



Tamar Gegelia*

Female Rape Survivor in the Trial and Epistemic Injustice. Part 2**

[Kobieta, która przeżyła zgwałcenie, w procesie sądowym i niesprawiedliwość epistemiczna. Część 2]

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.

* **Tamar Gegelia** – PhD in Law, visiting lecturer in law at (among others) Ilia State University (Tbilisi, Georgia, affiliation); <https://orcid.org/0009-0000-1420-4766>; tgegelia@cu.edu.ge / dr nauk prawnych, wykładowca gościnny z zakresu prawa m.in. na Państwowym Uniwersytecie Ilia (Tbilisi, Gruzja, afiliacja).

** The first part of this article appeared in the previous issue (3/2025/75) of ERL&IR [EPPiSM] (ed.) / Pierwsza część artykułu ukazała się w poprzednim numerze (3/2025/75) EPPiSM (red.).

[...]

Evidence Against Rape Myths

They [police] fixate on small details that seem inconsistent or illogical, which, in their mind, is proof of lying.

Miranda A. H. Horvath, Jennifer M. Brown¹

In assessing the credibility of the testimony of a rape victim, we must confront the firmly established prejudices and non-scientific approaches that the criminal justice system is based on. It is also essential to implement international progressive legal approaches.

Much has been done recently for the rights of the victims. A victim-centred approach emerged in the international law of human rights protection, and the positive obligation of the state to protect fundamental human rights from attacks by individuals was established. Protecting a person's sexual autonomy from rape is also a positive obligation of the state. And rape should be criminalized by criminal law.² International legal mechanisms require the state to effectively fight gender-based violence, which also means eradicating gender-related myths and prejudices, which are often an obstacle for women to access justice.³

Despite these international conventional guarantees, the reality of different jurisdictions found in this research assures us that rape myths are still firmly rooted in legal system.

Social and cultural perceptions of the rape paradigm silence the rape survivor. Studies conducted at different times reveal the extent of unreported rape and other violent sexual experiences. Despite this data, the most common accusation against a female rape survivor is that she lies about the rape.

¹ 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.

² See: *X and Y v. the Netherlands*, 26 March 1985, § 23.

³ For the analysis see: A.-K. Wolf, M. Werner, *Victims' Rights Looking Good on Paper—How Criminal Prosecution in Germany Fails Victims of Sexual Violence*, 'German Law Journal' 2021, 22, 5, pp. 802–805.

The harm and the evidence

The harms caused by rape are physical, psychological, financial, and many others.⁴ Rape is a severe form of violence that destroys the victim. Rape victims usually, but **not necessarily**,⁵ develop post-rape trauma disorder. However, rape is on the list of traumas that provoke Post-traumatic stress disorder (PTSD) the most.⁶ The trauma that accompanies rape is considered the most severe trauma in psychiatry.⁷

According to psychiatrists, the most difficult stage is for the patient to face what happened and how she behaved directly during the experience.⁸ This is often followed by the painful symptom of self-blame.⁹

In international rape trials, it is an established practice to invite a post-traumatic stress disorder specialist and share an expert opinion.¹⁰ The clinical professor for psychiatry and behavioral sciences, often invited as an expert, asks the court for particular information on the psychological impact of rape and other forms of sexual violence on men and women in the cultural context of the charged sexual offences.¹¹ If there is a late report of rape in the case, to overcome the myth of a false accusation, the expert is asked how the late report can be explained. The expert answers that this can be explained by a severe traumatic situation, fear, and the shame of the expected social stigma. Also, the questions asked to the expert are related to memory failures in the rape victim and other similar things, which often become the cause of discrediting the credibility of the testimony. However, scientists, including those who have already been repeatedly mentioned in this text, point out that traumatic memory is different from ordinary memory. Trauma can cause

⁴ J. Brown, T. Cole, and Y. Shell, *Revealing Rape's Many Voices Differing Roles, Reactions and Reflections*, Springer International Publishing 2023, pp. 3 and 4.

⁵ J. Herman, *Trauma and Recovery, The Aftermath of Violence— From Domestic Abuse to Political Terror*, Basic Books 2015, pp. 58–60.

⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition DSM-5* 2013, p. 276.

