



Tamar Gegelia*

Female Rape Survivor in the Trial and Epistemic Injustice. Part 1**

[Kobieta, która przeżyła zgwałcenie, w procesie sądowym i niesprawiedliwość epistemiczna. Część 1]

Abstract

Sexual violence from coerced-based to non-consent has already been transformed in many countries. The reason for the reform was the non-comprehensiveness of sexual violence, it did not cover all the significant actions affecting sexual autonomy. The international law gave the change of the national legislation impetus for protecting human rights. Nevertheless, the Georgian Criminal Code still recognizes the old paradigm of sexual violence. The reasons for delaying the reform are the patriarchal ideology that produces rape myths about the 'liar' and 'revengeful' woman. The article shows the problems of rape law in practice, both by observing the reality of Georgia and the experiences of other countries, how female victim-witness testimony that she was raped is constantly suppressed with rape myths and gender prejudice. The article uses Miranda Fricker's philosophical idea of epistemic injustice related to structural discrimination to name the problem. The article is an attempt to show the relevance of this idea in connection with the rape trial. This paper is not a detailed survey of evidentiary standards, including progressive approaches, its purpose is to show the essential influence of gender stereotypes and rape myths on criminal justice through the analysis of court decisions and generalizations, it also shows knowledge that counters prejudices, although their application is fragmental. The article discusses progressive approaches to proving sexual violence, what might be sufficient to establish the truth so that, on the one hand, to overcome the strict standard established in the practice of investigating sexual violence and, on the other hand, to do so without violating the accused's right to a fair trial, which opponents of the reform point to as being at risk. The article sees a solution to the problem by changing from an 'offender-friendly' approach to a 'victim-centered' one.

Keywords: rape survivor, rape myths, gender prejudice, testimonial injustice, rape law.

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** The second part of the article will be published in the next issue (4/2025/76) of ERL&IR (ed.) / Druga część artykułu ukaże się z następnym numerze (4/2025/76) EPPiSM (red.).

The assumption that a woman who does not respect the double standard deserves whatever she gets (or at the very least «asks for it») operates in the courts today.'

Susan Griffin, 1971¹

'... what is their standard for sex, and is this question asked from the *woman's point of view*? The level of force is not adjudicated at her point of violation; it is adjudicated at the standard of the normal level of force. Who sets this standard?'

Catharine A. Mackinnon, 1987²

'...In any case, you must be a total slut to have escaped alive. Any woman who values her dignity would rather die. My very survival incriminates me. The fact of being more terrified by the possibility of being murdered than traumatized by the thrusts of those three idiots starts to seem monstrous.'

Virginie Despentes, 2006³

'Her body's secretions and underclothing are scrutinized, her photographed injuries distributed as exhibits, her body's level of sexual arousal debated without regard to her testimony. She is objectified in similar fashion to her objectification in rape itself. This is the meaning of the term «judicial rape».'

Sue Lees, 1997⁴

'Women quickly learn that rape is a crime only in theory; in practice the standard for what constitutes rape is set not at the level of women's experience of violation but just above the level of coercion acceptable to men. Then level turns out to be high indeed.'

Judith Herman, 2015⁵

'Here in Canada, people often say that we have the best justice system in the world. But if the same system doesn't work well to protect women who have been raped, who have been beaten by their partners, how can you say you have a successful justice system? In my opinion, it is not a successful criminal justice system, it is a failure.'

Elizabeth Sheehy, 2021⁶

¹ S. Griffin, *Rape. The All-American Crime*, 'Ramparts Magazine' 1971, 10, 3, p. 4.

² C. A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press 1987, p. 88.

³ V. Despentes, *King Kong Theory*. Transl. by S. Benson, Feminist Press 2010, p. 37.

⁴ S. Lees, *Ruling Passions: Sexual Violence, Reputation and the Law*, Open University Press 1997, p. 78.

⁵ J. Herman, *Trauma and Recovery, The Aftermath of Violence: From Domestic Abuse to Political Terror*, Basic Books 2015, p. 72.

⁶ See: E. Sheehy when presenting the research – video from 1:00:50, <https://vimeo.com/514212021> [accessed: 05.11.2024]. See also: *Women Who Kill: How the State Criminalises Women We Might Otherwise Be Burying*, The Centre for Women's Justice 2021.

‘Anyone can be raped, but men aren’t conditioned to live in terror of it, nor are they constantly warned that their clothing, travel choices, alcohol consumption, and expressions of sexuality are likely to bring violations upon them.’

Kate Harding, 2015⁷

‘Law enforcement personnel have the power to frame the narrative and they habitually decriminalise criminal reports.’

Miranda A. H. Horvath, Jennifer M. Brown, 2023⁸

Introduction

I started the article with the women’s voices, to show how the results of observation are the same at different times, in different countries when it comes to the rape trial and a female victim’s testimony. There are many examples of the neglect of women as subjects and the constant suppression of their voices in this text.

Women have been subjected to violence, including sexual violence, since time immemorial, and the number of facts has always been shockingly high. Judith Herman explains the event like this:

‘The real conditions of women’s lives were hidden in the sphere of the personal, in private life. The cherished value of privacy created a powerful barrier to consciousness and rendered women’s reality practically invisible. To speak about experiences in sexual or domestic life was to invite public humiliation, ridicule, and disbelief. women were silenced by fear and shame, and the silence of women gave license to every form of sexual and domestic exploitation.’⁹

Statistics of sexual violence against women are still shockingly high. According to Eurostat about 215,000 sexual violence were recorded by the police in the European Union in 2015. Nearly 80 000 were rapes. More than 9 in 10 rape victims and more than 8 in 10 sexual assault victims were girls and women, while nearly all perpetrators of these crimes were male (99%).¹⁰ According to WHO, one in three women has been a victim of physical or sexual violence

⁷ K. Harding, *Asking for It. The Alarming Rise of Rape Culture – and What We Can Do About It*, Da Capo Press 2015, p. 5.

⁸ M. A. H. Horvath, J. M. Brown, *Setting the Scene: The Challenges of Researching Rape* [in:] *Rape Challenging Contemporary Thinking – 10 Years On*, M. A. H. Horvath, J. M. Brown (eds), Routledge 2023, p. 16.

⁹ J. Herman, *Trauma...*, p. 28.

¹⁰ *Violent Sexual Crimes Recorded in the EU*, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20171123-1> [accessed: 08.03.2024].

by an intimate partner at some point in her lifetime.¹¹ According to the research conducted in different jurisdictions, which are used in this article, the attrition rate is still high and convictions are very low compared to sexual violence allegations.

It was only in the 20th century that feminists began to reveal the real data and fight against violence against women. It was supposedly 'scientifically' justified that women 'subconsciously wanted rape' or other sexually violent experiences, that it was some inherent passion of theirs and not violence. Public and private space was permeated with these superstitions and pseudo-science. As a result of feminist research and efforts, psychiatry began to understand sexual violence and trauma against women, about which there was no information until then. However, recognition of post-rape trauma in women also came after scientists conducted research on traumatized male war veterans and made new scientific findings on post-traumatic stress disorder (PTSD).¹² And it was only in 1980 that PTSD appeared in the American Psychiatric Association manual as a type of mental disorder.¹³ Today, in the same manual,¹⁴ post-traumatic mental disorder is assigned with number and includes rape-related traumatic disorder.

Today, scientists recognize the fallacy of teaching in psychiatry in the past century that sexual violence against women and incest (child sexual molestation) was a rarity, while the reality was always the opposite.¹⁵ After revealing the facts, they began to understand and recognize the post-rape trauma.¹⁶ This finding has been reflected to some extent in international legislation and, due to its influence on national law, the statute of limitations for sexual crimes has been extended, and in some cases, it has been abolished altogether.¹⁷ Today, no one disputes that rape is one of the most traumatic experiences affecting survivors' mental health. Trauma hinders the ability to talk about it. Sexual violence is now considered a public issue.

