf?1527599090. Particularly, the case of *Amal* narrated in the report is very illustrative of the pressure exercised by both families to make the victim marry her rapist.

220. CEDAW Committee, *Concluding Observations on the Third Periodic Report of Bahrain*, U.N. Doc. No. CEDAW/C/BHR/CO/3, ¶ 21–22 (Mar. 10, 2014); see also *General Recommendation 35*, *supra* note 174, ¶ 31(b).

justice, but they also “allow women to be traded as possessions between families.”²²¹ This is a direct violation of the obligation to criminalize the trafficking of women, pursuant to article 6 of the CEDAW.

The African Commission on Human and Peoples Rights (“ACHPR”) decided a case on the matter of rape-marriage laws and the practice of bride abduction in *Equality Now v. Ethiopia*.²²² The complainant of the case was thirteen-years-old when she was abducted and raped by a man, Aberew Jemma Negussie, who received assistance from others.²²³ She was eventually found by police, days after the rape, in the house of one of Negussie’s friend. The police reported finding blood in her pajamas, and the medical report found bruises around her vagina, supporting the conclusion that there had been penetration.²²⁴ Negussie was arrested on kidnap and rape charges and subsequently released on bail.²²⁵ After his release, he abducted the complainant again, held her for a month in his brother’s house and forced her to sign a marriage contract.²²⁶ In the criminal proceedings initiated against Negussie, the trial court convicted him and his accomplices for abduction and rape in July 2003. Negussie appealed this judgement and the High Court of Arsi Zone granted the appeal and released him, arguing that the complainant had consented to the act by signing the marriage contract.²²⁷ The complainant impugned the decision, and the Oromia Supreme Court dismissed her appeal.²²⁸ She then lodged a complaint against the state of Ethiopia, alleging the violation of her rights to equal protection before the law, to personal integrity, to freedom, the violation of the prohibition of torture and the existence of discrimination in the law.²²⁹

In this case, the ACHPR noted that a state breaches its international human rights obligations when it tolerates private actors violating the rights enshrined in the African Charter with impunity.²³⁰ Specifically, the ACHPR held that Ethiopia should have been aware of the practice of bride abduction and was thus required to escalate the current criminal law measures to prevent any further violations related to such practice.²³¹ The ACHPR stressed the deterrent role of prosecuting a conduct that violates human rights by noting that bride abduction increased in surrounding areas after the defendant was released on bail.²³² Therefore, the

221. EQUALITY NOW, *supra* note 219, at 19.

222. Equal. Now & Ethiopian Women Law. Ass’n v. Federal Republic of Ethiopia, Communication 341/2007, Afr. Comm’n H.P.R. (Feb. 2016), <https://www.globalhealthrights.org/wp-content/uploads/2018/07/Equality-Now-Ethiopia.pdf>.

223. *Id.* ¶ 3.

224. *Id.*

225. *Id.* ¶ 4.

226. *Id.*

227. *Id.* ¶¶ 4–5.

228. *Id.* ¶ 7.

229. *Id.* ¶ 14.

230. *Id.* ¶ 125.

231. *Id.* ¶ 126.

232. *Id.* ¶ 130.

ACHPR concluded that Ethiopia failed to prevent the abduction of the complainant, which amounted to a violation of its obligations under the African Charter.²³³

In addition to the duty to prevent human rights violations, the ACHPR referred to the obligation of the states to redress violations by providing an effective remedy for the victims. When human rights violations amount to criminal conduct, a criminal investigation and punishment is the adequate remedy that the state must provide to victims.²³⁴ The ACHPR held that Ethiopia violated the complainant's right to a judicial remedy, her right to have her case heard by national courts, and its duty to redress human right violations.²³⁵

Despite setting out the standard regarding the duty to criminalize harmful practices like bride abduction, the African Commission failed to declare a violation of the victim's right to equal protection before the law. This is an essential argument that lacked gender perspective in the ACHPR's decision. The complainant argued that Ethiopia violated the right to equal protection before the law, because the courts interpreted the domestic legislation in a discriminatory way that allowed bride abduction. The ACHPR did not find a violation to the right of equality before the law, because it considered that the law did not discriminate between men and women, as it permitted bride abduction of both men or women.²³⁶ In this finding, the Commission disregarded the fact that only women are victims of bride abduction, and they suffer rape and often physical abuse during the abduction.²³⁷ Women are the only group impacted by the omission of enforcement of laws prohibiting bride abduction. In this sense, the effect of criminal laws that do not prohibit bride abduction, or that encourage unwanted marriage, is discriminatory on the basis of gender and, subsequently, is incompatible with International Law.

Another form of forced marriage is child marriage. "Child marriage is any marriage where at least one of the parties is under 18 years of age . . . [and] is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent."²³⁸ Under exceptional circumstances, such as when the child is at least sixteen-years-old and the marriage is authorized by a judge on evidence of maturity and full comprehension of the child, international law allows child marriages.²³⁹ Most often, however, children are not able to make informed life decisions and cannot consent to marriage; additionally, they are not physically and psychologically ready for adult life.²⁴⁰

Other types of forced marriages include dowries, or "bride prices," and levirate marriages, which is when a widow is coerced into marrying a relative of her

233. *Id.* ¶ 132.

234. *Id.* ¶ 133.

235. *Id.* ¶ 137.

236. *Id.* ¶¶ 147–49.

237. See U.S. DEP'T OF STATE, ETHIOPIA 2018 HUMAN RIGHTS REPORT 27–28 (2018).

238. CEDAW & Comm. on the Rights of the Child, *supra* note 214, ¶ 20.

239. *Id.*

240. *Id.* ¶ 21.

deceased husband.²⁴¹ The payment of dowries violates a woman's right to freely choose a spouse. For children and young girls, such acts might amount to trafficking of persons.²⁴² As previously noted, this practice comes from Assyrian civilization and Babylonia, when women were considered property of their husbands and fathers and had a "bride price."

In sum, international standards on human rights require that rape laws prohibit rape against both men and women, spousal and inter-partner rape, and forced marriages. Therefore, states that do not punish those acts are in breach of the CEDAW, the ICCPR requirement of laws compatible to human rights and non-discrimination, and other regional human right treaties.