⁷ U. Schnyder, M. Cloitre, *Evidence Based Treatments for Trauma-Related Psychological Disorders*, Springer 2015; J. Herman, *ibid.*; B. Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*, Viking 2014; E. R. Dworkin, A. E. Jaffe, M. Bedard-Gilligan, S. Fitzpatrick, *PTSD in the Year Following Sexual Assault: A Meta-Analysis of Prospective Studies*, 'Trauma Violence Abuse' 2023, 24, 2, pp. 497–514.

⁸ B. Kolk, *The Body...*, p. 20; 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, 8, p. 933; A. Wolbert Burgess, *Rape Trauma Syndrome*, 'Behavioral Sciences & the Law' 1983, 1, 3, p. 104.

⁹ See: C. C. Nadelson, *Consequences of Rape: Clinical and Treatment Aspects*, 'Psychother Psychosom' 1989, 51, 4, p. 187; L. Kelly, *Surviving Sexual Violence*, Polity Press 1998, pp. 211–213.

¹⁰ *The Prosecutor v. Dominic Ongwen* (2021), ICC-02/04-01/15, § 600–601; *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2442, 07 November 2019, § 88; *The Prosecutor v. Jean-Pierre Bemba Gombo*, no.: ICC-01/05-01/08 Date: 21 March 2016.

¹¹ *Ibid.*

complete erasure of memory, which can be triggered and recovered later, even years later, in connection with some event. The more severe the trauma, the more difficult it is to remember events consistently.¹² This does not mean that their memory is not reliable.¹³ Often with time, as trauma lessens with healing, more details are remembered by the victim. Human memory is not a ‘video recorder’,¹⁴ the criminal justice agents somehow forget this. In the questions asked to the expert, there is also the question of freeze/tonic immobility directly during the rape as a response to the impending violence, how it can be explained scientifically that the victim is unable to raise their voice, etc. The expert answers these questions with scientific reasoning that is real and characteristic, explaining why and where these symptoms come from. These are the arguments that the prosecution must remember and repeat at every rape trial where it is necessary to overcome gender prejudices. In the International Criminal Court, it is an established practice to explain the victim’s behavior with the emotional and psycho-traumatic state,¹⁵ and the national courts should do the same.

The trauma is so severe that it does not disappear without a trace. Remembering the trauma is so traumatic for women that they often block the memory, but the trauma does not disappear, it gets worse.¹⁶ Insomnia and anxiety are also typical symptoms;¹⁷ Changes in behavior are common: they can’t leave the house, radically change their routine, reduce socialization opportunities, and isolate themselves from everyone.¹⁸ Veterans traumatized by war have exactly the same experiences.¹⁹ Judith Herman, based on her 20 years of practice, says that there are rape-specific traumatic symptoms, including pointing to trauma-specific fears, sexual problems, and limitations in daily life.²⁰ These are the symptoms most often reported by rape survivors.²¹ Also, suicidal thoughts and suicide attempts were the most common among rape victims.²²

¹² Bessel van der Kolk points out that based on several other pieces of evidence ‘the younger the age of the trauma, and the more prolonged, the greater the likelihood of significant amnesia’ – B. Kolk, *Trauma and memory*, ‘Psychiatry and Clinical Neurosciences’ 1998, 52, S1.

¹³ B. H. Ryan, V. N. Valliere, *Successful Prosecution of Intimate Violence: Making It Offender-Focused*, Routledge 2024, p. 33.

¹⁴ 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; See also: K. Hohl, M. A. Conway, *Memory As Evidence: How Normal Features of Victim Memory Lead to the Attrition of Rape Complaints*, ‘Criminology & Criminal Justice’ 2016, 17, 3, pp. 248–265.

¹⁵ *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2442, 7 November 2019, § 79–80, 88.

¹⁶ J. Herman, *Trauma...*, p. 42.

¹⁷ J. Herman, *Trauma...*, p. 41; See also: C. C. Nadelson, *Consequences...*, p. 188.

¹⁸ For details on PTSD symptoms, see: American Psychiatric Association, *Diagnostic...*, pp. 271–290. See also: J. Herman, *Trauma...*, pp. 45, 50; See also: A. Wolbert Burgess, *Rape...*, pp. 97–114.

¹⁹ J. Herman, *ibid.*

²⁰ J. Herman, *Trauma...*, p. 48.

²¹ See also: A. Wolbert Burgess, *Rape...*, p. 104.

²² J. Herman, *Trauma...*, p. 50.