¹¹ WHO 2021. Violence Against Women, <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> [accessed: 08.03.2024].

¹² J. Herman, *Trauma...*, pp. 29-32.

¹³ J. Herman, *Trauma...*, p. 33.

¹⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* Dsm-5. 2013.

¹⁵ Psychiatrist Bessel van der Kolk writes that he was shocked by the numbers he came across during his work on traumatic experiences, during which he learned about the real violent experiences of women and girls. See: B. Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*, Viking 2014, p. 25, and p. 158. See also: J. Herman, *Father-Daughter Incest*, Harvard University Press 1981.

¹⁶ A. W. Burgess, *Rape Trauma Syndrome*, 'Behavioral Sciences & the Law' 1983, 1, 3, pp. 97-114. As it is explained Sigmund Freud glanced at the reality of child sexual abuse in the family but eventually described it as a child's 'phantasy'. For criticism, see: F. Rush, *The Freudian Coverup*, 'Feminism & Psychology' 1996, 6, 2, pp. 260-276. See also: J. Herman, *Father...*, *passim*.

¹⁷ See: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Article 33. Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Article 59.

Angela Davis, in a 2021 article, points out that it took 50 years for women's experiences of violence to be given a relevant name and adequately addressed.¹⁸ She is referring to the #metoo movement of 2017, when women united against a man in power and all together exposed his unbridled sexuality that defied women's will. Such a universal protest which exposes the violent reality and structural discrimination, which was previously only talked about by individuals, now has a large-scale character, and this is where the fundamental transformation of social norms begins. The mass media also devotes a lot of time to the issues of consent and sexual harassment, which itself creates new narratives and discourse around the issue, which is significant for a cultural shift.¹⁹ These changes were initiated by feminists from the 70s of the 20th century. It was then that new narratives emerged on the rape paradigm; arrows of blame were directed at the perpetrator, and thus the cultural change began. However, changes cannot happen everywhere at the same time, every country has its own pace. For example, in Georgia, A TV presenter whose sexual assault has been proved by all three courts in civil law justice²⁰ still takes the position and has power.

In Georgia, there is a patriarchal culture, public and private spaces are permeated with sexism and male dominance. Women in parliament are subjected to physical²¹ and verbal abuse.²² Women politicians and journalists are silenced by publishing secret videos showing their sex lives.²³ There is no effective legal response to this. Women are abused on the streets, in public transport, in the office, in the family, everywhere. Women are killed because they are women. The scale of the violence is very high. It is with such a sexist and discriminatory environment that the extent of sexual violence and what happens in the rape trial when a female victim decides and raises her voice about sexual violence are related. This is the 'sexual violence as a continuum', as Liz Kelly describes it.²⁴

But it must also be noted that young women in Georgia have started talking about these experiences and more and more women are using legal mecha-

¹⁸ A. Davis, *Struggle, Solidarity, and Social Change* [in:] G. Chandra and I. Erlingsdóttir (eds), *The Routledge Handbook of the Politics of the #MeToo Movement*, Routledge 2020, p. 27.

¹⁹ K. Harding, *Asking...*, p. 7.

²⁰ See: Radio Free Europe, G. Nemsadze, The case 'Samkharadze vs. Ramishvili' – what is written in the court decision, <https://tinyurl.com/236zn5r4> [accessed: 23.03.2024]. See also: The public defender established the fact of sexual harassment by Shalva Ramishvili, <https://www.gyla.ge/ge/post/sakhalkho-damcvelma-shalva-ramishvilis-mier-seqsualuri-shevitsroebis-faqti-daadgina#sthash.gYhrlvpx.dpbs> [accessed: 23.03.2024].

²¹ See: Netgazeti 2021. A Deputy With the Function of a Law Enforcement Officer: How women were abused in the parliament, <https://netgazeti.ge/news/554876/> [accessed: 23.03.2024].

²² See: Netgazeti 2023. 'Dream' Member Irakli Beraia Verbally Abused Teona Akubardia, <https://netgazeti.ge/life/694890/> [accessed: 23.03.2024].

²³ See: Radio Tavisupleba 2018. Disclosure of Information on Private Life. The program – Reflections, <https://www.youtube.com/watch?v=E7z6HXpJJ9k> [accessed: 23.03.2024].

²⁴ L. Kelly, *Surviving Sexual Violence*, Polity Press 1998.

nisms to fight,²⁵ this is undoubtedly thanks to the #metoo movement, as well as the activism of Georgian feminists.

Through the efforts of the feminist movement many steps have been taken to address the gender perspective in criminal law and the female experience of violence. At the international level, there has been recognition of the systematic and large-scale violence against women that took place historically and was invisible and tolerated. Sexual violence is considered a discriminatory crime.²⁶ Rape is considered as such by the international legal standard.

‘Recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.’²⁷

‘The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.’²⁸

Violence against women could not be given its name and could not be talked about, because the content and purview of criminalized violence were determined by men in power. Gender-related violence and gender motives have appeared in modern criminal law. Nevertheless, criminal law is still male law and has not been transformed into an instrument which defends equality. This is indicated by many factors, the main one being the patriarchal understanding²⁹ of ‘logic’ and ‘rationality’ on which the action of criminal law is based. It ignores the logic and rationality of what is real and scientifically established. The same applies to sexual violence. Rape reform is difficult to achieve especially in a patriarchal society because it aims to revise the boundaries of rape, which is not in the interest of patriarchy.³⁰ Russell makes the

²⁵ See: Five Women Talk About Sexual Harassment by the Metropolitan, RadioLiberty, <https://shorturl.at/ackxU>. Also see: Female Football Players Talk About Sexual Harassment from Their Coach, RadioLiberty, <https://shorturl.at/giL03> [accessed: 02.03.2024].

²⁶ C. A. Mackinnon, *Rape Redefined*, ‘Harvard Law & Policy Review’ 2016, 10, 2, p. 436; M. Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* The Raoul Wallenberg Institute Human Rights Library, 38, Boston 2011, p. 365. See also: T. Dekanosidze, N. Chikhladze, G. Kharatishvili, *The Administration of Justice on Sexual Violence Crimes Against Women in Georgia*, Council of Europe 2020; J. Conaghan, Y. Russell, *Rape Myths, Law, and Feminist Research: Myths About Myths?*, ‘Feminist Legal Studies’ 2014, 22, 1, p. 46.

²⁷ The Preamble of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence.

²⁸ CEDAW General Recommendation No. 19: Violence Against Women Adopted at the Eleventh Session of the Committee on the Elimination of Discrimination against Women, in 1992 (contained in document A/47/38), para. 6. See also: CEDAW, General Recommendation No. 35, para. 1.

²⁹ According to Judith Herman: ‘The most widespread and enduring form of tyranny is patriarchy. A social system of male dominance and female subordination has prevailed over millennia and still prevails to a greater or lesser degree in countries throughout the modern world.’ See: J. Herman, *Truth and Repair: How Trauma and Survivors Envision Justice*, Basic Books 2023, p. 55.

³⁰ S. E. Ullman, *Talking About Sexual Assault: Society’s Response to Survivors* (2nd ed.), American Psychological Association 2023, p. 25.

right point when she writes: ‘The law takes the logic of the masculine logo to its only conclusion and it is structurally invested, for its own survival and coherence, in the exclusion and erasure of woman’s voice, which represents the possibility of a plural form of being and thinking and is thus a fundamental challenge to the legitimacy of law.’³¹

Rape has already been modified by absence of consent in many countries, the reason for the reform was the narrow limits of sexual violence that did not include all acts that interfere with sexual autonomy. The international law for the protection of human rights gave impetus to the change of the national legislation. Nevertheless, a large number of European countries, including the Georgian Criminal Code, still set a high threshold for what constitutes unlawful sex. The reasons behind the reform, both in Georgia and in other jurisdictions, are patriarchal ideologies that produce rape myths³² about the ‘deceitful’ and ‘vengeful’ women.³³ The criminal justice system sets the standard of the ‘ideal victim’ for a woman, the ‘rational’ rules of action during sexual violence. In particular, it determines what the ‘typical behavior’ is for a woman before, during, and after sexual violence. If the female rape survivor’s behaviour does not fit this mould, she remains outside of legal protection, the criminal justice professionals suppress her voice, and they do not believe her because the behaviour is not ‘adequate’ and ‘reliable’ according to the primitive measure of ‘typical behaviour’. As O. Smith correctly assessed, the system is ‘oversimplifying the context of rape.’³⁴

A woman may not be able to physically resist violence, it may be fear of death, or tonic immobility, which is confirmed by scientific evidence. It is also logical why the victim may delay reporting the rape because the fear of being disbelieved and humiliated is great, and the reason may also be trauma, which is an obstacle to speaking.