D. THE PROHIBITION OF EVIDENTIARY REQUIREMENTS TO PUNISH RAPE

Lastly, international human rights standards prohibit rape laws from requiring specific evidence to prosecute or punish the crime of rape. The former Special Rapporteur on Violence against Women, Ms. Radhika Coomaraswamy, noted that the laws in many countries required the corroboration of the victim/survivor's testimony and that evidentiary rules allowed the incorporation of proof related to the victim's past sexual history. Some laws even required the victim to be a virgin and to undergo a "virginity examination."²⁴³ Thus, she recommended that states revise their evidentiary laws to avoid discriminatory provisions or harmful procedures for the victim.²⁴⁴

The CEDAW Committee has also stressed the need to repeal discriminatory evidentiary rules and procedures in order to adequately prosecute sexual violence.²⁴⁵ The U.N. Human Rights Council has urged states to ensure that their legislation is in accordance with international standards and does not discriminate by requiring corroboration of the victim's testimony.²⁴⁶

The imposition of evidentiary requirements to prove rape perpetuates the use of so-called "rape myths." Social sciences define rape myths as "prejudicial, stereotyped or false beliefs about rape, rape victims, and rapists."²⁴⁷ Some of the most significant rape myths are that "[unchaste] women ask to be raped," that "women lie about being raped" and that "husbands cannot rape their wives."²⁴⁸ These myths are actually inherited gender stereotypes that come from ancient and medieval cultural beliefs and rape laws. Ancient and medieval laws throughout the world only protected virgins from rape, disregarded women's consent,

241. *Id.* ¶ 23.

242. *Id.* ¶ 24.

243. Coomaraswamy, *supra* note 164, ¶ 39.

244. *Id.* ¶ 161.

245. *General Recommendation 35*, *supra* note 174, ¶ 31(b).

246. Human Rights Council Res. 23/25, U.N. Doc. A/HRC/RES/23/25, ¶ 8 (Jun. 23, 2013).

247. Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 217 (1980).

248. See Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 761 (2011).

blamed the victims of rape for the act committed, and set very high standards in the burden of proof for the crime.

Therefore, laws that require specific evidence to prove sexual violence or allow the use of the survivor's sexual history in trial are discriminatory and violate the right to equality before the law. They perpetuate patriarchal cultural beliefs and gender stereotypes linking a woman's honesty to her virginity and proscribing rape only for virgins. The enactment of "shield laws" is a good practice against the use of gender stereotypes in trials and should be adopted by governments around the world.

While this article focuses on rape laws, it is important to note that there are also non-legal challenges to prosecuting and punishing rape, arising from cultural beliefs and gender stereotypes inherited from ancient rape laws. The "myths" used in rape trials, as well as the culture of shaming and blaming victims, are all factors that create an impunity culture and prevent survivors from reporting rape and sexual violence. Rape is the most underreported crime in countries like the U.S., and victims state that they do not report their assault due to loss of privacy, shame, and the discriminatory conduct of authorities throughout the reporting process.²⁴⁹

Reforming domestic legislation through shield laws and modifying the definition and the legal understanding of rape can create an environment where women and survivors feel empowered and safe to report sexual violence. These measures could also prevent the use of rape myths in trials and investigations, especially if the law establishes specific criteria regarding consent and coercive circumstances.

International human rights standards require that rape laws be based on the victim/survivor's consent, and they require that states repeal any laws that would allow rape and any evidentiary requirements related to corroboration and sexual history. However, it is necessary to stress that sexual violence is a very complex issue that countries around the world have historically ignored, allowed, or undermined in their legal systems. Current international standards on sexual violence and rape laws are fragmented through many soft-law and regional sources and do not address the issue comprehensively. Most of the regional treaties on violence against women do not offer a definition of rape or sexual violence. It would be useful if the international community adopted an instrument that specifically discussed the issue of sexual violence, addressing not only standards on rape laws, but also attempting to eliminate "rape cultures," by taking holistic measures to eradicate gender stereotypes and cultural beliefs which prevent victims from reporting and which hinder law enforcement officials from prosecuting and convicting rapists.

249. See W. David Allen, *The Reporting and Underreporting of Rape*, 73 S. ECON. J. 623, 624 (2007).

III. CURRENT CHALLENGES OF RAPE LAWS WORLDWIDE

This section studies the lack of compliance by national legislations worldwide for IHRL standards of rape laws, through: (A) the lack of a consent-based definition of rape laws globally; and (B) laws that allow some forms of rape.

A. THE LACK OF A CONSENT-BASED DEFINITION OF RAPE LAWS AROUND THE WORLD

The Istanbul Convention is the only international treaty which directly obligates states to adopt a consent-based definition of rape. To date, in spite of the generalized ratifications to the Istanbul Convention, only eight European jurisdictions define the crime of rape as sexual intercourse without consent.²⁵⁰ Two of those jurisdictions adopted the consent-based definition of rape by legislative amendment as late as March and May 2018.²⁵¹ Germany only adopted this legal approach in 2017, which was accompanied by the repeal of the physical resistance requirement to prove rape.²⁵² However, the German and the Austrian models have been criticized for still requiring a verbal or explicit expression of the lack of consent. Thus, the law presumes that “women consent to sex perpetually, unless they state otherwise.”²⁵³

One case that recently raised concerns regarding the element of consent in rape laws was the case of the “wolf pack” gang rape in Spain. In the early morning of July 7, 2016, a group of five men, who later adopted the alias of *La Manada* (“the wolf pack”), cornered an 18-year-old woman in an alley during a local festival in the city of Pamplona. The men penetrated her mouth, vagina, and anus, while she closed her eyes and remained passive.²⁵⁴ The perpetrators recorded the incident on video.²⁵⁵

The members of the “wolf pack” were charged with sexual assault but were convicted for the less serious crime of sexual abuse, which does not imply rape.²⁵⁶ Specifically, the conviction in both the trial court and the court of appeals used paragraphs 3 and 4 of the article 181 of the Spanish Penal Code, which defines sexual abuse as occurring with the consent of the victim through intimidation.²⁵⁷ However, the victim declared in trial that she did not consent to those acts but that she remained passive, because she was paralyzed by fear.²⁵⁸ The

250. Amnesty Int'l, *supra* note 140, at 10.

251. *Id.* at 9.