According to Professor Herman, trauma undermines the trust system of a traumatized person, it destroys the belief system that was the meaning of her life before the event. The sense of security is destroyed.²³ A traumatized person who has lost trust and is isolated is more like the dead than the living. This is what happens to a rape victim.²⁴

J. Herman explains what happens to the victim during the trauma, which is difficult for practicing lawyers to understand. When a person falls into a helpless situation, she goes into a state of surrender, and the system of self-defence is completely shut down. Due to helplessness, she might run away from the situation, but not physically (she can't do that) but mentally. Herman draws a parallel with animals, their reaction to the imminent violence is the same when captured.²⁵ The 'freeze' which is provoked by altered consciousness, is a fundamental feature of post-traumatic stress disorder.²⁶ Therefore, the dissociation that happens to a rape victim is scientifically explained in psychiatry.²⁷ In the interviews of rape trauma patients, it is common to mention how they felt during the rape as if the person being raped was not in their body, they watched the event from a distance.²⁸ This is exactly what the soldiers who have been in the war, who suffer from post-traumatic stress disorder, call this feeling and dissociation 'anesthetized look'.²⁹

According to B. van der Kolk in psychiatry, severe trauma often leaves the traumatised person speechless, according to his assessment, trauma has the same effect on speech function as a heart attack. This happens because the part of the left hemisphere of the brain that ensures the formulation of thoughts into words is damaged.³⁰ According to Kolk, even years later, it takes a lot of effort for the traumatized person to tell the story of what happened to her. Her body seems to go through terror, vulnerability, inability to escape.³¹

A forensic psychologist or psychiatrist with experience with rape survivors can be helpful to overcome prejudices towards the victim, in particular, to explain the opposite of what judicial professionals call 'counter-intuitive behavior'.³²

²³ J. Herman, *Trauma...*, pp. 51 and 52; See also: C. C. Nadelson, *Consequences...*, p. 189; See also: A. Möller, H. P. Söndergaard, L. Helström, *Tonic...*, p. 8.

²⁴ J. Herman, *Trauma...*, *ibid.*, p. 52.

²⁵ J. Herman, *Trauma...*, p. 43.

²⁶ *Ibid.*

²⁷ See also: B. Kolk, *Trauma...*, p. 12.

²⁸ J. Herman, *ibid.* See also: B. Kolk, *The Body...*, p. 116.

²⁹ J. Herman, *ibid.*

³⁰ B. Kolk, *The Body...*, p. 43.

³¹ B. Kolk, *The Body...*, *ibid.*

³² B. H. Ryan, V. N. Valliere, *Successful...*, p. 76.

Evidentiary standard

*The perpetrator seeks to establish his dominance
not only by terrorizing the victim but also,
often most effectively, by shaming her.*

Judith Herman³³

In dozens of cases that have dealt with sexual violence and found violations of the state's positive obligation, including the rape paradigm and the strict evidentiary standard, the Strasbourg Court has repeatedly reiterated, case after case, that the investigation of sexual violence must be context-based, with a gender-sensitive perspective. The court is critical of the one-dimensional investigation of sexual violence, the simplistic narrative of rape, which does not always reflect what happened, and sexual autonomy remains unprotected. Several cases confirm the judicial approach to consider other evidence where appropriate, such as hearsay evidence, expert witness assessments, etc., and that a physical resistance standard should not limit the system.³⁴

Witness testimony is evidence. According to the standard of international courts, a guilty verdict can be based on a single piece of evidence.³⁵ Interestingly, according to researchers, witness testimony is most often used in various criminal cases and is highly trusted.³⁶ Why is witness testimony less reliable about sexual violence? Rape myths are the problem. D. Tuerkheimer, a distinguished scholar of evidentiary law and sexual offenses in particular, lists several supporting pieces of evidence to test the credibility of witness testimony that is often ignored in reality.³⁷ D. Tuerkheimer lists evidence that is sometimes not given due attention but is always present in the case. These are:

³³ J. Herman, *Justice From the Victim's Perspective*, 'Violence Against Women' 2005, 11, 5, p. 572.

