

# **Gender Stereotyping in Cases of Sexual Violence: An Analysis of Regional Human Rights Courts and Croatia**

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LL.M. LONG THESIS

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## List of used abbreviations:

**Belém Do Pará Convention** the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women

**CEDAW** the Convention on the Elimination of All Forms of Discrimination against Women

**CEDAW** the Committee on the Elimination of All Forms of Discrimination against Women

**CoE** Council of Europe

**ECHR (or the European Convention)** the European Convention on Human Rights

**ECtHR** the European Court of Human Rights

**GBV** gender-based violence

**GC** Grand Chamber

**HRC** the Human Rights Council

**IACmHR (or the Inter-American Commission)** the Inter-American Commission on Human Rights

**IACtHR** the Inter-American Court of Human Rights

**Istanbul Convention** Convention on preventing and combating violence against women and domestic violence

**NGO** non-governmental organization

**OAS** Organization of American States

**OHCHR** the UN Office of the High Commissioner for Human Rights

**PTSD** post-traumatic stress disorder

**VAW** violence against women

**VS RH** Vrhovni sud Republike Hrvatske (the Supreme Court of the Republic of Croatia)

## Executive summary

This thesis explores an emerging issue of gender stereotyping in cases of sexual violence, with the emphasis on rape. One of the main aims of this research is to analyze to which extent the harmful gender-based stereotypes are still present when it comes to cases of sexual violence and what are the most effective ways of combating them. Topic is important since gender-based myths and stereotypes hinder women's access to justice and in long term contribute to their re-victimization, especially in cases that are so delicate as rape. Research focuses on the practice and jurisprudence of the regional human rights bodies (namely, the European Court of Human Rights, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights) in addressing and combating harmful gender-based stereotypes. The aim of this comparative analysis is to answer which regional actor went the furthest in addressing and contesting gender-based stereotypes in general, particularly those that are prevalent in rape cases. Also, establishing their 'best practices' is important because such practice can be useful to states which are not successful in fulfilling their international and regional obligations in this specific field. My personal contribution to this topic comprises of detailed and critical assessment of the *de iure* and *de facto* situation regarding sexual violence in Croatia. If analysis shows that there are some deficiencies in domestic (Croatian) legislation and/or institutional practice, then those international standards and developments can be used as useful guidance in order to eliminate them.

*Before second-wave feminism there had been a fixed set of perceptions about rape. Some will be familiar by now: rape is sex, and women say no when they mean yes. Victims are beautiful young women whose attractiveness arouses men so much that they can't help themselves – or loose women who provoke men willfully and get their just deserts. Either way, the victim is at least partly responsible for getting herself raped, because she asked for it by wearing a miniskirt. Deep down, women want to be taken against their will – especially women who invite a man home on a first date. No woman can be entered against her will if she puts up a real fight (but, paradoxically, no woman can really defend herself against a male attacker, so it is better not to try at all and thus avoid getting hurt). Real rape is incredibly rare, with false accusations of rape are epidemic because the complainants are hysterical, want to get back at a man who rejected them, or want to account for an illegitimate pregnancy. Rapists are foreigners, outsiders, psychopaths, and/or sex fiends. Rape occurs outside, not in the home; victim and perpetrator are unknown to each other. Perpetrators are the stranger behind the bush. And so on.*

Sanyal, Mithu: *Rape – From Lucretia to #MeToo*, Verso, 2019, p. 32

## Introduction

The cited text ironically and sharply sums up the most common rape myths, which are deeply-rooted (and therefore hard to change) all around the globe. In my thesis, I want to address an important issue of gender stereotyping in cases of sexual violence, with the emphasis on rape. One of the main aims of this thesis is to analyze to which extent the harmful stereotypes are still present when it comes to cases of sexual violence and what are the most effective ways of combating them. Therefore, I will focus my thesis research on the practice and jurisprudence of the regional human rights bodies (namely, the ECtHR, the IACtHR and the Inter-American Commission) in addressing and combating harmful gender-based stereotypes. The aim of this comparative analysis is to answer which regional actor went the furthest in addressing and contesting gender-based stereotypes in general, particularly those that are prevalent in rape cases. Also, establishing their 'best practices' is important because such practice can be useful to states which are not successful in fulfilling their international and regional obligations in this specific field. If there are some deficiencies in domestic (Croatian) legislation and/or institutional practice,

then those international standards and developments can be used as useful guidance in order to eliminate them. In the following paragraphs, I will explain how I plan to structure my thesis in accordance with the above-enclosed table of content and briefly summarize each chapter.

In the first chapter of my thesis I will focus on giving relevant scholar's definitions of stereotypes and see which forms of stereotypes exist. Also, introductory remarks will be first of all based on the position which stereotypes have in modern anti-discrimination and international human rights law. Although feminist scholars have vividly discussed the correlation between stereotypes and GBV for quite a long time, their interconnection has been included only recently in international and regional human rights treaties. The CEDAW is undoubtedly a pioneer since it was the first international treaty that explicitly required the elimination of gender-based stereotypes, when it was enacted in 1979.

After the preliminary observations about stereotypes in general, my focus will switch to gender-based stereotypes, myths and generalizations. They can be especially dangerous in societies where they can further perpetuate existing discriminatory practices against women, underline gender inequality and thus have numerous other implications that will be elaborated further in this thesis, with particular regard to cases of sexual violence. It is consequently worth noting that ‘fundamental assumptions about male and female sexuality are played out in rape law.’<sup>1</sup> Some of the stereotypes which will be addressed in more detail in the following chapters in the domain of sexual violence include *per se* problematic attitudes, such as “women are sexually passive and, therefore, they are disposed submissively to surrender to men’s sexual advances;”<sup>2</sup> or “women should dress modestly and, therefore, an immodestly dressed woman is responsible for

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<sup>1</sup> Edwards S.M., Susan: *Sex and gender in the legal process*, Blackstone Press Limited, 1996, p. 330

<sup>2</sup> *Ibid.*, p. 52

her own sexual assault.”<sup>3</sup> Other factors which are often scrutinized in depth during criminal proceedings include the ‘...behavior of the complainant in the lead-up to the incident, her physical attractiveness, the level and fact of her intoxication, or the existence of any previous flirtation or intimacy with the defendant.’<sup>4</sup> These and other misguiding stereotypes form what is expected from the ‘real’ rape and ‘real’ rape victim, and ‘...continue to inform both the popular and penal imagination.’<sup>5</sup> Numerous researches have independently shown that rape is a gendered crime and this thesis will also mostly deal with cases of women as victims of sexual violence. However, it should be emphasized that men are also everyday victims of sexual violence and that women can be perpetrators (towards men or in lesbian relationships). By underlining this I want to deconstruct the common stereotypical image of women as being the only victims of sexual violence, which itself creates additional stigma of male victims/survivors or individuals who do not conform to the binary concept of gender (e.g. transgender people).<sup>6</sup> Even the current international and regional human rights framework is generally based on a stereotypical viewpoint of who is the victim, and who is the perpetrator of sexual violence. Widespread harmful male rape myths include the following ones: ‘that female-perpetrated abuse is rare or non-existent; that male victims experience less harm; that for men all sex is welcome anyway; and that ‘real men’ can protect themselves. This is important because male-rape myths are as detrimental to male victims as female-rape myths are to female victims.’<sup>7</sup> To understand the complexity of the issue, in this introductory chapter I

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<sup>3</sup> *Ibid.*, p. 53

<sup>4</sup> Ellison Luise and Munro E. Vanessa: *Reacting to rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, British Journal of Criminology, 2009, p. 202 and 203

<sup>5</sup> Raluca, Popa: *Session 4b Judicial Stereotypes in Cases of Sexual and Gender Based Violence*, Workshop of Regional and Sub-Regional Courts, Gender Equality Unit, Council of Europe, October 2015, p. 2

<sup>6</sup> As Mithu Sanyal empathetically concluded ‘To recognize men and people of other genders as victims doesn’t detract any recognition from female victims.’ - Sanyal, Mithu: *Rape – From Lucretia to #MeToo*, Verso, 2019, p. 153

<sup>7</sup> *Ibid.*, p. 146



will also include the leading (legal) feminist's scholars' observations regarding the issue of stereotypes in rape cases.

In this domain, the CoE's *Convention on preventing and combating violence against women and domestic violence* (better known under the acronym, The *Istanbul Convention*)<sup>8</sup> undoubtedly went furthest. Consequently, its provisions on stereotypes and sexual violence will be thoroughly examined. It is interesting to notice that the ECtHR explicitly recognized the issue of gender stereotypes in certain cases that will hence be briefly examined, such as *Konstantin Markin v. Russia*<sup>9</sup> and *Carvalho Pinto de Sousa Morais v. Portugal*.<sup>10</sup> It still has not, however, explicitly addressed the harmfulness of stereotypes in GBV cases, including sexual violence. Therefore, in the second chapter, I will discuss why it is a crucial step for the ECtHR to further broaden and develop its case-law in naming and contesting gender based stereotypes in the field of sexual violence, including rape.<sup>11</sup> Nevertheless, it should not be forgotten that the ECtHR has in many aspects contributed to more effective protection of women from rape, above all, by defining rape in a gender-sensitive manner and by clarifying what constitutes effective prosecution.<sup>12</sup> After analyzing the ECtHR's judgments in rape cases, I will try to fill the missing gap starting from the point of identifying which rape stereotypes the Court did not explicitly name in its otherwise rich rape jurisprudence.

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<sup>8</sup> *Convention on preventing and combating violence against women and domestic violence*, Council of Europe Treaty Series - No. 210, Istanbul, 11.V.2011

<sup>9</sup> The ECtHR: *Konstantin Markin v Russia*, Application no. 30078/06 22, March 2012 (GC)

<sup>10</sup> The ECtHR: *Carvalho Pinto de Sousa Morais v. Portugal*, application No. 17484/15, judgment of 25 July 2017

<sup>11</sup> Peroni, Lourdes and Timmer, Alexandra: *Gender Stereotyping in Domestic Violence Cases. An Analysis of the European Court of Human Rights' Jurisprudence* in Brems, Eva, Timmer, Alexandra (editors): *Stereotypes and Human Rights Law*, Intersentia Ltd., 2016, p. 65

<sup>12</sup> More in Radačić, Ivana: *Rape cases in the jurisprudence of the European Court of Human Rights: Defining rape and determining the scope of state's obligations*, European Human Rights Law Review, 13, 2008

In the third part of my thesis I will focus on the IACtHR, which evidently went further than its main ‘concurring’ regional counterpart, the ECtHR, in combating gender-based stereotypes in cases of GBV. Its landmark case in the field is *Gonzalez, Monreal and Monarrez (Cotton Field) v. Mexico*.<sup>13</sup> From an analysis of this case, it can be seen that the IACtHR comprehensively approached to the problem of GBV, bearing in mind that it is also the first case in which ‘the Court explicitly addressed the issue of stereotyping.’<sup>14</sup> Besides the IACtHR, the Intra-American Commission has also dealt with the stereotypes in its jurisprudence and influential Reports. In the following analysis I will also address the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (furthermore: *Belém Do Pará* Convention) and the IACtHR's relevant rape jurisprudence from which I can single out certain persistent (but judicially actively resisted) gender stereotypes.

Pioneering research on the judgments of Croatian courts concerning rape in the period from 2008-2012 has clearly shown that Croatian judges are under a strong influence of rooted social (patriarchal) myths and stereotypes. The author of the research, Ivana Radačić, concluded that the courts themselves perceive raped women as those who want to be subordinated, submissive and "taken" by a man in a sexual sense.<sup>15</sup> The women's ‘contribution to rape’ was obviously wrongly taken into account in the discussed judgments. Therefore, in the last chapter of my thesis, I am keen to find out from the analysis of available and recent Croatian jurisprudence on rape whether judgments still include such evident and intolerable gender stereotypes. I will assess 23 judgments from the period of 2013-2017. 20 dealing with the crime of rape, while in

<sup>13</sup> The IACtHR: *Gonzalez, Monreal and Monarrez (‘Cotton Field’) v. Mexico*, Ser C No 205 (16 November 2009)

<sup>14</sup> Undurraga, Veronica: *Gender Stereotyping in the Case Law of the Inter-American Court of Human Rights* in *op. cit.* (note 11), p. 69

<sup>15</sup> Radačić, Ivana: *Seksualno nasilje – Mitovi, stereotipi i pravni sustav (Sexual Violence - Myths, stereotypes and the legal system)*, Tim Press, Zagreb, 2014, p. 24

three of them perpetrators were found guilty of ‘sexual intercourse without consent’ (tried by the Municipal Criminal Court in Zagreb). The rest of the analyzed rape cases were decided by; the County Court in Varaždin (12), the County Court in Pula (6) and the Supreme Court of the Republic of Croatia (2). One of the premises that I will examine with this socio-legal analysis is whether still exist in Croatia ‘taboos’ and misconceptions about sexual violence, especially regarding rape. In order to better understand the central part of my thesis research, I will briefly explain the current standpoint of Croatian legislation regarding different types of sexual violence. Moreover, I will also reflect on the problematic praxis of gender stereotyping in the Croatian media when the reporting issue is sexual violence.

As stated, my personal contribution to this topic will be to research whether gender-based sexual myths and stereotypes still exist in recent Croatian judgments since, as already mentioned, the latest scientific research on this topic was conducted for a limited period between 2008-2012. If the answer to this claim is positive, then I will analyze present myths and stereotypes in recent domestic Court's judgments and State practice and, bearing in mind the highest international human rights standards, I will give recommendations towards helping combat gender-based stereotypes and myths in sexual violence cases. A comparative analysis of the far-reaching jurisprudence and practices of other analyzed regional human rights courts and other relevant mentioned treaties provisions such as those of the *Istanbul Convention*, can be used as a useful guidance for Croatia in order to more efficiently address and combat harmful gender stereotypes in cases of sexual violence.

## Chapter 1

### i) Definitions and Theories on Stereotypes

Defining stereotypes is not an easy task, so it is not surprising that there are many different available definitions that are only in nuances varying from each other. The most cited definition in different international legal and policy documents is the one offered by Rebecca J. Cook and Simone Cusack, according to which stereotype is ‘*a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, members of a particular social group.*’<sup>16</sup> These two experts make a further distinction between a stereotype which is ‘*at its core, a belief and that belief may cause its holder to make assumptions about members of the subject group... In contrast, the term “stereotyping” refers to the practice of applying a stereotypical belief to an individual member of the subject group...*’<sup>17</sup>

To simplify, stereotypes represent shared, common beliefs about a group of people which are usually deeply rooted within those who share it within society. Research on stereotypes is *per se* interdisciplinary since they are often topics of different psychological or sociological studies. Only recently stereotypes entered into the (international and regional) legal domain (through different Conventions and the following jurisprudence), as will be examined in the second part of this chapter. However, examining gender stereotypes in cases of sexual violence is a specific topic since it unavoidably also enters into field of criminal law (especially victimology, but also to the certain extent criminology).

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<sup>16</sup> Cook, Rebecca J. and Cusack, Simone: *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, 2010, p. 9

<sup>17</sup> *Ibid.*, p. 20

This thesis will focus on the operation of harmful and wrongful gender stereotypes. Therefore, those terms will be further clarified. According to a broad definition offered by Cook and Cusack gender stereotype ‘refers to a structured set of beliefs about the personal attributes of women and men.’<sup>18</sup> Furthermore, not all stereotypes are necessarily negative; there exists something that is commonly referred to as ‘a good prejudice.’ Yet, sometimes even (seemingly) benign stereotype can produce a seriously negative (harmful) impact.<sup>19</sup> Worldwide, women are being considered the more nurturing and gentle gender. In many instances that proves to be true, which also shows how some stereotypes are not necessarily inaccurate. However, the mentioned benign stereotype is often a root cause that forces many women to leave their workplace after they give birth (or if some family member gets sick), which in the long run hinders their professional development. *A contrario*, an example of an evidently wrongful stereotype is ‘... the failure to criminalize marital rape based on the stereotype of women as the sexual property of men. Another example is the failure of the justice system to hold perpetrators of sexual violence accountable based on stereotypical views about women’s appropriate sexual behavior.’<sup>20</sup> There are many other useful distinctions of stereotypes as well. It is agreed that stereotypes can be ‘descriptive/statistical (perceiving all members of a certain group to have the same attributes regardless of individual differences) and prescriptive/normative (setting the parameters for “acceptable” behavior).’<sup>21</sup>

Moreover, we can assess stereotypes by examining who is responsible for stereotyping. In this thesis, stereotyping will usually be a product of a judge. Accordingly, judicial

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<sup>18</sup> *Ibid.* The *Istanbul Convention* defines gender in Article 3 as ‘socially constructed roles, behaviors, activities and attributes that a society considers appropriate for women and men.’ – *op. cit.* (note 8)

<sup>19</sup> Available on: <https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderStereotypes.aspx>, accessed on 28 September 2019

<sup>20</sup> *Ibid.*

<sup>21</sup> *Op. cit.* (note 16), p. 14

stereotyping represents ‘the practice of judges ascribing to an individual specific attributes, characteristics or roles by reason only of her or his membership in a particular social group. It is used, also, to refer to the practice of judges perpetuating harmful stereotypes through their failure to challenge stereotyping, for example by lower courts or parties to legal proceedings.’<sup>22</sup> So stereotyping can be the misdeed of a single judge or expression of his/her omission to react to a wrongful or harmful stereotype that can be attributable to lower judicial instances. As per Simone Cusack and Rebecca J. Cook, ‘stereotyping by judges can have particularly pernicious effects, especially because their unique position of power means they can give stereotypes the full weight and authority of the law.’<sup>23</sup> As a matter of common knowledge and jurisprudence, judges are accompanied in stereotyping by other actors in the justice system as well, *e.g.* by law enforcement officials.

## **ii) Role of Stereotypes in International Human Rights Law with the Emphasis on Gender Stereotypes and the Work of the CEDAW Committee as a Global Pioneer in Naming and Contesting Gender Stereotypes**

The previous subchapter included different experts’ definitions on stereotypes. This part of the thesis will question whether there exists a common definition on stereotypes in international human rights law and what is the (historical and current) attitude towards them of relevant international human rights *fora*?

International human rights law has long been silent on the issue of stereotypes, until the drafters of the CEDAW explicitly included stereotypes in its Article 5(a). CEDAW is,

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<sup>22</sup> Cusack, Simone: *Eliminating Judicial Stereotyping: Equal access to justice for women in gender-based violence cases*, Final paper, Submitted to the Office of the High Commissioner for Human Rights on 9 June 2014, p. 2

<sup>23</sup> *Op. cit.* (note 16), p. 36

with reason, appraised as the ‘international bill of rights of women.’ Already in 1979, the drafters of the CEDAW in the far-reaching Article 5(a) recognized that:

*‘States Parties shall take all appropriate measures:*

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’<sup>24</sup>*

The importance of Article 5(a) of the CEDAW is that it ‘calls attention to the social and cultural barriers to women’s full enjoyment of their human rights.’<sup>25</sup>

The CEDAW Committee further developed its stance on gender stereotypes in its General Recommendation. From the paragraph 9 of General Recommendation No. 28 arose three distinct obligations for all branches of government; namely, to refrain from stereotyping (*obligation to respect*), to ensure stereotyping does not infringe human rights (*obligation to protect*) and ensure women can exercise and enjoy the right to be free from wrongful gender stereotyping (*obligation to fulfill*).<sup>26</sup>

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<sup>24</sup> Moreover, in the Article 10 (c) CEDAW calls for the elimination of any stereotypes in the field of education: ‘*The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education...*’ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> [accessed 3 December 2018]

<sup>25</sup> Biholar, Ramona: *Transforming Discriminatory Sex Roles and Gender Stereotyping: The Implementation of Article 5(a) CEDAW for the Realisation of Women's Right to be Free from Gender-based Violence in Jamaica*, (Dissertation), (supervisor Holtmaat, Rikki), 2013p. 3

<sup>26</sup> General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/2010/47/GC.2, 2010; Cusack, *op. cit.* (note 20), p. 7

The CEDAW Committee is the UN expert Committee which is (unsurprisingly, due to its specific mandate) reasonably recognized as a global pioneer in combating gender-based stereotypes. Harmful gender-based rape ‘myths’ and stereotypes were firstly explicitly and in detail addressed and condemned in the landmark CEDAW Committee’s case *Karen Tayeg Vertido v. the Philippines*.<sup>27</sup> The applicant herself has numerated and elaborated on several harmful gender stereotypes which were used by the judge during a domestic criminal proceeding and which were the ‘key’ factors that led to the acquittal of the alleged rape perpetrator. The *Vertido* case also shows how rooted stereotypes easily affect people, regardless of their sex, gender, education and other social statuses. I mention this because from the facts of the case, it is clear that stereotypes applied in the judgment were decided by a *female* judge, from whom one may have (clearly wrongly) expected a certain level of gender sensitivity and especially immunity to the operation of rape stereotypes/myths.

It was easier for the CEDAW Committee (than for some other comparable international body) to find the Philippines' responsible for gender stereotyping. The CEDAW, unlike some other international and regional instruments, contains already mentioned specific provision on stereotypes. The reason why *Vertido* is of such importance and why it is so often eagerly cited by the legal and feminist's scholars, is because the CEDAW Committee clearly imposed obligation on States Parties to refrain from gender stereotypes – in fact, they should combat them – and moreover, it imposed a further obligation that judgments in court's proceedings should not be based on rape myths.<sup>28</sup>

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<sup>27</sup> CEDAW Committee UN Doc. CEDAW/C/46/D/18/2008 (22 September 2010)

<sup>28</sup> *Ibid.*, point 8.4.



The CEDAW Committee rightly observed and warned that '*... stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence in general.*'<sup>29</sup> Moreover, seven sexist gender stereotypes were assessed in a clear way (even by being numbered), therefore, the *Vertigo* judgment can serve as a textbook example of what to avoid when adjudicating rape cases for the other Contracting Parties to the CEDAW.

The CEDAW Committee has dealt with gender stereotypes and prejudices in other similar cases as well, for instance in another infamous case decided against the Philippines about the rape of a disabled girl<sup>30</sup> and in its shocking Report about abductions, rapes and female murders (*femicide*) in the Mexican city Ciudad Juárez.<sup>31</sup>

Besides the CEDAW Committee, the OHCHR has also dedicated considerable attention to the issue and impacts of gender stereotyping since 2013. It is praiseworthy that in the same year the OHCHR issued a comprehensive *Report on gender stereotyping*.<sup>32</sup> Just from a brief examination it is evident that the Report is highly influenced by the submission of one of the greatest experts in this specific field, Simone Cusack. Among other activities, the OHCHR

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<sup>29</sup> *Ibid.*

<sup>30</sup> *R.P.B. v. the Philippines*, CEDAW Committee/C/57/D/34/2011

<sup>31</sup> 2005 Report on Mexico by CEDAW and Reply from the Government of Mexico, CEDAW Committee C/2005/OP.8/MEXICO

<sup>32</sup> The OHCHR Commissioned Report: *Gender Stereotyping as a Human Rights Violation*, September 2014

facilitated an annual full-day discussion on women's human rights at the 2014 Human Rights Council, in which one panel was specifically devoted to the issue of gender stereotyping.<sup>33</sup>

UN Women, a specialized UN agency, graphically and in writing often warns on its social media about the need to 'end the structures and false perceptions that are embedded in society, keeping women and girls from achieving their full potentials.'<sup>34</sup> Among those it *expressis verbis* lists 'misogyny, patriarchy, discrimination, inequality and stereotypes.'<sup>35</sup> It is clear that gender stereotypes have increasingly been on the UN agenda in recent years, especially due to the far-reaching impacts of movements such as #MeToo.

It is evident that as a concept/tool stereotypes have firstly been developed in the context of sex/gender, and then further broadened on other grounds such as disability, race, ethnicity, etc.

In addition to the CEDAW, *the Convention on the Rights of Persons with Disabilities* (further: the CRPD) is the only other among core UN human rights treaties that contain special provisions concerning stereotypes. Moreover, the added-value of Article 8(1)(b) of the CRPD is that 'it is the first provision in an international human rights treaty to impose an express obligation to address compounded stereotypes.'<sup>36</sup> However, besides the explicit recognition of harmfulness of gender and disability stereotypes in discussed treaties, other 'UN human rights mechanism have given comparatively little attention to other types of stereotyping and their

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<sup>33</sup> Summary of the panel *The Impact of Gender Stereotypes on the Recognition and Enjoyment of Women's Human Rights* available on <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14739&LangID=E>, accessed on 20 October 2019

<sup>34</sup> UN Women Facebook page, available on 3 September 2019

<sup>35</sup> *Ibid.*

<sup>36</sup> *Op. cit.* (note 16), p. 8 'This is significant for women and girls with a disability whose experiences of violence and discrimination may differ from the experiences of men and other women due to the application or enforcement of compounded stereotypes.'

response to this issue has been ad hoc and weak as a result.<sup>37</sup> For example, the CERD Committee does ‘...address the issue explicitly, albeit mostly in non-binding recommendations.’<sup>38</sup> To conclude, stereotypes are emerging as a topic of interest in international human rights law, but ‘... UN mechanisms need to take advantage of the momentum generated over the past half-decade to further strengthen and expand their responses to stereotyping.’<sup>39</sup>

### iii) Gender Stereotypes and Myths – Why are They So Harmful?

As stated, stereotypes are not *per se* harmful. However, one should be aware that ‘once the lens of stereotypes is applied, one can understand how these conscious or unconscious beliefs about groups can also imprison them in certain roles, destine them automatically towards certain professions...’<sup>40</sup> and often serve as a root-cause of discrimination.