The victim’s right to be heard is systematically violated under the influence of sexist prejudices that have always existed against women, and which are not based on any reliable source. When the credibility of a witness’s testimony is undermined not by evidence but by sexist prejudice, this is called epistemic injustice. The article will use Miranda Fricker’s philosophical view of epistemic injustice.³⁵ I will try to show the relevance of this idea in the legal system, specifically concerning sexual violence in criminal justice. There are few examples of the integration of Fricker’s philosophical idea into law;

³¹ Y. Russell, *Woman’s Voice / Law’s Logos: The Rape Trial and the Limits of Liberal Reform*, ‘Australian Feminist Law Journal’ 2016, 42, 2, p. 291.

³² Rape myth – it is believed that the first use of this term was by Susan Brownmiller [in:] *Against Our Will: Men, Women, and Rape*, Ballantine Books 1993.

³³ J. Jordan, *Tackling Rape Culture: Ending Patriarchy*, Routledge 2022.

³⁴ O. Smith, *Rape Trials in England and Wales Observing Justice and Rethinking Rape Myths*, Palgrave Macmillan 2018, p. 66.

³⁵ M. Fricker, *Epistemic Injustice: Power and the Ethics of Knowing*, Oxford University Press 2007.

among the legal scholars I have come across are Deborah Tuerkheimer³⁶ and Jan Christoph Bublitiz.³⁷

Rape justice, from the investigation stage to the trial, is discriminatory against women.³⁸ The efforts of the state to protect female rape survivors who are subjected to violence on a large scale are not effective. This environment makes violence invisible and it turns justice into a deaf wall for women. The problem the UN report is described as follows: 'When the State fails to hold the perpetrators of violence accountable, this not only encourages further abuses, it also gives the message that male violence against women is acceptable or normal. The result of such impunity is not only denial of justice to the individual victims / survivors, but also reinforcement of prevailing inequalities that affect other women and girls as well.'³⁹

The article will also discuss progressive approaches to proving sexual violence, what can be sufficient to determine the truth so that, on the one hand, it overcomes the strict standard established in the practice of sexual violence investigation, and, on the other hand, it happens without violating the accused's right to a fair trial, which the opponents of the reform point to as if it were in danger.

The article examines rape-related judicial justice, which is based on gender prejudices and social delusions rather than reliable empirical observations and science. In the research, I show what 'epistemic injustice' means to rape survivors. Gender stereotypes and rape myths dehumanize female rape survivors and are still successfully used in the 21st century to protect male rapists. Prejudice deprives women of every chance to give voice to justice, which is muted by these social norms. I will use research and cite specific cases from criminal justice in Georgia and from various jurisdictions to illustrate this injustice to show how universal prejudices against women are, especially if she is a rape survivor and speaks out.

The purpose of this article is to expose the gender biases that still dominate rape cases and prevent women from accessing justice, leading to injustice. The research rationally and scientifically analyses the issue against prejudices, which should be a necessary tool to overcome gender myths in rape trials.

The aim of the study is to rethink the standard of evidence established in rape cases. Arguing that this is an inappropriately harsh approach, criminal law sets a double standard for rape and other crimes. For the research, the

³⁶ D. Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 'University of Pennsylvania Law Review' 2017, 166, 1.

³⁷ J. Ch. Bublitiz, *When is Disbelief Epistemic Injustice? Criminal Procedure, Recovered Memories, and Deformations of the Epistemic Subject*, 'Criminal Law and Philosophy' 2023, 18, 3 (Aug.).

³⁸ For the same evaluation see: Tuerkheimer, *Incredible...*, *ibid.*

³⁹ United Nations (2006), *Ending Violence Against Women: From Words to Action*. Study of the Secretary-General, p. iv-v.

standard of evidence established by international human rights protection law will be searched and analysed, including by observing the approaches of the European Court of Human Rights (ECtHR, Strasbourg Court) and also the practice of international criminal courts / tribunals. It is worth noting that the approach of international courts regarding Rape Law, both in its material and procedural aspects, is progressive, and it is their approach that is supported by the present study.

For research purposes, legal literature and court practice as well as feminist criminology and sociology were used, which is crucial to overcoming the gender blindness that pervades much of the legal text. Feminist findings and insights should not be confined to feminist works. Findings of psychiatry and psychology were used for research purposes to show how much harm sexual violence has and that this harm is not only physical, which is also significant for the development of evidence law.

Epistemic Injustice: How Rape Myths and Gender Prejudices Impact on the Decision-Making Process

You've heard of «victimless» crimes.
Rape is perhaps the only perpetratorless
crime, in our collective imagination.⁴⁰

K. Harding

K. Harding, with this short sentence, accurately conveys the terrible reality in which raped women find themselves when they enter the system to protect their rights, and the system is raised like a deaf wall in front of them.

The injustice to which female rape survivors are subjected in criminal justice system can be called epistemic injustice.⁴¹ Miranda Fricker calls epistemic injustice '...a wrong done to someone specifically in their capacity as a knower.' Fricker distinguishes two types of epistemic injustice, testimonial and hermeneutical injustice.

According to Fricker:⁴²

'Hermeneutical injustice occurs at a prior stage, when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experience.' As an example of *hermeneutical*

⁴⁰ K. Harding, *Asking...*, p. 36.

⁴¹ D. Tuerkheimer, *Incredible...*, *ibid.*

⁴² M. Fricker, *Epistemic...*, p. 1.

injustice, according to Fricker, it is sexual harassment in a culture where it has not yet been properly evaluated.⁴³

‘Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker’s word.’

M. Fricker explains epistemic injustice with unethical and stubborn prejudice despite evidence to the contrary. When a person spreads prejudice against another because of an innocent mistake, this is not what is meant here.⁴⁴

As an example of testimonial injustice, Fricker cites the examples of fictional characters of a black man and a woman. characters are narrators who are not believed simply because one is a black man who ‘always lies’ and the other is a woman who is ‘not asked for an opinion’.⁴⁵

Those who know the truth are not treated as knowers because of preconceived notions and prejudices that are not based on reliable sources but on social delusions. It is the culture permeated with such prejudices and discrimination that creates an unfair environment that M. Fricker calls epistemic injustice.⁴⁶ As far as Fricker explains testimonial injustice with the connection to social injustice, she calls prejudice that causes systematic testimonial injustice ‘negative identity prejudice’.⁴⁷ Those who know the truth are not trustworthy because they are not reliable sources due to identity prejudice. The roots of both kinds of ‘systemic epistemic injustice’ are structural inequalities of power.⁴⁸ For a hearer with power in structural injustice, the narrator is not a moral agent, she / he is an object.⁴⁹

‘The epistemic injustice bears a social meaning to the effect that the subject is less than fully human. When someone suffers a testimonial injustice, they are degraded *qua* knower, and they are symbolically degraded *qua* human.’⁵⁰

Fricker considers testimonial injustice to be the case when ‘it [prejudice] results in her receiving less credibility than she otherwise would have – a credibility deficit.’⁵¹ She explains testimonial injustice ‘as a kind of injustice in which someone is wronged specifically in her capacity as a knower.’