252. *Id.* at 10.

253. *Id.*

254. “*La Manada*”: *El Caso del Grupo de 5 Jóvenes que Abusó Sexualmente de una Chica en los Sanfermines que Causa Indignación en España* [“*The Wolf Pack*”: *The Case of the Group of 5 Young Men who Abused a Girl in the Sanfermines that Causes Indignation in Spain*], BBC Mundo (Apr. 16, 2018), <https://www.bbc.com/mundo/noticias-internacional-43907559>.

255. *Id.*

256. Mohorte, *La Condena a La Manada: Qué Significa la Sentencia por “Abuso Sexual” y no por “Agresión Sexual”* [The Conviction of The Wolf Pack: What Does the Judgement of “Sexual Abuse” and not “Sexual Assault” Mean], MAGNET (Jan. 8, 2019, 10:46 AM), <https://magnet.xataka.com/en-diez-minutos/la-condena-a-la-manada-que-significa-la-sentencia-por-abuso-sexual-y-no-por-violacion>.

257. *Id.*

258. *Id.*

conviction on appeal recognized the existence of intimidation and coercion but did not declare the act sexual assault, because the gang rape was not committed through violence.²⁵⁹ In the trial court, there was even a highly controversial dissenting opinion of one of the judges, who stated that the videos “only showed five men and one woman performing sexual acts in a merriment environment.”²⁶⁰

The acquittal for rape in favor of the “wolf pack” sparked national outrage, and many protested in the streets, demanding their conviction and a change in the law.²⁶¹ The social upheaval forced the government to appoint a commission of experts to study the potential for a legal reform of rape laws in Spain.²⁶² In 2019, the Supreme Tribunal overruled the Navarra Courts’ decision and sentenced the “wolf pack” to 15 years in prison for the crime of rape.²⁶³ There is currently a proposed bill to reform the Spanish Penal Code, presented by the Ministry of Equality.²⁶⁴

The “wolf pack” was a symbolic case which demonstrated the legal challenges that rape prosecutions face in modern times. The fact that Spain ratified the Istanbul Convention in 2014²⁶⁵ and, nonetheless, maintained a legal definition of rape that focused on violence and not on consent is very discouraging. Rape laws are failing to address the perspective of survivors, by not considering their consent. This is a legacy left by the former legal conceptions of the status of women, as victims are still viewed as objects and not as subjects entitled to human rights.

Just like in Europe, countries in Latin America, Africa, and Asia fail to address consent in their legal definition of rape and focus on the use of “violence” instead. For the purpose of analyzing legal challenges in the Latin American region, this subsection will study the rape laws of Colombia, Bolivia, Guatemala, Nicaragua, and Venezuela. Article 205 of the Colombian Penal Code criminalizes the offense of “violent carnal knowledge,” which consists of carnally accessing a person through the use of violence.²⁶⁶ This provision completely disregards the consent of the victim and only criminalizes sexual acts through violence, not intimidation or coercive circumstances. This provision has raised a jurisprudential debate on the issue of consent.

259. J. Doria, P. Álvarez, & I. Valdés, *El Tribunal Superior de Navarra Confirma la Condena de La Manada a Nueve Años de Cárcel por Abuso Sexual [The Court of Appeals for Navarra Upholds the Conviction of The Wolf Pack to Nine Years of Prison for Sexual Abuse]*, EL PAÍS (Dec. 5, 2018, 9:21 PM), https://elpais.com/sociedad/2018/12/05/actualidad/1543995494_456176.html.

260. *Id.*

261. Mohorte, *supra* note 256.

262. *Id.*

263. *Id.*

264. *La Sentencia de ‘La Manada’ Fuerza la Reforma del Código Penal [The Ruling in ‘The Wolf pack’ Case Forces Reform of the Penal Code]*, VANGUARDIA (June 23, 2019), <https://www.lavanguardia.com/vida/20190623/463053035953/manada-violacion-tribunal-supremo-navarra-reforma-codigo-penal.html>.

265. Council of Europe, *Chart of Signatures and Ratifications of Treaty 210* (May 2, 2019), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>.

266. CÓDIGO PENAL [C. Pen.], art. 205 (Colom.).

The initial precedent of the Colombian Supreme Court of Justice was to emphasize the victim's resistance to establish the "violent" element of the legal definition of rape. In 2009, the Supreme Court issued a controversial judgement, in which it acquitted a man of rape, because the two victims did not display resistance to the man's sexual demands.²⁶⁷ However, the Court failed to address the fact that, minutes before the sexual acts, the defendant in that case was in the company of four other men who had just robbed the two women, after cornering them in a deserted park.²⁶⁸ The defendant stayed after the other men left and told the two victims that he had a knife and would cut them if they did not do as he said.²⁶⁹ He forced one of them to perform oral sex on him while he fondled the other woman, who was eventually able to cry for help to a group of taxi drivers that were passing through the area.²⁷⁰ The defendant left and was later captured by the police and charged for robbery and violent carnal knowledge.²⁷¹

The trial and appeal courts convicted the man of rape and robbery. However, when the case arrived at the Supreme Court, the defendant was acquitted of the rape charge. One of the Justices pointed out the strange contradiction in which the Supreme Court had fallen by allowing the robbery charge to stand and then stating that the victims had decided to have consensual sex in the middle of a public park with the man who mugged them.²⁷² The case raised the attention of the media in 2017, because the same man that had been acquitted by the Supreme Court in 2009 was again charged of sexual assault in 2016 against another woman.²⁷³

In 2014, the Congress of Colombia enacted Law no. 1719 to ensure that victims of sexual violence were afforded the right to access justice, particularly in the context of an armed conflict.²⁷⁴ Article 18 establishes that "1. Consent shall not be inferred from any word, gesture, or behavior of the victim when it is not free and voluntary. 2. Consent shall not be inferred from the silence or the lack of resistance of the victim of sexual violence . . ." ²⁷⁵ Even though this is a significant improvement in the law, it does not change the legal definition of rape used by the country.

After the national outrage caused by the 2009 decision, the Supreme Court repealed this case law in 2018 and "categorically" rejected such a stance.²⁷⁶ The

267. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Penal mayo 13, 2009, M.P.: Bustos Martínez, Expediente 29308 (Colom).

268. *Id.* at 2.