Similarly, gender stereotypes ‘...lie at the basis of discrimination against women. The elimination of all forms of discrimination against women is impossible without eradicating these causes.’<sup>41</sup> It is realized that there exists a strong connection between ‘Embedded constructions of femininity and masculinity based on ascribed sex roles and consequent gender stereotyping’, whose effect is that they ‘hinder the elimination of GBV and the implementation and full realization of women’s human rights.’<sup>42</sup> Since harmful gender stereotypes eventually ‘help maintain VAW, there is an urgent need to address them.’<sup>43</sup> Properly addressing/naming gender

<sup>37</sup> Cusack, Simone: *How the UN’s Response to Stereotyping is Evolving* in *op. cit.* (note 11), p. 12

<sup>38</sup> Möschel, Mathias in *op. cit.* (note 11), p. 141

<sup>39</sup> Cusack, Simone: *Building Momentum Towards Change: How the UN’s Response to Stereotyping is Evolving* in *ibid.*, p. 39

<sup>40</sup> Möschel, Mathias: *Racial Stereotypes and Human Rights* in *op. cit.* (note 11), p. 120

<sup>41</sup> Holtmaat, Rikki: *Article 5* in Freeman, Marsha; Chinkin, Christine, Rudolf, Beate: *The UN CEDAW: A Commentary*, OUP, 2012, p. 144

<sup>42</sup> *Op. cit.* (note 25), p. 3

<sup>43</sup> Radačić, Ivana: *Barriers to access to justice for victims/survivors of gender based violence: gender bias in the legal system*, 2015, p. 4

stereotypes is important since they represent ‘one of the factors that structurally contribute to domestic violence [all forms of GBV, emphasis added] and ineffective state responses.’<sup>44</sup> However, this is just a first step. The second one - contesting gender stereotypes - requires an active approach from States and their respective institutions.<sup>45</sup>

Numerous international institutions, including the former Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, and other researchers independently concluded that ‘...the investigation of cases of VAW and the sanctioning of perpetrators are underpinned by patriarchal notions and stereotypes’,<sup>46</sup> that are deeply internalized. Devastating effect of gender stereotyping in GBV cases is that it impedes women’s access to justice and even may led to impunity for serious women’s rights violations.

Overall, harmful gender stereotypes represent a serious obstacle in achieving substantive equality and therefore, successful challenging of deeply rooted, outdated and harmful gender stereotypes eventually aims for achieving ‘transformative equality.’<sup>47</sup> Still, it should be emphasized that ‘abolishing, eradicating, or eliminating gender stereotypes, or even modifying them, is a long and slow process.’<sup>48</sup>

#### iv) Legal Feminist’s Approach Towards Gender Stereotypes in Rape Cases

Stereotypes, as well as intersectionality, have been primarily recognized and advanced by (feminist) lawyers as a critique of anti-discrimination law and its limitations. Also, it

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<sup>44</sup> Peroni, Lourdes and Timmer, Alexandra: *Gender Stereotyping in Domestic Violence Cases: An Analysis of the European Court of Human Rights’ Jurisprudence* in *op. cit.* (note 11), p. 40

<sup>45</sup> *Ibid.*

<sup>46</sup> Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/23/49, 14 May 2013, para. 53

<sup>47</sup> *Op. cit.* (note 41), p. 148

<sup>48</sup> *Ibid.*, p. 155

is important to emphasize that the critical assessment of rape jurisprudence (including issues such as attrition and what is referred to as ‘conundrum of consent’<sup>49</sup>) has been far better developed within the common-law legal system.<sup>50</sup> It should be emphasized that over the years, legal feminists in many different jurisdictions succeeded in unravelling many ‘insoluble inconsistencies in the law of rape.’<sup>51</sup> Rape was historically perceived as a criminal offence against a woman’s honor or decency, however, there is a clear shift worldwide towards reconceptualization of rape as a violation of women’s bodily integrity, agency, sexual self-determination and (personal) sexual autonomy.<sup>52</sup> Far-reaching CEDAW Committee’s *General Comment Number 35* requires from State Parties to characterize rape as ‘a crime against women’s right to personal security and their physical, sexual and psychological integrity.’<sup>53</sup> As stated, discussions and personal revelations about sexual violence and sexism immensely developed after the #MeToo movement.<sup>54</sup> New generational feminists agree that ‘rape is a charged issue for all of us, with far more impact on our lives than any other crime... Moreover, the information we get about rape isn’t just information about rape; it’s also about gender, the relationship of the sexes to each other, and even sexuality.’<sup>55</sup>

Many feminist’s lawyers examined rape law through the prism of

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<sup>49</sup> ‘The rape conundrum: should a suspect know consent – or the DPP know the law?’, available at: <http://www.chrissaltrese.co.uk/the-rape-conundrum-should-a-suspect-know-consent-or-the-dpp-know-the-law/> accessed 15 October 2019

<sup>50</sup> Due to the efforts and pivotal work of feminist scholars such as Catherine MacKinnon. E.g. MacKinnon, Catharine: *Women’s Lives Under Men’s Laws*, Harvard University Press, 2005, p. 35-36

<sup>51</sup> Greer, Germaine: *On Rape*, Melbourne University Press, 2018, p. 32

<sup>52</sup> Fredman, Sandra and Oxford Pro Bono Publico: *The Reform of India’s Sexual Violence Laws*, January 2013, p. 1-2

<sup>53</sup> CEDAW Committee: *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, 2017, CEDAW/C/GC/35, p. 11, para. 33

<sup>54</sup> Writer and rapist survivor Sohaila Abdulali summarized ongoing trends that worldwide popularized debates about rape ‘Jyoti Singh, the election of Donald Trump, #MeToo, the Kathua rape/murder, UK MP’s calling for an end to bringing up rape victims’ sexual histories in court... We’ve started talking about rape and these big dramatic moments are merely highlights in the ongoing discourse. They are markers along a very long journey towards what scholar and lawyer Catharine MacKinnon calls ‘shifting gender hierarchy’s tectonic plates.’ - Abdulali, Sohaila: *What We Talk About When We Talk About Rape*, Myriad Editions, 2018, p. 42

<sup>55</sup> *Op. cit.* (note 5), p. 3

first and foremost... as an illustration of sexism in the criminal law... In rape, the male standard defines a crime committed against women, and male standards are used not only to judge men but also to judge the conduct of women victims. Moreover, because the crime involves sex itself, the law of rape inevitably treads on the explosive ground of sex roles, of male aggression and female passivity, of our understandings of sexuality – areas where differences between a male and a female perspective may be most pronounced.<sup>56</sup>

It also needs to be underlined that

Rape is a pervasive, highly gendered, type of abuse, which is reproduced through stereotypes that devalue women; through the practices of socialization, that orient boys towards power, control and endorsement of violence, through the media's glorification of violence and the sexualisation of women and girls; but also through weak or limited implementation of the law, which signals to rapists that they can act with impunity; and, not least, through the failure of the criminal justice system to respond.<sup>57</sup>

The importance of this specific topic can be summarized in the following manner:

‘the discourse around rape is one of the last bastions and breeding grounds for gender stereotypes we wouldn’t dare to think, let alone say out loud-and that goes for all political camps and social strata.’<sup>58</sup> There are many worldwide recognized rape myths, and the most known and the most problematic ones will be further elaborated. They are a reflection of the widespread attitude according to which ‘... cultural picture of manhood supports the idea of dominant man, strong and active (*macho*), he is the one who starts sexual interaction, while woman is weak, passive and submissive.’<sup>59</sup> Anachronistic attitudes see rape as a sort of punishment for women who are in their respective societies viewed as too broadminded and/or independent; ‘some women deserve to be raped because they jump out of average, so they need to be reminded of their place in a society in regards to men.’<sup>60</sup> Or trivializing women’s consent to intercourse; ‘if a woman says no, it means

<sup>56</sup> Estrich, Susan: *Rape in Feminist Jurisprudence* (edited by Smith, Patricia), Oxford University Press, 1993, p. 159

<sup>57</sup> *Op. cit.* (note 5), p. 3

<sup>58</sup> *Op. cit.* (note 6), p. 7

<sup>59</sup> Mršić, Gordan, Modly, Duško: *Forenzika: Metodika istraživanja silovanja*, (*Forensics: Methods of research of rape*), Hrvatska sveučilišna naknada, Forensics Library, 2019, p. 56

<sup>60</sup> *Ibid.*, p. 57

yes.’<sup>61</sup> Consequently, in order not to provoke rape (or some other kind of sexual attack), women are expected to follow certain unwritten (but still well known) rules such as the following ones: ‘do not walk alone at night; do not wear provocative clothes; do not go alone in night clubs; do not initiate sexual foreplay if you do not mean to go all the way...’<sup>62</sup>

The list of described expected ‘proper’ behavior for ‘decent’ women is endless and therefore only modest women who act in accordance with the mentioned rules, if raped, are considered to be ‘real’/ ‘ideal’ rape victims.<sup>63</sup> However, if a woman nevertheless transgresses societal expectations (e.g. by being drunk in a club), and then is raped, her ‘contribution’ to rape would often be examined during the criminal procedure. Assessment of irrelevant factors, such as the victim’s past (sexual) behavior and/or outfit, in rape cases imply that the victim tacitly consented to sexual intercourse.

‘Bad’ victims—those women whose lives, backgrounds, and characteristics depart from the narrow confines of “ideal victims” in sexual assault cases—are the women whose accounts are subject to the most scrutiny, whose credibility is most attacked, and who are seen to be less deserving of the law’s protection. This, in turn, is inextricably tied with the pervasiveness of victim-blaming, the idea that women are, and should be, responsible for navigating their own safety, for managing men’s sexual attention and aggression, and also for accurately assessing and avoiding risk.<sup>64</sup>

Moreover, feminist’ lawyers have dedicated lots of their writing to the misconceptions connected with what is within the penal *imaginarium* referred to as a ‘real rape.’

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<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> ‘... despite the advent of a female sexual liberation in the past half century, social attitudes expressed through the criminal-justice system have remained profoundly ambiguous about female sexual activity that can in any way be labelled ‘promiscuous’, in contrast to a continuing popular acceptance of indiscriminate male sexual activity as ‘normal.’ – Rowbotham, Judith: *The Gendered Dock: Reflections on the Impact of Gender Stereotypes in the Criminal Justice System* in Jones, Jackie; Gear, Anna and Fenton, Rachel Anne (editors): *Gender, Sexualities and Law*, Routledge, 2011, p. 113

<sup>64</sup> Randall, Melanie: *Sexual Assault Law, Credibility, and “Ideal Victims”: Consent, Resistance, and Victim Blaming*, 22(2) Canadian Journal of Women and the Law, 2010, p. 397-398

At one end of the spectrum is the ‘real’ rape, what I will call the traditional rape: A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse. In that case, the law-judges, statutes, prosecutors, and all-generally acknowledge that a serious crime has been committed. But most cases deviate in one or many respects from this clear picture, making interpretation far more complex.<sup>65</sup>

In situations where a woman somehow ‘fails’ to conform to highly-imposed societal *mores*, the female victim is the one scrutinized. The criminal justice system should be focused on the perpetrator and his illegal act. Moreover, women who decide to report rape are often confronted with obvious skepticisms from the State's personnel who are supposed to help them. If the alleged victim fails to react in the expected way (*e.g.* if she is too ‘calm’ when reporting rape),<sup>66</sup> there is, unfortunately, a great chance that the investigators will approach her with clear distrust. Common stereotypical images of revengeful and lying women lead to wrong conclusion that they are eager to report rape when *de facto* intercourse was freewill or it did not even happen, just in retaliation to (current or ex) partner/husband or men in general. However, studies have proved that the issue of false allegations is maliciously and overwhelmingly presented, since ‘the scale of false reporting in rape cases is not higher than for other crimes.’<sup>67</sup>

The usage of the harmful gender-based stereotypes is unacceptable and (at least should be) prohibited in all cases, especially in those that are so sensitive like rape; ‘it is important

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<sup>65</sup> *Op. cit.* (note 56), p. 160-161

<sup>66</sup> As it was realistically portrayed in the recent Netflix TV show ‘*Unbelievable*’ (aired September 2019, based on a Pulitzer Prize-winning article published in December 2015 by the Marshall Project and ProPublica) that followed a real-life investigation for a serial rapist in the US. The victim Marie Adler was even charged with the false reporting and as ‘Adler’s counselor succinctly deduced in a later episode, “So, basically, you were assaulted twice. Once by your attacker, then again by the police.” More available on: <https://coloradosun.com/2019/09/29/sexual-assault-metoo-rape-police-opinion/>, accessed 30 September 2019

<sup>67</sup> Kelly, Liz: *The (In)credible Words of Women: False Allegations in European Rape*, Violence Against Women, Vol 16, Issue 12, 2010, p. 1352 As realistically pointed out by Sohaila Abdulali ‘Where in the world is it pleasant to report a rape? I find it very hard to believe that droves of girls and women are rushing to say they’ve been assaulted when they haven’t. Women still don’t generally have an easy time reporting sexual assault. In fact, the opposite is too often true.’ – *op. cit.* (note 54), p. 26



to ensure that the interpretations of rape legislation and the prosecution of rape cases are not influenced by it.’<sup>68</sup>

Nevertheless, the sad reality is that there are numerous infamous rape judgments across the different legal systems, all of which are based on certain false and degrading rape myths and/or wrong assessments of the woman’s ‘role’ in rape. For example, an Italian judgement from 1999 has rightly caused national outrage since the Court of Cassation concluded ‘that it would have been impossible for the perpetrator to have taken off an 18-year-old client's jeans "without the collaboration of the person wearing them" and that she must, therefore, have consented to sex.’<sup>69</sup> Only in 2008 did the Italian Court of Cassation (yet, in another case) realize that ‘jeans cannot be compared to any type of chastity belt.’<sup>70</sup> Similarly, the shocking decision was the one in which the Appellate Italian Court concluded that the ‘victim was not pretty enough to be raped.’<sup>71</sup> Three female judges accepted the perpetrator’s justification that rape did not occur because the victim was ‘too masculine.’ Because the judgment was primarily based on such intolerable and sexist reasoning, the case will finally be resolved in front of the highest national Court.

Some judges are keen to find scarce mitigating circumstances for perpetrators of sexual violence. As recently as 2018, the New Jersey Supreme Court judge ‘granted leniency to a 16-year-old rape suspect in part because he came from a “good family” and attended “an excellent

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<sup>68</sup> *Op. cit.* (note 5), p. 3

<sup>69</sup> Available on: <https://www.telegraph.co.uk/news/worldnews/europe/italy/2447225/Italy-overturms-ruling-that-women-wearing-tight-jeans-cannot-be-raped.html>, accessed on 5 August 2019

<sup>70</sup> *Ibid.*

<sup>71</sup> Available on: [https://www.huffpost.com/entry/italy-rape-case-too-masculine\\_n\\_5c881227e4b038892f482daf](https://www.huffpost.com/entry/italy-rape-case-too-masculine_n_5c881227e4b038892f482daf), accessed on 12 August 2019

In the same hostile and myzogenic tone in 2014 notorious Brazilian President Bolsonaro (then acting as a Congressman) apparantly told to the female member of the Congress that he 'wouldn't sexually assault her because she's not worthy of it.' – Available on: <https://time.com/3630922/brazil-politics-congresswoman-rape-comments/>, accessed on 31 August 2019

school.<sup>72</sup> Besides the judgment being primarily based on common stereotypical circumstances corresponding to ‘real’ rape, the judge further pressed the rape victim and her family by asking if they understand “‘the devastating effect’ that pressing charges would have ‘on G.M.C.’s life.’”<sup>73</sup> (the author’s remark: the perpetrator’s) The judge was clearly lacking sensitivity to not realize how his inappropriate comments can *de facto* produce ‘*the devastating*’ and long-lasting ‘*effect*’ on the victim and her family.<sup>74</sup>

However, despite the presented negative judicial examples, it is important to have in mind that

the persistence of gendered attitudes cannot be condemned as automatically perverse and inequitable. The need is not to avoid gender stereotyping, which is practically and theoretically impossible. It is instead important for the criminal-justice system to develop a conscious awareness of this reality as a continuing issue which is, of itself, neither automatically negative nor positive in its workings.<sup>75</sup>

Not only that the courts have an obligation to be independent and impartial, but, they also have a crucial role in naming and contesting harmful gender stereotypes in cases of GBV, including sexual violence. Courts should not be left alone in this important ‘task’, because the same duty should be followed by the actions of other responsible State institutions, such as police and public prosecutors in all stages of the proceeding, which is, unfortunately, not always a case.

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<sup>72</sup> Available on: <https://www.huffpost.com/entry/judge-james-troiano-resigns-new-jersey-sexual-assault.html>, accessed on 5 August 2019

<sup>73</sup> *Ibid.*

<sup>74</sup> Public outrage that this case produced led to the judge’s dismissal.

<sup>75</sup> *Op. cit.* (note 63), p. 115

## Chapter 2

### i) Standards on Combating Gender Stereotypes from the Istanbul Convention and the Council of Europe's Soft Law

Within the CoE, Article 12(1) of the *Convention on Preventing and Combating Violence against Women and Domestic Violence* explicitly requires Contracting Parties to 'take the necessary measures to promote changes in the *social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men*'<sup>76</sup> (emphasis added). Article 14(1) is a comparatively broadly framed provision that asks Parties to 'take, where appropriate, *the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, nonviolent conflict resolution in interpersonal relationships, GBV against women and the right to personal integrity*, adapted to the evolving capacity of learners, in formal curricula and at all levels of education'<sup>77</sup> (emphasis added).

Moreover, drafters of *the Istanbul Convention* understood that women often face serious obstacles when they wish to access the justice system; namely outdated discriminatory laws, inappropriate social and cultural patterns (stereotypes, prejudices and patriarchal culture), gender-bias in the justice system, and lack of financial and other resources.<sup>78</sup> It is an especially difficult position for the victims of sexual violence. Actually, one can argue that the comprehensive

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<sup>76</sup> *Op. cit.* (note 8)

<sup>77</sup> *Ibid.*

<sup>78</sup> Duban, Elisabeth; Radačić, Ivana for the CoE and EU (Partnership for Good Governance): *Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice (General Part)*, 2017, p. 12-13

measures in the *Istanbul Convention* are underpinned by the broader aim of fighting gender inequality, which is also reflected in its position towards sexual violence.

The *Istanbul Convention* explicitly includes rape as one of the forms of GBV that represents ‘... a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men.’<sup>79</sup> Although the text of the *Istanbul Convention* does not include a comprehensive definition of sexual violence,<sup>80</sup> it lists which conduct should be characterized as sexual violence in respective national legislations.<sup>81</sup>

Finally, Article 36 deals with the substantive criminal law definition of rape and consequently, requires State Parties to the *Istanbul Convention* to criminalize rape and all other non-consensual acts of sexual nature in their national legislations, including rape that occurs between former and current spouses and partners. Furthermore, Article 25 of the *Istanbul Convention* explicitly requires State Parties to ‘take the necessary legislative or other measures to provide for the setting up of appropriate, easily accessible rape crisis or sexual violence referral centers for victims in sufficient numbers to provide for medical and forensic examination, trauma support and counselling for victims.’<sup>82</sup> The cited Article clearly aims to make the victim safe and secure when she is approaching the legal system and requires State Parties to the Convention to ensure a so-called the ‘victim-centered approach’ as a norm.

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<sup>79</sup> Preamble, *op. cit.* (note 8)

<sup>80</sup> The Policy Department for Citizen's Rights and Constitutional Affairs for the FEMM Committee: *The Issue of Violence against Women in the European Union*, Study, 2016, p. 13

<sup>81</sup> ‘Engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; engaging in other non-consensual acts of a sexual nature with a person; causing another person to engage in non-consensual acts of a sexual nature with a third person.’ – *op. cit.* (note 8)

<sup>82</sup> *Ibid.*

Gender stereotyping is a topic which is increasingly receiving attention within the broader CoE gender equality agenda. In its Gender Equality Strategy 2018-2023, the CoE defined gender stereotypes as ‘*preconceived social and cultural patterns or ideas whereby women and men are assigned characteristics and roles determined and limited by their sex.*’<sup>83</sup> As discussed in the first chapter of this thesis, the CoE agrees that gender stereotyping ‘*presents a serious obstacle to the achievement of real gender equality and feeds into gender discrimination. Such stereotyping can limit the development of the natural talents and abilities of girls and boys, women and men, their educational and professional preferences and experiences, as well as life opportunities in general.*’<sup>84</sup>

The latest appraised and comparatively unprecedented development is that in March 2019, the CoE adopted *Recommendation on Preventing and Combating Sexism*.<sup>85</sup> This contextually comprehensive legal instrument is drafted with the need to correct ‘the lack of an internationally agreed definition of “sexism” and of a dedicated legal instrument to tackle it,’<sup>86</sup> and *inter alia* explicitly links sexism to the widespread occurrence of VAW and girls. Its far-reaching aspirational aim is to ‘create a Europe free from sexism and its manifestations.’<sup>87</sup> For the CoE *tackling sexism* (emphasis added) is ‘thus part of States’ positive obligation to guarantee human rights, gender equality and to prevent VAW and girls in accordance with international human rights law and, for States Parties, the *Istanbul Convention*.’<sup>88</sup>

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<sup>83</sup> The CoE: *Gender Equality Strategy 2018-2023*, Strategic objective 1, March 2018

<sup>84</sup> *Ibid.*

<sup>85</sup> The CoE: *Recommendation on Preventing and Combating Sexism*, CM/Rec (2019)1 adopted by the Committee of Ministers of the CoE, 27 March 2019

<sup>86</sup> *Ibid.*, p. 8

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*, p. 11

Having a legal instrument which specifically deals with the harmfulness of sexism is a huge step forward in standard setting, however, it must be emphasized that Recommendations are not legally binding. Therefore, it is up to the discretion of the CoE Member States to decide which proposals they will implement domestically. It is recognized that eliminating sexism is a long term process that requires a multi-sectoral approach, and therefore, the CoE requests Member States to ‘monitor progress in implementing its guidelines and to inform the CoE’s Gender Equality Commission of measures taken and progress achieved.’<sup>89</sup>

## ii) Recognition of Gender Stereotypes in the ECtHR’s Jurisprudence:

The ECtHR pragmatically rarely decides to reflect on the issue of operative gender stereotypes in its judgments. However, in the following pages I will briefly examine 2 influential judgments where the Court both identified and contested harmful gender stereotypes.

The ECtHR has made several progressive remarks in the landmark case, *Konstantin Markin v. Russia*.<sup>90</sup> The Court recognized that the refusal of the Russian military service to grant the applicant parental leave as a sole parent was based entirely on a gender stereotype. The applicant proved that he did not get parental leave just because he, as a man, is not societally perceived as a care-giver, unlike the female employees. Mr. Markin is an example of a ‘father who run into a parental wall when he rejected the traditional stereotype of non-caregiving

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<sup>89</sup> ‘CoE adopts first-ever international legal instrument to stop sexism’, available on: <https://www.coe.int/en/web/genderequality/-/council-of-europe-adopts-first-ever-international-legal-instrument-to-stop-sexism>, accessed on 28 September 2019

<sup>90</sup> *Op. cit.* (note 9)

breadwinner’<sup>91</sup> and just by that fact challenged ‘discriminatory gender nonconformity working practice.’<sup>92</sup>

In assessing whether there was a breach of Article 14, a crucial step is to look for a comparator. In this case it was clear that female soldiers could easily get parental leave (certain other benefits would as well be solely granted to women). This direct difference in treatment the Government unsuccessfully tried to justify by ‘referencing the need to maintain the operational effectiveness of the armed forces or by reference to the State’s attitudes to gender roles.’<sup>93</sup> The ECtHR disregarded the Russian Government’s argument that allowing women (and not men) parental leave is a sort of positive action measure.<sup>94</sup>

According to the Court, parental leave falls under the right of family life. Although it is disputable whether the Court went too far by implying that parental leave is a social right, nevertheless, the far-reaching outcome for European anti-discrimination law is that the ECtHR found a violation of both Articles 8 and 14 of the European Convention, thus confirming that “‘the advancement of the equality of the sexes ’... entails a commitment both to formal equality and to disrupting gender-role stereotyping.’<sup>95</sup>

This case represents a textbook example of how deeply-rooted/common gender stereotype according to which women are exclusively seen as care-givers (while men as *pater familias* should be bread-winners), can also be harmful to men. Therefore, *Konstantin Markin* is

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<sup>91</sup> Greenberg, A. Julie: *The Gender Nonconformity Theory: A Comprehensive Approach to Break Down the Maternal Wall and End Discrimination Against Gender Benders*, Thomas Jefferson Law Review, Vol. 26, 2003, p. 49

<sup>92</sup> *Ibid.*

<sup>93</sup> Jacobs, White and Ovey: *The European Convention on Human Rights*, OUP, Seventh Edition, 2017, p. 648

<sup>94</sup> *Op. cit.* (note 9), para. 141

<sup>95</sup> Timmer, Alexandra: *Gender Justice in Strasbourg*, available on <https://strasbourgobservers.com/2012/03/22/gender-justice-in-strasbourg/>, accessed 8 November 2019

remembered as a case in which ‘harmful stereotypes about women may be at the heart of a case that is ostensibly about discrimination against men.’<sup>96</sup> From paragraph 141, it unambiguously follows that ‘sex role’<sup>97</sup> gender stereotypes are ‘disadvantageous both to women careers and to male family life.’

It should not be forgotten that this outcome benefitted from a third party intervener (whose impact on the outcome of the case(s) is, *nota bene*, often in the analysis of the ECtHR’s judgments quite neglected), which in this particular case was Ghent University.<sup>98</sup> Such a prominent institution clearly laid out accurate anti-discrimination issues that arrive from this case, and which rightly caught the ECtHR’s attention.