³⁴ See: *M.C. v. Bulgaria* (Application no. 39272/98), 4.03.2004; *I.G. v. Moldova* (App. no. 53519/07), 15.03.2012; *Y. v. Slovenia* (App. no. 41107/10), 28.08.2015; *I.C. v. Romania* (App. no. 36934/08), 24.08.2016; The Court's request for child-sensitive investigation when a child is a victim of rape, see also: *C.A.S. and C.S. v. Romania* (App. no. 26692/05, 30.03.2012; *M.G.C. v. Romania* (App. no. 61495), 15.03.2016; *E.B. v. Romania* (App. no. 49089/10), 19.03.2019.

³⁵ *Khan v. the United Kingdom* (App. no. 35394/97), ECHR, 12.05.2000, para. 35–37; *Allen v. the United Kingdom* (App. no. 25424/09), ECHR, 12.07.2003, para. 43, and other cases are cited from the paper: C. Edgerton, T. Dekanosidze, G. Khatiashvili, N. Barbakadze, L. Bitchikashvili, *Effective Investigating, Prosecuting and Adjudicating Sexual Violences: A Manual for Practitioners in Georgia*, 'Equality Now' 2021, 52. Note 239. See also: *Prosecutor v. Ntaganda*, Case no. ICC-01/04-02/06-2359, Trial Judgment, 8 July 2019, paras 75–76; *Prosecutor v. Haradinaj*, Case no. IT-04-84-A, Appeal Judgment, 19.07.2010, paras 145, 219 and other cases cited in the same manual, p. 52. Note 240.

³⁶ J. Lackey, *Eyewitness Testimony and Epistemic Agency*, 'Noûs' 2022, 56, 3, pp. 696–715.

³⁷ D. Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 'Pennsylvania Law Review' 2017, 166, 1, pp. 9–10.

”... electronic evidence like text messages, voicemails, photographs or social media posts, forensic reports, witnesses to the lead-up or aftermath, and, on rare occasions, eyewitnesses to the incident. [...] expert testimony that dispels rape myths can also be considered a type of corroborative evidence. A more holistic approach contemplates the potential availability of corroboration, which—if properly gathered—obviates the need to pit word against word.”³⁸

It should also be noted that if the system does not change its focus from victim-blaming to offender-focused approach, any innovation will work to the detriment of the victim.³⁹ Therefore, it is crucial for justice professionals, fundamental changes in their vision and approaches, which can be achieved through continuous education and new professionals.

Rape law reform supporters are not calling for the abolition of the right to a fair trial, the reversal of the presumption of innocence that opponents often accuse them of.⁴⁰ Supporters of rape law reform oppose the double standard, and rightly so. As O. Smith rightly points out, the beyond-a-reasonable-doubt standard (BRD) is not a 100% truth standard, it is only applied to a conviction for sexual assault.⁴¹ That the BRD standard is not an absolute truth standard is evidenced by the approach of the Strasbourg Court.⁴² Only a reasonable doubt about a person’s innocence should be the basis for refusing to convict him,⁴³ but as we have seen in rape cases, the doubt is unreasonable and prejudiced, which becomes the reason for the dismissal of the case.⁴⁴

The established practice in Georgian reality for decades was that convictions in drug crime cases were based on the testimony of a law enforcement officer based on information provided by a confidential informant or an anonymous person. Very few lawyers criticized this standard in Georgia.⁴⁵ Only recently it was declared unconstitutional by the decision of the Constitutional Court.⁴⁶ Sexual violence reform calls for nothing of the sort. It is also worth noting several types of delicts that cause a reversal of the presumption of in-

³⁸ Ibid. For evidence of the impact of sexual violence see also: C. Edgerton, T. Dekanosidze, G. Khatiashvili, N. Barbakadze, L. Bitchikashvili, *Effective...*, p. 35.

³⁹ See: K. Hohl, E. A. Stanko, *Five Pillars: A Framework for Transforming the Police Response to Rape and Sexual Assault*, ‘International Criminology’ 2022, 2, 3, pp. 222 and 223; J. Molina, S. Poppleton, *Rape Survivors and the Criminal Justice System*, Victims’ Commissioner for England and Wales 2020.

⁴⁰ See: J. Ch. Bublitz, *When is Disbelief Epistemic Injustice? Criminal Procedure, Recovered Memories, and Deformations of the Epistemic Subject*, ‘Criminal Law and Philosophy’ 2024, 18.

⁴¹ O. Smith, *Rape Trials in England and Wales Observing Justice and Rethinking Rape Myths*, Palgrave Macmillan 2018, p. 214.