269. *Id.*

270. *Id.* at 3.

271. *Id.*

272. *Id.* at 40–41.

273. Juan David Laverde Palma, *Un Proceso Kafkiano de Violencia Sexual [A Kafkaian Process of Sexual Violence]*, ESPECTADOR (Dec. 11, 2017, 9:00 PM), <https://www.elespectador.com/noticias/judicial/un-proceso-kafkiano-de-violencia-sexual-articulo-727846>.

274. Ley 1719, Jun. 18, 2014, DIARIO OFICIAL [D.O.] No. 49.186 (Colom.).

275. *Id.*

276. C.S.J., Sala Penal, Feb. 28, 2018, M.P.: Barceló Camacho, Expediente 50493, at 16 (Colom.).

Court then managed to circumvent the Colombian legal provision requiring “violent” carnal knowledge, by constructing the concept of “moral violence” through case law,²⁷⁷ thus recognizing coercive circumstances. This is an example of how judicial interpretation can correct the law’s deficiency. However, the law should nevertheless focus on the survivor’s consent as a way to recognize them as a subject entitled to rights and should value a survivor’s personal experience and autonomy.

Like the approach taken by the Supreme Court in Colombia, the Penal Code of Guatemala stipulates that the crime of rape involves sexual intercourse through physical or psychological violence.²⁷⁸ Similarly, the Bolivian Penal Code defines rape as the carnal knowledge of a person through violence or intimidation.²⁷⁹ Again, both of these provisions leave out the consent of the rape survivor.

Rape is also criminalized in a similar way by the Penal Code of Nicaragua and the Law on Violence against Women of Venezuela. The Penal Code of Nicaragua states that rape is carried out by “force, violence, intimidation or any other means that deprive the victim of their will”,²⁸⁰ and the Law on Violence against Women of Venezuela establishes that sexual violence is carried out by “the use of violence or threats coercing a woman to agree to unwanted sexual contact . . .”²⁸¹ Even though these two provisions allude to the “will” of victims and “unwanted sexual contact,” they do not focus on consent but, rather, on the act of violence or the coercive circumstances.

In the African continent, the Criminal Codes of Angola and D.R.C. also leave out consent, whereas the criminal code of Mozambique takes consent into account, but focuses primarily on violence and intimidation.²⁸² Angola criminalizes sexual aggression as “any sexual act carried out through violence, coercion, threats or putting the victim in a situation where she/he cannot resist.”²⁸³ The D.C.R.’s Penal Code establishes that rape is committed through violence, grave threats or coercion, by deception, psychological pressure or taking advantage of a coercive environment.²⁸⁴

In Eurasia, the following countries do not include lack of consent as an element of the crime of rape, do not contemplate any coercive circumstances, and specifically require the use of violence:²⁸⁵ Armenia, Azerbaijan, Belarus, Estonia,

277. *Id.* at 13–14,19.

278. CÓDIGO PENAL [C. Pen.], art. 173 (Guat.).

279. CÓDIGO PENAL [C. Pen.], art. 308 (Bol.).

280. Ley No. 641, Nov. 13, 2007, Código Penal [Penal Code], tit. II, ch. II, art. 167, LA GACETA, DIARIO OFICIAL [L.G.], 3 Dec. 2007 (Nicar.).

281. Ley Orgánica sobre el Derecho de las Mujeres a una Vida Libre de Violencia No. 38.668, art. 43. (Venez.).

282. Lei n.º 35/2014, art. 218, 31 Dec. 2014, I Boletim da República 105. (Mozam.).

283. CÓDIGO PENAL [C. Pen.], art. 183(b) (Angl.).

284. Loi No. 06/018 du 20 Juillet 2006 Modifiant et Completant le Decret du 30 Janvier 1940: Portant Code Penal Congolais, *supra* note 206, art. 2. (Dem. Rep. Congo).

285. EQUALITY NOW, ROADBLOCKS TO JUSTICE: HOW THE LAW IS FAILING SURVIVORS OF SEXUAL VIOLENCE IN EURASIA 38 (2019).

Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, and Uzbekistan. In Asia, some states that still do not include lack of consent as part of the crime of rape are: China,²⁸⁶ Japan,²⁸⁷ Myanmar,²⁸⁸ and Cambodia.²⁸⁹

In Iran, there are current legal provisions that replicate and perpetuate ancient rape laws. The crime of *zina* prohibits any sexual intercourse between a man and a woman who are not married, and *livat* criminalizes any homosexual intercourse between men.²⁹⁰ The Iranian criminal code also stipulates that “in the case of *zina* committed by coercion or force [i.e. rape], if the woman is a virgin, the offender, in addition to the punishment provided, shall be convicted to pay the compensation for virginity . . . and if she is not a virgin, the offender shall be sentenced to the punishment and payment of a *mahr-ul-methl*.”²⁹¹ In other words, both a female survivor of rape and her assaulter are punished with lashes, but the latter has to pay the survivor a compensation fine according to her “virginity status.” With regard to homosexual rape, there is a similar provision: both of the parties are given a hundred lashes, but if one of them used force against the other he is also sentenced to death penalty.²⁹² This is a reproduction of ancient laws and is a legal punishment for rape survivors. In its concluding observations to Oman—which has the same provision on *zina* as Iran—the CEDAW Committee stated its concern that the crime of *zina* and its enforcement contribute to the fact “that women and girls who are victims of sexual abuse risk facing criminal proceedings if they press charges, since the reporting of rape, if not proved, can be considered a confession of sexual relations outside of marriage (*zina*), which is criminalized under articles 225 and 226 of the Penal Code.”²⁹³

The Inter-American Commission on Human Rights issued two merits reports related to the criminalization of consensual homosexual intercourse in 2020, declaring it a violation of the right to equality before the law by Jamaica.²⁹⁴ The IACHR stated that the Jamaican provision criminalizing consensual homosexual sex was not only discriminatory against persons with a diverse sexual orientation and gender identity, but it prevented them from accessing justice and health services due to a fear of being indicted.²⁹⁵

286. 中华人民共和国刑法修正案(九) [Amendments to the Criminal Law of the People’s Republic of China], *supra* note 209, art. 237.