The Portuguese case, *Pinto*, showed how compounded stereotypes (of gender and age) could easily be present even in medical malpractice, regarding damage costs. When compared to the male patients in similar situation, domestic courts ‘awarded’ Madame Pinto with a significantly smaller monetary compensation for the gynecological negligence, which negatively affected her health in general, but also permanently disabled her for sexual relations.<sup>99</sup> From their shocking argumentation it is clear that they equate women’s sexuality with the procreation, so for them women over 50 years (as was the applicant), already had chance to fulfill their reproductive role, and therefore, their sexual life lost in importance. *A contrario*, domestic courts showed empathy (through generous monetary compensations) if older men’s sexual life was medically jeopardized, since (rightfully) sexual urges do not stop while ageing. The ECtHR recognized, by finding a violation of both Articles 8 and 14, that Portuguese judiciary ordered insufficient

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<sup>96</sup> Brems, Eva and Timmer, Alexandra: *Introduction* in *op. cit.* (note 11), p. 9

<sup>97</sup> *Op. cit.* (note 16), p. 28

<sup>98</sup> Ghent University already in 2013 organized conference on gender stereotypes. Möschel in *op. cit.* (note 11), p. 119

<sup>99</sup> *Op. cit.* (note 10), para. 10



compensation solely due to the intertwining factors of the applicant's age and gender (although the gender aspect of the judgment was more emphasized).<sup>100</sup> Another degrading, outdated and paternalistic comment from domestic courts was that the applicant at that age '*probably only needed to take care of her husband*'.<sup>101</sup> Such sexist stereotype limits 'older' woman's role in society exclusively to the one of an obedient and devoted wife, now when her children have grown up. National courts lowered reparation under the influence of operative gender role stereotype that perceives women as 'only' nurturing wives and mothers. In paragraph 46 of the judgment, the European Court accurately proclaims that '*the issue with stereotyping of a certain group in society lies in the fact that it prohibits the individualized evaluation of their capacity and needs*'.<sup>102</sup> Portuguese courts based their harmful assessment on a prescriptive sexual stereotype according to which women (especially those who are not anymore 'in the flower of their youth') 'have sex not because they want to, but to procreate or to 'nurture' their partner.'<sup>103</sup>

As evaluated by Lourdes Peroni

*Carvalho Pinto* is ultimately an intersectionality case. Ageism and sexism interact, one openly and the other subtly, to undermine the importance of non-reproductive sex in the applicant's life and to shape the compensation she receives for the damage caused by medical malpractice... It could have also addressed the intersectional discrimination more explicitly... *Carvalho Pinto* is still a laudable non-discrimination judgment. It unveils gender bias in judicial reasoning by naming the gender stereotypes, by describing their workings in the concrete case and by assessing their influence on the judicial decision. The judgment represents a key step in the Court's anti-stereotyping case law and reinvigorates Article 14 jurisprudence.<sup>104</sup>

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<sup>100</sup> *Ibid.*, para. 53

<sup>101</sup> *Ibid.*, para. 16

<sup>102</sup> *Ibid.*

<sup>103</sup> *Op. cit.* (note 16), p. 27

<sup>104</sup> Peroni, Lourdes: *Age and Gender Discrimination: Laudable Anti-Stereotyping Reasoning in Carvalho Pinto v. Portugal*, <https://strasbourgothers.com/2017/09/28/age-and-gender-discrimination-laudable-anti-stereotyping-reasoning-in-carvalho-pinto-v-portugal/#more-3897>, accessed 8 November 2019

Analyzed judgments are prominent examples of how the ECtHR can rightfully identify and condemn harmful gender stereotypes when it finally decides to reflect on that specific issue. Therefore, they should serve as a basis for the further developments in naming and condemning gender stereotypes in cases of GBV, including sexual violence.

### iii) The ECtHR Silence about Stereotypes in Sexual Violence Cases: Analysis of Selected Jurisprudence

The Court decided its first rape case as early as in 1985. *X and Y v. the Netherlands*<sup>105</sup> dealt with the rape of a 16-year old girl with mental disabilities and the Court find a violation of Article 8 since ‘this was a case where fundamental values and essential aspects of *private life* were at stake.’<sup>106</sup> (emphasis added) The ECtHR just reacted to the Dutch legislative lacuna in the *Criminal Code* and did not examine at all concerns regarding possible Article 3 violation (although such violation was claimed due to the suffered psychological trauma). In the time of *X. and Y. v. the Netherlands*, rape was still not perceived as a violation of the victim’s physical integrity, which would lead to violation of Article 3. The ECtHR focused its analysis in the mentioned case on determining the scope of the state’s positive obligations, which in this particular case included the adoption of deterrent criminal law measures. Although it was a case about the abuse of a mentally disabled female child, the Court did not analyze in detail how the intersectional grounds of gender, age and mental status *de facto* operate. This is not surprising since, as stated, *X. and Y. v. the Netherlands* represents an example of the Court’s early GBV jurisprudence. Intersectionality emerged only recently as (still marginally) a topic of discussion.

<sup>105</sup> *X and Y v. The Netherlands*, Application no. 8978/80, 26/03/1985, para. 27

<sup>106</sup> *Ibid.*, para. 27

There were other cases in which the Court dealt with rape and/or sexual abuse of a child, such as *M.C. v. Bulgaria* (14-year girl), *P.M. v. Bulgaria* (13-year), *I.G. v. the Republic of Moldova* (14-year). In all such cases it is clear that the ECtHR paid special attention to the physical and moral integrity of children by recognizing their particular vulnerability due to their sensitive age.

The first landmark rape case in which the ECtHR found a violation of both Articles 3 and 8 was the *M.C. v. Bulgaria*.<sup>107</sup> The 14-year old girl reacted to rape with what can be described as ‘frozen fright’<sup>108</sup> syndrome. The restrictive standpoint of then valid Bulgarian criminal legislation required active resistance from the victim in order for the act to amount to rape. Also, it was considered that consent to intercourse existed if no physical force or threat of was applied. Despite the inherent margin of appreciation, paragraphs 156-159 reveal that a minimum standard was emerging in regard to the ‘modern’ elements of rape in Europe. For the Court, it is clear that rape cases require a ‘context-sensitive’<sup>109</sup> approach with the focus on consent since the lack of latter and ‘not force, is seen as the constituent element of the offence of rape.’<sup>110</sup> Moreover, the ECtHR recalled the progressive developments in international law (e.g. what constitutes rape for the ICTY) in detail.<sup>111</sup> The Court did not *expressis verbis* name or reject any rape myth. However, it noted how victims ‘often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator.’<sup>112</sup> Also, the ECtHR was aware that the Bulgarian prosecutors acted under the harmful assumption that if anything happened to

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<sup>107</sup> The ECtHR: *M.C. v. Bulgaria* (Application no. 39272/98), 04/03/2004

<sup>108</sup> *Ibid.*, para. 70-71

<sup>109</sup> *Ibid.*, para. 177

<sup>110</sup> *Ibid.*, para. 159

<sup>111</sup> *Ibid.*, para. 163.

<sup>112</sup> *Ibid.*, para. 164

the victim, it was ‘only’ ‘*a date rape*’,<sup>113</sup> thus implicitly devaluating the harmfulness of the experience she suffered. Ultimately, the Court concluded that Bulgaria needs to change its legislation and practice in this area, since its criminal law provisions were not a sufficient deterrent. Moreover, it listed deficiencies in the way authorities handled the case (especially regarding ineffective investigation and prosecution) ‘*rooted in stereotypes about the behavior the women.*’<sup>114</sup> However, although finding a violation of Article 3 was an applaudable moment for the Court, still the final outcome would be more empowering if the ECtHR ‘referenced to Article 14 and issues of women’s equality.’<sup>115</sup> Nevertheless, since groundbreaking *M.C. v Bulgaria*, the ECtHR started to examine rape and (rare instances of other forms of) sexual violence cases solely through the prism of violations of Articles 3 and/or 8.<sup>116</sup>

It is positive that in its recent rape jurisprudence the ECtHR started to refer to the provisions of the *Istanbul Convention* (e.g. in *Y. v. Slovenia*).<sup>117</sup> However, it should be noted that the ECtHR has referred to the *Istanbul Convention*’s legal predecessor *Recommendation Rec (2002)5 of the Committee of Ministers of the CoE on the protection of women against violence* already in the analyzed *M.C. v Bulgaria*.<sup>118</sup>

However, following cases will serve as typical instances of a broader Court’s rape jurisprudence in which the ECtHR missed an opportunity to name and react to rampant rape myths and harmful gender assumptions that are/were operating on the level of different State Parties. For

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<sup>113</sup> *Ibid.*, para. 179

<sup>114</sup> Schabas, William: *The European Convention on Human Rights: A Commentary*, OUP, 2017, p. 576

<sup>115</sup> *Ibid.*

<sup>116</sup> Critical and detailed assessment of the ECtHR’s sexual violence jurisprudence available in comprehensive scholarly work by Maria Sjöholm: *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems*, Brill/Nijhoff, 2017, p. 238-299

<sup>117</sup> The ECtHR: *Y. v. Slovenia*, Application no. 07/10, 28/8/2015

<sup>118</sup> As well as to ‘CEDAW, GR No. 19, ‘thereby bringing into its case law both these non-binding statements of legal standards with respect to VAW.’ – Chinkin, Christine for CAHVIO: *Case Law of the European Court of Human Rights on Violence Against Women*, 2009, p. 10

instance, in *D.J. v. Croatia* the pre-trial judge decided to drop the charge mainly because the alleged rape victim did not fit the description of an ‘ideal’ rape victim. Both the investigating judge and police officer used derogatory comments about the victim’s drunkenness and ‘problematic’ behavior, as if those factors ‘contributed’ to her victimization (in accordance with the underlying ‘she got what she deserved’ attitude).<sup>119</sup> Laudable aspect of this particular judgment is that the Court for the first stressed ‘...that the allegation that a rape victim was under the influence of alcohol or other circumstances concerning the victim’s behaviour or personality cannot dispense the authorities from the obligation to effectively investigate’<sup>120</sup> On the other side, the applicant persuasively argued that the fact that authorities ‘acted with prejudice’ amounted as well to Article 14 violation, but the Court (unsurprisingly) remained silent about her argumentation in that regard.<sup>121</sup>

In decision *I. P. against Moldova*, the European Court did not dedicate enough attention to the issue of unfounded rape myths. The Court again insufficiently reflected on the problematical dealing of Moldovan authorities to so-called ‘date rape’ of a minor. They acted under the unhidden premise that she could oppose to the intercourse if she really wanted, since she used to date the alleged perpetrator and had sex with him.<sup>122</sup> Harmful underlying stereotype is that girls (especially those who are no longer virgins) want to be sexually ‘possessed’ and are expected to endure (ex)boyfriend’s (violent/uncontrolled) sexual urges. Such horrible approach creates hierarchies of both rape and rape victims and has dangerous effect of normalizing violence that women suffer in (ex)-relationships. Moreover, the domestic authorities were overtly suspicious

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<sup>119</sup> The ECtHR: *D. J. v. Croatia*: Application no. 42418/10, 24 July 2012, para. 73 and 76

<sup>120</sup> *Ibid.*, para. 101

<sup>121</sup> *Ibid.*, para. 106

<sup>122</sup> The ECtHR: *I. P. v. Moldova*, Application no. 33708/12, 28/07/2015, para. 12

since she did not report rape immediately. In this case the ECtHR should have taken into account specific Moldovan context in which GBV (including sexual violence) represents a huge societal problem (as well as institutional non-adequate response to it), as warned by *e.g.* the UN Working Group on discrimination against women in law and practice.<sup>123</sup>

Finally, from *M.G.C. v. Romania*,<sup>124</sup> it is clear that the ECtHR explicitly opted for the child-sensitive approach.<sup>125</sup> Surprisingly, however, it dismissed the chance for a well needed gender-sensitive analysis. The domestic court shockingly concluded that the 11-year old applicant (!) ‘provoked’ the alleged perpetrators to have sex with her largely because she was “scantily dressed.”<sup>126</sup> By eventually finding a violation of both Articles 3 and 8, the ECtHR properly condemned Romanian authorities for being skeptical because the child did not immediately report the rape to her parents. However, they did not refer to another harmful domestic argument according to which she provoked the rape by her choice of dressing. This problematic standpoint is based on the combination of rape myths; that she provoked her assault and that only ‘ideal’ rape victims deserve State protection. Outdated examinations of the ‘modesty’ of the victim’s clothes should be considered irrelevant in every rape case. Such paternalistic practice is especially worrisome when children are the ones being raped. The ECtHR’s appropriate reflection on how there is no uniformed victim’s response to rape (especially when the victim is a child), is diminished by the missed opportunity to combat the real ‘elephant in the room’ – in this case, the harmful (and evidently still widespread) rape stereotype of ‘provocative clothing.’

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<sup>123</sup> Janssens, Yaiza: *I. P. v. the Republic of Moldova: missed opportunity to tackle rape myths*, available on: <https://strasbourgobservers.com/2015/05/20/i-p-v-the-republic-of-moldova-missed-opportunity-to-tackle-rape-myths/>, accessed 24 November 2019

<sup>124</sup> The ECtHR: *M. G. C. v. Romania*, Application no. 61495/11, 15/06/2016

<sup>125</sup> *Ibid.*, para. 70

<sup>126</sup> Peroni, Lourdes: *Clothes on Trial: M.G.C. and the Need to Combat Rape Stereotypes*, available on: <https://strasbourgobservers.com/category/cases/m-g-c-v-romania/>, accessed 8 November 2019

iv) Conclusion: Need for the More Active Approach from the ECtHR in Naming and Contesting Gender Stereotypes in Sexual Violence Cases

The previous subchapter briefly presented how the ECtHR missed the opportunity to tackle evident and harmful rape myths that still widely operate on the level of Contracting State Parties. In my opinion the Court should be especially more sensitive to the issue of gender stereotypes after it explicitly recognized them in appraised *Markin* and *Pinto* rulings. Moreover, ‘the Court’s reasoning in *Opuz v. Turkey* has not been followed in cases of sexual violence, in as much as the nature of sexual violence as discrimination against women is concerned.’<sup>127</sup>

The question is, therefore, if Court uses (or lacks thereto) gender-sensible approach in its sexual violence (and broader GBV) jurisprudence? It seems to me that the ECtHR is a pragmatic human rights court which sometimes deliberately refuses to address visible and more recent issues like gender stereotyping and intersectionality in its judgments. It would be unfair not to mention that the Court explicitly recognizes ‘particular vulnerability’ of certain applicants (especially girls and women with disabilities), especially when it comes to the instances of GBV. Therefore, the broader interpretation of a ‘vulnerability’ concept may encompass what is comparatively rightly perceived as intersectionality.

To conclude, there indeed exists a strong need for the ECtHR to more actively engage in both naming and contesting harmful gender stereotyping in sexual violence cases. According to Maria Sjöholm,

The main problem with the Court’s categorization in its adjudication with regard to sexual violence concerns its lack of recognition of discrimination and inherent or expressed gender

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<sup>127</sup> *Op. cit.* (note 5), p. 5

stereotypes. Discriminatory aspects have been neglected by the Court, even in cases where Article 14 complaints have been raised, such as *I. G. v. Moldova* and *D. J. v. Croatia*.<sup>128</sup>

It is therefore not surprising that the ECtHR has not (yet) found a link between a sexist context and occurrence of sexual violence. Finding a violation of Article 14 in sexual violence jurisprudence would emphasize the structural component of sexual violence, thus being gender-based. However, it should not be forgotten that the ECtHR ‘has imposed a number of positive obligations on states in relation to effective criminalization and prosecution of rape.’<sup>129</sup> Having in mind recent and quite progressive soft law CoE’s documents that seek from the Member States to actively confront sexism, it is also expected from the ECtHR to more eagerly engage into naming and condemning gender based myths and stereotypes in its sexual violence jurisprudence.

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<sup>128</sup> *Op. cit.* (note 116), p. 279

<sup>129</sup> Radačić, Ivana: *The European Court of Human Rights as a Mechanism of Justice for Rape Victims: Contributions and Limitations*, 2015, p. 13 (draft paper, final version published in N. Henry, A. Flynn and A. Powell (eds.) *Rape Justice: Beyond Criminal Law*, Palgrave, 2015



## Chapter 3

In this chapter, I will examine how the main adjudicative bodies within the Organization of American States, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights,<sup>130</sup> approach to the cases of sexual violence, with the emphasis on rape cases. As their main regional counterpart the ECtHR, these regional human rights bodies have so far a well established rich rape jurisprudence. However, for the purpose of this thesis, I will focus on whether the Inter-American Court and the Commission use a gender sensitive approach in their case-law, and whether other interconnected issues, such as gender stereotypes, are present and analyzed in their respective jurisprudence.

### i) The Inter-American System of Human Rights Approach to Gender Stereotypes

Both the Inter-American Court and Commission are praised because their decisions often contain (comparatively) thorough and comprehensive remarks about gender and compound stereotypes. Further, in this chapter will be a more detailed assessment of how wrongful stereotypes serve/operate as an underlying cause and justification of sexual violence. But the IACtHR and the IACmHR have dealt sporadically with gender stereotypes in numerous other well-known judgments, *e.g.* in a case about In Vitro fertilization<sup>131</sup> and about discrimination on the basis

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<sup>130</sup> The IACmHR was created in 1959 and in 1970 the Commission was designed in an amended Charter of the OAS as the principal organ of the OAS and as the body responsible for the safeguarding of individual human rights until the *American Convention on Human Rights* came into force. The IACtHR was created by the *Inter-American Convention on Human Rights* in 1979. More about the organization and functions of the IACtHR and IACmHR available in Articles 34-60 of the *Inter-American Convention on Human Rights* – OAS, "Pact of San Jose", Costa Rica, 22 November 1969

<sup>131</sup> The IACtHR: *Gretel Artavia Murillo et al. ('In Vitro Fertilization') v. Costa Rica*, Ser C No 257, 28 November 2012

of sexual orientation.<sup>132</sup> Not only are these rulings representative of the Court's approach to gender stereotyping, but also

more generally, of its conception of equality – and gender equality – as substantive and transformative. The strong concern of the Court regarding structural patterns of discrimination results in an analysis of individual human rights violations that is enriched by an understanding of those cases as instances of more pervasive situations of subordination, exclusion and violence. Through its rulings, the Court seeks to improve the underlying conditions that made the rights violations possible, and to generate an institutional and cultural environment that would prevent those violations from happening again.<sup>133</sup>

As the ECtHR analyzed in *Konstantin Markin*, in vitro fertilization is also a prominent example of a judgment which shows how gender stereotypes are/or may be harmful both to men and women.<sup>134</sup> Expert remarks about gender stereotypes and prejudices were used by the IACtHR in order to establish the existence of indirect discrimination in relation to gender (by implying that an absolute ban on in vitro fertilization disproportionately impacts infertile women as compared to infertile men). In reaching this conclusion, the Court firstly noted how ‘in many societies infertility is attributed mainly and disproportionately to women owing to the persisting gender stereotype that defines a woman as the basic creator of the family.’<sup>135</sup> Nevertheless, the IACtHR emphatically included testimonies of infertile men whose impotence is societally perceived as being ‘unmanly.’<sup>136</sup>

Furthermore, the Court uses the CEDAW Committee's conclusion according to which a ‘*decision to postpone “surgery due to pregnancy is influenced by the stereotype that protection of the fetus should prevail over the health of the mother.”*’<sup>137</sup> The same discriminatory

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<sup>132</sup> The IACtHR: *Karen Atala and Daughters v. Chile*, No. 239, 24 February 2012

<sup>133</sup> *Op. cit.* (note 14), p. 67

<sup>134</sup> *Op. cit.* (note 131), para. 295

<sup>135</sup> *Ibid.*, para. 295

<sup>136</sup> *Ibid.*, para. 301

<sup>137</sup> *Ibid.*, para. 297

reasoning influenced by the (underlying) wrongful gender stereotype is analogically reflected in the Costa Rican Constitutional Chamber's inflexible attitude which gives 'absolute prevalence to the protection of the fertilized eggs without considering the situation of disability of some of the women.'<sup>138</sup> The IACtHR is explicit in stating that '*gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them.*'<sup>139</sup> Still, it vigilantly exculpated itself by affirming that '*the Court is not validating these stereotypes and only recognizes them and defines them in order to describe the disproportionate impact of the interference caused by the Constitutional Chamber's judgment.*'<sup>140</sup> However, in this particular judgment, the IACtHR's somehow cumbersome approach is rightly criticized since, 'in order to support its indirect discrimination argument, the Court relied on the existence of wrongful stereotypes.'<sup>141</sup> Namely, that above everything 'women's natural urge to motherhood was harmed by the ban.'<sup>142</sup> As presented, the Court included the plaintiff's and expert testimonies showing how a ban on in vitro fertilization consequently impacted both male and female patients (couples), it nevertheless concluded that although '*the ban on IVF is not expressly addressed at women, and thus appears neutral, it has a disproportionately negative impact on women.*'<sup>143</sup> The Court's benevolent intent may be maliciously interpreted in a way that it underlined and reinforced the stereotype of women who, more than anything, seek to fulfill their 'traditional' role as mothers and nurturers, while from the facts of the case it was clear that infertile men indeed suffered as well. In my view, especially from gender perspective, it would be better and more empowering if the IACtHR reflected more on the stereotype of prioritizing fertilized eggs over women's health,

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<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*, para. 302

<sup>140</sup> *Ibid.*

<sup>141</sup> *Op. cit.* (note 14), p. 86

<sup>142</sup> Lemaitre, Julieta and Sieder, Rachel: *The Moderating Influence of International Courts on Social Movements: Evidence from the IVF Case Against Costa Rica*, Health and Human Rights Journal, 2017 Jun, 19(1), p. 154

<sup>143</sup> *Op. cit.* (note 131), para. 298

or conclude about the existence of the disproportionate effect ‘because the procedures are invasive to a woman’s body.’<sup>144</sup>

On the other hand, *Karen Atala* is one of the Court’s much-admired judgments which, according to Simone Cusack, can serve as a ‘good practice example of challenging judicial stereotyping in cases concerning issues other than GBV.’<sup>145</sup> In *Karen Atala*, the applicant lost the custody over her daughters just because she was a lesbian and the IACtHR criticized ‘how wrongful stereotypes against women and also specific prejudices against lesbians influenced the outcome of the decision of the Chilean Supreme Court, which substituted an individual assessment of Ms. Atala’s parental capacities with unproved preconceptions about non-conforming sexual minorities.’<sup>146</sup> Verónica Undurraga distinguished how -in the hierarchy of the operative stereotypes- a ‘noteworthy aspect of this case is how the stereotype of lesbians as bad mothers won over the stereotype of women as natural caregivers... Ms. Atala was considered a fit mother until she made public that she was a lesbian. From that moment, she was seen as selfish, hardly maternal, unfit, dangerous and contagious.’<sup>147</sup> In this particular judgment the IACtHR used strong anti-discriminatory language and concluded that judicial stereotyping is a form of discrimination and inequality.<sup>148</sup>

The IACtHR is a unique human rights court not only because it recognizes that States must refrain from discriminatory treatment and stereotyping, but it also goes one step further and ‘reminded the State that its human rights obligations are not only negative in kind, but that it

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<sup>144</sup> *Ibid.*, para. 299

<sup>145</sup> *Op. cit.* (note 22), p. 4

<sup>146</sup> *Op. cit.* (note 14), p. 78

<sup>147</sup> *Ibid.*, p. 77

<sup>148</sup> *Op. cit.* (note 22), p. 12

is required to take affirmative measures to change cultural demeaning stereotypes against women and sexual minorities that impede the full enjoyment of their human rights.’<sup>149</sup>

In the context of the elimination of GBV in the Inter-American human rights system, the crucial women’s rights legal instrument is the Inter-American *Convention on the Prevention, Punishment, and Eradication of Violence against Women* (more known as the Convention of Belém do Pará).<sup>150</sup> According to Article 6(b) of the mentioned Convention, ‘The right of every woman to be free from violence includes, among others, the right of women to be *valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.*’<sup>151</sup> (emphasis added). Moreover, Article 8(b) requires from the State Parties

to undertake progressively specific measures, including programs to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to *counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women.*<sup>152</sup> (emphasis added)

In this regard, the Court often orders among its far-reaching reparations in cases of GBV a general measure of ‘*education and training programs regarding GBV, discrimination and stereotyping.*’<sup>153</sup> Obviously, the IACtHR is alert to ‘*a link between violence and discrimination, gender stereotypes that negatively influence the actions of prevention and*

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<sup>149</sup> *Op. cit.* (note 14), p. 79

<sup>150</sup> OAS/Ser.P, AG/Doc.3115/94 rev. 2, 9 June 1994

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> *E.g.* The IACtHR: *I.V. v. Bolivia*, ser. C, No. 329, 30 November 2016

*protection from the different State branches*<sup>154</sup> and it is commendable that it tries to dismantle this vicious and pervasive circle.

For instance, the IACtHR was willing (unlike the ECtHR) to declare that in cases such as forced sterilization of a migrant woman underlying causes of such horrific violation are gender discrimination and stereotyping of medical personnel. The IACtHR categorically and progressively recognizes that

the freedom and autonomy of women in sexual and reproductive health, generally, has historically been limited or annulled on the basis of negative and harmful gender stereotypes in which women have been socially and culturally viewed as having a predominantly reproductive function, and men viewed as decision-makers over women's bodies. The Court recognized that non-consensual sterilization reflects this historically unequal relationship. The Court noted how the process of informed decision-making operated under the harmful stereotype that I.V., as a woman, was unable to make such decisions responsibly, leading to "an unjustified paternalistic medical intervention" restricting her autonomy and freedom.<sup>155</sup>

*I.V. v. Bolivia* was the case in which the Court reinstated its firm position in combatting gender stereotypes, however, this time (as in in vitro sterilization case) in the delicate sphere of reproductive rights. In the equally strong anti-discrimination language it warned that '*the obligation to eliminate all forms of discrimination against women carries the obligation to eliminate discrimination based on gender stereotypes that are socially dominant and persistent and that consciously or unconsciously constitute the basis of practices that reinforce women's position as dependents and subordinates.*'<sup>156</sup>

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<sup>154</sup> Celorio, Rosa M.: *The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting*, University of Miami Law Review, Vol. 65, 2011, p. 864

<sup>155</sup> Available on: <https://reprohealthlaw.wordpress.com/2017/03/29/i-v-v-bolivia-decision-forced-sterilization-is-based-on-harmful-gender-stereotypes/>, accessed 3 September 2019

<sup>156</sup> *Op. cit.* (note 153), para. 186

## ii) Analysis of the Inter-American Court on Human Rights Jurisprudence in Sexual Violence Cases

As stated, the Inter-American system of human rights comprises of both the Commission and the Court. Although the IACtHR was for a long time criticized for ‘ignoring the possible violations of particular human rights of women, the Court gradually started to recognize that it was necessary to read alleged violations carefully so as to include them under the Convention.’<sup>157</sup>

Equally to the CoE’s *Istanbul Convention*, the *Convention of Belém do Pará* also recognizes rape as a form of GBV. *Belem do Pará Convention*, which entered into force in 1994, is the first (regional) human rights treaty that exclusively dealt with the issue of GBV (the comprehensive *Istanbul Convention* being merely the second one, since it was adopted in 2011 and entered into force only 20 years after the *Belém do Pará Convention*, in 2014).<sup>158</sup> (Already) In 1994, when there were still heated debates about the private/public dichotomy of VAW even within the UN,<sup>159</sup> the Inter-American human rights system recognized, quite progressively, for the time, that ‘VAW shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, *whether in the public or the private*

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<sup>157</sup> Medina, Cecilia: *The American Convention on Human Rights*, Intersentia, 2014, p. XI

<sup>158</sup> The *Belem do Pará Convention* was ratified by 32 the OAS Member States (out of 35), while the *Istanbul Convention* was so far ratified by 34 CoE Member States. List of signatories for both Conventions available on: <http://www.oas.org/juridico/english/sigs/a-61.html>, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>, accessed on 25 August 2019. Unlike the *Istanbul Convention*, there were not any problems with the ratification of the *Belém do Pará Convention*, moreover, it is the most ratified instrument of the Inter-American system of human rights. - *op. cit.* (note 154), p. 819

In the African human rights system women’s rights (including GBV) are included in the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (more known as the Maputo Protocol), which was adopted in 2003 and entered into force in 2005 – Wandia, Mary: *Rights of Women in Africa: Launch of a Petition to the African Union*, republished in *"African Voices on Development and Social Justice*, Mkuki na Nyota Publishers, Tanzania, p. 96-99

The *Maputo Protocol* addresses gender stereotypes in Articles 2(2), 4(2)(d) and 12(1)(b).