⁴² See: *Nachova and others v. Bulgaria* (Applications nos. 43577/98 and 43579/98), § 147; *Baka v. Hungary* (App. no. 20261/12), § 143. For an analysis of the case law of the Strasbourg Court, the BRD standard, is not an absolute truth-determining standard, see: Kelenjeridze, Chapter 5 [in:] *Sexual Offenses*, World of Lawyers 2020, p. 165.

⁴³ See: *G. Keburia v. Parliament of Georgia*, Decision of the Second Panel of the Constitutional Court of Georgia no. 2/2/1276, Dec. 25, 2020, motivational part, para. 77 and 78.

⁴⁴ See: 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, pp. 96–106.

⁴⁵ See: T. Gegelia, G. Imnadze, G. Davituri, *Unethical Drug Policy*, EMC 2014, *passim*.

⁴⁶ Decision of the second panel of the Constitutional Court of Georgia no. 2/2/1276 of Dec. 25, 2020.

nocence, including ‘Possession Offences’, which few scholars speak critically about.⁴⁷ However, opponents see the problem only in sexual violence reform. This is a double standard and an attempt to protect male interests. Whereas the modified rape definition does not represent a shift of the presumption of innocence. The prosecutor must present evidence that the accused initiated sexual penetration despite the victim’s lack of consent.⁴⁸

Not only does the accused have the right to be heard, it is also the right of the victim. which is confirmed in several international legal acts.⁴⁹ The victim’s right to be heard is especially important in a rape trial.⁵⁰ It is also the victim’s right to be treated with respect during the process.⁵¹ What happens in the courtrooms against victims of sexual violence cannot be justified by any defense strategy, it cannot be part of the accused’s right to a fair trial to violate the dignity of another person, which is also a fundamental human right.⁵² The approach of the Strasbourg Court is also a balancing of rights. Court also drew attention to the repeated victimization of the rape survivor during cross-examination.⁵³ The court noted that cross-examination should not be used as a means of intimidating or humiliating witnesses.

Concluding Remarks

Miranda Fricker considers **negative identity prejudice** to be the most vicious prejudice that is not based on any reliable empirical observation; prejudiced associations are false.⁵⁴ It is the prejudice-based legal system that turns justice into a dead wall for women. In this total deafness, women have to testify and fight for the truth. According to Fricker, epistemic injustice is characterized by the fact that the receiver of information does not perceive the

⁴⁷ See: A. Ashworth, *The Unfairness of Risk-Based Possession Offences*, ‘Criminal Law and Philosophy’ 2011, 5, pp. 237-257; See also: T. Gegelia, (ed.) *The Limits of Criminal Law*, Open Society Georgia Foundation 2021.

⁴⁸ See: S. P. Green, *Criminalizing Sex: A Unified Liberal Theory*, Oxford University Press 2020, p. 34.

⁴⁹ See: Declaration of Basic Principles of Justice for Victims of Crime (UN General Assembly, 1985); European Parliament. (2012). Directive 2012/29/EU of the European Parliament 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.

⁵⁰ This idea is also supported in criminal law theory. See: T. Hörnle, *The Role of Victims’ Rights in Punishment Theory* [in:] A. du Bois-Pedain, A. E Bottoms (eds.), *Penal Censure: Engagements Within and Beyond Desert Theory*, Hart Publishing 2019.

⁵¹ See: Declaration of Basic Principles of Justice for Victims of Crime. (UN General Assembly, 1985); European Parliament. (2012). Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

⁵² O. Smith, *Rape Trials...*, p. 224.

⁵³ *Y. v. Slovenia* (Application no. 41107/10), 28.08.2015, § 104.

⁵⁴ M. Fricker, *Epistemic Injustice: Power and the Ethics of Knowing*, Oxford University Press 2007, pp. 33 and 34.

informant as a subject. She is an object for him.⁵⁵ This is exactly what happens to women in rape trial. If the victim raises her voice and comes to the court, her voice is not heard. Her 'no' was treated as a 'yes,' and in the courtroom, her words are weaponized against her; the facts are translated through the distorted lens of those who refuse to hear her truth.

As can be seen from the cases above, if a woman reports rape late, it is a big problem for her, if she reports on time, then the request for a prompt report loses its force. If there is no evidence of injuries as determined by the system, it is a problem, if there is, it can be a problem too. If she could not resist or resisted and then she could not anymore, that is also a problem; if she resisted to the end and was able to prevent rape, that is also a problem. Justice for a rape survivor is Kafkaesque.