287. Keihō (Pen. C.) art. 177 (Japan).

288. PENAL CODE, arts. 354–55 (Myan.).

289. PENAL CODE, art. 239 (Cambodia).

290. MAJMU’AH QAVANINI JAZAI [(NEW) CODE OF CRIMINAL LAWS] 1381, arts. 221, 233 [2014] (Iran) (translated in Iran Human Rights Documentation Center).

291. *Id.*, art. 231.

292. *Id.*, art. 234.

293. CEDAW Committee, *Concluding Observations on the Combined Second and Third Periodic Reports of Oman*, U.N. Doc. No. CEDAW/C/OMN/CO/2-3, ¶ 27 (Nov. 22, 2017).

294. T.B. & S.H. v. Jamaica, Case 13.095, Inter-Am. Comm’n H.R., Report no. 401/20, OEA/Ser.L/V/II.173, Doc. 419 (2020); Gareth Henry y Simone Carline Edward vs. Jamaica, Case 13.637, Inter-Am. Comm’n H.R., Report no. 400/20, OEA/Ser.L/V/II.XX, Doc. 418 (2020).

295. T.B.Y.S.H. v. Jamaica, ¶ 49; Gareth Henry y Simone Carline Edward vs. Jamaica, ¶ 39.

Finally, other countries, like Latvia²⁹⁶ and Venezuela, still contemplate rape as an “honor crime” instead of criminalizing it as a violation of a person’s sexual autonomy and liberty. In the *López Soto v. Venezuela* case of the IACtHR, the Court of the Americas noted that the Venezuelan Penal Code was discriminatory against women, as the crime of rape was conceived to protect “morality and good customs” and not the sexual integrity of survivors.²⁹⁷ This is clearly a reproduction of ancient and medieval rape laws, whereby women were viewed as property and the law was directed at the modesty and honor of a woman’s family or husband.

B. LAWS THAT ALLOW SOME FORMS OF RAPE

As previously stated, international standards require that national legislation prohibit both male and female rape, marital and inter-partner rape, and forced marriages. Due to the requirement of gender-neutral definitions of rape, most jurisdictions criminalize rape against men and women. However, the lack of prohibition against male rape is still seen in countries that criminalize homosexuality.

Morocco, for instance, defines the crime of rape as “a man who has sexual intercourse with a woman against her will.”²⁹⁸ It does criminalize the “indecent assault carried out with violence regardless of the sex,”²⁹⁹ although indecent assault is not considered rape. But since consensual sex between same-sex couples is illegal,³⁰⁰ male survivors are obviously discouraged from reporting “indecent assaults” as they might be prosecuted. Myanmar, for its part, criminalizes rape against a woman and any consensual and non-consensual homosexual intercourse.³⁰¹

Pakistan defines rape as the sexual intercourse of a man against a woman’s will or without her consent and under other coercive circumstances.³⁰² It also criminalizes “voluntary” homosexual intercourse.³⁰³ In this way, Pakistan indirectly criminalizes male rape, as it does not punish a male victim who did not “voluntarily” consent to the sexual intercourse. However, the same issue arises in Morocco, where the criminalization of homosexual relations discourages male survivors of rape from reporting, because they might be punished, as well.

296. EQUALITY NOW, *supra* note 285, at 38.

297. Case of *López Soto et al. v. Venezuela*. Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 362, ¶ 152 (Sept. 26, 2018). In Spanish, the expression is “la moral y las buenas costumbres,” unofficially translated from Spanish as “morality and good customs.”

298. CODE PÉNAL [C. P.] [PENAL CODE], Dahir No. 1-59-413, art. 486 (28 Joumada II 1382, 1962) (Morocco).

299. CODE PÉNAL, art. 485. (Morocco).

300. U.S. DEP’T OF STATE, MOROCCO 2019 CRIME & SAFETY REPORT (2019), <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=26107>.

301. PENAL CODE [P. C.], arts. 375–76 (Myan.).

302. PAK. PENAL CODE, art. 375, *amended by* Protection of Women (Criminal Laws Amendment) Act, 2006, S.5.

303. PAK. PENAL CODE, art. 337.

Therefore, the lack of direct criminalization of male rape and the prohibition of homosexual relations constitutes a violation of international standards on human rights on equality before the law.

Many countries have undergone recent legal reforms to criminalize marital and inter-partner rape, thanks to NGOs advocating for the rights of the women worldwide. For example, Thailand enacted legislation prohibiting marital rape in 2007.³⁰⁴ However, despite the progress and work of NGOs, marital rape is still a legal exemption to the punishment of rape in the following countries:³⁰⁵ Belize,³⁰⁶ Ethiopia,³⁰⁷ Ghana, India, Indonesia, Jordan, Lesotho, Malaysia,³⁰⁸ Nigeria, Oman, Singapore, Sri Lanka and Tanzania. According to a 2016 report by the World Bank, 112 countries do not explicitly criminalize marital rape.³⁰⁹ According to recent studies, “[m]ore than one billion women lack legal protection against sexual violence by an intimate partner or family member”³¹⁰

Some countries, such as Belize,³¹¹ India,³¹² Indonesia,³¹³ Lebanon,³¹⁴ and Myanmar,³¹⁵ have drafted legal reforms to expressly prohibit marital rape. Singapore repealed the martial immunity for rape in May 2019, and the law

304. *Thailand passes marital rape bill*, BBC NEWS (Jun. 21, 2007, 10:32 AM), <http://news.bbc.co.uk/2/hi/asia-pacific/6225872.stm>.

305. EQUALITY NOW, *supra* note 219, at 6. Most of the countries in the list were provided by Equality Now’s report and confirmed to still have such a legal provision on marital immunity for rape by the author.

306. *Belize*, UN WOMEN, <http://caribbean.unwomen.org/en/caribbean-gender-portal/caribbean-gbv-law-portal/gbv-country-resources/belize#CCA>.

307. The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, art. 620. *See also* U.S. DEP’T OF STATE, *supra* note 237, at 27.

308. PENAL CODE [P. C.], art. 375 (“Exception—Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognized in Malaysia as valid, is not rape.”) (Malay.).

309. *See* WORLD BANK GROUP, *Women, Business and the Law 2016: Getting to Equal* (2015), <https://openknowledge.worldbank.org/handle/10986/22546>.