<sup>159</sup> Edwards, Alice: *Violence Against Women under International Human Rights Law*, Cambridge University Press, 2011, p. 69-71

*sphere*.<sup>160</sup> (emphasis added) However, it should be noted that only Article 7 of the *Belem do Pará Convention* ‘serves as the basis for the jurisdiction of the Inter-American Court, as confirmed in ‘*Cotton Field*’. This provision, which is particularly welcome, is a long one and is couched in very broad terms.’<sup>161</sup> Therefore, it is clear that the *Belém do Pará Convention* complements the *Inter-American Convention*, which is for case-law especially important since its Article 7(b) contains for women’s rights adjudication crucial due diligence principle.

The landmark ‘*Cotton Field*’<sup>162</sup> case served for the Court and the Commission as a turning point for the recognition of a discriminatory, structural aspect of VAW, thus being gender-based. Since the *Cotton Field* judgment, the Court and the Commission have ruled in a gender sensitive manner in subsequent cases of *femicides*,<sup>163</sup> forced sterilization and *inter alia* sexual violence, including rape.

Although the famous *Cotton Field* judgement primarily dealt with *femicides* of three Mexican girls, the IACtHR stressed the fact that before their deaths victims also endured brutal raping, to the extent that one of them was even found with mutilated breasts and genitalia. The Court recognized how incompetent and insensitive authorities unwillingly approached the investigation of crimes, without even trying to hide their deeply rooted gender-based stereotypes and prejudices.<sup>164</sup> Especially the Mexican police; continuously acting under the influence of sexist stereotypical images of how the ‘good girls’ should/(not) behave and asked the victim’s families

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<sup>160</sup> *Op. cit.* (note 150), Article 2

<sup>161</sup> Burgorgue-Larsen, Laurence and Úbeda de Torres, Amaya: *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford University Press, 2011, p. 445

<sup>162</sup> *Op. cit.* (note 13)

<sup>163</sup> The IACtHR: *Velásquez Paiz et al. v. Guatemala*, November 2015

<sup>164</sup> *Op. cit.* (note 13), para. 400



inappropriate questions about their sexual life, ‘thus insinuating that if anything happened to them it was because they were looking for it.’<sup>165</sup>

It is laudable that for the Court such inappropriate and misogynic comments and questions unambiguously constitute *stereotyping*,<sup>166</sup> and moreover, *Cotton Field* entails an overt definition of gender stereotyping. According to the IACtHR, ‘*gender stereotyping refers to a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women*’,<sup>167</sup> and ‘*which can be reflected in the policies, practices, and language of judicial and police authorities*.’<sup>168</sup> Moreover, the *Cotton Field* judgement is the prime example of how the IACtHR meticulously follows (and, more importantly, further develops) the best practices from other international and regional human rights bodies. To illustrate, in this particular instance, the Court broadly reflected on the landmark case of the ECtHR the *Opuz v. Turkey* and developments of the CEDAW Committee about GBV.<sup>169</sup> Such influential comparative standards and case-law made it easier for the IACtHR to conclude that *femicides* were ‘influenced by a culture of discrimination against women based on the erroneous idea that women are inferior.’<sup>170</sup>

Most victims of *femicides*, forced disappearances and brutal sexual violence in Ciudad Juárez were poor, migrant, uneducated, *maquilas* workers and/or prostitutes. The IACtHR briefly reflected on the issue of intersectionality, since it correctly noted that victims suffered ‘a

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<sup>165</sup> *Ibid.*, para. 442

<sup>166</sup> ‘...in the instant case, the comments made by officials that the victims had gone off with a boyfriend or that they led a disreputable life, and the use of questions about the sexual preference of the victims constitute stereotyping.’ *Ibid.*, para. 208

<sup>167</sup> *Ibid.*, para. 401

<sup>168</sup> *Op. cit.* (note 154), p. 845

<sup>169</sup> *Op. cit.* (note 13), para 394-396

<sup>170</sup> *Ibid.*, para. 398

*double discrimination*' because they were of the '*humble origin*.'<sup>171</sup> Deeply rooted gender-based prejudices and stereotypes against those mentioned, in the eyes of authority, evidently second categories of female victims, had led to the fact that *de facto* and *de iure* many of committed crimes end with impunity or with minimum punishments.<sup>172</sup> Such impunity is problematic because it further perpetuates gender-based violence against marginalized women.<sup>173</sup> Clearly, the victim's 'contribution' to their rape and murder has influenced the sloppy investigation. However, as stated, inappropriate stereotypical attitudes were rightly and for the first time expressly recognized and reprehended by the Court. Moreover, the IACtHR sharply noted the social 'background story' that contributed to the unprecedented increase of VAW, namely the massive employment of Mexican women as a cheap labor force in the *maquila* industry.<sup>174</sup> The Court even went one step further and connected how their recent employment was beginning to challenge the (stereotypical) image of Mexican

...women, who traditionally had complied with their stereotyped role of housewives, challenged that stereotype by becoming the household providers and were perceived as more competitive and financially independent. This economic transformation was not accompanied by a change in traditional patriarchal mentalities. The abnormal increase of crimes against women could be explained as motivated by a hierarchical use of terror and violence aimed at keeping women in their traditionally subordinated roles.<sup>175</sup>

As a final point, *Cotton Field* plainly shows diabolic consequences of harmful gender stereotypes – not only that they reinforce gender discrimination and inequality, but also that they serve as an underlying force which perpetuate GBV, including its worst (and fatal)

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<sup>171</sup> *Ibid.*, para. 391

<sup>172</sup> Željko, Darija: *Recognition of Intersectionality in Femicide and Rape Cases Decided by the IACmHR and the IACtHR*, available on: <https://corteidhblog.blogspot.com>, accessed on 21 August 2019

<sup>173</sup> 'The Court found that the subordination of women is exacerbated when stereotypes are reflected in the attitude and behavior of the police and authorities, as they were in this case. Their indifference reproduces the violence that it claims to be trying to counter and perpetuates it by sending the message that violence against women is tolerated. This too constitutes discrimination regarding access to justice.' - *Op. cit.* (note 14), p. 74

<sup>174</sup> Engle Merry, Sally: *Gender Violence: A Cultural Perspective*, Wiley-Blackwell, 2009, p. 121-122

<sup>175</sup> *Op. cit.* (note 14), p. 73

misogynic form, *femicides*. Consequently, it is not so unexpected that among transformative and comprehensive reparations the IACtHR ordered, *inter alia*, the very specific training to identify and dismantle wrongful gender stereotypes about women's role in society.<sup>176</sup>

The IACtHR's rape cases which received special attention are *Fernandez Ortega*<sup>177</sup> and *Rosendo Cantú*.<sup>178</sup> I will examine those in more depth. In both cases decided against Mexico, the rape victims were of indigenous origins and it is clear that for the Court rape represents 'a paradigmatic form of violence with consequences that transcend the person of the victim.'<sup>179</sup>

In *Fernández Ortega*, the Court showed empathy towards numerous structural troubles which the applicant encountered in her troublesome pursuit for justice as an indigenous woman

...who lived in an isolated mountainous area, who had to walk many hours for denouncing her rape to health and legal authorities who did not speak her language. These charges would probably have negative repercussions in her social and cultural environment, among others, a possible disapproval from her community. Despite all of that, she denounced and persevered in her accusation, knowing that the area where she lives continued to be policed by the army, some of whom she was imputing a serious crime.<sup>180</sup>

Such a detailed description of the victim's difficult personal circumstances, as well as of her broader oppressive surrounding, is commendable judicial approach since evidently '...the Court positively valued the courageous act of the victim, highlighting its personal implications and burdens. This is the kind of human sensibility that feminist legal scholars ask for, to compensate for the male standard implicitly incorporated by the legal system.'<sup>181</sup> The IACtHR

<sup>176</sup> *Op. cit.* (note 13), para. 541

<sup>177</sup> The IACtHR: *Fernández Ortega et al. v. Mexico*, Series C No. 215, 30 August 2010

<sup>178</sup> The IACtHR: *Rosendo Cantu et al. v. Mexico*, Series C No. 225, 15 May 2011

<sup>179</sup> *Op. cit.* (note 177), para. 119

<sup>180</sup> *Ibid.*, para. 107

<sup>181</sup> Prandini Assis, Mariana: *Violence against Women as a Translocal Category in the Jurisprudence of the Inter-American Court of Human Rights*, *Revista Direito e Práxis*, Vol. 08, N. 2, 2017, p. 1535

was well aware that in delicate cases such as rape, it is not ‘unusual that some aspects of the history might lack precision when retelling the experience of rape’<sup>182</sup> and it has shown praiseworthy gender sensibility since it did not take certain inconsistencies in her testimonies against her. *A contrario*, it recalled of her ‘added’ difficulty – language barrier- which made communication (including the act of reporting of the crime) with the authorities almost impossible. The Court furthermore noted that the Mexican authorities failed to provide her with the assistance of an interpreter.

Another victim, Rosendu Cantú, was 17 years old and a young mother when she was raped by group of Mexican soldiers. In *Rosendu Cantú*’s case, rape and sexual violence inflicted by State agents amounted to torture and, for the Court, ‘it is clear that the harm done to the *reputation of* [the alleged victim] *also has discriminatory roots and is based on gender stereotypes, since it is aimed at diminishing her value as a woman due to the aggression to which she was subjected.*’<sup>183</sup> (emphasis added)

In closed, patriarchal indigenous communities such as the Me’phaa to which Rosendu Cantú and her daughter belonged, prevailing gender stereotypes of male ‘domination and power’ *mean they were ostracized after the committed crime, as if they were the ones to be blamed for the committed rape. The impacts of gender stereotypes were boosted by the victim’s young age and her status as ‘an indigenous person... whose communities are affected by poverty find themselves in a situation of particular vulnerability.*’<sup>184</sup> So, although the Court did not use the term intersectionality *per se*, it is clear that it recognized that her situation was ‘aggravated by her condition as an indigenous minor in a situation of poverty, “making her the victim of a convergence

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<sup>182</sup> *Ibid.*, p. 1534

<sup>183</sup> *Op. cit.* (note 178), para. 84

<sup>184</sup> *Ibid.*, para. 201

of discriminations.”<sup>185</sup> Later in its judgment, the Court noted that she suffered ‘multiple forms of discrimination.’<sup>186</sup> Despite certain terminological deficiencies and inconsistencies, a praiseworthy aspect of this particular the IACtHR’s judgment is that it nevertheless clearly recognizes ‘...the importance of intersecting grounds... in relation to rape of indigenous women, in which gender, indigenusness, language and, more notably, child status, were addressed by the Court.’<sup>187</sup> Therefore, this judgment is applauded as ‘the first time an international court has analyzed the interaction and intersection among different categories protected against discrimination, including gender, race, age, and poverty.’<sup>188</sup>

As in *Fernandez Ortega*, the IACtHR found a violation of several rights of the *American Convention on Human Rights* and established a robust set of detailed reparations with which Mexico must comply. Reparations aim to have a profound effect on the victim’s personal situation, but also more broadly tend to improve the vulnerable position of indigenous women in Mexican society. Experts noted how ‘since *Rosendo Cantú* and *Fernando Ortega* cases, the Court has been developing new standards for evaluating evidence in the cases of violence against women and, particularly, sexual violence... This shift in the Court’s understanding... might be, among other factors, explained as a rejection of the victim’s blaming strategy commonly pursued by national courts.’<sup>189</sup> The IACtHR warned how national proceedings clearly lacked an ethnic and gender perspective. Both judgments include important remarks about the complexity of rape that require a more detailed examination.

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<sup>185</sup> *Ibid.*, para. 82

<sup>186</sup> *Ibid.*, para. 169

<sup>187</sup> Sosa, Lorena: *Intersectionality in the Human Rights Legal Framework on Violence against Women At the Centre or the Margins?*, Cambridge University Press, 2017, p. 166

<sup>188</sup> Available on: <https://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings-database/rosendo-cantu-and-other-v-mexico>, accessed on 28 March 2019

<sup>189</sup> *Op. cit.* (note 181), p. 1537

In several cases the IACtHR indirectly dealt with the issue of widespread sexual violence and rape in the broader context of internal armed conflict or military *coup*.<sup>190</sup> The constant evolution of the Court's sexual violence jurisprudence led to the case *Women Victims of Sexual Torture in Atenco v. Mexico*, decided in December 2018. In this case, the Court established how 11 applicants (with other women as well) were raped and sexually molested by police forces after being arrested as a result of taking part in a two-day peaceful demonstration in 2006. The Court emphasized how Mexican police '*instrumentalized the bodies of the women as tools to convey a message of repression and disapproval*'<sup>191</sup> and found Mexico guilty for physical, psychological and sexual violence that amounted to acts of torture. During proceedings in front of the IACtHR, the victim testified how Mexico eagerly adopted a 'victim-blaming' strategy by accusing her of being 'liar' after she reported suffering sexual abuse in jail.<sup>192</sup> As in other GBV judgments, the Court noted how '*victims were subject to several forms of verbal and psychological violence with sexual connotations or reference which were heavily stereotyped and discriminatory.*'<sup>193</sup>

One of the IACtHR's recent and most appraised judgments is *Loaiza López Soto and others v. Venezuela*, in which the Court dealt with the issue of sexual slavery. The case was published by the Court in November 2018 and it represents the first case of GBV decided against Venezuela.<sup>194</sup> The applicant was abducted by an influential individual on March 27, 2001 and was held as his personal sexual slave until July 19 of the same year. During captivity, she was raped on

<sup>190</sup> E.g. The IACtHR: *Penal Miguel Castro-Castro v. Peru*, Series C No. 160, 25 November 2006

<sup>191</sup> Analysis by Kravetz, Daniela available on: <https://www.ejiltalk.org/holding-states-to-account-for-gender-based-violence-the-inter-american-court-of-human-rights-decisions-in-lopez-soto-vs-venezuela-and-women-victims-of-sexual-torture-in-atenco-vs-mexico/>, accessed on 28 March 2019

<sup>192</sup> Available on: <https://www.npr.org/sections/thetwo-way/2017/11/19/550502559/women-testify-against-mexican-police-for-sexual-torture-in-international-court>, accessed on 9 September 2019

<sup>193</sup> The IACtHR: Press Release CortelIDH\_CP-58/18, p. 2

<sup>194</sup> The IACtHR: *López Soto y Otros vs. Venezuela*, Sentencia de 26 de Septiembre de 2018 (Fondo, Reparaciones y Costas)

numerous occasions and exposed to numerous other humiliating sexual and violent physical acts. After the victim managed to escape from captivity almost four months later, she had to endure many flaws during the investigation and prolonged trial, including the usage of stereotypes regarding her sexuality and role as a woman. First, the investigators did not react after the victim's sister constantly reported her kidnapping (and who kidnapped her). Instead, they claimed that Linda and her aggressor were 'probably' partners, and moreover, that their relationship is a private matter and that the best thing to do is simply wait.<sup>195</sup> During the criminal proceeding, the victim's alleged sexual and work activity was thoroughly examined with the intention to diminish her credibility and all the horrors she experienced. The national judiciary trusted the perpetrator's testimony whose aim was to discredit and blame the victim, which was also a clever legal tactic since the outdated and discriminatory *Criminal Code* (from 1947!, but at that time it was still in force) allowed '...for a reduced sentence: for example, if the victim was a "prostitute."<sup>196</sup> Unsurprisingly, the perpetrator thus claimed that 'the victim and her sister belonged to a prostitution ring, the victim's injuries were caused by others, and that she was to blame for 'seducing' and blackmailing him.'<sup>197</sup>

There were also other instances of gender tactlessness towards the traumatized victim, e.g. her psychiatric examinations were mostly carried by men, even though in the victim's medical records it was clearly indicated that she was 'fearful of the male gender.'<sup>198</sup> After the appeal, the perpetrator was held liable only for personal injuries and illegal deprivation of liberty, but there was no conviction for the committed crime of sexual violence. The complainant's case

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<sup>195</sup> The IACHR: *Loaiza López Soto and others v. Venezuela*, Report No. 33/16, Case 12,797, OEA/Ser.L/V/II., Doc. 38, July 29, 2016, para. 51

<sup>196</sup> *Ibid.*, para. 14

<sup>197</sup> *Ibid.*, para. 26

<sup>198</sup> *Ibid.*, para. 17

‘underscores the institutional violence and double victimization that victims of sexual violence in the region suffer.’<sup>199</sup>

*Loaiza López Soto and others v. Venezuela* is one of the cases in which it should be emphasized that sexual violence was inflicted by a so-called private actor and not by a State-agent, as in case of *Rosendo Cantu* or of the women of Atenco. The Court went one step further in developing the due diligence standard since ‘the report of an abduction or disappearance of a woman is, in itself, sufficient to trigger the State’s due diligence duty to act. The Court thus departed from prior decisions where it had additionally required proof of the State’s awareness of a context of VAW.’<sup>200</sup> Further, groundbreaking was the Court’s finding of a violation of Article 6 of the *Inter-American Convention to Prevent and Punish Torture* (furthermore: the IACPPT). The IACtHR found numerous other violations of the Inter-American Convention and Article 7 of the *Belém do Pará Convention*.

For the IACtHR, sexual violence may represent a form of slavery. This progressive judgment is of landmark importance because it is the first ruling by the Court in which a State was held responsible for acts of sexual torture and sexual slavery committed by a private individual.<sup>201</sup> For comparison, in rape cases hereby decided by the ECtHR, rape amounted to torture only in cases where it was committed by State-agents.<sup>202</sup> In accordance with its well-developed practice, the IACtHR ordered comprehensive reparations which have a transformative aim of carrying out ‘structural changes in laws, public policies and the administration of justice in terms of preventing

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<sup>199</sup> Available on: <https://cejil.org/en/linda-loaiza-lopez-soto>, accessed on 28 March 2019

<sup>200</sup> *Op. cit.* (note 194)

<sup>201</sup> Analysis by Chinkin, Fernández Rodríguez de Liévana and Yoshida available on: <https://blogs.lse.ac.uk/wps/2018/12/06/inter-american-court-reaches-landmark-decision-on-torture-and-sexual-slavery/>, accessed on 28 March 2019

<sup>202</sup> In *Aydin v. Turkey* the applicant was raped and tortured while in detention, and according to the ECtHR ‘the especially cruel act of rape to which she was subjected’ constituted torture. – 1997, para. 83-87



and punishing VAW in Venezuela.’<sup>203</sup> The Court’s innovative ‘victim-centered’ reparations primarily tend to remedy the victim’s personal situation, but will also (hopefully) have significant *erga omnes* effects for Venezuelan women since reparations include, *inter alia*, the ‘implementation of public policies for the investigation and comprehensive care of women victims of violence; the implementation of specialized Courts to address the topic of VAW; the incorporation of a permanent gender education program under the name of "Linda Loaiza" into the National Education System’s national curriculum...’<sup>204</sup> The Court’s far-reaching reparations contain a visible gender perspective.

Linda Loaiza López Soto herself later become a prominent Venezuelan women’s rights defender and lawyer, whose 17 year-long pursuit of justice made her an emblematic actor in the fight against widespread impunity for GBV in Venezuela and the broader region.<sup>205</sup>

### **iii) Analysis of the Inter-American Commission Approach on Gender Stereotypes and its further Contributions to Rape Jurisprudence**

When compared to the IACtHR, it is noticeable from the analysis of the Commission’s jurisprudence how, in most cases, it dedicates even more space in its reasoning to the issue of gender stereotypes. Further, that the Court usually confidently follows the Commission’s conclusions about stereotyping. Some of the prominent individual decisions in

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<sup>203</sup> *Op. cit.* (note 194)

<sup>204</sup> *Ibid.*

<sup>205</sup> Available on: <https://www.cejil.org/en/linda-loaiza-venezuelan-survivor-gender-violence-makes-history-inter-american-court-human-rights>, accessed on 28 March 2019

which the IACmHR successfully confronted gender stereotypes include *Morales de la Sierra v. Guatemala*,<sup>206</sup> *Veliz Franco v. Guatemala*,<sup>207</sup> and *Jessica Gonzales*<sup>208</sup>

For the States which have not ratified the *Inter-American Convention on Human Rights*, only the Commission may consider petitions of alleged violations of human rights guaranteed in the *American Declaration*. Accordingly, in the domestic violence case *Lenhan*,<sup>209</sup> it was the Commission which recommended the United States to ‘*adopt comprehensive public policies and institutional programs designed to eliminate discriminatory stereotypes about women’s role and to promote the eradication of discriminatory socio-cultural patterns that prevent women’s full access to justice...*’<sup>210</sup>

Over the years, the Commission also published different thematic reports on women’s rights, including the one that solely dealt with the subject of ‘*Access to Justice for Women Victims of Sexual Violence in Mesoamerica*.’<sup>211</sup> Within this, the IACmHR summarized its own and the Court’s progressive jurisprudence, conducted research and regional developments concerning access to justice for women victims of sexual violence. It proved and publicly condemned one of the following widespread assumptions, according to which national ‘*Police, prosecutors, judges, lawyers and others involved in law enforcement and the administration of justice are influenced by stereotypes, practices, and assumptions, which detracts from the importance that acts of sexual*

<sup>206</sup> The IACmHR: Case No. 11.625, Report No 28/98 OAE/Ser L/V/II. 95 Doc 7 Rev at 136, 1997

<sup>207</sup> The IACmHR: Case 12.578, Report No 170/11, 2011

<sup>208</sup> The IACmHR: No. 1490-05 Report No 52/07 OAE/Ser L/V/II.130 Doc 22 Rev 1, 2007

<sup>209</sup> The IACmHR, Case No. 12.626, 2011

<sup>210</sup> *Ibid.*, Recommendation 7

<sup>211</sup> The IACHR, OEA/Ser.L/V/II. Doc. 63, 9 December 2011

violence deserve... *The IACmHR believes that allowing these stereotypes inside the judicial branch serves to legitimize and aids and abets impunity.*<sup>212</sup>

Analyzed cases from both the IACmHR and IACtHR have shown how

Because of the stereotypes and biases that members of law enforcement and officers of the court harbor, they give little credence to the victim's version of what happened, put the blame on her, justify what happened by pointing to the victim's attitude or behavior or her previous relationships, question the woman's honor, or use a sexist vocabulary. The discrimination is often a function of the victim's sexual preference, the color of her skin, her ethnic origins, her low level of education, her nationality, and other factors.<sup>213</sup>

Although aware of the numerous difficulties, the Commission still requires State Parties to ensure that the victims of sexual violence have 'adequate and prompt access to justice' and in order to help them in removing the barriers to justice it issued detailed recommendations.<sup>214</sup> Before the mentioned specific report, the Commission issued another influential report, titled '*Access to Justice for Women Victims of Violence in the Americas.*'<sup>215</sup>

In that report, the Commission entered into an interesting dialogue with the Member States and asked them of their opinion on the main contributing factors for the pervasiveness of GBV in the Americas ('...*challenges in implementing laws and public policies to prevent, punish and eradicate discrimination and VAW.*')<sup>216</sup> Surprisingly, different State Parties realized and independently admitted how '*The most entrenched obstacle to the prevention, protection and punishment of VAW is the persistence of sexist imaginaries that are highly tolerant*

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<sup>212</sup> *Ibid.*, para. 49, p. 15

<sup>213</sup> *Ibid.*, para. 181, p. 51

<sup>214</sup> *Ibid.*, para. 350, p. 93

<sup>215</sup> The IACHR, OEA/Ser.L/V/II, Doc. 68, January 20, 2007

<sup>216</sup> *Ibid.*, para. 150

*of VAW... Conduct of State officials is influenced by traditional stereotypes, attitudes and expectations of society...*<sup>217</sup>

The following conclusion from the mentioned comprehensive report was also cited by the IACtHR in the *Cotton Field*:

The influence exerted by discriminatory socio-cultural patterns may cause a victim's credibility to be questioned in cases involving violence, or lead to a tacit assumption that she is somehow to blame for what happened, whether because of her manner of dress, her occupation, her sexual conduct, relationship or kinship to the assailant and so on. The result is that prosecutors, police and judges fail to take action on complaints of violence. These biased discriminatory patterns can also exert a negative influence on the investigation of such cases and the subsequent weighing of the evidence, where stereotypes about how women should conduct themselves in interpersonal relations can become a factor.<sup>218</sup>

Although the Commission's decisions often do not receive the same 'spotlight' as those of the IACtHR, they evidently serve as the basis for the latter. For example, in the more recent case of *Loaiza López Soto and others v. Venezuela*, the Commission rightly noted how the lack of response from the State institutions towards GBV derives 'consciously or unconsciously from gender stereotypes.'<sup>219</sup> The same conclusion was later reached by the Inter-American Court as well. Moreover, besides its important adjudicative role, the Commission is a crucial regional institution for raising awareness about the most urgent human rights issues in the Americas, but also about neglected topics such as harmful gender stereotypes. From the brief analysis of its Reports and jurisprudence, it can be undoubtedly concluded that the Commission, much as the IACtHR, 'has demonstrated a creative commitment to eradicating cultural practices that contribute to persistence of gender discrimination and violence.'<sup>220</sup>

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<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*, para. 155

<sup>219</sup> *Op. cit.* (note 195), para. 162

<sup>220</sup> *Op. cit.* (note 14), p. 86

#### iv) Conclusion

Over the years, both the Commission and the Court have developed unique sexual violence jurisprudence in which they tackle important and novel human rights issues, such as harmful gender stereotypes and intersectionality. In rape cases the IACtHR and Commission usually find a violation of three different legal instruments; namely the *Inter-American Convention*, the IACPPT and Article 7 of *Belém do Pará Convention*.