The legal system for female rape survivors embodies both types of epistemic injustice. Fricker calls this phenomenon double epistemic injustice.⁵² The agents of justice evaluate the credibility of a female rape survivor’s testimony based on gender stereotypes. They persist in doing this despite the

⁴³ Ibid.

⁴⁴ M. Fricker, *Epistemic...*, p. 34.

⁴⁵ M. Fricker, *Epistemic...*, pp. 10, 23.

⁴⁶ M. Fricker, *Epistemic...*, pp. 27, 54.

⁴⁷ M. Fricker, *Epistemic...*, p. 29.

⁴⁸ M. Fricker, *Epistemic...*, p. 156.

⁴⁹ M. Fricker, *Epistemic...*, p. 135.

⁵⁰ M. Fricker, *Epistemic...*, p. 44.

⁵¹ M. Fricker, *Epistemic...*, p. 17. Cf. E. Anderson, *Epistemic Justice as a Virtue of Social Institutions*, ‘*Social Epistemology*’ 2012, 26, 2, p. 170.

⁵² M. Fricker, *Epistemic...*, p. 160.

legal requirements that evaluations be supported by evidence and the information available to them and exists in the world. Gender stereotypes and rape myths feed the mainstream narratives used in rape trials. A woman is 'emotional', 'vindictive', and 'unreliable' and a man is 'rational' and 'trust-worthy'.⁵³

O. Smith identifies three main narratives by observing the courts of England and Wales. The stereotype of 'damaged' women, 'vengeful' women, and 'capricious princesses'.⁵⁴ The narrative of the 'damaged' woman is the most prevalent narrative concerning rape survivors,⁵⁵ linking her new accusation that she is 'disordered' to past traumatic experiences and being silenced by medicalization.⁵⁶ O. Smith says that during the trial, the defence's strategy is built entirely on dehumanizing the female rape survivor, and no one interferes with this, including often not even the prosecutor.⁵⁷

Using the history of a woman's traumatic experiences to discredit her testimony in the current case or calling a psychiatrist to test the reliability of the woman's testimony should be inadmissible. Because the only purpose it serves is to strengthen general stigma with mental health and the prejudice of the 'damaged woman'.⁵⁸

Observing US courts, Deborah Tuerkheimer highlights these myths:

'[V]indictive and therefore lying about her rape; she is regretful about consenting to sexual activity with the accused and therefore lying about her rape; or she is incapable of assessing whether she consented due to intoxication, and therefore lying when she claims otherwise.'⁵⁹

It is worth noting that gender bias against men also exist, however, according to the researchers, this works in their favour. Among them, they single out a man's aggressive sexuality that seems to be impossible to control. This is where the victim-blaming superstition comes from – she invited rape.⁶⁰ The Halo Effect / Attractiveness of the defendant,⁶¹ a 'family man', a 'good employee' or just a handsome guy whom the collective imagination cannot put in the image of a rapist, also works in favor of the defendants. It was the halo effect that additionally worked in favour of I. Jishkariani's high-profile case which will be discussed below.

⁵³ O. Smith, *Narratives, Credibility and Adversarial Justice in English and Welsh Rape Trials* [in:] *Rape Narratives in Motion*, U. Andersson, M. Edgren, L. Karlsson, G. Nilsson (eds), Palgrave Macmillan 2019, pp. 76–79.

⁵⁴ O. Smith, *Narratives...*, p. 130.

⁵⁵ O. Smith, *Narratives...*, p. 81.

⁵⁶ For the same observation see: B. H. Ryan, V. N. Valliere, *Successful Prosecution of Intimate Violence: Making It Offender-Focused*, Routledge 2024, pp. 74 and 75.

⁵⁷ O. Smith, *Narratives...*, p. 91.

⁵⁸ See: T. Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 'University of Pennsylvania Law Review' 2005, 153, p. 1196.

⁵⁹ D. Tuerkheimer, *Incredible...*, p. 9.

⁶⁰ J. Jordan, *Tackling...*, p. 65.

⁶¹ B. H. Ryan, V. N. Valliere, *Successful...*, p. 7.

How women are silenced in court by gender bias is clearly demonstrated in the following cases. The first case took place in Romania, which were considered by the Strasbourg Court which found a violation of the state's positive obligation, while the second case is from Georgian judicial practice. The cases serve as an example of how prejudice in the legal system silences female rape victims, even when there is evidence that the victim is speaking the truth.

Ms. J. K. in the trial⁶²

'Rape trials where the woman's body, its secretions and its desires are the subjects of close examination, function as a form of control over female sexuality. By focusing on the woman's body, rather than on her testimony, the impression is given that she is ruled by her body and therefore her 'consent' or 'rationality', the core issue of dispute in rape trials, is implicitly questioned.'

Sue Lees⁶³

E. B. v. Romania⁶⁴

According to the applicant's testimony, she was coming from the meadow where she left her husband to work, and a stranger approached her on the way, first offered her sex in exchange for money, when she refused, he forcibly dragged her away to the cemeteries and raped her. He threatened her with a knife, and the woman followed his instructions.

The victim approached the police the same day but found the door locked. On the way to the police, she told this story to a woman she knew. Who also was a witness to the fact that the victim returned from the police because no one met her there. The victim told her friend and her husband about the rape the same evening. The next day she reported to the police.

The defendant argued that the sex was consensual and the reason for the rape complaint was that the woman was afraid of her husband. It should be noted that the accused was previously convicted of rape.

The examination could not identify 'any specific sign with the genitals characteristic of rape'. It should be noted that the woman had a mild intellectual disability. The woman testified several times and she also described the symptoms characteristic of post-rape syndrome. At the court, the first indirect witness, with whom the rape victim talked about the incident, was questioned. She also confirmed that the woman found the police station closed.

When asked *why* she didn't scream, and *why* she didn't fight, the victim an-

⁶² Inspired by Franz Kafka's *The Trial* (*Der Prozess*).

⁶³ S. Lees, *Ruling...*, p. 74.

⁶⁴ E. B. v. Romania (appl. 49089/10) [accessed: 19.03.2019].

swered that the rapist had a knife and she was scared. The prosecutor's office responded that you have no physical injuries and you could not be raped! It was more convincing for them that a woman would willingly have sex with a stranger in a cemetery. This is a rare case where the rape survivor immediately reported the incident to the police, but in such cases, it becomes secondary because there are no physical injuries. Physical bruises she had was not used as evidence in the case due to the negligence of the system.

The Strasbourg Court found a violation of the applicant's rights in this case. 'In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy.'⁶⁵

The court repeated the same in this case that the presence of two irreconcilable versions of the facts obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances. That could have been done by questioning people known to the applicant and the perpetrator, such as friends, neighbours and others who could shed light on the trustworthiness of their statements, or by seeking an opinion from a specialist psychologist about post-rape trauma. In this context, the authorities could also verify whether any reasons existed for the victim to make false accusations against the alleged perpetrator. However, the Court observes that none of the above was done at any stage of the investigation in the current case.⁶⁶

It is important to note that the Strasbourg Court indicated that because the woman had an intellectual disability, there was a need to show even more sensitivity during the investigation, which the State did not do.⁶⁷ In particular, in what condition she would be during the rape. Also focused on the place, and the context of the rape, it took place in a cemetery in a deserted place, in the evening,⁶⁸ which was not taken into account by the prosecutor's office. The only thing the prosecution appealed to was the absence of physical bruises. Even though the perpetrator had already been convicted of rape, prosecutors did not doubt the reliability of his testimony.

The case of Tamta Todadze

One of the clearest examples of abuse and injustice of the victim with the help of gender myths is the case of Tamta Todadze from the latest Georgian court practice. Tamta was a victim of sexual violence in a case where the

⁶⁵ Ibid., § 56.

⁶⁶ Ibid., § 58.

⁶⁷ Ibid., § 59.