310. Paula Tavares & Quentin Wodon, *Ending Violence Against Women and Girls: Global and Regional Trends in Women’s Legal Protection Against Domestic Violence and Sexual Harassment*, WORLD BANK 8 (Mar. 2018).

311. Johnelle McKenzie, *Sexual Crimes Legislation Reform Project*, LOVE FM (Jan. 11, 2019), <http://lovefm.com/sexual-crimes-legislation-reform-project/>.

312. *Bill to Criminalize Marital Rape Proposed in India*, TIMES OF OMAN (Jan. 2, 2019), <https://timesofoman.com/article/675219>.

313. Kate Walton, *Indonesia Sexual Violence Bill Sparks Conservative Opposition*, AL JAZEERA (Feb. 8, 2019), <https://www.aljazeera.com/news/2019/2/8/indonesia-sexual-violence-bill-sparks-conservative-opposition>.

314. Zeina Naisser, *LF Introduces Draft Law Criminalizing Marital Rape*, AN-NAHAR (Mar. 9, 2019), <https://en.annahar.com/article/946298-lf-launches-draft-law-criminalizing-marital-rape>.

315. *Myanmar May Finally Pass Legislation to Criminalize Domestic Violence and Marital Rape*, WOMEN’S MEDIA CENTER (Dec. 31, 2018), <https://www.womensmediacenter.com/news-features/myanmar-may-finally-pass-legislation-to-criminalize-domestic-violence-and-marital-rape>; *see also Myanmar’s Proposed Prevention Of Violence Against Women Law: A Failure to Meet International Human Rights Standards*, GLOBAL JUSTICE CENTER (July 2020), https://www.globaljusticecenter.net/files/20200710_MyanmarPOVAWlawAnalysis.pdf; P. C. 1861, 16, § 375 (Myan.).

entered into force in January 2020.³¹⁶ However, it is still worrying that in countries where there is no express prohibition of marital rape, judges are free to interpret whether marital rape is allowed or disallowed.³¹⁷ In some jurisdictions, like Belize³¹⁸ and Sri Lanka,³¹⁹ marital rape is only prohibited when spouses are separated or when there has been physical assault, or a court's order against the husband in the case of Belize. This situation is an ongoing violation to the right to equality before the law worldwide. There is absolutely no legal justification to not prosecute and punish rape within marriage.

There are also legal voids that may have an impact in the prosecution of marital rape. France, for instance, was recently sued before the ECtHR due to the ruling of a Versailles Court in a divorce case, which held that a woman had a "marital duty" to engage in sexual relations with her husband.³²⁰ Two feminist groups backed the lawsuit arguing that the interpretation of the French courts deprived women of the right to consent or not consent to sexual relations within marriage. The ECtHR's upcoming ruling on this issue will surely advance standards on the prohibition of marital rape, consent and gender stereotypes in trials. It is very concerning that the following countries still have rape-marriage laws and allow some forms of forced marriages: Bahrain,³²¹ Bolivia,³²² Iraq,³²³ Kuwait,³²⁴ Philippines,³²⁵ and Tajikistan.³²⁶

316. *6th May 2019 Bill Amendments to Singapore's Penal Code*, SINGAPORE CRIMINAL LAWYER GLORIA JAMES-CIVETTA & CO, <https://www.singaporecriminallawyer.com/bill-amendments-singapores-penal-code/>.

317. U.S. DEP'T OF STATE, *supra* note 237, at 27.

318. *Belize*, *supra* note 306; see also U.N. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, U.N. Doc. CCPR/C/BLZ/1, ¶ 17 (Sep. 26, 2017).

319. U.S. DEP'T OF STATE, SRI LANKA 2018 HUMAN RIGHTS REPORT 17 (2019).

320. *France Taken to European Court over Divorce Ruling that Woman Had 'Marital Duty' to Have Sex with Husband*, THE LOCAL (Mar. 19, 2021, 4:40 PM), <https://www.thelocal.fr/20210319/france-taken-to-european-court-after-divorce-ruling-that-woman-had-marital-duty-to-have-sex-with-her-husband/>.

321. PENAL CODE 1976, 2, art. 353 (Bahr.).

322. CÓDIGO PENAL 1972, art. 317, amended by el artículo 8 de la Ley N° 2033, Oct. 29, 1999, Ley de Protección a las Víctimas de Delitos Contra la Libertad Sexual (Bol.). Currently in force according to Bolivia Info Leyes, <https://bolivia.infoleyes.com/articulo/32654>.

323. Heba Kalso, *Will Iraq be Next to Abolish Controversial 'Marry Your Rapist' Law?*, REUTERS (Mar. 29, 2018, 2:19 PM), <https://www.reuters.com/article/us-iraq-law-rape/will-iraq-be-next-to-abolish-controversial-marry-your-rapist-law-idUSKBN1H5318>.

324. EQUALITY NOW, *supra* note 219, at 18. The Equality Now report also mentions Kuwait and Tajikistan, but the author could not confirm whether those countries still have rape-marriage provisions in force. *Id.* at 6. The report mentions Jordan, Lebanon and Palestine, which have all since reformed their legislations repealing "marry-your-rapist" laws. Algeria, Eritrea, Libya, and Syria are commonly mentioned as having those laws as well; however, such provisions were not found in their Penal Codes by the author nor confirmed by other means. *Id.*

325. PHILIPPINE COMMISSION ON WOMEN, STRENGTHENING THE PROVISIONS OF R.A. 8353: AMENDING THE ANTI-RAPE LAW, <https://pcw.gov.ph/strengthening-the-provisions-of-r-a-8353-amending-the-anti-rape-law/#:~:text=Strengthening%20the%20Provisions%20of%20R.A.%208353%3A%20Amending%20the%20Anti%2DRape%20Law,-Focus%20Areas&text=This%20policy%20brief%20provides%20the,by%20repealing%20the%20forgiveness%20clause>.