It is noticeable that, similar to the ECtHR, the IACtHR is particularly observant when it comes to the violation of girl's rights. In such situations, it is more willing to pay attention to structural discrimination that certain categories of women face.

Both the Inter-American Court and the Commission are internationally eminent as institutions which 'focus... on addressing, as much as possible, the underlying causes that made the violations possible and in restating or generating legal, institutional and cultural conditions at the domestic level aimed at rehabilitating legal order compatible with the American Convention.'<sup>221</sup> This is especially important when it comes to the interconnection between harmful gender stereotyping and GBV, including sexual violence.<sup>222</sup> Naming wrongful gender stereotypes is crucial because they serve both as a root cause of GBV, but also tend to further perpetuate gender inequality and GBV. Especially against the most marginalized victims such as indigenous women in the Inter-American context. However, it is problematic that impunity is still high when it comes

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<sup>221</sup> García Ramírez, Sergio: *Reparations in the Inter-American System: A comparative Approach Conference*, 56 Am UL Rev, p. 1433

<sup>222</sup> The IACtHR with reason pointed out to stereotypes and impunity as both 'causes and consequences' of GBV. - L. Cavallaro, James; Vargas, Claret; Bettinger-Lopez, Caroline *et al.*: *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System*, OUP, 2019, p. 580

to *femicides*, sexual and other forms of GBV in the most of the OAS countries,<sup>223</sup> and like in the *Cotton Field*, in many cases official bodies are still opposing an approach to GBV with due diligence and/or their activity (or more precise and realistically, their inactivity) is under the influence of deeply-rooted gender stereotypes.

To conclude this chapter, both human rights adjudicative bodies within the Inter-American landscape are, with their respective decisions, regional pioneers in confronting the widespread ‘*machismo* culture.’ Also, as was presented, in many areas of women’s rights (especially regarding its recognition of the interconnection of gender stereotyping and GBV) the IACtHR and the IACmHR are influential and appraised at the global level, as well as the CEDAW Committee

The Court performs an extraordinary expressive and educational role when it brings into its decisions the language on stereotypes as it does in the *Cotton Field* and the *Atala* cases. That role is brought to its maximum expression when the Court makes the state take actions directed at deconstructing gender and other hierarchies and dignifying the victims it previously dismissed...<sup>224</sup>

The latest analyzed IACtHR development regarding its rape jurisprudence was when it concluded that rape and sexual slavery inflicted by a private actor amounted to torture. Bearing in mind all its achievements, I am sure that the IACtHR’s rape jurisprudence will continue to develop progressively in this sensitive matter.

However, what also needs to be emphasized is that the judicial activism of the IACtHR is openly challenged by some State Parties to the Intra-American Convention, to the

<sup>223</sup> *Exempli gratia*, 14 out of the 25 nations with the globally highest recorded rates of *femicides* are situated in Latin America and in the Caribbean. – Available at: <http://www.latinamerica.undp.org/content/rblac/en/home/presscenter/pressreleases/2018/spotlight-initiative--european-union-and-united-nations-join-for.html>, accessed on 9 September 2019

<sup>224</sup> *Op. cit.* (note 14), p. 83

extent that certain countries have withdrawn from the IACtHR or threat thereof.<sup>225</sup> This (un)surprising backlash evidences how State Parties are obviously not ready for ‘too-much’ progress in the ‘problematic’ areas such as women’s rights and rights of sexual minorities.<sup>226</sup> Significant and constant judicial progress of the IACtHR and the IACmHR in fighting (gender) inequality and harmful stereotypes needs to be accompanied by *de iure* and *de facto* institutional, structural and societal changes of its final addressees (State Parties) in order to be meaningful.

Moreover, it is well known that compliance rates with the far-reaching reparations have proved to be a challenge in the Americas.<sup>227</sup> Therefore, both the Court and the Commission should more firmly monitor and insist State on compliance with their respective decisions. Otherwise crucial judgments such as *Cotton Field* would just remain an example of a promising judicial achievement, but will not be *de facto* enforceable and as a result not accomplish its main aim of necessary structural transformation of persistent gender inequalities in the Americas.

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<sup>225</sup> In the Inter-American system, two states have left the system, namely Trinidad and Tobago in 1998 and Venezuela in 2012. - Lucas Sánchez and Raffaella Kunz: *The Inter-American System has always been in crisis, and we always found a way out* – An interview with Eduardo Ferrer Mac-Gregor Poisot”, Völkerrechtsblog, 17 October 2016, accessed on 7 September 2019. More about the backlash from cited countries, Peru and the Dominican Republic available in: Soley, Ximena and Steininger, Silvia: *Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights*, International Journal of Law in Context, Volume 14, Special Issue 2 (Resistance to International Courts), June 2018

<sup>226</sup> ‘... now that the Inter-American Court is developing a more robust jurisprudence on women rights and beginning to consider LGBTI people’s rights in the inter-American human rights system, the arguments about the Court’s unwelcome and dangerous attention to ‘the gender ideology’ and the ‘gay lobby’ are also emerging in conservative critical reviews of the Court’s decisions.’ – *op. cit.* (note 14), p. 90

<sup>227</sup> Engstrom, Par: *Reconceptualising the Impact of the Inter-American Human Rights System*, Direito &Práxis Revia, vol. 8 no. 2, 2017, p. 1254

## Chapter 4

### i) 'Case study': Republic of Croatia – Domestic Laws and Policies of Combating Sexual Violence in the Era of Women's Right Backlash

What needs to first be emphasized is that continuous year-by-year statistics of the Ministry of Interior show that the dominant types of sexual violence (namely rape, sexual intercourse without consent and sexual harassment) in Croatia are definitively gender-based. For instance, in 2017 all reported rape offenders were men with no occurrence of any female offenders.<sup>228</sup> When it comes to sexual offences, the protective object of Croatian criminal legislation was for a long time the so-called sexual morality.<sup>229</sup>

However, changes in the understanding of human sexuality, as well as the institution of marriage, have over time led to changes in criminal regulation. Thus, homosexual relations were punishable in the territory of Croatia until the reform of the penal legislation in 1977, and rape was punishable until the 1997 reform only in respect of a female person who was not in the marriage with the perpetrator. Although such anachronistic views are present in some countries even today, the contemporary legislature views sexual offenses primarily through the prism of protecting sexual freedom and protecting the well-being of children.<sup>230</sup>

According to the Croatian Supreme Court, sexual freedom means '*the freedom of the individual in the choice of place, time, manner and person with whom to have sexual*

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<sup>228</sup> Moreover, all rape victims were female, while only one victim of sexual assault being male. - *Gender Equality Ombudswoman's 2018 Work Report*, 2018, p. 146

<sup>229</sup> Sexual morality as an object of criminal protection is problematic because perceiving these offenses as acts against honor can contribute to the victim's re-victimization. However, the reference to morality continues to occasionally occur in Croatian jurisprudence, such as the assessment that '... an injured person, as a person with mental disability, very easily gives up moral judgments and behavior.' (VSRH. I Kž 528 / 13-4) 'However, such classification of these acts is not only being opposite to the law, but also reduces the seriousness of the injuries inflicted on the victim and the consequences for the physical and psychological integrity of the person and his/her autonomy.' - Turković, Maršavelski (glava XVI) u Cvitanović, Leo *et alt.*: *Kazneno pravo: Posebni dio*, Pravni fakultet Sveučilišta u Zagrebu, Biblioteka Udžbenici, Zagreb, 2018, p. 207

<sup>230</sup> *Ibid.*, p. 206



*intercourse. Protection of sexual freedom refers to the protection of sexual integrity and sexual self-determination (freedom to decide in the sexual sphere).*'<sup>231</sup>

As previously stated, the aim of this thesis is to check whether certain 'anachronistic understandings' still exist in Croatian legislation and/or legal practice since numerous reforms of the criminal legislation rightly intended, *inter alia*, to eradicate those unacceptable views.

Legislative changes led to the current situation in Croatia with two parallel, but slightly different criminal offences: rape and sexual intercourse without consent. This creates problems in judicial practice.<sup>232</sup> The crime 'sexual intercourse without consent' was introduced in 2013 with the explanation that it would sanction acts of sexual coercion in which there was no threat or use of force by the perpetrator - which are still necessary preconditions in order for qualifying the criminal offence as rape. Also, to qualify for this offence there must have been no resistance due to the condition of the victim (*e.g.* she/he was sleeping or was unconscious). Moreover, the current Croatian judge at the ECtHR, Ksenija Turković (who was leading the legislative Working Group for the current *Criminal Code*), noted how such a provision 'was almost unknown, not only to our legal environment and tradition at the time of its prescribing, but even beyond... The provision sought to be one of the most advanced legislative solutions when it comes to gender/sexual offenses in the world, in line with the *Istanbul Convention*, before it even came into force in Croatia.'<sup>233</sup>

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<sup>231</sup> VSRH, I KŽ-1201/04

<sup>232</sup> Articles 152 and 153, *Criminal Code*, Official Gazette no.125/2011, 144/2012, 56/2015, 61/2015, 101/2017

<sup>233</sup> *Op. cit.* (note 229), p. 211

Although it seems that the drafter's intentions were genuine and progressive, *de facto*, the new criminal offence produced many legal uncertainties and even controversies. One of the most problematic aspects of the current Croatian penal practice is that, in a significant number of cases of sexual violence against female judges automatically subsume act/conduct as 'sexual intercourse without consent' (although under the previous *Criminal Code* the same act would undoubtedly be tried and punished as rape), and consequently, the perpetrators receive significantly lower penalties. The minimum prescribed penalty is only six months of prison (maximum being five years), but even worse, the practice has shown that in such cases the imposed penalties are often conditional. The introduced criminal offence and its negative repercussions were therefore rightly criticized by the CEDAW Committee in 2015.<sup>234</sup> Judicial disorientation regarding the abovementioned legislative change has led to many absurd situations, such as the gruesome gang-rape of a minor which was legally watered down to 'sexual intercourse without consent.'<sup>235</sup> Maja Mamula, the founder of the NGO, *Woman's Room* (*Ženska soba*),<sup>236</sup> lobbied at all levels for the necessary amendment of the definition of rape. Since the introduction of the new offence, almost all rapes in marriage and extramarital affairs were qualified 'the sexual assault

<sup>234</sup> CEDAW, Concluding Observations, Croatia, July 2015, CEDAW/C/HRV/CO/4-5, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fHRV%2fCO%2f4-5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fHRV%2fCO%2f4-5&Lang=en), para 18(h), accessed on 20 September 2019

<sup>235</sup> (Negative) feature of criminal law system in general is that it often downgrades/re-characterizes criminal offence to the minimal level. However, in this particular case 'the gang rape of a minor was qualified as "sexual intercourse without consent" due to the victim being unconscious and under the influence of alcohol and thus unable to consent. The NGOs reported that following public outrage and pressure from different institutions and organizations, the classification of the offence was changed to rape.' – Amnesty International: *Right to be Free from Rape: Overview of Legislation and State of Play in Europe and International Human Rights Standards*, 2018, p. 13

<sup>236</sup> *Women's Room* (*Ženska soba*) is the Croatian women's rights NGO within which the only national Centre for Sexual Rights operates. 'According to the European Parliament and the CoE *Task Force to Combat Violence against Women Standards*, there should be at least 11 centers for support to victims of sexual violence in Croatia (1 center per 200,000 women)' *Croatia: Submission to the Committee on the Elimination of Discrimination against Women for the 61st Session* (July 6th - July 24th 2015). Shadow report by BaBe and Ženska Soba, p. 8, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fNGO%2fCRO%2f20854&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fNGO%2fCRO%2f20854&Lang=en), accessed on 20 September 2019. It is problematic that Croatia, as stated, has only a single center.

without consent' because, in such cases, the victim usually has no injuries and/or has not physically defended herself or screamed. This is why she cannot prove that the abuser threatened her.<sup>237</sup> It is common for women who were raped during marriage to suffer in silence in order not to awaken children or provoke further violence.

Among other problematic aspects of the current Croatian penal legislation is that the 2013 amendments decreased minimum penalty for rape from 3-10 years down to 1-10 years. In their shadow report to the CEDAW Committee, the Croatian women's rights NGOs expressed concern that 'the most common sentence is close to the minimum proscribed sentence. In reality, this means that victims of sexual violence will suffer 5-6 years of court procedures, and the rapist will get a one-year sentence, while in fact being released from prison after 8 months.'<sup>238</sup> Representatives of the *Woman's Room* have repeatedly warned that in such sensitive proceedings victims tend to be further traumatized by the excessive length of the criminal procedure (which itself violates the right to a fair trial), and moreover, that the perpetrators are given the minimum sentence of imprisonment. For example, they publicly reacted in 2017 when the gang rape perpetrators of a minor each received only one-year imprisonment (a minimum even with many aggravating circumstances). NGOs condemned the fact that the Court, when considering the criminal offence, failed to account for the relevant circumstances that make the offense a qualified (committed by multiple perpetrators, longer-term offense-victim was held for three days in captivity-, the victim's minority, multiple degrading acts).<sup>239</sup>

<sup>237</sup> Available on: <https://www.jutarnji.hr/vijesti/hrvatska/apel-centra-za-zrtve-seksualnog-nasilja-u-hrvatskoj-kazne-za-silovatelje-su-preniske-zakon-mora-biti-strozi-prema-njima/8758058/>, accessed on 13 August 2019

<sup>238</sup> *Op. cit.* (note 236), p. 6

<sup>239</sup> Available on <https://www.libela.org/vijesti/8948-zenska-soba-zrtve-se-traumatizira-pociniteljima-se-daju-minimalne-kazne/>, accessed on 21 September 2019

However, after the perennial struggle of women's rights NGOs and the unexpected success of the Croatian #MeToo Movement, named #SaveMe' (#SpasiMe'),<sup>240</sup> the Croatian Government as recently as September 2019 finally decided to change the outdated and problematic provisions regarding GBV in its *Criminal Code*, the *Criminal Procedure Act* and the *Family Violence Protection Act*. If accepted by the Croatian Parliament, comprehensive legislative changes will enter into force at the beginning of January 2020, and will also touch upon the current troublesome regulation of sexual violence.

The biggest change in that regard will be that the criminal offense of 'sexual intercourse without consent' will be terminated. Moreover, sexual consent will also be legally defined for the first time. 'Consent' will be understood as when a 'person chooses to enter into sexual intercourse with her own will and was able to make and express such a decision.'<sup>241</sup> It is further stated in the legal proposal that there is no such consent where the sexual intercourse was carried out with the use of threat, abuse of position and/or exploitation of the person's condition. With this legislative improvement, Croatia will enter into the small circle of European countries which define rape on the basis of the absence of consent in their legislation, as the case is currently in Ireland, England, Belgium, Cyprus, Island, Luxembourg, Sweden and Germany.<sup>242</sup>

It was also recognized that the imposed punishments were extremely (and comparatively) low, so the sentence for rape will increase from a minimum of one to three years

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<sup>240</sup> After receiving numerous shocking testimonies on its Facebook page, the citizen's initiative #SpasiMe successfully organized the major protest against widespread VAW (and infective response of responsible institutions) in Croatian capital Zagreb in March 2019. As a result, some of their members were included in a working group for changes of inadequate laws that deal with GBV.

<sup>241</sup> Available on <https://www.jutarnji.hr/vijesti/hrvatska/prvi-uspjeh-akcije-spasi-me-svaka-modrica-kazneno-djelo-i-seks-bez-pristanke-tretirat-ce-se-kao-silovanje-minimalna-kazna-dize-se-na-3-godine/9345899/>, accessed on 21 September 2019

<sup>242</sup> Amnesty International, *op. cit.* (note 235), p. 10

of imprisonment. The maximum sentence remains ten years. All the described changes are welcomed, and with them the legislator sends a clear message to the victims of (sexual and other forms of) GBV that such behavior will not be tolerated.

Victims of sexual violence usually suffer long-lasting consequences and therefore need special protection, especially during the course of judicial proceeding which (if unprofessionally) may provoke additional trauma. The Croatian *Criminal Procedure Code* already complies with the highest EU standards when it comes to access to justice for the victims of violent acts. Relevant articles of *Directive 2012/29/EU*<sup>243</sup> (intended to serve as minimum protection) were incorporated and further developed in the domestic *Criminal Procedure Code* in 2017.<sup>244</sup> Special needs of victims of sexual violence are (or at least should be) recognized.<sup>245</sup> One of the biggest and the most important novelties is Article 44(5) paragraph 3; victims of sexual violence and human trafficking have the right to withhold answers to unnecessary questions on the victim's strictly personal life.<sup>246</sup> Paragraph 4 of the same Article allows for the legal possibility to use audio-video devices while examining victims. However, this right, as NGOs representatives warned at the conference '*The Victims' Rights-Ensuring Protection Measures*' held in September 2019, still

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<sup>243</sup> *Directive 2012/29/EU of the EP and of the Council establishing minimum standards on the rights, support and protection of victims of crime*, and replacing Council Framework Decision 2001/220/JHA, Official Journal of the EU

<sup>244</sup> 7th legal novella entered into force on 19<sup>th</sup> July 2017, *Criminal Procedure Code*, Official Gazette, No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17

<sup>245</sup> *Inter alia* 'the victim of any crime against sexual freedom has the right to consult with the counselor before interrogation, at the expense of the state budget; at the police and the public prosecutor office needs to be interrogated by the person of the same gender, and if it is possible, the same person interrogates the victim in the case of further need.' – *Ibid.*, Art. 44, para 1 and 2

<sup>246</sup> *Ibid.*

largely depends on the discretion of the individual judge.<sup>247</sup> The same applies with the realization of the right to be accompanied by a person of trust during all phases of the criminal proceeding.<sup>248</sup>

Even before the pioneering #SpasiMe initiative emerged, it is praiseworthy that the Croatian Government recognized some of the sensitive issues that go 'hand-in-hand' with rape cases, and recently adopted a modern *Protocol of Conduct in Case of Sexual Violence*,<sup>249</sup> which is evidently under the strong influence of the above-mentioned women's rights international and regional conventions, including the recently ratified (and in public quite contested) *Istanbul Convention*.<sup>250</sup>

In the Preamble of that *Protocol* it is emphasized that

...some of the reasons for non-reporting of sexual violence lie in a broad social context that is contaminated by the existence of typical myths and prejudices related to sexual violence. Some of the reasons are closely related to the work of institutions, some are purely personal in nature, linked to the victim itself.<sup>251</sup>

The text of the *Protocol* further tends to deconstruct famous myths about the 'real' rape victim by stating that following the 'movie' scenario in typical rape cases is actually quite unusual; 'an unknown perpetrator, a violence that has occurred outside the home of a victim or

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<sup>247</sup> Conference 'The Victims' Rights-Ensuring Protection Measures', available on: <http://pzs.hr/2019/09/25/odrzana-konferencija-prava-zrtve-osiguranje-mjera-zastite/>, accessed on 28 September 2019

<sup>248</sup> However, that specific right is not regulated by the *lex superior Criminal Procedure Code*, but by the *Rules on the Work of the Victims and Witnesses Support Section*, Official Gazzete 133/2015

<sup>249</sup> *Protocol on the Procedure in Case of Sexual Violence* (Protokol o postupanju u slučaju seksualnog nasilja), Official Gazette NN 70/2018, 1 August 2018

<sup>250</sup> The *Istanbul Convention* was firmly opposed because of the unreasonable and widespread fear that it promotes so-called 'gender ideology.' After the heated public and parliamentary debates, it was eventually ratified and entered into force for Croatia on the 1st of October 2018. More about the ratification controversies available in Bosak, Martina; Munivrana Vajda, Maja: *The reality behind the Istanbul Convention: Shattering conservative delusions*, Women's Studies International Forum, Vol. 74, 2019, p. 77

<sup>251</sup> *Op. cit.* (note 249), p. 17

perpetrator (for example, a street, a park, a veil), use of force and/or weapons and serious physical injury to a victim. However, such elements are rarest...'<sup>252</sup>

The former (withal the first one) *Protocol* from 2012 also included an explanation as to why many victims of sexual violence are not eager to report it (which consequently leads to a high so-called dark number of such crimes). From direct work with the victims, it is clear that 'some women think that in some way they contributed to violence due to something they did or did not do because that is dominant social message that comes as a result of their socialization, and which is full of myths about sexual violence ('she got what she deserved or 'she asked for it, and now she is complaining.')<sup>253</sup> The text continues, emphasizing that many victims also fear the perpetrator and possible revenge. Other reasons are psychological and social; they feel shame, fear from stigmatization and reactions from family and friends.<sup>254</sup> The *Protocol* covers to the wide spectrum of relevant institutional actors, namely to the police, health care, judiciary, social welfare centers and educational institutions.

Reading between the lines, it is suggested that every now and then rape victims are not adequately treated during certain stages of the criminal procedure,<sup>255</sup> which is often connected with the widespread misuse of problematic gender-based stereotypes and which often further leads to secondary victimization of the victims. All this needs to be condemned and avoided and will be examined later, when assessing concrete domestic jurisprudence.

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<sup>252</sup> *Ibid.*, p. 18

<sup>253</sup> *The Protocol of Conduct in Case of Sexual Violence*, 29 November 2012, Biblioteka Ona, p. 14

<sup>254</sup> *Ibid.*, p. 14

<sup>255</sup> 'It is not uncommon for women to experience gender bias and inequalities in legal proceedings. Such biases are the result of commonly-held stereotypes that are usually unconscious.' Choudhry, Shazia: *Women's Access to Justice: A Guide for Legal Practitioners*, 2018, p. 29

## ii) **How Vivid are Stereotypes and Wrongful Assumptions in Recent Croatian Sexual Violence Judgments?**

As in many other jurisdictions, sexual violence in Croatia is used as an ‘umbrella term’ encompassing conduct as varying from sexual harassment to rape. Therefore, in the following section, I will briefly introduce ‘typical’ Croatian judgments in this field.<sup>256</sup> At the heart of many appeals is the examination of legal continuity of a particular crime (due to the mentioned changes in the 2013 *Criminal Code*) and, in turn, the perpetrator’s right to apply for ‘a more lenient application of the law.’

Sexual harassment is a new criminal offense for which there previously existed only misdemeanor’s liability. The definition of ‘sexual harassment’ has been taken from Article 3 (2) of the *Anti-Discrimination Act*, entitled *Harassment and Sexual Harassment*. Misdemeanor provisions are laid down in Article 26 of the same Act.<sup>257</sup> I will critically examine one of the rare final judgments in the area of sexual harassment.

The County Court upheld a defendant's complaint that his conduct did not satisfy the characteristics of sexual harassment. The facts of the case are the following

The defendant is charged that he, as a teacher at the Secondary Technical School, on four occasions asked a 17-year-old female student to stay during a classroom break to review her exercises and when left alone, he once grabbed her by the leg; then he hugged her, the third time he waved his hand to kick her buttocks and the fourth time he said that she should be beaten and slapped her buttocks...

<sup>256</sup> ‘Typical’ meaning that they are reproduced as examples and extracts of the court’s practice in Croatian legal textbooks and expert commentaries.

<sup>257</sup> Garačić, Ana: *Kazneni zakon u sudskoj praksi: Posebni dio*, Libertin naklada, Rijeka, 2016, p. 266



Article 156 of the *Criminal Code* is about indecent and misconduct with sexual connotations, which brings a person into an extremely embarrassing and degrading position.<sup>258</sup> The described actions, in the opinion of the judicial council, were not of a sexual nature in such a way as to impair the dignity of the female student and to put her in a degrading position. Moreover, they continued the analysis by stating the following: 'It is obvious that the underage student did not feel comfortable with such teacher's behavior, which is her subjective experience which, given the characteristics of her personality (withdrawn, introverted, unfriendly), is justifiable and understandable, but the accused's objective actions taken altogether do not constitute a gross encroachment in the sphere of sexuality.'<sup>259</sup>

This kind of judicial justification of (sexual) harassment is problematic and, clearly lacking from the respective Court's analysis, an assessment of the situation through a gendered lens. More specifically, the judge's description of the victim's personality suggest that it was primarily her exaggerated sensibility which is the reason why she was not feeling 'comfortable', as opposed to the objectively unacceptable behavior of the teacher.

Although the court noted that the injured party was a minor, they overlooked the apparent relationship of superiority/subordination and dependence that inherently exists between teacher and student. Moreover, the injured party's particular vulnerability due to her age was not discussed in detail and, as stated, they did not enter into dialogue on the repercussions of the teacher's abuse of his position and authority.

The defendant's behavior should not only be 'unacceptable and inappropriate' for the student, but also for a panel of judges. Striking the buttocks is not the type of conduct that we

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<sup>258</sup> *Ibid.*, p. 268, from the judgement of the County court in Bjelovar, Kžm-32/14-3 from 15 January 2015

<sup>259</sup> *Ibid.*

expect from a high school teacher. However, according to the court such conduct '... was not intended to offend the dignity of a schoolgirl and to put her in a humiliating position.'<sup>260</sup> The court did not take into account the broader picture, particularly that the degrading treatment happened in a school environment (which is supposed to be a safe place for students). As stated, they did not reflect at all on the violation of (the expected) relationship of trust between the teacher and the alleged victim, and in my opinion, she suffered 'a violation of dignity... that causes a fearful, hostile, degrading or abusive environment',<sup>261</sup> which corresponds to the legal definition of 'harassment.' If you assess the situation from the victim's perspective, inappropriate touching could entail (legally required) a sexual connotation.

It was emphasized in the judgment that 'It should be borne in mind that no other student reported the accused because of similar behavior or suspected misconduct, but all students, along with their fellow teachers, generally gave him their support to return to work and continue working as a teacher.'<sup>262</sup> Such a description of the situation contributes to discrediting and belittling the victim's allegations, the victim's voice, and how she (subjectively) perceives the situation. Furthermore, unanimous support for the teacher may have serious repercussions for the victim (it potentially can lead to blaming her for what happened and her being ostracized from the school and wider community) or reducing the case to something meaningless.

To conclude, the outcome of a ruling will surely affect the victim's confidence in the criminal justice system. Moreover, since the case was widely circulated in recent student criminal law and judicial textbooks, this problematic decision may make it more difficult for other

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<sup>260</sup> *Ibid.*

<sup>261</sup> *Op. cit.* (note 232), Article 156

<sup>262</sup> *Op. cit.* (note 229)

to report the occurrence of (sexual) harassment in educational institutions.