⁶⁸ Ibid., § 60.

accused was acquitted.⁶⁹ According to the testimony of the victim, sexual violence took place at work, in the defendant's room, he was the head of the bureau where Tamta worked as his assistant. According to the victim's testimony, on that day the accused Ilia Jishkariani was drunk and he offered her to drink alcohol too, which Tamta did not refuse and she also drank a little. After the accused touched her sexually without her permission and then aggressively continued it, the victim threatened to take a video with her mobile phone. Due to this the accused broke the mobile phone, held her with his hands, and did not allow her to escape.⁷⁰ According to the testimony of the victim, she managed to escape from the building. As soon as the victim got home, she called 112 from her mother's cell phone, the police came and she told them about the incident in detail. However, the scene was inspected at 3 a.m., while the report was made at noon. The victim's first testimony was recorded by the police body camera.⁷¹ The case contains the report of a medical expert who identified physical bruises on the victim's body, which corresponded to the time when the incident occurred. Later, the accused was also interviewed. who denied this fact. However, after the conclusion of the biological examination, it became known that fragments of I. J.'s biological material were left on the victim's body, then the accused told the investigation a completely new version of the story; that Tamta allegedly attacked him because she was not promoted at work, while according to accused, she was 'drunk' and 'inadequate'. At the same time, the defendant's lawyer referred to the victim with insulting words, namely, 'little liar', 'extortionist', etc.⁷² They also referred to the victim's advocates, who were lawyers for a feminist organization. The defence tactics were based on the myths that Tamta is a greedy woman, drinks 'like a man' and behaves 'inadequately'. The state inspector even fined the defendant's lawyer for illegally processing the victim's sensitive personal information.⁷³ It should be noted that the other three people employed in the bureau were relatives and friends of the accused. At the time of the incident, there was no one in the office except the accused and Tamta.

In this case, the victim of sexual violence immediately called the police and described the events in a precise sequence, the fact that the video cameras confirmed her quick escape, and that there was biological material of the ac-

⁶⁹ Tabula. Todadze's case – the court acquitted the former MP accused of sexual crimes, <https://tabula.ge/ge/news/686370-todadzis-sakme-seksualur-danashaulshi-braldebuli> [accessed: 03.11.2024].

⁷⁰ On.ge What Does the Woman Who Accuses the Georgian Dream MP of Sexual Violence Say?, <https://shorturl.at/clxC3> [accessed: 03.11.2024].

⁷¹ The case of Tamta Todadze: What the victim says and the closing speech of the prosecutor, Tamta Khaliani, 2022, Feb. 22, <https://publika.ge/tamta-todadzis-saqme-ras-hyveba-dazaralebuli-da-prokuroris-daskvni-ti-sityva/> [accessed: 03.11.2024].

⁷² The case of Tamta Todadze, 2020, Jan. 24, <https://tabula.ge/ge/news/638842-tamta-todadze-mariam-kublashvils-etikis-kodeksis> [accessed: 13.02.2024].

⁷³ Ibid.

cused on her body, and also the expert report of the physical injuries. I. J. was acquitted. Despite this evidence, the version of the accused was convincing to the court. In this case, the female victim's actions meet the strict standard for a sexual offense case, she was physically assaulted, ran away, and immediately called the police. In such cases, other barriers come to the force, and the fact that the woman behaved 'typically' becomes secondary. In this case, in addition to gender prejudices, the privileged position of the accused also played a huge role, he was the majority deputy of the ruling party.

Why didn't the system believe these women? In the first case, the rape myth worked in favour of the abuser, 'she regretted it after sex' and that's why she complained. The reason for discrediting the woman's testimony was not any evidence that the witness had a reason to lie, but a myth, and her intellectual disability was an additional barrier to access to justice.⁷⁴ In Todadze's case, the credibility of the woman's testimony was also reduced not based on investigation and evidence, but on the myth that she was a 'drunk and inadequate', a 'vengeful' woman who did not get what she wanted from a man and therefore complains. The facts in the case that supported the credibility of the woman's testimony, including physical harm and biological material, were outweighed by the prejudice against women while the fact that the accused was the head of the bureau and was partying at work, he instructed Tamta to set the table and then clean it up, or that he employed relatives in the bureau, these bad characteristics of his behaviour were not taken into account by anyone. 'Offender-focused'⁷⁵ prosecution is what is missing.

In most of the cases instead of listening to the victim, who is a direct witness of what happened, the agents of justice focus on small details, which are, firstly, peripheral⁷⁶ to the case and secondly, they are not the evidence that excludes rape. Ignoring the testimony of the victim only serves the purpose of maintaining a narrow and simplistic narrative of rape, which is based on mistrust of the woman. Calling the female victim 'inadequate', 'lying extortionist' without evidence and completely dehumanizing her, this is a rape trial.

To make the epistemic injustice against female victim witnesses even more visible, it is appropriate to consider other cases and the most common rape myths, while at the same time confronting them with scientific evidence and gender perspective.

⁷⁴ On barriers to access to justice on the grounds of disability as well as for minority groups on various grounds, see: J. Brown, T. Cole, Y. Shell, *Revealing Rape's Many Voices Differing Roles, Reactions and Reflections*, Springer International Publishing 2023, pp. 57–59. For an analysis of the discriminatory treatment of persons with disabilities in the Georgian justice system, see A. Tavkhelidze (2023), *Women With Psychosocial Needs in the Justice Process*, <https://phr.ge/blog/650?lang=geo> [accessed: 15.03.2024].

⁷⁵ B. H. Ryan, V. N. Valliere, *Successful...*, *ibid*.

⁷⁶ O. Smith, *Narratives...*, p. 94.

The culture of disbelieving women

Laura Palmer is a fictional character from the American television series *Twin Peaks*. Palmer was raped and killed. Although she was thrown into the river wrapped in plastic, when the police found her on the river bank and removed the cellophane, she still had a beautiful face. This is probably a metaphor for the ‘ideal victim’. The whole town is crying and no one doubts that she is a victim of violence. Would Laura Palmer be believed if she were alive? Would her testimony that she was raped be as credible?

Among the myths is that a raped woman must have physical harm and torn clothes.⁷⁷ A woman should fight back against the rapist, this is considered ‘typical behaviour’ from a woman. Whereas, when faced with imminent and inevitable violence, the victim often becomes paralyzed, completely incapable of resistance, this is scientifically explained (for details, see the analysis of psychology in the second part of the article). The fact that physical resistance is not a necessary instinct and typical behaviour of the victim is also confirmed by many studies.⁷⁸ According to an English study, 14% of rape cases are cases where the attacker was a stranger and physically assaulted the victim.⁷⁹ In most cases, physical force is not used.⁸⁰ According to another study that replicated the results of previous studies, 70% of 298 female rape survivors reported significant tonic immobility and 48% reported extreme tonic immobility during the assault.⁸¹

Call when you die!

The standard of physical resistance also applies in modern Georgian court practice, even when the victim is a child. An example of this is the cases that were included in the Public Defender’s report.⁸² There are cases of child abduction and rape. The perpetrator was punished because the child was under

⁷⁷ J. Temkin, J. M. Gray, J. Barrett, *Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study*, ‘Feminist Criminology’ 2018, 13, 2, pp. 210 and 211; O. Smith, T. Skinner, *How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials*, ‘Social & Legal Studies’ 2017, 26, 4, p. 449.

⁷⁸ A. Möller, H. P. Söndergaard, L. Helström, *Tonic Immobility During Sexual Assault: A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression*, *Acta Obstetrica et Gynecologica Scandinavica* 2017, 96, p. 932; D. White, L. McMillan, *Statutory Response to Sexual Violence Where Doubt Is Always Considered Reasonable* [in:] *The Routledge Handbook of Gender and Violence*, N. Lombard (ed.), Routledge 2018.