326. See EQUALITY NOW, *supra* note 219.

Angola,³²⁷ Jordan,³²⁸ Lebanon,³²⁹ Palestine,³³⁰ and Tunisia³³¹ repealed their former rape-marriage provisions between 2017 and 2019. Iraq is currently undergoing a domestic process to reform and repeal rape-marriage laws.³³² For its part, in 2018, Morocco enacted new legislation explicitly prohibiting forced marriages and repealing its rape-marriage law; however, this new law was criticized for not explicitly prohibiting marital rape.³³³ Palestine also repealed its rape-marriage law in 2018.³³⁴ Another country that still has laws explicitly allowing forced marriages through dowry is the United Arab Emirates.³³⁵ Furthermore, while most countries have set the marriage age as 18,³³⁶ at least 117 countries in 2016 allowed child marriages, either by law or through a parental or judicial authorization exception.³³⁷

The challenges in reforming rape laws are mostly cultural. Ancient and medieval rape laws are a representation of patriarchal cultural beliefs that still pervade many societies throughout the world. Rape myths are common in the legal practice and in the public opinion, and they are still reflected in many discriminatory laws around the world. The increased awareness of these discriminatory laws and push by feminist movements towards reforms have proven to be effective in changing the laws. The enactment of shield laws in the U.S. and England in the twentieth century, as well as the path to legal reforms in Spain and Colombia in recent years, are examples of the important role that civil society can play in modifying inadequate rape laws.

327. The new Penal Code of Angola, adopted in 2019, does not contain the former rape-marriage provision, consequently repealing the immunity granted for marry the victim after raping her/him. See Lei que Aprova o Codioi Penal Angolano, 1 So. No. 179 (Nov. 11, 2020) at https://governo.gov.ao/fotos/frontend_1/gov_documentos/novo_codigo_penal_905151145fad02b10cd11.pdf.

328. Zena Tahhan, 'Historic Day' as Jordanian Parliament Repeals Rape Law, AL JAAZERA (Aug. 1, 2017), <https://www.aljazeera.com/features/2017/8/1/historic-day-as-jordanian-parliament-repeals-rape-law>.

329. *Lebanon Rape Law: Parliament Abolishes Marriage Loophole*, BBC NEWS (Aug. 16, 2017), <https://www.bbc.com/news/world-middle-east-40947448>.

330. *Palestine: 'Marry-Your-Rapist' Law Repealed*, HUMAN RIGHTS WATCH (May 18, 2018, 9:01 AM), <https://www.hrw.org/news/2018/05/10/palestine-marry-your-rapist-law-repealed>.

331. Rothna Begum, *Middle East on a Roll to Repeal 'Marry the Rapist' laws*, AL JAZEERA (Aug. 24, 2017), <https://www.aljazeera.com/indepth/opinion/2017/08/middle-east-roll-repeal-marry-rapist-laws-170822095605552.html>

332. Kanso, *supra* note 323.

333. *Morocco Bans Forced Marriage and Sexual Violence*, BBC NEWS (Sept. 12, 2018), <https://www.bbc.com/news/world-africa-45496337>.

334. *Repealing 'Marry Your Rapist' Laws*, EQUALITY NOW, https://www.equalitynow.org/repealing_marry_your_rapist_laws (last visited Apr. 20, 2021).

335. *Marriage*, UAE GOV'T, <https://government.ae/en/information-and-services/social-affairs/marriage> (last visited Apr. 20, 2021). The government sets the maximum dowry at AED 50,000 UAE nationals.

336. *Child Marriage and the Law*, GIRLS NOT BRIDES, <https://www.girlsnotbrides.org/child-marriage-law/#do-all-countries-have-a-minimum-age-of-marriage>.

337. Aleksandra Sandstrom & Angelina E. Theodorou, *Many Countries Allow Child Marriage*, PEW RSCH. CTR. (Sept. 12, 2016), <https://www.pewresearch.org/fact-tank/2016/09/12/many-countries-allow-child-marriage/>.

In conclusion, many forms of forced marriages are still allowed by laws around the world, with some forms, such as child marriage, more widespread than others. Some countries have undergone a path of legal reforms to adapt their laws to conform to international standards. However, there are still many legal challenges to compliance with international human rights standards on laws relating to sexual violence and rape. Civil society and feminist groups are a key element in pushing towards the path of legal reforms.

IV. RECOMMENDATIONS FOR LEGAL REFORMS AND ADVANCING HUMAN RIGHTS STANDARDS

Overall, this article has outlined the evolution of rape laws around the world, the development of international standards on the matter, and the shortcomings of making the laws a viable remedy for rape survivors. However, there are some countries that offer an example of good practices by enacting laws that not only comply with international standard but take further steps to offer justice to rape survivors. Shield laws are an example of effective practices in prosecuting sexual violence and preventing the use of rape myths in trials. Another example of a law taking additional steps to ensure justice for rape survivors was a proposed bill in Pakistan³³⁸ that would have established a legal presumption believing the victim/survivor whenever a rape trial was reduced to a contradiction between the declarations of the defendant and the victim/survivor (the “he-said/she-said” scenario). The proposed article stipulated:

“114A. Presumption as to absence of consent in certain prosecutions for rape.- In a prosecution for rape under sub-section (3) of section 376 of the Pakistan Penal Code (XLV of 1860) where sexual intercourse by the accused [defendant] is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court *shall presume that she did not consent.*”³³⁹

This provision takes the issue of consent even further than what has been established by international standards. The existence of a presumption of innocence in favor of the defendant might be controversial. However, if one takes into account that, historically, laws established that women: i) could not report rape; ii) could not access any form of justice if they were not virgins or behave themselves according to stereotypical roles because they were presumed to be “non-honest”; and iii) were not believed if their testimony was not corroborated; then, a

338. The Anti-Rape Laws (Criminal Laws Amendment) Act, (Jan. 13, 2014) (Pak.), http://www.senate.gov.pk/uploads/documents/1389775408_477.pdf. In 2016, the Parliament of Pakistan adopted a legal reform to toughen the punishments for rape and ‘honor killing’ of women; however, the author of this paper ignores if the provisions of the Bill were adopted as they had been introduced in the Senate in 2014.

339. *Id.* (emphasis added).

provision like the above constitutes nothing less than an affirmative action to protect a vulnerable group who has been historically silenced by the law. Laws have historically deprived rape survivors of justice; thus, affirmative legal action is required to balance the unequal status of women and men survivors before the legal systems.

International standards establish that rape laws must have lack of consent as a central element of the crime of rape. However, international law does not define what consent is nor how it should be construed. I argue that consent is what the victim/survivor says it is. Consent is a subjective element of sexual autonomy, and as such, the main proof of consent or lack thereof is the victim/survivor's testimony.