In the eyes of the justice system, a woman's credibility is tied directly to her adherence to traditional gender norms. If she fails to fit the mold of the 'docile and pure' victim, the system turns against her to protect the *status quo*. Consequently, the female victim must lead a life without mistakes, otherwise, they will not believe her. At the trial, she will be reminded of many things and scolded for, with whom she flirted, how she verbally abused her husband when she was angry, etc. all done in an effort to discredit her. A woman is punished for deviating from the gender construct. The complaining woman is also perceived as angry and not feminine. That is why such act is penalized.

Ultimately, the justice system for rape is discriminatory, affecting women disproportionately. Because state efforts to protect survivors are ineffective, violence continues on a large scale. This environment allows the violence to remain invisible, and that must change.

The case law of the Strasbourg Court about sexual crimes has revealed an important point: the Court requires states to conduct context-sensitive investigations. Especially when the victim is a child or a disabled person. Due to the specificity of rape cases, the Strasbourg court also emphasizes the importance of expert testimony when there is such possibility. Physical harm is not the only measure, rape also has psychological consequences that should be carefully checked where possible. In all reviewed cases, the victim had an RTS which was ignored at all stages of the case. The court emphasizes the importance of investigating the case in all aspects, questioning indirect witnesses, to assess the reliability of conflicting testimonies. This was ignored in the cases listed above because the only measure of evaluating the act as rape was the physical injuries of the victim. This is a very primitive measure of the event. No evidence can be given pre-determined force. Rape Law is totalitarian. It requires a typical action from the individual, and a different behavior cannot fit into the image of the victim and the perpetrator.

⁵⁵ M. Fricker, *Epistemic...*, p. 135.

Criminal justice must also be transformed following modern requirements. It is shocking the narrow lens through which judges look when evaluating an act as rape. Evidence with pre-determined force, which must be present in a rape case to establish the crime (physical injuries and biological material), is outdated and unfair. There is a lot of other evidence that can be used to confirm the fact that the courts must take into account when determining rape. Courts must learn to listen to rape victims without rape myths. The victim-blaming approach should be shifted to ‘offender-focused’ prosecution. It is also important to adopt a rape shield law, based on the experience of the Anglo-American legal system, which will protect the victim of sexual violence from questions whose sole purpose is to dehumanize the victim.⁵⁶

The definition of rape should also be changed from coerce-based to non-consent, according to international human rights law.⁵⁷

Sigmund Freud, in the book *Civilization and Its Discontents*,⁵⁸ rightly points out that an intolerable culture must be changed. The sexist culture we live in is intolerable, so yes, it must change. Among the efforts, important is sex education in schools, where children are taught the essence of consent, recognizing violence and protecting themselves from it. More hours in law schools should be devoted to teaching sexual offences and gender mainstreaming in general. Continuing education and specialization of justice agents about sexual violence is very important, cases should only be handled by specialized actors at all stages. It is equally crucial for legal scholars to talk and write about this problem, be critical, and educate law students.

T. Hörnle, in her recent article, expresses her interest that judicial system might change for the better and that the ‘offender-friendly’ approach transforms as many young female judges come into the legal system.⁵⁹ The current situation in Georgia is not very promising, although we have a few good practices regarding rape trials. From this point of view, the decision of 2024 should be noted,⁶⁰ which convicted a man who raped his underage niece between 2006 and 2013, the victim was able to speak out only years later, as an adult. In this case, the prosecutor, the victim’s advocate, and the judge are good examples of gender sensitivity and trust in the victim’s testimony. Thus, the hope is indeed for better justice.

⁵⁶ Istanbul Convention, art. 54.

⁵⁷ See my latest article on rethinking the boundaries of sexual violence: T. Gegelia, *Rethinking the Scope of Sexual Violence for Criminal Law Reform*, ‘Law and World’ 2024, 10, 3, pp. 178–221, <https://doi.org/10.36475/10.3.15> [accessed: 01.09.2024].

⁵⁸ S. Freud, *Das Unbehagen in der Kultur*, Internationaler Psychoanalytischer Verlag, Wien 1930.

⁵⁹ T. Hörnle, *The New German Law on Sexual Assault* [in:] *Sexual Assault: Law Reform in a Comparative Perspective*, T. Hörnle (ed.), Oxford University Press 2022, p. 158.