When it comes to their interpretation of Article 152 of the *Criminal Code*, which criminalizes 'sexual intercourse without consent', judges often examine the alleged victim's credibility. Stating that '... the injured party had no reason to charge the defendant without merit,' the Croatian Supreme Court notes that 'based on the available information, there are no indications of the victim's preference for fabricating events and suggestibility.'<sup>263</sup> In this case the fact that the victim was under the influence of alcohol was not used against her, *a contrario*, 'Because of her condition, that is, intoxication, she was unable to resist the the defendant, which fact he misused and with the injured person without her consent, performed sexual intercourse as described in the operative part of the impugned judgment.'<sup>264</sup> This decision is therefore clearly in line with the analyzed international and regional standards regarding how the judiciary should approach cases of sexual violence.

Furthermore, some of the misconceptions regarding what conduct amounts to marital rape can be traced in the following judgement; 'Finally, the defendant himself, while denying the existence of the act, confirms that his wife had on one occasion refused sexual intercourse "*so they only performed it partially*" and admits that she could have perceived it as rape, although he considered it as a normal spousal relationship.'<sup>265</sup> Moreover, the Supreme Court boldly warned that '... the allegations of the appeal, citing the Supreme Court's earlier practice regarding the victim's subsequent consent to sexual intercourse, have been overlooked, since these

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<sup>263</sup> *Op. cit.* (note 257), p. 233, from judgement VSRH, I Kž-89/15-4, from 22 April 2015

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.*, p. 238, from judgement VSRH, I Kžm-30/13, from 6 February 2014

court decisions take into account the victim's voluntary conduct during the same sexual intercourse, which is not the case here.<sup>266</sup>

Certain cumbersome judgments tend to focus on whether the perpetrator was aware (subjective element of the crime) that the victim was opposing intercourse;

The fact that the accused at the time of the perpetration of this act was countable in itself is not sufficient to conclude that he also possessed an awareness of the victim's opposition to such sexual intercourse. Specifically, given the nature of the overall relationship between the defendant and the injured party prior to the incident, and especially the injured party's behavior towards the accused during a critical morning (completely passive posture), it was necessary to determine whether the accused could have been aware of the victim's opposition to sexual intercourse with him, or wrongly, he believed that she was not opposed to it, and if so, whether his misconception about the circumstance was remedial.<sup>267</sup>

Many of the devastating and dangerous myths about rape are invoked by the parties themselves (especially by the perpetrators). This strongly suggests that they are indeed deeply rooted and perpetuated.

A further statement by the perpetrator effectively sums up the popular myth according to which 'no means yes': 'He states that both he and the injured party, while living together, sometimes said that they did not want the intercourse, while in fact both of them wanted it.'<sup>268</sup> The most problematic 'excuse' offered by the perpetrator is that he could not be aware that sexual intercourse without consent in the relationship was forbidden, because, in his view, no force was applied when he took off the injured party's underwear. He also disputed the existence of an extramarital affair between himself and the injured party by saying that he did not have children with her but with another woman. Moreover, he added that it would appear that he lived in bigamy. Extremely questionable is the relevance of his confusing observations about their relationship

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<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*, p. 239, VSRH, I Kž-658/13 from 10 December 2013

<sup>268</sup> *Ibid.*, p. 246

status in connection with the alleged rape. What is appalling from his attitude is the clear lack of any sexual education and knowledge about gender equality and/or on human, let alone women's, rights. He contended that he was actually raped by the injured party <sup>269</sup> and that the first instance Court committed a mistake when in finding him guilty.

Fortunately, the appellate court pronouncedly distanced itself from the perpetrator's misconceptions about rape; 'The motion to obtain the misdemeanor files was reasonably rejected, and the inspection of them would not establish anything significantly new that would contribute to a better determination of the facts of this criminal case. It states that '... the defendant's defense was assessed as improbable and aimed at avoiding criminal liability.'<sup>270</sup> The court's standing is commendable because the misdemeanor files potentially charge the victim (*e.g.* for the family violence) or indicate her former conviction and/or delinquency. By recognizing the irrelevance of those files for the procedure in question, the Court rightly put emphasis on the act of rape itself. Therefore, the motion to obtain the misdemeanor files was reasonably rejected. It is highly unlikely that the inspection of them would establish anything significantly new that could contribute to a better determination of the facts of this case. The Court went further by adding that, 'the defendant's defense was assessed as improbable and aimed at avoiding criminal liability... It should be noted here that, contrary to the defendant's contention, the injured party is, in the sense of Article 87, paragraph 9 of the *Criminal Code*, a person close to him, since it is beyond doubt that he is his ex-spouse's wife.'<sup>271</sup>

The judge, specializing in children's rights, dealt first-hand with this case of rape among acquaintances, students (younger adults, aged 20), and was aware that 'Throughout the

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<sup>269</sup> *Ibid.*, p. 247

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

evidentiary process, the intent was to discredit the injured girl, saying that she must have taken drugs, that she wanted the intercourse, that it was a joint voluntary sexual intercourse, and/or that the intercourse was not violent but that these were fabricated stories by the injured party. Even though she had resisted his assault in a car, among other things, by saying "Don't touch me, you have a girlfriend", he said "All women are whores, and all of you made me to do it!"<sup>272</sup> Such misogynic justifications for rape that include blaming the female gender are not rare in judgments.

In the next case the victim's age (16 years) was assessed as an aggravating circumstance, yet the jurisprudence is such that age alone does not result in particular vulnerability.<sup>273</sup>

In another judgment it was twice referenced that the minor victim cried '... and when she gave her testimony, she also wept, and in the same way she testified about the incident to a psychologist and described it to her mother M. and mother's husband A.K., the son of the defendant, and who both testified about it identically.'<sup>274</sup> But what if the victim did not cry? While I take the aforementioned court's note as an expression of the court's benevolence and solidarity to the under-aged victim, however, is it really necessary that the victim's credibility and consistency in testimonies is over-emphasized? It should to be underlined that in gender sensitive cases judges should 'refrain from assessing the credibility of a victim on the basis of how emotionally expressive she appears to be when testifying, remembering that victims may have different reactions to the investigative and judicial process.'<sup>275</sup>

<sup>272</sup> Petö Kujundžić, Lana: *Sudska zaštita djece: Iskustvo jedne sutkinje za mladež*, Novi Informator, 2010, p. 84

<sup>273</sup> Article 154, para. 2 'Serious Crimes against Sexual Freedom' in *op. cit.* (note 232), p. 249

<sup>274</sup> *Op. cit.* (note 257), p. 279, from the judgment of the County Court Varaždin, KŽ-104/15-4, 20 January 2015

<sup>275</sup> *Op. cit.* (note 255), p. 28

Nevertheless, it is praiseworthy that the second instance court noted how 'the factual situation was not incompletely established, as suggested by the defendant in his appeal seeking to re-interview the injured party with expert witnesses, as well as to call her aunt, grandmother and grandfather to re-testify...'<sup>276</sup> Since the victim had already made extensive statements to the psychologist, the Court correctly recognized that there is no need for re-examination. The Court was aware that multiple repetitions of her testimony, especially when the victim in question is a child, in large contributes to secondary victimization and additional trauma, which should be avoided.

### iii) Basic Features of Selected Jurisprudence

In this section I will analyze the final Croatian court's decision in 19 rape cases and three cases of 'sexual intercourse without consent', from the period of 2013-2017. Even such a limited number of final judgments should be enough to assess whether there were certain improvements in respect to the court's approach to sexual violence cases and their assessment of the victim's credibility.

First, I will analyze three 'sexual intercourses without consent' cases of the Municipal Criminal Court in Zagreb and then turn to the rape cases decided by the County Court in Varaždin (12), the County Court in Pula (6) and the two appeals that ended in front of the Supreme Court of the Republic of Croatia. Of 23 cases there were 21 convictions (three for 'sexual intercourse without consent', two for 'a serious crime against sexual freedom', three attempts of

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<sup>276</sup> *Op. cit.* (note 257), p. 280

rape and 12 for rape) and 2 acquittals. In five cases, the judgment was based on the agreement of the parties, per Articles 360-363 of the *Criminal Procedure Code*.<sup>277</sup>

In only three cases (which corresponds to 15%) did the victim not previously know the perpetrator, which negates the widespread rape myth according to which rape perpetrators are some unknown and kinky individuals. Only one case resembled the ill-famed ‘unknown perpetrator jump[ing] out of bush/nowhere and threaten[ing] to kill the victim’ scenario.<sup>278</sup> Interestingly enough, that was also the case in which the perpetrator received the highest penalty (9 years of imprisonment), although it was eventually attempted rape.<sup>279</sup> The sentencing praxis immensely differs, even within the same court. This is visible when the cited judgement is compared to another case of attempted rape tried by the same court, but this time about the perpetrator’s partner. In the latter judgment the perpetrator received only eight months imprisonment.<sup>280</sup> Such a drastic difference in punishment for the same offense shows how judges are still inclined to ‘real rape’ and ‘real victim’ myths, as opposed to another rape myth, the perpetrators of sexual violence were the victim’s current husbands or love interests, ex-partners, friends, acquaintances, employers or customers (once victim was the waitress in the local cafe bar).

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<sup>277</sup> The perpetrator of the anal rape received one year of the juvenile prison. – County Court Varaždin, 6 OV KOV-7/14-7, 04 March 2014, p. 2 In the second case the perpetrator was sexually exploiting a minor, who was pimped by her own mother. Inappropriately for the horrifying circumstances, the perpetrator received only conditional sentence (one year of imprisonment, which will not be executed if he does not commit new offense in the following 3 years). – County Court Varaždin, 4 Kzd-9/16-3, 29 November 2016, p. 2

In the third case the perpetrator raped the waitress, for which he received one year of imprisonment, which was eventually replaced with the community service. – County Court Varaždin, 4 Ov Kov-21/16-9, 12 September 2016, p. 2

In the fourth case the perpetrator of the marital rape (convicted for the ‘serious crime against sexual freedom against a close person’) received partially conditional sentence (1 year of imprisonment and the remaining imprisonment of year and 6 months will not be executed if he does not commit a new offense in 5 years) – County Court Pula, Kov-43/14-94, p. 3

The fifth perpetrator was convicted for the same criminal offense by the same court, and received 2 years and 6 month of imprisonment. – K-12/16-118, 21 December 2016, p. 2

<sup>278</sup> County Court Varaždin, 23 K-27/15-26, 10 December 2015

<sup>279</sup> *Ibid.*, p. 5

<sup>280</sup> County Court Varaždin, 23 K-29/15-19, 17 December 2015



The victim's house proved to not be safe in seven cases, but rape also occurred three times in the perpetrator's vehicle and in different places, such as a common friend's house, meadow and beach. Out of the analyzed three courts, only the County Court in Pula used the legal possibility of ordering different security measures. In one case tried by the County Court in Pula, the perpetrator was ordered compulsory treatment of addiction,<sup>281</sup> while in another case the same court ordered compulsory psychosocial treatment. The third measure was a 'ban on approaching the victim for less than 100 meters in the next 5 years.'<sup>282</sup> I welcome the Court's pronouncement of security measures, but *de facto* the last measure will unlikely be executed after the perpetrator's release from prison given the victim is his wife and they live together.

This analysis confirms that in some rape proceedings, courts 'do not recognize the victim's need for avoiding visual contact with the perpetrator, or the victims are not sufficiently informed about the existence of such a right, which is why they do not claim it, with the result that the victims were not examined through audio-video devices in some cases of sexual offenses and trafficking in human beings.'<sup>283</sup> This analysis illustrates that it is not unlikely that the victim will be called to repeat her testimony in front of the court, even though she previously testified through video-link.<sup>284</sup> *Exempli gratia*, in K-21/14, the victim testified three times (once – which was recorded – at the evidentiary hearing during the investigation, and twice at the hearing).<sup>285</sup>

Multiple interrogations of a victim unnecessarily contributes to the occurrence of secondary

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<sup>281</sup> Because he was addicted to heroin. County Court in Pula, K-15/14 12 December 2014, p. 14

<sup>282</sup> County Court Pula, Kov-43/14-94, 23 January 2015, p. 3

<sup>283</sup> Human Rights House: *Ljudska prava u Hrvatskoj: Pregled stanja za 2018. godinu (Human rights in Croatia: overview for 2018)*, March 2019, p. 31

<sup>284</sup> DVD recording occurred in 2 Kzd-6/16-15, p. 2,3 – still the victim was examined as a witness at the trial; the same happened in the 23 K-27/15-26, p. 2 In the K-15-14 (2014) the victim's statement has been read at the trial. Also, the video link of her examination was reproduced during the trial, since she was child and was not able to testify because the worsening of her mental illness – p. 3, 11 The injured party was examined through video-link 'in the separate room during the main trial' by the County Court in Pula, K-12/14, 26 September 2014, p. 11, 14, 20

<sup>285</sup> The fact was highlighted (although not condemned) in the appeal decided by the Supreme Court of Croatia in Kž 106/2017-12, 14 September 2017, p. 2

victimization and it is problematic that such practice is widespread in the Croatian penal system.<sup>286</sup>

The *facto* realization of the claim for damages produces a similar effect.<sup>287</sup>

Because one of the conditions for deciding on a compensation claim is that it should not significantly delay the criminal proceedings, courts often, on the pretext of delaying the proceedings, refer the injured parties to the litigation. In such cases, it is expected from the victim to initiate civil proceeding, which leads to their re-victimization and traumatization and exposure to additional financial costs. It is known that victims are missing certain rights in civil proceedings which they have in criminal ones, so the situation could be to traumatize the victim after preventing the same in criminal proceedings.<sup>288</sup>

It is commendable that in case 23 K-25/13-58, the County Court Varaždin, equated the act of ‘pushing twice finger into the victim’s vagina’ with rape (‘sexual act equal to sexual intercourse’).<sup>289</sup> This conclusion is significant improvement for the Croatian judiciary, particularly when we recall the notorious case from 2005 in which the first instance judge referred to forceful anus fingering of an American basketball player as ‘a local a form of handshaking.’ (*ličko rukovanje*)<sup>290</sup> A further, praiseworthy aspect of the more recent judgment is that the judicial council of the County Court in Varaždin convicted the perpetrator to three years. With this the Court has sent an important message that all forms of rape should be severely punished. This is especially important in patriarchal societies as Croatian which usually perceive rape as only vaginal and/or anal.<sup>291</sup> Rare cases like that analyzed prove that, from time to time, it is not a legal cliché that the

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<sup>286</sup> *Op. cit.* (note 283), p. 59

<sup>287</sup> Claim for damages (but only for amount of 2000 HRK, approximately 273 EUR) was filed in the case of the County Court of Varaždin, 20 K-41/1-109, 17 March 2016, p. 2; as well in the case K-DO-59/12 (amount 30 000 HRK, approximately EUR) p.11 The victim was instructed to associated action for damages in two cases decided by the County Court in Pula K-15/14, p. 16 and in K-21/14, 5 December 2016, p. 67

<sup>288</sup> *Op. cit.* (note 283), p. 33

<sup>289</sup> County Court Varaždin, 23 K-25/13-58, 18 February 2014, p. 1 The same Court did the same in 4 Ov Kov-21/16-9, p. 2

<sup>290</sup> However, second instance court convicted the perpetrator (*nota bene* local politician) for fornication. Available on: <https://www.jutarnji.hr/vijesti/hrvatska/otkrivamo-silovatelj-poznat-po-lickom-rukovanju-vratio-se-u-hdz-iako-je-mraovic-u-zatvoru-bio-20-mjeseci-stranka-mu-odobrila-reaktivaciju/7719825/>, accessed 22 October 2019

<sup>291</sup> In case 6 OV KOV-7/14-7, decided by the County Court in Varaždin, the victim endured the anal rape (after the consensual vaginal intercourse), 04 March 2014, p. 1

In case K-26/14 the victim was anally raped and in the appellate phase the Supreme Court of Croatia somehow problematically noted that ‘if she wanted to falsely accuse the defendant, she could persuade the Court that it was forced vaginal intercourse... For the accused party such description of the act was very traumatic and humiliating,

pronounced sentence serves ‘to sufficiently express social condemnation for the offense, to strengthen citizens’ awareness of the perils of committing crimes and the fairness of punishing perpetrators.’<sup>292</sup>

Even this small sample of judgements prove how reported rapes in Croatia are gendered crimes (however, as stated, it does not mean that the men are not victims of sexual violence as well, or that there are not female perpetrators). When it comes to the legal terminology, I will intentionally use the term ‘victim’ (Croatian: *žrtva*) rather than ‘survivor’, since the latter is still unrooted in Croatian law and practice. The analyzed jurisprudence routinely uses the combined term ‘victim-injured party’ (*žrtva-oštećenica*), which I find somewhat cumbersome since it is not in the spirit of the Croatian language. For the benefit of the defense, I will also use the terms ‘perpetrator’ and ‘defendant’.

### 1. *Blurred Lines: Sexual Intercourse Without Consent or Rape?*

Case KO-1628/13 is a *prima facie* example of ‘sexual intercourse without consent’, at least according to the current crime’s prescribed definition in Article 152 para. 1 of the Croatian *Criminal Code*. The perpetrator ‘took advantage of the fact that the injured one was sleeping on the bed, took off her panties and pushed his genitals into her genitals, which woke up the victim, who then pushed him away and ran out of the apartment.’<sup>293</sup> Such brief description of the unwanted sexual intercourse *de facto* sums up what is wrong with the Croatian legal definition of ‘sexual intercourse without consent’. The perpetrator, clearly, took advantage of the state of the

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which are important indicative circumstances that prove the credibility of the victim's testimony.’ - 1 Kž 119/17-7, 10 May 2017, p. 5 Such *rationale* creates unnecessary ‘hierarchy’ among the different types of rape and produces an additional stigma for the victims of anal rape.

<sup>292</sup> *Op. cit.* (note 289), p. 5

<sup>293</sup> Municipal Criminal Court in Zagreb, KO-1628/13, 16 August 2013, p. 1

victim's infirmity (as she was asleep) and from a gender sensitive approach his act undoubtedly amounts to rape. Moreover, due to the low prescribed penalties for 'sexual intercourse without consent', the judge only 'sentenced the perpetrator to seven months' imprisonment, which will not be enforced if the defendant does not commit a new criminal offense within two years of the verdict being enforced.'<sup>294</sup>

The next case, decided in 2015, was more complex. As a matter of fact, sexual violence cases are delicate because *inter alia* institutions are faced with the victim's account of the story against the perpetrator's version of events. In this concrete case the County Court of Zagreb eventually gave trust to the victim's recollection of events, however, then, in my opinion, the case needed to be punished as rape, and not as 'sexual intercourse without consent'.

The perpetrator and the victim have met in a club, and later she followed him to his car where 'He immediately pushed her into the recumbent position with the pressure of his hands, while the victim immediately told him not to do so. Because of the shock and fear that the defendant will beat or injure her, she did not physically resist, but she was repeatedly saying 'don't'... He was trying to spread her legs, and when she tried to resist he squeezed her neck... then lied to her with full weight of his body and against her will put his penis in her vagina, penetrated and ejaculated, while she was sobbing and repeating 'it hurts me, it hurts me.'<sup>295</sup>

In order for the act to be trialed as rape, current Croatian jurisprudence requires occurrence of force and/or threat. In this case the perpetrator used physical force and moreover, the victim verbally resisted during the attack. However, the victim's verbal resistance was not sufficient for the Court, as well as the applied force was evidently not strong enough to amount as

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<sup>294</sup> *Ibid.*, p. 2

<sup>295</sup> Municipal Criminal Court Zagreb, KO-226/14, 11 September 2015, p. 2

rape. The County Court briefly reflected how it is ‘logically and lively that the perpetrator’s act caused the victim a state of shock... To that trauma she only reacted consequently by uncontrolled crying after returning to the club and when she found herself in the safe environment of her friends.’<sup>296</sup> The perpetrator tried to present intercourse as being the consensual one. Among different presented evidences, the County Court cited different witness statements. In her statement, the victim was clear that she did not provide physical resistance because she wanted to escape from any more serious consequences, however she unambiguously added ‘that it was clear from her the color and tone of her voice that she did not want to have an intercourse.’<sup>297</sup> Clearly, the perpetrator was deaf to the girl’s ‘no’ and/or equated ‘no’ with ‘yes.’ The defense was endlessly asking witnesses and the victim to describe her ‘intimate’ way of dancing,<sup>298</sup> her drinking and questioned why she followed him to his car. The defense asked the victim’s friends to describe the victim’s typical behavior during their night-outs. It is problematic that the Court allowed such questions because unmistakably their only purpose was just to discredit the victim (and, moreover, it is not relevant how she intimately behaves outside that particular evening). A friend described the victim’s night-life *persona* as being ‘a freer than the (rest) three of them so it can happen that she speaks with other people in the club, dances with unknown young men, and during dance sometimes exchange kisses.’<sup>299</sup> Such inappropriate defense’s tactics aimed to show the victim as promiscuous and that therefore the disputed intercourse was eventually consensual. The victim was again crystal clear in stipulating that she just ‘wanted to meet the perpetrator better outside the club, kiss and hug him a bit, but nothing more than that.’<sup>300</sup> When it comes to the (unnecessary)

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<sup>296</sup> *Ibid.*, p. 14

<sup>297</sup> *Ibid.*

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.*, p. 7

<sup>300</sup> *Ibid.*, p. 6

description of the victim's 'intimate dancing' in the court's file, even if they were indeed touching and kissing (which was also disputed), it does not imply that the victim wanted for the intercourse to happen as well. Furthermore, the County Court improperly reflected on how it is 'unconvincing and inanimate' that the victim would report the defendant for the rape 'especially since he in his defense does not even attempt to indicate the motive of the injured party to falsely report him.'<sup>301</sup> With such casual comment, the Court corroborates the dangerous myth of vindictive women who eagerly report rape due to some hidden motive. Again, in the same tone, the Court emphasized how there is 'no single circumstance which would cast doubt on her testimony or which would indicate that the injured party had some personal or inappropriate interest for such reporting, especially due to the fact that she did not know the perpetrator from before.'<sup>302</sup>

Although it is positive that the County Court resisted to the defense's unhidden attempt of victim-blaming; still it made a serious mistake in characterizing described act as 'sexual intercourse without consent.' Also, the received penalty was low - one year of imprisonment, which 'would not be enforced if the defendant does not commit a new criminal offense within four years of the verdict being enforced.'<sup>303</sup> (conditional sentence, according to Article 56 of the *Criminal Code*)

The thin line between crimes of rape and 'sexual intercourse without consent' played a role in the next case as well. The victim refused the defendant's (her ex-boyfriend) request to satisfy him orally, 'whereupon the defendant, in an attempt to satisfy his sexual urge, suddenly

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<sup>301</sup> *Ibid.*, p. 14

<sup>302</sup> *Ibid.*, p. 14 The same reasoning was used in case 23 K-27/15-26, p. 5, while in 23 K-9/16-100 the County Court Varaždin additionally noted 'how the injured party does not possess intellectual capacity to (falsely) construct incidence.' In that case the injured party was a person with a diagnosed lower mental capacity. - 03 March 2017, p. 5,7

<sup>303</sup> *Ibid.*, p.2

shifted his body on the injured party with the intention of engaging in sexual intercourse, by taking advantage of the state of her shock.<sup>304</sup> He has held firmly her hands, and she tried to resist him ‘*not strongly*’ by saying she does not want the intercourse.’<sup>305</sup> After the unwanted intercourse, the victim yelled at the perpetrator, and there was a verbal and physical conflict in which her body and head were injured. Whether due to the fact that she did not resist (physically or verbally) ‘*strongly*’ enough or that the physical assault was only *after* the intercourse, the County Court trialed and convicted the perpetrator for the ‘sexual intercourse without consent.’ This is the rare case in which the victim insisted on the damages for her suffering (the payment of an amount of 80,000 HRK, approximately 11 000 EUR), but she was informed to fill a new lawsuit with this claim.<sup>306</sup> In this case the perpetrator was convicted for the one-year imprisonment, however, again he was sentenced conditionally (if he will not commit new offence in the next five years).<sup>307</sup>

Three analyzed cases prove how women’s rights NGOs were right in expressing their dissatisfaction with the crime ‘sexual intercourse without consent.’ Firstly, perpetrators are convicted of low and inappropriate conditional sentences. Moreover, in two out of three cases perpetrators used physical force against victims, however, these cases suggest that the expressed force was evidently not ‘strong enough’ for Zagreb’s Municipal Court to amount for rape.