⁷⁹ J. Temkin, J. M. Gray, J. Barrett, *Different...*, *ibid.*, p. 211. See also: J. M. Gray, M. A. H. Horvath, *Rape Myths in the Criminal Justice System* [in:] *Women and the Criminal Justice System*, E. Milne, K. Brennan, N. South, J. Turton (eds), Palgrave Macmillan 2018, p. 18.

⁸⁰ K. Adolfsson, *Blaming Victims of Rape: Studies on Rape Myths and Beliefs About Rape*, BrandFactory 2018; D. White, L. McMillan, *Statutory...*, *ibid.*

⁸¹ A. Möller, H. P. Söndergaard, L. Helström, *Tonic...*, *ibid.*

⁸² Special Report of the Ombudsman (2022), *Harmful Practice of Early / Childhood Marriage in Georgia – Existing Challenges and Solutions*.

the age of 16, but the qualification was downgraded (sexual intercourse with a person under the age of consent [art. 140]).⁸³ The court requires children who are victims of violence to provide evidence of physical resistance, otherwise, their testimony is not believed. The same gender stereotypes and rape myths work for children – ‘asking for it’.

The case of 2021 is also an illustration of a double standard. The 15-year-old child was abducted by three men, one of whom wanted to ‘marry’ her. The court did not doubt the abduction, considering the available evidence to be sufficient. The power of three men to show the suppression of the victim was convincing to the court, however, the charge of rape was dismissed with the argument that they were already alone in the room and she could have physically resisted. The judge also focuses on the clothes, that they were not torn, and that the child did not have ‘injuries typical of rape’ on her body.⁸⁴ The fact that the child is locked in a house where the climate is violent is not enough evidence for the court, the judge narrows the rape with bodily injuries. The child’s body is observed under a microscope. This is an extreme simplification of sexual violence and the context in which it occurs, a primitive measure of what violence is. If the child was 16 years old (age of consent), the judge would not have punished the perpetrator for sexual violence at all. What I’m saying is that the content and boundaries of violence are still defined based on male perspective and interests.

In this decision, it is interesting that the judge noted that the prosecutor himself did not believe the victim’s testimony that she resisted the abuser. There are several problems here. One thing is that the prosecutor might also believe in rape myths and cannot include sexual violence against a child in the rape paradigm that he learned years ago. A few weeks of training in specialization does not help to change one’s mind. Even if we assume that the child did not resist the abuser physically, the victim, under the influence of the prosecutor, knows that they will not believe that the sex was unwanted for her, so she makes a small adjustment of the events, and for more credibility of the testimony, she may claim physical resistance.⁸⁵ Physical resistance does not matter! The climate is violent, here the prosecutor is free from proving the absence of consent. A child who was abducted and trapped in a house could not possibly consent to sex. And a reasonable person cannot possibly believe that she consented.⁸⁶

⁸³ Judgment of Bolnisi District Court of April 22, 2021, #1/322-20.

⁸⁴ *Ibid.*, para. 3.83–3.94.

⁸⁵ See: Decision of the Supreme Court of Georgia, № 77AP-17, 27 March 2017. In this case, the child had to undergo the sexual abuse again to prove the truth that she had been sexually assaulted. The child was repeatedly sexually molested by the godfather. When she managed to tell her parents about the violence, they did not believe her. A video camera was fixed where violence was expected according to the child’s testimony. Only after the video recorder revealed the truth about the child’s sexual molestation, did they believe her.

⁸⁶ It should be noted that there are few but significant good practices in the cases of child rape survivors in the Georgian justice system. For analysis, see: I. Kelenjeridze, Chapter 5, § 2 [in:] *Sexual Offenses*, World of Lawyers 2020, pp. 170–174.

Michelle J. Anderson⁸⁷ cites a 1900 case (state vs. Neel, 60 P. 510, 511 [Utah 1900]) where the judge noted that it was a woman's instinct to respond immediately to rape. This is certainly a rumor and has no scientific basis. Thus, approaches to female rape survivors in criminal justice are static and universal.

Another strategy to silence women is to speak for the woman by using her body's secretion as a witness. Against the perpetrator's defence it should also be said that the victim's physiological response to sexual violence, such as lubrication, genital stimulation, etc. does not exclude rape, and should not be a defence of the accused.⁸⁸ Such automatic behaviours are not relevant. This issue is resolved even without biological and psychological explanations. Sexual penetration without consent is complete upon initiation. Discrediting women's testimony is based on rape myths, it has nothing to do with science and law.

It is a myth that a rape victim would run and scream.⁸⁹ Again and again, the severe mental state of the victim during rape is ignored. There is widespread scientific evidence that rape victims experience 'freezing' / tonic immobility as a response to an inescapable threat.⁹⁰ Like an animal, a person, being in an extreme situation, when she/he perceives that there is no way to defend herself / himself, she / he falls into an involuntary temporary motor state.⁹¹ (For further description of the condition see the second part of the article).

Another illustration of rape myths is the 2015 case from German criminal justice.⁹² The accused was the manager of the state employment agency, who met the applicant in his office at a business meeting. There was no relationship or acquaintance between them until then. A woman came for an interview. Suddenly the accused started kissing the woman and offered oral sex. The woman was stunned. The woman refused the offer. Despite this, the man unzipped his pants, removed his penis, and performed oral sex with her. Penetration was rapid. After that, he masturbated in front of her. The court convicted the man of exhibitionism but acquitted him of rape. According to the court's explanation, the woman had the opportunity to scream and call for help from others, and since she did not do this, the judge ruled out rape.

⁸⁷ M. J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, Villanova University School of Law 2004, p. 10.

⁸⁸ R. J. Levin, W. van Berlo, *Sexual Arousal and Orgasm in Subjects Who Experience Forced or Non-Consensual Sexual Stimulation: A Review*, 'Journal of Clinical Forensic Medicine' 2004, 11, 2, pp. 82–88.

⁸⁹ J. Temkin, J. M. Gray & J. Barrett, *Different...*, *ibid.*, p. 211; O. Smith & T. Skinner, *How Rape...*, *ibid.*, p. 449.

⁹⁰ B. A. de Heer, L. C. Jones, *Tonic Immobility as a Defensive Trauma Response to Rape: Bridging Public Health and Law*, 'Violence Against Women' 2024 Oct., 30, 12–13, pp. 3111–3139; Also see: B. H. Ryan, V. N. Valliere, *Successful...*, p. 35.

⁹¹ A. Möller, H. P. Söndergaard, L. Helström, *Tonic...*, pp. 932–938; K. Kozłowska, P. Walker, L. McLean, P. Carri-ve, *Fear and the Defense Cascade: Clinical Implications and Management*, 'Harvard Review of Psychiatry' 2015, 23, 4, pp. 263–287.

⁹² Federal Court of Justice, Jan. 29, 2015. The case is cited [in:] T. Hörnle, *The New German Law on Sexual Assault and Sexual Harassment*, 'German Law Journal' 2017, 18, 6.

Prosecutors, judges, and other actors cannot allow the victim to be confused, intimidated, or petrified. At the same time, the contexts are different and the victims are also different. It is important where the violence takes place, and how much it makes sense to scream, the victim may be confused, otherwise, it may be a factor of fear that the abuser will kill her. There is no typical behaviour, there is a situation and a victim. Although rape has been defined as non-consensual in Germany since 2016, the case law has drawn criticism among legal scholars⁹³ because gender stereotypes do not change so quickly. The woman's voice is silenced again.