⁶⁰ See the Statement of the lawyer of the victims <https://www.facebook.com/PHR.HumanRights/posts/pfbid02NP5rmMTfNiTCAChz2TLjWdhDymuunhFjmUrUnuHiqSRTXKL397gwAxuFoY8vJGLcl> [accessed: 23.03.2024].

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; przedstawia 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, które 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.

BIBLIOGRAPHY

Adolfsson Kerstin, *Blaming Victims of Rape: Studies on Rape Myths and Beliefs About Rape*, BrandFactory 2018.

Anderson Elizabeth, *Epistemic Justice as a Virtue of Social Institutions*, 'Social Epistemology' 2012, 26, 2.

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

Armstrong Lynsi, *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.

Ashworth Andrew, *The Unfairness of Risk-Based Possession Offences*, 'Criminal Law and Philosophy' 2011, 5.

Brown Jennifer, Cole Terri, Shell Yvonne, *Revealing Rape's Many Voices Differing Roles, Reactions and Reflections*, Springer International Publishing 2023.

Brownmiller Susan, *Against Our Will: Men, Women, and Rape*, Ballantine Books 1993.

Bublitz Jan Christoph, *When is Disbelief Epistemic Injustice? Criminal Procedure, Recovered Memories, and Deformations of the Epistemic Subject*, 'Criminal Law and Philosophy' 2024, 18, 3.

Conaghan Joanne and Russell Yvette, *Rape Myths, Law, and Feminist Research: Myths About Myths?* 'Feminist Legal Studies' 2014, 22, 1.

Dekanosidze Tamar, Chikhladze Nino, Kharatishvili Gvantsa, *The Administration of Justice on Sexual Violence Crimes Against Women in Georgia*, Council of Europe 2020.

Despentes Virginie, *King Kong Theory* (transl. by Stéphanie Benson), Feminist Press 2010.

Eriksson Maria, *Defining Rape: Emerging Obligations for States Under International Law?*, The Raoul Wallenberg Institute Human Rights Library, 38, Boston 2011.

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

Galvin Harriett R., *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 'Minnesota Law Review' 1986, 70.

Gegelia Tamar, Imnadze Giorgi, Davituri Giorgi, *Unethical Drug Policy*, EMC 2014.

Gegelia Tamar, Kelenjeridze Iza, Jishkariani Bachana, *Sexual Offenses*, World of Lawyers 2020.

Gegelia Tamar, *Rethinking the Scope of Sexual Violence for Criminal Law Reform*, 'Law and World' 2024, 10, 31.

Green Stuart P., *Criminalizing Sex: A Unified Liberal Theory*, Oxford University Press 2020.

Griffin Susan, *Rape. The All-American Crime*, 'Ramparts Magazine' 1971, 10, 3.

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

Heer Brooke A. de, Jones Lynn C., *Tonic Immobility as a Defensive Trauma Response to Rape: Bridging Public Health and Law*, 'Violence Against Women' 2024, 30, 12–13 (Oct.).

Herman Judith, *Father-Daughter Incest*, Harvard University Press 1981.

Herman Judith, *Justice from the Victim's Perspective*, 'Violence Against Women' 2005, 11, 5.

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

Herman Judith, *Truth and Repair. How Trauma and Survivors Envision Justice*, Basic Books 2023.

Hester Marianne, Walker Sarah-Jane, *Rape Investigation and Attrition in Acquaintance: Domestic Violence and Historical Rape Cases*, 'Journal of Investigative Psychology and Offender Profiling' 2017 14, 2.

Hohl Katrin, Conway Martin A., *Memory as Evidence: How normal features of victim memory lead to the attrition of rape complaints*, 'Criminology & Criminal Justice' 2016, 17, 3.

Holmes Emily A., Grey Nick, Young Kerry A. D., *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.

Hörnle Tatjana, *The New German Law on Sexual Assault and Sexual Harassment*, 'German Law Journal' 2017, 18, 6.

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

Kelly Liz, *Surviving Sexual Violence*, Polity Press 1998.

Kölbe Ralf, 'Progressive' Criminalization? A Sociological and Criminological Analysis Based on the German 'No Means No' Provision, 'German Law Journal' 2021, 22.