## 2. Assessment of the Victim's Credibility and Character

Case 20 K-41/14-109 brings a nauseating assessment of the victim’s credibility, through the prism whether there was a rape. Eventually, the court acquitted the perpetrator, since ‘the testimony of the injured party must be wholly truthful and credible... During the course of the

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<sup>304</sup> Municipal Criminal Court Zagreb, 20. K-1043/15-20, 9 October 2015, p. 2

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.*, p. 2

evidence, it was established that the victim's testimony was not wholly true, indeed, that it was false and therefore the court could not conclude that it was precise because the victim persistently claimed that she had been raped, that in that part her testimony was true.'<sup>308</sup> In this case, the County Court in Varaždin could not conclude beyond reasonable doubt that there was a rape and clearly took certain inconsistencies in the victim's testimonies to undermine her credibility. The biggest inconsistency was whether there was sexual intercourse between the alleged perpetrator and the victim prior to the alleged rape. While the victim insisted that there was not any, it had seemed that the perpetrator payed the victim multiple times for sex. When it comes to the alleged rape, the County Court cold-heartedly noted that 'what exactly happened on a critical day, only they know. Whether the defendant was rougher to the injured party that time than usual, so she perceived it as rape, or raped her on that occasion, one can only speculate.'<sup>309</sup> The Court continued by trying to disassociate itself from the rape myth; 'this does not mean that a person who otherwise has regular sexual relations with another person cannot be raped by that person.'<sup>310</sup> Nevertheless, the Court added that the victim did not suffer PTSD and soon after the alleged rape has met her new husband and became pregnant. It seems to me that by emphasizing those facts, the Court in subtly way implied that 'the real' rape victim is not supposed to 'move on' so easily if rape did indeed happen. Moreover, it is problematic that the Court tried to belittle the fact that the perpetrator was the recidivist (convicted for rape, attempt to rape and fornication) by (unconvincingly) concluding this fact 'does not mean that he committed this criminal act.'<sup>311</sup>

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<sup>308</sup> County Court Varaždin, 20 K-41/14-109, 17 March 2016, p. 10

<sup>309</sup> *Ibid.*, p. 17

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*



The County Court in Varaždin did not find a ‘reliable basis’ to conclude that the minor raped his colleague at the birthday party.<sup>312</sup> This case proves how it is a hard task for courts to accurately reconstruct what happened. It seems, however, that the Court based its judgment on a measure of how a ‘real’ victim ought to behave. The Court held that ‘the differing description of the defendant's reactions is not surprising given the passage of time from the event to the witnesses’ testimonies.’<sup>313</sup> Yet it is problematic that it did not allow the same benefit for the victim when she was confronted with smaller inconsistencies in her two testimonies. Moreover, the County Court was openly skeptical of the fact that the victim reported the alleged rape six months after the event, ‘triggered by certain external circumstances unfavorable to her.’<sup>314</sup> The victim negated one testimony by stating that the witness was under the influence of marijuana. In response, the Court bluntly added; ‘then, compared to it, there is far more ground for the same reason to doubt the testimony of the injured party,’<sup>315</sup> since she drank and smoked more than she first admitted. The County Court of Varaždin gave itself the right to imply how the victim should behave. First, for the Court, ‘lying in the same bed is indicative of the conclusion about the voluntariness of sexual intercourse, especially since the victim, if she just wanted to get some rest, could go to her home which is only 3 minutes away.’<sup>316</sup> The victim said she tried to ‘free herself by moving from him on a bed’, but the Court dubiously contended that ‘it is not justifiable to expect that the perpetrator would have reason to understand her moving as an absence of consent.’<sup>317</sup> Furthermore, the Court coldly assessed the victim’s crying in the following way; ‘it is not clear *even in her version* whether

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<sup>312</sup> County Court Varaždin, 2 Kzd-6/16-15, 7 February 2017, p. 12

<sup>313</sup> *Ibid.*, p. 10

<sup>314</sup> *Ibid.*, p. 11

<sup>315</sup> *Ibid.*, p. 7

<sup>316</sup> *Ibid.*, p. 8

<sup>317</sup> *Ibid.*

crying was an expression of her opposition to the intercourse or a consequence of painful penetration.<sup>318</sup> (emphasis added)

Another straightforward case is 2 K-4/12-74. Here, the victim was *tempore criminis* only 14. The perpetrator drugged her and committed a prolonged act of rape, for which he received four years imprisonment. The County Court in Varaždin came to an interesting conclusion, according to which the perpetrator's act of giving marijuana to a minor was considered aimed 'to disable the victim for relevant resistance, in which he succeeded, so exactly giving the marihuana to her represents the application of force over her.'<sup>319</sup> The Court resolutely disabled any attempt of victim-blaming and emphatically noted (based on the victim's psychiatric assessment) that there are certain intersectional grounds – her age, low intellectual status (her intellectual disabilities) - that need to be taken into account, especially in comparison to the perpetrator's age (44) and experience. Obiter, it is relevant for this thesis; namely because in his testimony, the victim's brother added that he 'did not ask the victim what happened while she was absent, because it is usual that about *these things only women speak*.'<sup>320</sup> (emphasis added) Such a statement speaks for itself; rape (referred euphemistically as '*these things*') is still a taboo topic in Croatian society. Similarly, victims of rape are often confronted with distrust, even from people close to them. The sad recount of one victim evidences how her father and neighbors did not believe her at first about the rape, while her grandma even told her to move away and into her father's house. Her father was skeptical because 'she was not crying and was not in some special shock, but it was noticeable how she did not like whatever happened to her'<sup>321</sup> Additionally, she was anxious to report the

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<sup>318</sup> *Ibid.*

<sup>319</sup> County Court Varaždin, 2 K-4/12-74, 28 May 2013, p. 12

<sup>320</sup> *Ibid.*, p. 9

<sup>321</sup> County Court Varaždin, 19 March 2015, p. 5

perpetrator because ‘she was afraid not to be beaten by him, because she was 11 years in a violent marriage and is still suffering consequences of beating.’<sup>322</sup> This case shows how there are certain societal expectations and pressures of how the ‘real rape victim’ should behave in order to be trusted. In a child rape case tried by the County Court in Pula, the perpetrator’s sister was telling everybody ‘to leave her family alone, that the injured party sleeps with everybody and that she will tell that to her father; further, she was taking pictures of the victim when she finally went out after the rape and said that those will serve as ‘[further] evidence at the court.’<sup>323</sup> This illustrates how victims are easily blamed for what happened to them and that they need to endure significant pressures, which adds to their trauma and secondary victimization. Victims could expect much more empathy (even from courts), especially when they suffer from ‘psychological problems resulting from the rape; if they didn’t display these problems, that was seen as problematic itself.’<sup>324</sup> Also, it is repeatedly emphasized in judgments that if victims are diagnosed with PTSD,<sup>325</sup> courts sympathize more with victims who reacted to rape as it in these situations, such a reaction is expected from them.

It is praiseworthy when courts themselves decide to deconstruct some of the more common rape myths. For example, in one judgment the County Court in Varaždin took a firm stance by stating how ‘jurisprudence has long been of the view that the existence of visible injuries to the injured party is not decisive for the crime of rape committed by force.’<sup>326</sup> Likewise, the County Court in Pula refused the attempt of the defense to question the fact that the victim had not immediately reported the rape, ‘Bearing in mind that the injured party is 15 years old, it is

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<sup>322</sup> *Ibid.*, p. 4

<sup>323</sup> K-15/14, (note 281), p. 6-7

<sup>324</sup> *Op. cit.* (note 6), p. 89

<sup>325</sup> In overall 3 analyzed cases: K-15/14, p. 10, K-12/14, 26 September 2014, p. 17 and 21

<sup>326</sup> County Court Varaždin, 23 K-9/16-100, 3 March 2017, p. 12 Similar conclusion was reached in another judgment by the same court in 23 K-29/15-19, 17 December 2015, p. 10

acceptable that she firstly wanted to go home to her mother, and did not accept suggestion of the unknown person to take her to police.<sup>327</sup> In the same case, the court valued another defense motion as being ‘irrelevant, not in connection to this offense.’<sup>328</sup> Namely, the defense wanted to call as a witness a man who alleged that the victim’s mother threatened to report him for the rape of her daughter. By calling him as witness, the defense probably wanted to portray the victim and her mother as deceitful and revengeful. In another case, the County Court in Pula dismissed the perpetrator’s claim that the victim falsely reported rape by stating that she ‘exposed herself to painful and excruciating testimony that lasted several hours on two occasions, which provoked her emotional reaction in the form of crying.’<sup>329</sup> The same court in another case summarized that for the existence of rape ‘it is not necessary for the victim to defend herself, but one clear and decisive ‘no’ is enough for the person to express its opposition to the sexual intercourse.’<sup>330</sup> Besides, the court showed an understanding for the fact that the victim had not immediately mentioned the rape to her closest friends whom she had met afterwards; ‘this fact is totally irrelevant and does not diminish the credibility of her testimony... Namely, it is common for victims of rape to feel discomfort and shame and avoid talking about it.’<sup>331</sup> Moreover, the court was clear in emphasizing that the fact that she texted to meet the perpetrator, ‘does not mean that she consented to the sexual intercourse’<sup>332</sup> and therefore is irrelevant. One particular part of the court’s reasoning is crucial; ‘...even if she wanted the intercourse at the beginning, she clearly changed her mind later, to which she is entitled to, so her behavior does not exculpate the defendant.’<sup>333</sup> Such a commonsense *rationale* rejects the widespread rape myth of so-called ‘subsequent consent.’ However, such

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<sup>327</sup> K-15/14, p. 7

<sup>328</sup> *Ibid.*, p. 11

<sup>329</sup> K-12/14, *op. cit.* (note 284), p. 20

<sup>330</sup> County Court Pula K-26/15-397, p. 28

<sup>331</sup> *Ibid.*, p. 31

<sup>332</sup> *Ibid.*, p. 34

<sup>333</sup> *Ibid.*

‘unprovoked’ judicial explanations regarding certain specifics of rape are unfortunately rare in other national judgments.

K-21/14 is the finest example among those analyzed in which the County Court in Pula, in a total of 69 pages, diligently and explicitly refused many attempts of the victim-blaming. Certain witnesses, among them the perpetrator, to the detriment of his employee (waitress), his wife and their friends, earnestly tried to depict the victim with the following ‘eloquent’ expressions; ‘a promiscuous person and ‘an easy woman’, a pathological liar, drug addict, even a drug dealer, a person who is prone to blackmail, theft and revenge.’<sup>334</sup> To the contrary, they presented the defendant as ‘a positive person who would never do such a thing.’<sup>335</sup> (multiple (3) rapes, emphasis added) However, the court was aware that the aim of these sound expressions were to ‘discredit her testimony and present her as someone who falsely accused the defendant.’<sup>336</sup> Moreover, this is the case of which the Supreme Court unduly refers as being ‘too-detailed.’<sup>337</sup> However, it is positive that the same court empathetically noted that ‘the conduct of the injured party, before and after filing a criminal complaint, does not diminish the value of her courageous, consistent and logical testimony.’<sup>338</sup> As a side, the County Court in Pula added that there was no motive for the injured party to falsely testify, moreover since the defendant was in a friendly relationship with her father, he is her fellow citizen and ‘clearly as a young person at the threshold of life would not unnecessarily expose herself to defamation, especially due to the fact that her material existence was dependent on a salary which she got from the defendant.’<sup>339</sup>

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<sup>334</sup> County Court Pula, K-21/14, 5 December 2016, p. 22

<sup>335</sup> *Ibid.*

<sup>336</sup> *Ibid.*, p. 23

<sup>337</sup> Kž 106/2017-12, p. 4

<sup>338</sup> *Ibid.*, p. 5

<sup>339</sup> *Ibid.*, p. 29

Further, the court reasonably accepted that she had ‘second thoughts’ about the withdrawal of criminal charges (she was even financially bribed by the perpetrator to do so) due to her challenging life circumstances: ‘she was left without any support of her parents since they avoided any conversation about the topic of rape, and even from her friends; she was exposed to psychic pressure and worried for her own existence and overall for her future, so she thought that the withdrawing charges would produce necessary peace in her community.’<sup>340</sup>

The aforementioned courts did not validate the outdated attitudes about marital rape. However, it is clear that some perpetrators stereotypically perceive women as their property; ‘he was saying her that they must have sexual intercourse because they are husband and wife, he will slaughter her if she tells anybody, he will bring three guys to fuck her, that she does not know what he is capable for and that she made a pact with the devil.’<sup>341</sup>

### 3. Sentencing: Aggravating and Mitigating Circumstances

Mitigating and aggravating circumstances represent a factor for consideration in the sentencing phase of the criminal process. The most common (and unproblematic) mitigating circumstance is the perpetrator’s ‘earlier non-conviction’, which is sometimes described as the proper functioning of life; ‘the accused has until now functioned properly in his life.’<sup>342</sup>

In KO-226/14 (‘the sexual intercourse without consent’), the County Court in Zagreb found impermissible mitigating circumstance simply because the perpetrator ‘married and went to live and work in Germany.’<sup>343</sup> There is no (scientific or any other plausible) correlation

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<sup>340</sup> *Ibid.*, p. 60

<sup>341</sup> Kov-43/14-94, *op. cit.* (note 282), p. 2

<sup>342</sup> *E.g.* in KO-226/14, p. 15

<sup>343</sup> *Ibid.*, p. 15

that marriage and moving abroad would decrease (his) possibility to sexually assault again. In the same case, it was very controversial that the Court, in reinstating the perpetrator's earlier non-conviction, described the committed offence as '*an excess* in his previous life.'<sup>344</sup> (emphasis added) Such a casual comment trivializes the nature of sexual violence and its far-reaching impacts for the victims.

In another 'sexual intercourse without consent' case, mitigating circumstances were 'sincere and complete confession of the crime, the fact that the perpetrator expressed regret for the crime, was the father of two under-aged children.'<sup>345</sup> In the same case, the Municipal Criminal Court in Zagreb considered the fact that the perpetrator is a 'multiple convicted person, being convicted in three different countries for three different crimes, *inter alia*, for the crime of bodily harm, which offense has the character of the use of force, and which nonetheless indicates that the commission of this crime is not an *excess* in his life,' An aggravating circumstance. (emphasis added)<sup>346</sup> As in the previous case the Municipal Criminal Court again degraded the victim's experience by comparing sexual violence with the mere excess. A gender-sensitive adjudication requires judges to refrain from 'careless and/or inappropriate use of language'<sup>347</sup> and degrading or belittling comparisons.

Unsurprisingly, for the perpetrators of sexual violence, the aggravating circumstance is when they are a recidivist of sexual violence. This is seen in four of the analyzed cases.<sup>348</sup> A sexual violence recidivist of three occasions, in one case, was ordered compulsory

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<sup>344</sup> *Ibid.*, p. 16

<sup>345</sup> *Op. cit.* (note 282), p. 4

<sup>346</sup> *Ibid.*

<sup>347</sup> *Op. cit.* (note 255), p. 29

<sup>348</sup> 2 K-4/12-74, p. 15; 23 K-27/15-26, p. 6; 4 K-19/16-32, p. 4; 23 K-9/16-100, p. 13

psychiatric treatment three times.<sup>349</sup> The County Court in Varaždin warned that ‘the previous convictions did not fulfill the purpose of punishment given that the accused repeated the criminal offense two years after he had been released from prison.’<sup>350</sup> Nevertheless, the court did not order the same measure again, since the perpetrator was not *tempore criminis* of ‘severely reduced criminal responsibility’, which is one of the legal prerequisites for the imposition of the measure, according to the Article 68 para. 1 of the *Criminal Code*.<sup>351</sup> In case 23 K-9/16-100, the perpetrator even raped the same victim as before (for the previous rape he was convicted for the one year of the juvenile imprisonment).<sup>352</sup> These cases show how the Croatian criminal justice system is ineffective in its distribution of rehabilitation and resocialization measures for the perpetrators, as well in the field of prevention.

Case 23 K-9/16-100 is a rare example in which the Court took into account, while sentencing, the impacts of the crime on the victim. The County Court of Varaždin showed empathy for the victim’s severe mental state, namely that ‘she [had] needed medical help, has problems with sleeping, every night dreams that the perpetrator is chasing her, is afraid of going out anywhere and is afraid that someone would try to rape her again.’<sup>353</sup> For the County Court in Pula an aggravating circumstances was that the ‘victim [d] health issues and [was] continuously being treated.’<sup>354</sup> The same court in another rape case noted that ‘the victim had to leave the place where she lived and until that moment as a young person she needed to cope with all the negative connotations typical for such cases in the smaller living environment, of which the defendant was

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<sup>349</sup> 23 K-25/13-58, p. 1

<sup>350</sup> *Ibid.*, p. 6

<sup>351</sup> *Ibid.*, p. 7

<sup>352</sup> County Court Varaždin, 23 K-9/16-100, 3 March 2017, p. 13

<sup>353</sup> *Ibid.*, p. 6

<sup>354</sup> K-15/14, p. 15



well aware.’<sup>355</sup> Although other victims expressed similar everyday adversities, the other mentioned courts failed to reflect on the victim’s difficulty coping with the long-lasting consequences of her experience. Moreover, in the cited case,

that was the first intercourse [for the victim], it came to the defloration of the injured party, then circumstance that she had a period, but he nevertheless was seeking for anal and vaginal intercourse. After the committed offense, he was threatening to kill her if she reports what he did to her, and was seeking her telephone number during intercourse and was calling her later.<sup>356</sup>

The court’s standing is two-fold: in a benevolent manner, meaning that the explained circumstances provoked additional trauma to the sexually inexperienced child. On the other hand, as Ivana Radačić sharply concluded, as

emphasizing virginity as an aggravating circumstance may suggest that there are different types of rape with regard to whether the victim is a virgin, or that the sexual freedom of virgins is more valuable than the sexual freedom of other women... Virginity should not be assessed as an aggravating circumstance because it supports norms of sexuality according to which women should be chaste.<sup>357</sup>

Other mitigating circumstances include where perpetrator is ‘a person with lesser means’,<sup>358</sup> ‘of a younger life age’,<sup>359</sup> ‘the victim of family violence during childhood’,<sup>360</sup> ‘suffers from disorder with dissociative and narcissistic subtype characteristics’,<sup>361</sup> or that the *tempore criminis* was ‘reducibly liable.’<sup>362</sup> External circumstances, such as the death of the perpetrator’s father, are also accepted as a mitigating factor.<sup>363</sup> Additionally, courts took into account the perpetrator’s *modus operandi*. Therefore, for the County Court in Varaždin the aggravating

<sup>355</sup> K-21/14, *op. cit.* (note 334), p. 65

<sup>356</sup> *Ibid.*

<sup>357</sup> Radačić, *op. cit.* (note 15), p. 155 and 156

<sup>358</sup> County Court Varaždin, 4 K-19/16-32, 23 March 2017, p. 4

<sup>359</sup> K-15/14, p. 15

<sup>360</sup> K—12/14, p. 27

<sup>361</sup> *Ibid.*

<sup>362</sup> *Op. cit.* (note 278), p. 6

<sup>363</sup> *Ibid.*

circumstance was that ‘the perpetrator abused the drug at the expense of the minor victim in order to make it easier to manipulate her’<sup>364</sup> or ‘extreme persistence in the commission of the crime.’<sup>365</sup> In the same manner, the court considered the fact that the ‘perpetrator illegally entered into the victim’s house during the night, [harmed] her privacy.’<sup>366</sup> The County Court in Pula graphically addressed as an aggravating circumstance how, the perpetrator penetrated the victim’s vagina and anus with his fingers, ‘lifting her in such position and mocking her sport activity (fitness), which besides expressed callousness and causing the intense pain, represented additional humiliation of the accused party.’<sup>367</sup> It is positive that the same court emphasized in detail how the perpetrator of rape abused her trust as ‘an employer, older person, and father’s friend, and a safety she thought to have on her job; as he misused feature of dominant, authoritative and aggressive employer, who like a mature person over 45 years-old with a wife and two children, raped life inexperienced injured party aged 21.’<sup>368</sup> In another rape case decided by the same court, it improperly referred to ‘the brevity of violent sexual contact’ as a mitigating circumstance, having no regard to his aggravating actions towards the victim after the commission of the crime (that include kicking her out of the car and left naked on the road; threatened to throw a stone at her).<sup>369</sup> Those actions caused the victim to suffer additional humiliation, as well as a fear for her life in a situation of helplessness and sustained injuries.

Undoubtedly, a problematic mitigating circumstance is that the perpetrator ‘was a participant in the Homeland War, for which he was honored.’<sup>370</sup> Another shocking mitigating

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<sup>364</sup> *Op. cit.* (note 319), p. 15

<sup>365</sup> *Op. cit.* (note 268), p. 6

<sup>366</sup> County Court Varaždin, 19 March 2015, p. 10

<sup>367</sup> K-21/14, *op. cit.* (note 334), p. 66

<sup>368</sup> *Ibid.*

<sup>369</sup> County Court Pula, K-26/14-397, 9 December 2016, p. 38

<sup>370</sup> *Ibid.*

circumstance – shocking because of the fact that it was considered to the benefit of the defendant and detriment of the victim, as opposed to the other way around – is that the perpetrator was ‘under the influence of alcohol.’<sup>371</sup> As already warned by Ivana Radačić

It is not clear why and how the participation in the Homeland War is relevant... It is also questionable why the perpetrator’s alcohol intoxication is used as a mitigating circumstance in cases where there was no established perpetrator’s diminished mental capacity, especially if we know that the intoxication presents one of the risk factors, so such behavior should be prevented (including by conviction), not justified.<sup>372</sup>

The most problematic mitigating circumstance was that he ‘committed criminal offence against the injured party with whom he lived in an extramarital union that lasted more than a year, which was turbulent and marked by disputes. Both of them were prone to violent behavior, which led to misdemeanor proceedings.’<sup>373</sup> The fact that the intimate partner’s violence escalated to a novel level (in a form of attempted rape) should not be, by any means, justified by the mere fact that their relationship can be characterized turbulent. By assessing violence in relationship as a mitigating circumstance, the court (un)consciously approved the dangerous attitude according to which, the victim was jointly responsible for the occurrence of violence, that she somehow provoked it by her behavior.

#### **iv) ‘Balkan Model of Rape?’: Gender Stereotypes in the Media Representation of Sexual Violence**

The Croatian media often report VAW in a sensationalist manner; without considering how their judgmental writing style affects the victims and their families. The same is true for the victims of sexual violence; who are particularly affected when the media publicly

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<sup>371</sup> *Op. cit.* (note 352), p. 13

<sup>372</sup> Radačić, *op. cit.* (note 15), p. 153

<sup>373</sup> County Court Varaždin, 23 K-29/15-19, 17 December 2015, p. 11

questions their behavior (shaming and blaming method); instead of focusing on the perpetrator. Moreover, the media has the power to ‘...significantly influence public attitudes regarding gender stereotypes and rape myths.’<sup>374</sup> Therefore, part of the ongoing project of the Gender Equality Ombudswoman is to widely implement the *Media Code with Guidelines for Sensitized Reporting on Violence Against Women and Femicide*.<sup>375</sup> In the following section, I will include some typical stories about sexual violence from the leading Croatian media; with the purpose of examining whether such guidelines are needed.

The Gender Equality Ombudswoman repeatedly notes in her report that, when reporting the rape, it is often suggested underhandedly that the party ‘just’ somehow went wrong or that their sexual relationship was not entirely voluntary (while described circumstances indisputably amount to the rape). The media is keen to underline, and thereby undermine, that the girl was drunk; or that she was dating the boy/s before, then rejecting him/them. The Ombudswoman was right when she warned that the direct effect of such texts is that they question the word of a raped woman. Therefore, she urged journalists who write about sexual violence to ‘...pass special education through which they will learn more about the problematics of rape, statistics, victim’s trauma, reasons and types of rape that show that rape is primarily about domination and control, and not sexuality, especially not healthy sexuality that due to alcohol or unrestrained parties went wrong.’<sup>376</sup> However, in 2018, she acted in the case which was internally

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<sup>374</sup> Stevenson, Kim: ‘*She never screamed out and complained*’: *Recognizing gender in legal and media representations of rape in op. cit.* (note 63), p. 121

<sup>375</sup> *Media Code* is part of the ongoing comprehensive EU project funded by the European Commission ‘*Building more effective protection: transforming the system for combating violence against women*’ No: JUST/2016/RGEN/AG/VAWA/9940, which is led by the Gender Equality Ombudswoman. – Sudar, Nevenka (editor), 2019

So far 13 media outlets signed it (according to the latest available data from 8 March 2019). Available on: <https://slobodnadalmacija.hr/novosti/hrvatska/clanak/id/592676/ona-nije-suodgovorna-za-silovanje-njezin-identitet-se-ne-otkriva-i-ne-propitkuje-se-njezin-privatni-zivot-hrvatske-medijske-kuce-potpisalestrongnbspstrongkodeks-za-izvjestavanje-o-nasilju-prema-zenama>, accessed on: 13 August 2019

<sup>376</sup> *Gender Equality Ombudswoman's 2013 Work Report*, Media Chapter, Zagreb, March 2014, p. 4

documented as PRS-05-02/18-21. The journalistic article was about the rape of three foreign women during the Ultra Europe 2018 music festival in Split. However, the article overemphasized that the victims were drunk. So, the Ombudswoman warned that the move of focus, from the criminal act of rape to the state of victim's drunkenness, seriously and problematically diminished the significance of the specific crime of rape and the conviction of her perpetrator.<sup>377</sup> In the same way she continued; 'the media must be aware that when reporting about the degree of drunkenness of a raped woman, they reinforce stereotypes and prejudices according to which a raped girl or woman in some way provoked what happened to her, and therefore deserved it.'<sup>378</sup> Furthermore, such reporting does not comply with Article 17 of the *Istanbul Convention*. As a result of the Ombudswoman's warning, the newspaper's chief editor apologetically required journalists *pro future* to 'they should not emphasize the victim's intoxication as the primary or the bigger thing than the act of their raping.'<sup>379</sup> It is troublesome and disturbing that such comment is obviously not self-evident to many Croatian editors and journalists, and it speaks for itself of the education about GBV needed in Croatia.

In May 2015, Croatian headlines, online and offline, were full of horrifying videos and images of

... a young woman, a fashion model and a TV personality, who was drugged, gang-raped and the whole ordeal was filmed and released to the public. The whole thing was presented as a sex-scandal, something done for purposes of self-promotion and, at least at first, never as an act of sexual violence. Public blaming and shaming was on her, and not on perpetrators who proudly presented to the public their shameful act.<sup>380</sup>

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<sup>377</sup> *Op. cit.* (note 228), p. 259

<sup>378</sup> *Ibid.*

<sup>379</sup> *Ibid.*

<sup>380</sup> *Op. cit.* (note 375), p. 8

As the Gender Equality Ombudswoman accurately reported, the case received the worst type of misogynistic public response (even through headlines and especially through the brutal online comments section). Although she was clearly drugged and appeared quite disoriented in videos that became viral *hits*, the woman was publicly mocked (her name Tina was renamed to the nickname *Threena*, insinuating that she was part of a threesome), while the perpetrators were somehow glorified (as those who just used ‘the opportunity’, in accordance with the troublesome ‘she got what she deserved’ attitude/narrative). Her new ‘nickname’ is still widely connected (‘stuck’) with her (although she disappeared from the public since the scandal erupted), while it is not known what happened to the perpetrators of the sexual assault. Such unprecedented (public) victim-blaming undoubtedly added to her secondary victimization

It is not unusual to read a headline like the following in Croatian black chronicle in April 2018 ‘She accused him of rape because he found a new girlfriend.’<sup>381</sup> This ‘juicy’ headline insinuates that women falsely accused men of rape because of jealousy, basically that she had reported rape as an act of personal revenge. Though this might happen in the rare occasion, it is not the place of the media to imply that this is the majority of situations and thereby discredit all women raped by an ex-partner. In this particular case, the County Court in Zadar acquitted the man (age 31) from Zagreb after a six year long criminal procedure. He was accused of three different criminal acts; rape, unlawful deprivation of liberty and the death threat to his (ex) girlfriend.