Consent should be construed from the survivor's point of view. This would incorporate a gender perspective into rape laws. Rape trials question the victims' statements on consent and tend to generate secondary victimization on top of the widespread impunity of sexual violence crimes. As illustrated by the "wolf pack" case in Spain and the 2009 theft-rape case in Colombia, judges tend to construe the victim's consent based on their conduct and not on what they testify. In Spain, one of the trial court judges even went so far as to say that the victim was having fun.³⁴⁰ Ancient laws like the Deuteronomy required a specific reaction of the victim, such as screams, in order to not hold her accountable for her own rape.³⁴¹ Thus, judges and laws have often substituted the victim's own experience with what they think is a "normal" reaction to rape, even demanding that victims resist or act in a specific way.

Therefore, laws and international standards should establish a presumption of veracity to what the rape survivors declare in trials, in cases where intercourse was proven. The intent of international standards on consent-based rape laws is to focus on the victim's autonomy and personal experience. However, if the legal practice hinders the recognition of the victim's subjective experience, then the law should also address the issue of how judges should construe the victim's consent. Only rape survivors truly know whether they gave consent or not, and only they can attest to it and to why they reacted in a certain way. Rape laws have long discriminated against and shamed rape survivors. A presumption of veracity can correct this wrong that is embedded in today's legal practice.

Although some may argue that the enactment of a legal presumption of veracity could violate the defendant's right to be presumed innocent, the presumption of innocence is not contrary to believing victims. The testimony of victims is, in fact, an important resource to elucidate criminal cases. In a scenario where sexual intercourse has been proven and the question remains on who to believe—the word of the defendant or that of the victim—giving more credibility to the defendant under the color of the presumption of innocence can have a discriminatory effect. Indeed, it perpetuates the medieval stereotype that links honesty to

340. Doria, Álvarez, & Valdés, *supra* note 259.

341. Deuteronomy 22, 23–24.

chastity. Thinking that women who engage in sexual intercourse tend to lie about being raped is recognized as a rape myth that hinders the access to justice for rape survivors.³⁴²

Although some may argue that a presumption of veracity might encourage women to falsely report rape cases, there is no factual evidence to support this claim whatsoever. According to U.S. statistics, the prevalence of false reporting is between 2% to 10%, while rape is the most underreported crime with a 63% estimated rate of non-reported cases.³⁴³ A legal presumption of veracity could actually empower female and male survivors of sexual violence to report assaults.

Additionally, another original recommendation that arises from this study is the need for an international instrument—whether a treaty or declaration—addressing and unifying standards on sexual violence. The former Special Rapporteur on Violence against Women recommended the drafting of an international treaty on violence against women to correct the current normative gap in international law on gender-based violence.³⁴⁴ I advance this proposal by suggesting the drafting of an international treaty or a declaration specifically setting out standards on sexual violence, since violence against women and sexual violence have been addressed altogether but not enough attention has been paid to the latter issue. Most of the current soft-law standards are fragmented and states are clearly not complying with these standards.

The remaining recommendations for legal reforms arise from the international standards on rape laws. Particularly, states should criminalize rape by considering consent a key element in the legal definition of the crime. They should also repeal any laws that allow some form of rape, and they should not require any specific evidence to prove rape or the corroboration of the survivor's declaration.

In conclusion, the history of rape laws has left discriminatory and patriarchal beliefs in current laws, which violate the right of rape survivors to access justice. Whereas international human rights law has attempted to create standards in order to protect rape survivors, there is a normative gap in some issues on sexual violence, namely what consent is and how it should be addressed by national courts. Therefore, the following are recommendations to enhance both the national and international legal framework of sexual violence:

- States must enact, modify, and repeal laws in their domestic legislation to comply with international standards on rape laws. Accordingly, states should:

342. See Edwards et al., *supra* note 248, at ##.

343. *Statistics about Sexual Violence*, NAT'L SEXUAL VIOLENCE RESOURCE CTR. (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf.

344. Rashida Manjoo, (Special Rapporteur on Violence Against Women, its Causes and Consequences), *Report on Existing Legal Standards and Practices Regarding Violence Against Women in Three Regional Human Rights Systems and Activities Being Undertaken by Civil Society Regarding the Normative Gap in International Human Rights Law*, U.N. Doc. No. A/HRC/29/27, ¶ 63–65 (June 10, 2015).

- Introduce lack of consent as an essential element of the crime of rape.
- Repeal laws that allow any form of rape, namely female-only definitions of rape, marital immunity for rape, rape-marriage laws, laws that allow child marriages, dowry or bride price, and levirate marriages.
- Repeal laws that require corroboration of the testimony of the victim.
- Enact shield laws to prevent the usage of the previous sexual history of the rape survivor in legal proceedings.
- Repeal all laws that hinder the prosecution of rape, such as the criminalization of consensual intercourse, either homosexual or heterosexual, outside of marriage (i.e., *zina*).

States and the U.N. Human Rights Council should draft an international instrument on the prevention, eradication, and prosecution of sexual violence. States should implement a gender perspective in rape laws. One way to do so involves creating a legal presumption of veracity of the rape survivor's testimony in trial when intercourse has been proven and when the only existing contradiction is the testimony of the defendant. International human rights bodies should elaborate a standard to promote the creation of a presumption of veracity of the rape survivor's testimonies.

After delving into the legal history of rape, it is clear that the gender stereotypes from ancient and medieval laws have remained embedded in current laws and legal practice worldwide, hindering access to justice for survivors of sexual violence. In order to offer victims an effective remedy against sexual violence and rape, as enshrined in international human rights law, states around the world must undergo legal reforms to their current rape laws.

This article proposes that these reforms prohibit all forms of rape, including marital, homosexual, rape-marriage, child marriage, and dowry. It also states that the legal definition of rape in domestic legislation must take lack of consent as a key element of the crime, and, in turn, consent should be defined according to the victim's experience. The enactment of a legal presumption of veracity in the survivor's declaration on consent would constitute an affirmative measure to counteract the gender stereotypes that pervade rape laws and trials worldwide. It is time for nations worldwide to incorporate a gender perspective to end the impunity in cases of sexual violence around the world.