In this regard, the 2021 decision of the Criminal Chamber of the Swiss Federal Court is interesting. A person was acquitted in the case of raping a female partner. The court emphasized both the delayed statement, the woman reported about the incident 13 months after the fact, and the fact that the woman did not 'actively physically resist' the abuser.⁹⁴ The absence of physical resistance became the reason for the acquittal of the rape charge in another Swiss trial as well.⁹⁵ In another case, the court imposed a relatively light sentence, emphasizing that the victim was 33 years old and sexually experienced.⁹⁶

It is a myth that rape of an intimate partner is unusual.⁹⁷ It is as if consent is presumed in such a relationship. This kind of rape is trivialized⁹⁸ although it is considered as an aggravating circumstance according to international law.⁹⁹ While rape in the context of domestic violence is common, studies from several countries indicate this.¹⁰⁰ I remember in the spring semester of 2023, when I started giving a lecture on the subject of sexual crimes, one of the students in the audience said something like that, as if 'the male partner psychologically does not cross the threshold of prohibition of sexual violence'. Similar

⁹³ See e.g.: Hörnle, *The New...*, pp. 156–158.

⁹⁴ Federal Supreme Court judgment 6B_257/2020, 6B_298/2020, June 24, 2021. See § 5.

⁹⁵ Federal Supreme Court judgment 6B_912/2009 of 22 February 2010. See § 2.1.4. and 2.2.3

⁹⁶ Federal Supreme Court judgment 7B_15/2021, 7B_16/2021 Sept. 19, 2023. Also worth mentioning is the GRE-VIO report, which criticized the Swiss criminal justice system for gender bias and rape myths. See § 6.1 GRE-VIO (2022). Baseline Evaluation Report Switzerland, par. 183, <https://rm.coe.int/grevio-inf-2022-27-eng-final-draft-report-on-switzerland-publication/1680a8fc73> [accessed: 23.03.2024]

⁹⁷ B. H. Ryan, V. N. Valliere, *Successful...*, p. 11; J. Temkin, J. M. Gray, J. Barrett, *Different...*, p. 215; K. Adolfsson, *Blaming...*, p. 22.

⁹⁸ UNODC writes about this. See: Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-Based Violence against Women and Girls, p. 119; See also: A.-K. Wolf, M. Werner, *Victims' Rights Looking Good on Paper*, 'German Law Journal' 2021, 22, 5, p. 808; L. E. A. Walker, *The Battered Woman Syndrome*, Springer Publishing Company 2000, p. 57.

⁹⁹ See: The Istanbul convention, Article 46.

¹⁰⁰ K. R. Lynch, J. M. Golding, J. A. Jewell, A. Lippert, N. E. Wasarhaley, *She Is His Girlfriend – I Believe This Is a Different Situation: Gender Differences in Perceptions of the Legality of Intimate Partner Rape*, 'Journal of Family Violence' 2019, 34, 3, pp. 213–230. Also see: UN Women (2023). *The National Study on Violence against Women in Georgia*; J. Temkin, J. M. Gray, J. Barrett, *Different...*, p. 215; M. Hester, S.-J. Walker, *Rape Investigation and Attrition in Acquaintance, Domestic Violence and Historical Rape Cases*, 'Journal of Investigative Psychology and Offender Profiling' 2017, 14, 2, p. 181.

comments were made about rape in marital relations, that if they are raped and abused, why would a woman stay in a marriage.¹⁰¹ While talking about the need for rape reform, there are also frequent comments from students that false reports from women will increase. Also, my question about what evidence is used to support this argument is sometimes followed by silence, in such cases, the demonstration of contrary evidence is always impressive. Such comments are heard at the beginning of every semester, but by the end of the semester there are fewer and fewer of them, which emphasizes the importance of talking about this issue and raising awareness. Talking about violence and correct legal assessment is changing the rape culture, and the signs are visible.¹⁰²

Researchers from all over the world list the most common gender myths that they found by observing court practices: 'All women want to be raped', 'No woman can be raped against her will', and 'She was asking for it'.¹⁰³ These prejudices shift the burden of responsibility onto the victim. To overcome these myths and automatically repeated words, a woman needs a serious fight in the court process, no other crime with the testimony of a female victim is as discredited as that of rape. Why is this happening? A man accused of rape is unfairly protected by the entire system. As M. Fricker rightly notes, the source of systemic epistemic injustice is structural inequality of power.¹⁰⁴ Deep-seated gender inequality also comes from power asymmetry.

The fact that women are distrusted in cases of rape and not elsewhere is a clear example of this in a criminal case from Georgian court practice¹⁰⁵ where a woman claimed that she was robbed and raped by her ex-partner. In this case, the court of first instance acquitted the man of rape and convicted him of robbery. The evidence on which the decision was based was the woman's testimony that her ex-partner took her mobile phone without her permission and did not return it. It was not in dispute that the mobile phone belonged to the victim. Robbery is also a crime based on the absence of consent. Taking

¹⁰¹ For a social, cultural, and psychological analysis of staying with an abusive partner despite violent experiences, see: J. Herman, *Trauma... passim*; See also: Walker, *The Battered...*, *ibid*.

¹⁰² R. Kölbe, 'Progressive' Criminalization? A Sociological and Criminological Analysis Based on the German 'No Means No' Provision, *German Law Journal* 2021, 22, p. 823. Here the author writes about how after the rape law was changed in Germany the number of rape reports to the police increased. The author also connects this change with raising the awareness of prosecutors and judges. Also, an interesting example is New Zealand, where after prostitution was decriminalized, the attitude of the police towards sex workers changed. See: L. Armstrong, *Who's the Slut, Who's the Whore?: Street Harassment in the Workplace Among Female Sex Workers in New Zealand*, *Feminist Criminology* 2016, 11, 3, pp. 295 and 296.

¹⁰³ T. M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, *University of Minnesota Law Review* 1985, 69, p. 404; H. R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, *University of Minnesota Law Review* 1986, 70, p. 794; L. Kelly, *Surviving...*, pp. 34–36; J. Temkin, J. M. Gray, J. Barrett, *Different...*, pp. 205–210; K. Adolfsson, *Blaming...*, p. 16; O. Smith, T. Skinner, *How Rape...*, p. 443.

¹⁰⁴ M. Fricker, *Epistemic...*, p. 156.

¹⁰⁵ The Decision of Batumi City Court, 21.03.2016. Request for Public Information #162, para. 17.

another's thing does not in itself constitute this crime, but it is prohibited without the owner's consent. Accordingly, the main evidence in such cases is the confirmation of the lack of consent. The same court did not believe the woman's testimony that she was raped. Although her testimony was supported by such corroborating evidence as the physical bruises and biological material of the accused taken from the woman's body. For the unreliability of the victim's testimony, the judge pointed to the fact that at first, she hid the fact of rape and only reported the robbery. Gender stereotypes became the reason for acquittal of the accused in this case. One is that the former sexual partner was accused of rape, and the other is that the woman did not report the rape immediately.

Myth about false accusations

It is a myth that there are many false reports about rape. The opposite is true. It is difficult for women to talk about rape due to post-rape trauma, and this is also reinforced by a discriminatory and humiliating environment, which has been repeatedly emphasized in this article. The testimony of a rape victim is not considered trustworthy by the judicial system. And it is distrust of the system that keeps women silent. Where will a woman find the confidence to report a fictional rape? In addition, a false report is a crime and in case of good investigation, it is not very difficult to establish that fabrication took place.

From 20th-century studies to 21st-century cross-country observations, there are very few cases of false reporting on rape (the prevalence of false allegations is between 2% and 10%).¹⁰⁶ For example, in Georgia, there is no such data at all.¹⁰⁷ The false report rate is often artificially inflated by unscrutinized research.¹⁰⁸ When the investigation is terminated because the case is unfounded (baseless) or the action does not have elements of a crime, this may indicate an insensitive attitude to the case on the part of the investigating body and the absence of a gender perspective, the influence of rape myths on the investigation process, and a narrow definition of rape.¹⁰⁹ Delayed reporting by a female rape survivor is viewed suspiciously through the lens of gender prejudice mentioned above.¹¹⁰ Despite the scientific justification and rational

¹⁰⁶ S. Brownmiller, *Against...*, p. 387; D. Tuerkheimer, *Incredible...*, p. 20; M. J. Anderson, *The Legacy...*, pp. 33 and 34; See also: D. Lisak, L. Gardinier, S. C. Nicksa, A. M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 'Violence Against Women' 2010, 16, 12, pp. 1318–1334; M. Hester, S.-J. Walker, *Rape...*, p. 176.