The newspaper article (based on the inserts from the judgement) is full of gruesome descriptions of violence that his (ex) girlfriend was alleged to have suffered.<sup>382</sup> However,

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<sup>381</sup> Available on: <https://www.zadarskilist.hr/clanci/05042018/optu%C5%BEila-ga-za-silovanje-jer-je-na%C5%A1ao-drugu-djevojku>, accessed on: 6 August 2019

<sup>382</sup> ‘He repeatedly kicked the injured party and then pushed her back on the bed, torn her bra and sweatshirt, stripped off her underwear, and after breaking her resistance despite her screaming and crying, in order to sexually exploit her,

the judge concluded that the victim's/the injured party statement was 'not living and therefore unconvincing', including her denial that they were in a love affair at the time of the alleged incrimination. In my perspective, the mentioned judgment (at least parts which were transmitted in the local newspaper) is full of harmful gender stereotypes. The male judge reasoned that the alleged victim and the perpetrator had surely been in a relationship solely '...because it is really difficult to expect that otherwise the defendant would have sought her a job in the city of Novalja or that she would have responded to such a call.' Moreover, he questioned her behavior after the alleged rape, as she '.... stayed in a room with a balcony and window after the rape, in a place where there are so many people at all times of the day, and she did not consider it necessary to call for help from passers-by, even if they would let her out of the locked room.' He continued his reasoning by questioning why did she not report the rape immediately (especially since the police station was nearby), and also found her testimony that she did not do so out of fear unconvincing. The judge concluded that her testimony was inconsistent and contradictory, and that her reporting of the alleged crime was probably motivated by jealousy because the defendant had found another girl.

Concerning the alleged victim's late reporting of sexual violence, the judge completely dismissed many independent studies suggesting that the victims cope differently with trauma and that therefore it is reasonable that some need a longer period to report the act. He wrongly assessed the behavior of an alleged victim against how a 'normal' woman ought to behave.<sup>383</sup> By concluding that she alleged rape and assault out of jealousy, the judge trivialized both rape as a complex crime as well as the victim's (woman's) motivation for reporting it. It is

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penetrated her sexual organ with his sexual organ. After 20 minutes he did it again in the same way as before, and due to the reason that the injured person was already psychophysically incapable of resisting, he repeated the act.' - *ibid.*

<sup>383</sup> *Ibid.*

inapprehensible how he rejects the victim's claim that they were not in a relationship, with the misogynic explanation (which targets men) that there would be no other reasons why a man would help the woman in finding job. Nonetheless, in this case, the discussed gender stereotypes are indeed those of the insensible judge. However, the newspaper also contributed to the (alleged) victim's blaming by choosing the provocative newspaper title.

In March 2019, the County Public Prosecution in the city of Karlovac indicted a local politician for rape. When he was asked about the indictment by the national media, the suspect eagerly stated; 'It is a complete lie, it is disgrace towards me... I won't say publicly, (!) but she is a prostitute. She always acted against me as a community leader, always wrote against me, I didn't pay any attention and there was one meeting over something and so... She took the opportunity, reported, and it is like that.'<sup>384</sup> The media headlines and covers were full of suggestive descriptions that blamed the victim, like the following one; 'It is a lie; she is a prostitute.' The woman's side of a story was rarely presented in the media, and moreover, she was to the wider (and mostly conservative and patriarchal) interested public presented as a liar and prostitute. When it came to her reputation, the suspect insisted that it is a common 'knowledge' that she is a prostitute. It is problematic that his wording and attitude (and media's willing transmission of it) clearly suggest that, if she indeed is a prostitute/sexual worker, then she cannot be raped (and thus does not deserve the State's protection). Another, more popular, myth was that she is not trustworthy as she was lying about the rape out of personal interest, just to 't[ake] him down' as a successful man. Presenting an alleged rape victim as a revengeful and lying prostitute deeply contrasts with the media guidelines on such sensitive issue. Several other guidelines have been

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<sup>384</sup> <https://slobodnadalmacija.hr/novosti/crna-kronika/clanak/id/592716/hdz-ov-nacelnik-optuzen-za-silovanje-on-tvr-di-to-je-potpuna-neistina-necu-javno-iznositi-ali-ona-je-prostitutka-stalno-je-bila-protiv-mene-onda-se-dogodio-jedan-kontakt>, accessed on 1 October 2019



violated as well, namely, - the victim's intimate life was questioned, and her personal identity was revealed, which adds to her stigmatization, especially since she lives in a small community. The guidance explicitly requires the media to protect the dignity of the victim in every case,<sup>385</sup> and this cannot happen if her personal life is scrutinized.

In September 2019, one of the most deliberated issues was the alleged rape of another powerful person, closely tied to the governing structures. The victim denounced the rapist in a popular investigative TV program, and it was clear that before rape occurred, she had reported that she was sexually harassed by him. 'Empathetically' her company (where he was a director), responded to the sexual harassment by giving her one free day.<sup>386</sup> After her 'outing', two other female victims followed her example and have spoken out about sexual violence and threats that they suffered by the same individual. Although the main political actors uniformly condemned sexual violence, some influential people (friends of the perpetrator) stated that they recognize an 'atmosphere of lynch.' Yet, one said that prior to her reporting, he 'believed [the victim] was a lady.'<sup>387</sup> Subtle reprimands and patronizing silencing confirms that the more politically or economically powerful the perpetrator is, the more vulnerable the victim will be. The saga went even further when the defendant's lawyer filed criminal charges against the journalist and the victim. According to the worrisome statement by the Croatian Journalist Society, 'Filing charges against journalists and critics has become, unfortunately, a praxis in Croatia. But now for the first time the defendant filed criminal charges against the victim, which is a precedent.'<sup>388</sup> The only positive outcome of the otherwise disturbing case is that it produced widespread (and clearly

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<sup>385</sup> *Op. cit.* (note 375), p. 3

<sup>386</sup> Available at: <https://www.telegram.hr/politika-kriminal/zrtva-damira-skare-i-ranije-je-prijavljivala-spolno-uznemiravanje-u-autoklubu-su-joj-rekli-da-uzme-slobodan-dan/>, accessed on 21 September 2019

<sup>387</sup> Journal 24 sata (24 Hours), 9 September 2019

<sup>388</sup> Journal 24 sata (24 Hours), 'Pod povećalom', 4 October 2019, p. 2

needed) debate and awareness about the pervasiveness of sexual violence in Croatian society in time for the legislative amendments to be introduced. Also, competent interlocutors who have experience in dealing with victims of VAW are increasingly being contacted to comment when such cases occur, in accordance with the issued media guidance.<sup>389</sup> Furthermore, in the analysis of ‘bigger’ cases, more and more references are made to the legal provisions, relevant statistics and research findings of GBV.

On the other hand, when it comes to the perpetrators of sexual violence, they are usually described with expressions such as peculiarly deviant, ‘monstrous’ or ‘manic’. Such reporting should also be avoided (as requested by the Media Guidance) because it alludes that the perpetrators of violence are some abnormal (and therefore rare). This is misleading since, in fact, statistics show that the perpetrators of sexual violence are, in most cases, well-known to the victims, frequently even their (step)fathers, boyfriends, employers, friends, neighbors, uncles, *etc.*<sup>390</sup> One Croatian article described in April 2017 how a woman was ‘unlucky’ because her new employer was ‘multiple convicted recidivist’ who raped her on her first day of work, and that police ‘saved her from his *predator*’s claws.’<sup>391</sup> Instead of questioning how is it possible for her employer to be a multiple (so far four times!) convicted rapist (what about his punishment(s), was he treated and if he was, then how?), the author of the article rather inappropriately focused on the victim, implying that there was only a ‘lack of (her) luck’ at stake. As concluded by Mithu Sanyal,

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<sup>389</sup> *Op. cit.* (note 375), p. 2

<sup>390</sup> ‘Public recognition of such deceptive stereotypifications and acceptance of the ‘real rape’ myth (that stranger rape is more deviant and prevalent than intimate rape), allow us to ‘distance’ ourselves from the fearful actuality: that in fact we are more at risk from partners and acquaintances. As Gear asserts, press representations of gender norms falsely reassure us that ‘ordinary’ people do not commit sex offences; we therefore need only fear the unrealistic stereotype of the ‘predatory stranger’. – *Op. cit.* (note 63), p. 122

<sup>391</sup> Available on: <https://www.libela.org/sa-stavom/8437-silovanje-popraceno-mizoginim-komentarima/>, accessed on 13 August 2019

the ‘downside’ of such ‘discussions of sexism in the media’ is that it tends to reproduce the same old stereotypes: hunter/prey, active/passive, powerful/powerless.<sup>392</sup>

Finally, sexual violence in Croatia became the most discussed topic in October 2019. Briefly, in a case resembling the shameful Spanish ‘*La Manada*’ (wolf-pack) case,<sup>393</sup> a 15-year-old girl was allegedly gang-raped for a period of one-year. The alleged perpetrators recorded the first rape and then blackmailed the victim that they would show the tape in school and/or to her parents. Under that threat, she was forced into (again recorded) sexual intercourse four more times. She was constantly threatened and even, several time, seriously beaten by one defendant, who was her ex-boyfriend. National outrage exploded after the judge from the County Court in Šibenik did not order pre-trial prison for the five defendants (although the girl was still not examined by the court about the gang-rape and they all live in the same village), and only three precautionary measures. As often happens in such cases, the perpetrator’s families started to put the blame on the victim.<sup>394</sup> However, after the public prosecutor’s appeal, the defendants were finally deprived of liberty and given pre-trial prison.<sup>395</sup>

It is Praiseworthy that this gruesome act provoked an unprecedented number of well-researched articles, serious TV-debates about rape and sexual violence, and successful protests under the slogan ‘*Justice for girls*’ (*Pravda za djevojčice*) in 15 cities, including in the capital, Zagreb.<sup>396</sup> On the other hand, the case produced massive outrage towards the alleged

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<sup>392</sup> *Op. cit.* (note 6), p. 203

<sup>393</sup> BBC World News ‘*Top court rules Wolf Pack gang were rapists*’ (21 June 2019), accessed 6 November 2019

<sup>394</sup> They protested in front of the court how ‘she settled them up, she provoked the act with her behavior’ and used photos from her Instagram account to discredit her. – Drakulić, Slavenka in Jutarnji list ‘*There is no motive for rape, that is act of proving power*’, 19 October 2019, p. 24

<sup>395</sup> Jutarnji list: ‘*30 days long pre-trial prison ordered for 5 young men*’, 18 October 2019, p. 7

<sup>396</sup> The Independent: ‘*Release of teenage gang rape suspects in Croatia sparks backlash*’, available on: <https://www.independent.co.uk/news/world/europe/croatia-gang-rape-teenager-suspects-police-release-kadar-a9162246.html>, accessed on 7 November 2019

perpetrators (some of them are minors) and the judge, to the extent that the defendants' names started to circulate online and many called for the rape of them and members of their families. The heated atmosphere escalated to death threats, after which the odious judge even received police protection. Even if one of the fundamentals of the criminal justice system, like the presumption of innocence, is put aside, such '*plebes*' justice can produce serious negative repercussions on the minor victim as well. First, it can facilitate her identification and the spreading of her story in a sensationalist manner which can easily provoke additional trauma. Although the majority of the population and broader supported the victim, conversely, some 'prominent' commentators publicly used the worst type of misogynic language. For example, an 'expert' comment from the psychiatrist, Gruben (well-known for his misogynic and anti-LGBTI attitudes), focused on describing the difference between the American and Balkan rape; 'According to the American model, rape starts after the women's 'no!' and you cannot insist any further, while if we move to us at the Balkans, the act of conquering is part of the 'willy-nilly', meaning if a man would immediately quit after a woman's first 'no', he would not be a man.'<sup>397</sup> His shockingly sexist analysis reproduces the stereotypical image of '*macho* Balkan' men who cannot control their sexual urges as opposed to sexually passive and submissive Balkan women. He referred to (Balkan's) male sexuality as being inherently violent, and yet again (as gender stereotypes in *Konstantin Markin* ruling), cited 'regional' rape myths are harmful both to women and men. In a similar sexist manner, an influential TV host, Aleksandar Stanković, asked feminist and public figure Jelena Veljača, where to draw the line between sexual harassment and courtship. Besides this harmful (but clearly popular) argument, Gruben went one step further when he suggestively added that for the victim, rape '...was a trauma, but the question is how interesting it was for

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<sup>397</sup> *Op. cit.* (note 384)

her.’<sup>398</sup> When asked why the pre-trial prison was not ordered, the Supreme Court’s judge Marin Mrčela cold-heartedly exculpated his colleague by stating; ‘As you put it, it means that they are now in the same room and that they surrounded her. Nowhere in the law is written – if there is a small environment, the pre-trial prison must be ordered.’<sup>399</sup> Feminists vocally opposed this unacceptable argumentation. In the heated public atmosphere surrounding this particular case, the NGO, Women’s Room, reported how they received an unprecedented number of threats.

It is commendable that the Croatian Media Guidance has been issued in the same month as the discussed CoE *Recommendation on Preventing and Combating Sexism*. It is a well written and wide-ranging text, however, due to the inherent complexity of sexual violence, maybe the better solution would be to have a separated document on reporting, as it is the case in neighboring Montenegro.<sup>400</sup>

As a final point, this analysis shows how such Guidance was indeed indispensable in Croatian context, and that editors and journalists are often also influenced by sexist gender stereotypes. Therefore, the Media Guidance represents a useful tool which will hopefully, with time, contribute to avoiding the manifestation of

Any sensationalism, shifting focus or suggesting that a raped person may be guilty of the violence perpetrated against him or her, in the public consciousness, mitigates the fact that rape is a physical and psychologically degrading experience that has long lasting and profound consequences on the raped person and that the act of rape it is not an expression of a healthy sexual urge, but the establishment of power and superiority over another person.<sup>401</sup>

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<sup>398</sup> *Ibid.*

<sup>399</sup> Croatian Radio-Television: *Otvoreno*, 15 October 2019

<sup>400</sup> *Declaration on a Consistent, Ethical Reporting about Sexual Violence* is signed by 20 media in Montenegro in April 2019. – available on: <https://cssplatform.org/naming-and-shaming-sexual-violence-against-women-and-children>, accessed on 30 September 2019

<sup>401</sup> *Op. cit.* (note 375), p. 11

v) **Conclusion: ‘Eppur si muove?’**

Although I have presented some deficiencies in the current penal legislation with regards to acts of sexual violence, the real problem exists/lies within the institutional practice, whose many actors are insensible when it comes to dealing with victims of GBV, including sexual violence. Due to the enormous and continuous work of women’s rights NGOs, some legislative injustices (like the described offence of sexual intercourse without consent) will fortunately soon be a thing of a past. It is problematic how the realization of certain undoubtedly positive legislative changes in the *Criminal Procedure Code* (such as audio-video questioning of witnesses and right to be accompanied with the person of trust during the course of the criminal proceeding) still depend on the discretion of the individual judge. As the NGO, Human Rights House (*Kuća ljudskih prava*), warned

Although the victim’s rights are declaratory and normatively expanded by the amendments in the *Criminal Procedure Code* from 2017, still it is noted that a certain number of rights the victim could exercise only if he/she claims them. Also, it is not prescribed to whom such claim should be submitted, within what period and in which form. Also, no sanctions are imposed on judicial authorities for illicit refusal of such claims, nor do victims have the opportunity to file any remedy in case of refusal of the claim.<sup>402</sup>

Even though this limited assessment of final judgments shows that the judicial understanding of sexual violence has significantly improved since Radačić’s research, some previously indicated problems nevertheless remain, both *de iure* and *de facto*. Moreover, it is clear from this analysis that there exists a huge discrepancy between different national courts and their understanding of sexual violence. In general, four courts analyzed for the specific purpose of this thesis seem to produce judgments of a much better quality than some of their national counterparts. Accordingly, it is evident that the jurisprudence is still non-consistent in this sensitive area. On the

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<sup>402</sup> *Op. cit.* (note 283), p. 30

one hand, in this study I have presented and applauded instances where judges themselves debunked some rape myths, and on the other, I have condemned some troublesome judgments in which *inter alia* use of gender stereotyping was an issue.

Therefore, it is clear that there exists a strong need for the continuous education of law students, lawyers and judges in the dynamic field of human (and women's) rights and of the jurisprudence of relevant international bodies. Unfortunately, there is no evidence that the situation has improved since 2014 when Radačić concluded, '...there are still no courses on feminism and human rights of women in law schools and no gender studies programs at the universities. Moreover, feminism, VAW and human rights are not incorporated into the legal education or judicial training. Judges are very reluctant to be trained by non-judges, in particular by non-legal professionals and women service providers, who are exactly those who work with the victims'<sup>403</sup>

Clearly, the wider public is also suffering from a lack of sexual and civil education.<sup>404</sup> It is absurd that in 2019, (health) sexuality is still a taboo topic in a vastly conservative Croatian society. Some of the presented cases speak for themselves about the omnipresence of toxic masculinity and misogyny. It is also shown in the 2016 Eurobarometer research, in which as many as 37% of Croatian citizens considered rape to be justified in at least one of nine situations<sup>405</sup> (while the average EU level was 27%). For 19% of Croatian respondents,

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<sup>403</sup> Radačić, Ivana: *Rape Myths and Gender Stereotypes in Croatian Rape Laws and Judicial Practice*, Feminist Legal Studies, 2014, p. 85

<sup>404</sup> More about the reasons for the non-existence of the comprehensive sexual education in Croatia available in: *Comprehensive sexuality education in Croatia: Overview and the context*, Pariter, 2017, p.3-7

<sup>405</sup> As part of the survey, respondents were asked to evaluate whether 'sexual intercourse without consent' was justified in one of the following nine situations: Wearing revealing, provocative or sexy clothing; Being drunk or using drugs; Flirting beforehand; Not clearly saying no or physically fighting back; Being out walking alone at night; Having several sexual partners; Voluntarily going home with someone, for example after a party or date; If the assailant does not realize what they were doing; If the assailant regrets his actions. - Special Eurobarometer 449, *Gender-based violence Report*, November 2016, p. 62 and 102

‘sexual intercourse without consent’ may be justified if the victim was drunk or used drugs, and for 16% if she wore revealing, provocative or sexy clothing.<sup>406</sup> Such problematic answers confirm the women’s rights NGOs constant warning that *de facto*, in many instances it is as if the victim(‘s behavior/personality) is on trial, not the perpetrator. Three years later, the situation has not improved; Internet comment sections are often full of intolerable and misogynistic justifications for rapists. Moreover, the described case of the alleged gang-rapes led to numerous brave women’s testimonies who repeatedly warned about the institutional violence they suffered when they decided to report rape.<sup>407</sup>

To conclude, *de lege lata* Croatia has done a lot in recent years in the field of sexual violence, especially concerning the adoption of progressive (but unfortunately only) soft law sources like the *Protocol of Conduct in Case of Sexual Violence* and *Media Code with Guidelines for Sensitized Reporting on Violence Against Women and Femicide*. Also, pronounced and welcomed *Criminal Law* amendments will be ‘obsolete if not properly implemented by the authorities.’<sup>408</sup> In order to be effective, *de iure* improvements should be followed by broader action seeking to challenge and change the prevalent patriarchal mindset of the majority of the Croatian population. Outdated but clearly deeply rooted, gender stereotypes and myths require a more active Government to address them and finally, debunk them.

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<sup>406</sup> *Ibid.*, p. 102

<sup>407</sup> Jutarnji list ‘*After rape women suffer violence from institutions as well. That needs to stop*’, 20 October 2019, p. 6

<sup>408</sup> <https://www.independent.co.uk/news/world/europe/croatia-gang-rape-teenager-suspects-police-release-kadar-a9162246.html>, accessed on 7 November 2019



## Conclusion

This thesis proves that, despite ‘many reforms in definitions of rape in the last three decades... courts have not uniformly adopted the reforms, nor have societal attitudes and prejudices regarding rape and sexual violence necessarily changed as rapidly as the laws themselves.’<sup>409</sup> It is obvious from this analysis that (un)conscious harmful gender stereotypes and rape myths produce serious consequences for the victims of sexual violence. As presented, gender-based myths and stereotypes hinder women’s access to justice and in long term contribute to their re-victimization, especially in cases that are so sensitive as rape.

When it comes to the assessment of the ways in which the main regional human rights courts (namely the ECtHR and IACtHR) approach (gender) stereotyping, I find the following comparison - which itself uses ‘language’ of stereotypes - as being sharp, witty and ‘straight to the point.’

If we wanted to stereotype regional human rights courts, the ECtHR would be typecast as very prudent, always looking over its shoulder for the political reaction its judgments might cause, preferring incremental over radical approaches, and electing to be silent about potentially controversial issues that it need not strictly address. In contrast, the IACtHR might be presented as the daughter of many revolutions, preferring big steps over small ones, and not shying away from strong language or highly innovative interpretations.<sup>410</sup>

The IACtHR and IACmHR undoubtedly assess sexual violence through a gendered lens. When compared to the case-law and approach of its ‘revolutionist’ Inter-American counterparts, it is clear that the ECtHR is (still) not so eager to emphasize the structural aspects of sexual violence. It has been shown that the ECtHR is often reluctant even to identify/name gender

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<sup>409</sup> Lapidus M., Lenora; Martin J., Emily; Luthra, Namita: *The Rights of Women: The Authoritative ACLU Guide to Women’s Rights*, Fourth Edition, New York University Press, 2009, p. 180-181

<sup>410</sup> Brems, Eva and Timmer, Alexandra: *Introduction in op. cit.* (note 11), p. 6

stereotypes in its jurisprudence. Moreover, it has still not done so *expressis verbis* in cases of sexual violence, as seen in the previously analyzed *Konstantin Markin* and *Pinto* judgments. That also enables the Court to proclaim the existence of a clear link between deeply rooted and harmful gender stereotypes and the structural aspects of sexual violence (which is clearly being gender-based). The ECtHR has not yet called attention to (as it has in its domestic violence jurisprudence, e.g. in *Opuz v. Turkey*) the discriminatory aspect of sexual violence, through finding a violation of Article 14 in such cases. *A contrario*, the analyzed jurisprudence of the IACtHR and the IACmHR makes clear that they not only often identify gender based stereotypes, but usually go one step further and require states ‘to comply with the affirmative obligation to take all necessary measures to debunk wrongful stereotypes about women.’<sup>411</sup> (which corresponds with the obligation of condemning gender based stereotypes). I would argue that the ECtHR is a pragmatic human rights court, which is, unlike the activist IACtHR and IACmHR, concerned with the possible backlash from the Contracting State Parties that could occur if it delves deeper into the harmfulness of persistent gender stereotypes.<sup>412</sup>

It is positive that the ECtHR usually recognizes the special vulnerability of girls and women with disabilities in its sexual violence jurisprudence, but it does not explicitly analyze it in a broader intersectionality context like its Inter-American counterparts, the IACtHR and IACmHR. My view is that the ECtHR should consider cases of sexual violence from a broader intersectionality context, acknowledging other vulnerabilities of girls and women beyond disabilities in order to rightfully recognize the much more substantive categories of vulnerabilities which play into the stereotypes used against females in this gender-based crime.

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<sup>411</sup> *Ibid.*, p. 79

<sup>412</sup> Timmer, Alexandra: *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, Human Rights Law Review, 2011, p. 737

In this thesis, I have, in detail, reflected on the *de iure* and *de facto* situation regarding sexual violence in Croatia. It can be concluded that Croatia has an adequate legal and regulatory framework in this sensitive matter; especially after the troublesome crime ‘sexual intercourse without consent’ has officially become part of legislative and judicial history, expected January 2020. Some of Croatia’s soft law documents, such as the *Protocol of Conduct in Case of Sexual Violence* and *Media Code with Guidelines for Sensitized Reporting on Violence Against Women and Femicide*, are not only in accordance with the landmark *Istanbul Convention*, but also with more recent and progressive soft law sources of the Council of Europe. Moreover, a praiseworthy social development came from the recent controversial Croatian judgments (like not ordering pre-trial prison for alleged gang-rapists of a minor), which led to a public awakening through numerous successful protests and more broadly provoked important and necessary public discussions about the pervasiveness of sexual violence in Croatian society.

This thesis has shown that the real problem lies within the institutional practice. At first glance, it is problematic that courts’ jurisprudence is inconsistent (even within the same court) when it comes to sexual violence. While some courts eagerly debunk harmful gender stereotypes and rape myths in their respective judgments, others (un)consciously are less inclined to do so. However, as with the ECtHR, Croatian courts do not name *expressis verbis* outdated rape myths and gender stereotypes as such, even when they *de facto* deconstruct them (e.g. that the ‘real’ rape victim must report rape immediately). Furthermore, no judges in any of the considered Croatian judgments referred to the jurisprudence of any relevant regional or international human rights actor, such as the ECtHR and/or the CEDAW Committee. Needless to say, the persuasive Inter-American judgements are absolutely unknown as a far-reaching body of law.

It would be beneficial if domestic courts are continuously educated about the women's rights and the jurisprudence of the cited bodies. Moreover, I recommend judges to get a handbook of good practice jurisprudence in the area of gender stereotyping. Throughout this thesis I have referenced to different useful and easily accessible international and regional reports and training manuals that deal with the interconnection between women's access to justice and gender stereotyping. Interestingly enough, some of cited reports were even co-authored by Croatian expert, Ivana Radačić, who is currently serving as the Chair of the *UN Working Group on the Issue of Discrimination against Women in Law and in Practice*.<sup>413</sup> Such reports should be disseminated during judicial and law enforcement's personal trainings with an important aim to raise awareness about the need of challenging and in long term of eliminating harmful gender based stereotypes. Troublesome and continuing instances of public and judicial rampant sexism require the Government to finally introduce sexual education into public education, as a foundational means of preventing GBV (including sexual violence). Debunking deeply-rooted gender stereotypes is a transformative task that requires continuous action and multi-sectoral approach.

To conclude this thesis, it should be reminded that 'Identifying the underlying harmful stereotypes and assumptions, and scrutinizing and reforming the laws and practices that embody them, is a crucial dimension of efforts to end sexual violence against women, and ensure freedom from discrimination and the equal realization of women's human rights.'<sup>414</sup>

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<sup>413</sup> Available on: <https://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/Members.aspx>, accessed on 25 November 2019

<sup>414</sup> The International Commission of Jurists: *Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice*, 2015, p. 2

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