Kolk Bessel van der, *Trauma and Memory*, 'Psychiatry and Clinical Neurosciences' 1998, 52, 1.

Kolk Bessel van der, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*, Viking 2014.

Kozłowska Kasia, Walker Peter, McLean Loyola, Carrive Pascal, *Fear and the Defense Cascade: Clinical Implications and Management*, 'Harvard Review of Psychiatry' 2015, 23, 4.

Lees Sue, *Ruling Passions: Sexual Violence, Reputation and the Law*, Open University Press 1997.

Levin Roy J., Berlo Willy van, *Sexual Arousal and Orgasm in Subjects Who Experience Forced or Non-Consensual Sexual Stimulation: A Review*, 'Journal of Clinical Forensic Medicine' 2004, 11, 2 (Apr.).

Lisak David, Gardinier Lori, Nicksa Sarah C., Cote Ashley M., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 'Violence Against Women' 2010, 16, 12.

Lynch Kellie R., Golding Jonathan M., Jewell Jenna A., Lippert Anne, Wasarhaley Nesa E., *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.

Mackinnon Catharine A., *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press 1987.

Mackinnon Catharine A., *Rape Redefined*, 'Harvard Law & Policy Review' 2016, 10, 2.

Massaro Toni M., *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 'University of Minnesota Law Review' 1985, 69.

Molina Julian, Poppleton Sarah, *Rape Survivors and the Criminal Justice System, Victims' Commissioner for England and Wales* 2020.

Möller Anna, Söndergaard Hans Peter, Helström Lotti, *Tonic Immobility During Sexual Assault: A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression*, 'Acta Obstetrica et Gynecologica Scandinavica' 2017, 96, 8.

Nadelson Carol C., *Consequences of Rape: Clinical and Treatment Aspects*, 'Psychotherapy and Psychosomatics' 1989, 51, 4.

Rape – Challenging Contemporary Thinking – 10 Years On, M. A. H. Horvath, J. M. Brown (eds.), Routledge 2023.

Rape Narratives in Motion, U. Andersson, M. Edgren, L. Karlsson, G. Nilsson (eds.), Palgrave Macmillan 2019.

Rush Florence, *The Freudian Coverup*, 'Feminism & Psychology' 1996, 6, 2.

Russell Yvette, *Woman's Voice / Law's Logos: The Rape Trial and the Limits of Liberal Reform*, 'Australian Feminist Law Journal' 2016, 42, 2.

Ryan Bridget H., Valliere Veronique N., *Successful Prosecution of Intimate Violence: Making it Offender-Focused*, Routledge 2024.

Schnyder Ulrich, Cloitre Marylène, *Evidence Based Treatments for Trauma-Related Psychological Disorders*, Springer 2015.

Smith Olivia, Skinner Tina, *How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials?*, 'Social & Legal Studies' 2017, 26, 4.

Smith Olivia, *Rape Trials in England and Wales Observing Justice and Rethinking Rape Myths*, Palgrave Macmillan 2018.

Temkin Jennifer, Gray Jacqueline M., Barrett Jastine, *Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study*, 'Feminist Criminology' 2018, 13, 2.

The Limits of Criminal Law, T. Gegelia (ed.), Open Society Georgia Foundation 2021.

The Routledge Handbook of Gender and Violence, N. Lombard (ed.), Routledge 2018.

The Routledge Handbook of the Politics of the #MeToo Movement, G. Chandra, I. Erlingsson (eds.), Routledge 2020.

Tuerkheimer Deborah, *Incredible Women: Sexual Violence and the Credibility Discount*, 'University of Pennsylvania Law Review' 2017, 166, 1 (Dec.).

Ullman Sarah E., *Talking About Sexual Assault. Society's Response to Survivors*, American Psychological Association 2023.

Walker Leonore E. A., *The Battered Woman Syndrome*, Springer Publishing Company 2000.

Wilkinson-Ryan Tess, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 'University of Pennsylvania Law Review' 2005, 153.

Wolbert Burgess Ann, *Rape Trauma Syndrome*, 'Behavioral Sciences & the Law' 1983, 1, 3.

Wolf Anne-Katrin, Werner Maja, *Victims' Rights Looking Good on Paper*, 'German Law Journal' 2021, 22, 5.

Women and the Criminal Justice System, E. Milne, K. Brennan, N. South, J. Turton (eds.), Palgrave Macmillan 2018.