¹⁰⁷ Answer of the Ministry of Internal Affairs of Georgia, MIA 2 24 00418314, 12.02.2024.

¹⁰⁸ For criticism, see: D. Lisak, L. Gardinier, S. C. Nicksa, A. M. Cote, *False...*, *ibid*.

¹⁰⁹ Georgia is an example of this. In the 2020 study, attention is focused on the 'absence of elements of crime' as the basis for not starting or terminating rape investigations. See: T. Dekanosidze, N. Chikhladze, G. Kharatishvili, *The Administration...*, p. 27.

¹¹⁰ There is also a directive of the Council of Europe which calls on the states not to make a late report of the victim about the violence a cause for doubting its credibility. See: Directive 2012/29/EU of the European Par-

explanation of what can be a hindrance to timely reporting of rape, this myth is still rooted in cultures.¹¹¹ That is, more efforts are needed to change the public consciousness.

The construct of perfect victim

The existing stereotypes and dichotomous view of women as either 'Madonna or slut' created the rape paradigm and strict standards in rape cases.¹¹² This dichotomous view is still relevant in sexual offences cases. That is why, even in the 21st century, the temptation to judge a victimized woman by her personal life, the way she behaved before the rape, cannot be avoided. Was she wearing provocative clothes,¹¹³ was the woman drunk, these questions are repeated tirelessly.¹¹⁴ A woman who invites a man to drink (so-called coffee myth), or joins his proposal and drinks alcohol, has almost no chance to reach justice and receive the status of a rape victim.¹¹⁵ Therefore, it is not true to say that e.g. Georgian criminal law protects sexual autonomy from sexual violence, it still protects moral views on women and sexuality.

Observation of criminal rape cases has shown that, in most cases there is no physical harm, and no biological material.¹¹⁶ Why this happens has its rational explanation. Rape is a serious trauma for a person, in most cases a woman does not resist.¹¹⁷ This is often caused by the fear of being killed. The lack of biological material may be caused by a late report. The reason why a woman cannot immediately announce about rape can be caused by many factors, including the feeling of shame, which is a very strong barrier,¹¹⁸ as well as the fear of not being believed, and the expectation of this is rational.

liament and of the Council of 25 Oct. 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Preamble, para. 25.

¹¹¹ Everyone who has had contact with the law enforcement system of Georgia at least once knows that even a simple statement about the incident is written by the policeman, as he wants to see the events, the applicant then signs. Imagine how events change from the male police officer's perspective to the statement given by the female rape survivor. This should become the subject of research. Unfortunately, scholars in Georgia do not have such access to investigation materials. The study conducted in the UK proves this. See: M. A. H. Horvath & J. M. Brown, *Setting...*, *passim*.

¹¹² About rape myths that shift the responsibility from the abuser to the victim, see: A. Grubb, E. Turner, *Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming 'Aggression and Violent Behavior'* 2012, 17, 5, pp. 443–452.

¹¹³ J. Temkin, J. M. Gray, J. Barrett, *Different...*, p. 219.

¹¹⁴ T. Dekanosidze, N. Chikhladze, G. Kharatishvili, *The Administration...*, p. 37.

¹¹⁵ See: S. Brownmiller, *Against...*, p. 374; T. M. Massaro, *Experts...*, pp. 413 and 414; H. R. Galvin, *Shielding...*, p. 796; J. Temkin, J. M. Gray, J. Barrett, *Different...*, p. 213; K. Adolfsson, *Blaming...*, p. 21; O. Smith & T. Skinner, *How Rape...*, p. 445.

¹¹⁶ D. Tuerkheimer, *Incredible...*, *ibid.*; S. Brownmiller, *Against...*, p. 372; D. Rhode, *Justice and Gender: Sex Discrimination and the Law*, Harvard University Press 1989, p. 247.

¹¹⁷ M. J. Anderson, *The Legacy...*, pp. 29 and 30; A. Möller, H. P. Söndergaard & L. Helström, *Tonic...*, *ibid*.

¹¹⁸ E. A. Holmes, N. Grey, K. A. D. Young, *Intrusive Images and 'Hotspots' of Trauma Memories in Posttraumatic Stress Disorder: An Exploratory Investigation of Emotions and Cognitive Themes*, *Journal of Behavior Therapy and Experimental Psychiatry* 2005, 36, 1, pp. 3–17.

Prejudice against women gave rise to the traditional model of rape law that still exists in the majority of jurisdictions, which defines rape as force and the obligation of physical resistance on the part of the woman. Neither physical violence nor physical resistance of the victim is the *actus reus* of rape.¹¹⁹ The myth of physical resistance on the part of the female victim is maintained even in those jurisdictions where the rape definition has been modified by lack of consent.¹²⁰ Therefore, reforms should include the fight against prejudices.

Abstrakt

Modyfikacja rozumienia przemocy seksualnej – z opartej na przymusie na opartą na braku zgody – została już przyjęta w wielu krajach. Powodem reformy była niekompletność koncepcji przemocy seksualnej, która nie obejmowała wszystkich istotnych działań wpływających na autonomię seksualną. Prawo międzynarodowe dało impuls do zmiany ustawodawstwa krajowego w celu ochrony praw człowieka, niemniej jednak gruziński kodeks karny nadal uznaje stary paradygmat przemocy seksualnej. Powodem opóźnienia reformy jest patriarchalna ideologia, która kultywuje mity o „kłamliwej” i „mściwej” kobiecie. Artykuł ukazuje problemy związane z prawem dotyczącym zgwałceń w praktyce – zarówno przez obserwację rzeczywistości Gruzji, jak i doświadczeń innych krajów, w których zeznania kobiecych ofiar zgwałceń są stale, mniej lub bardziej, dezawuowane przez mity dotyczące gwałtu oraz uprzedzenia związane z płcią. Aby nazwać ten problem, artykuł wykorzystuje filozoficzną koncepcję niesprawiedliwości epistemicznej Mirandy Fricker związaną z dyskryminacją strukturalną. Tekst jest próbą ukazania znaczenia tej idei w związku z procesem o gwałt. Nie jest on szczegółowym przeglądem standardów dowodowych, w tym postępowych koncepcji, jego celem jest natomiast pokazanie istotnego wpływu stereotypów płciowych i mitów dotyczących zgwałcenia na wymiar sprawiedliwości w sprawach karnych – poprzez analizę orzeczeń sądowych; ukazuje również wiedzę, która przeciwdziała uprzedzeniom i uogólnieniom, choć jej zastosowanie jest fragmentaryczne. W artykule omówiono progresywne podejścia do udowadniania przemocy seksualnej; może to wystarczyć do ustalenia prawdy – aby z jednej strony przewyciężyć surowy standard ustanowiony w praktyce badania przemocy seksualnej, a z drugiej strony zrobić to bez naruszania prawa oskarżonego do rzetelnego procesu, co przeciwnicy reformy wskazują jako zagrożone. Autorka upatruje rozwiązania problemu w zmianie podejścia z „przyjaznego sprawcy” na „skoncentrowane na ofierze”.

Słowa kluczowe: ofiara zgwałcenia, mity dotyczące zgwałcenia, uprzedzenia związane z płcią, niesprawiedliwość zeznań, prawo dotyczące zgwałceń.

¹¹⁹ T. M. Massaro, *Experts...*, *ibid.*, p. 414.

¹²⁰ See: O. Smith, *Rape Trials...*, pp. 67 and 68; S. Ehrlich, *Perpetuating – and Resisting: Rape Myths in Trial Discourse* [in:] *Sexual Assault in Canada Law, Legal Practice and Women's Activism*, E. A. Sheehy (ed.), University of Ottawa Press 2012, pp. 389 and 390.

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