Araştırma Makalesi
Research Article

Gönderim / Received: 05/08/2024
Kabul / Accepted: 08/01/2025

Hukuk Fakültesi Dergisi
Ankara Hacı Bayram Veli University
Faculty of Law Review

ISSN: 2651-4141 e-ISSN: 2667-4068
Cilt / Volume 29 Nisan / April 2025 Sayı / No. 2

EUROPEAN UNION ADOPTS RAPE SHIELD LAWS: ENHANCING VICTIM PRIVACY AT THE EXPENSE OF DEFENDANTS' RIGHTS?

AVRUPA BİRLİĞİ TECAVÜZ KALKANI YASALARINI KABUL EDİYOR: MAĞDURUN ÖZEL HAYATININ GİZLİLİĞİNE YÖNELİK KORUMA SANIKLARIN HAKLARI PAHASINA MI ARTIRILIYOR?

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ABSTRACT

As the European Union adopted a landmark directive aimed at combating violence against women, the implementation of "rape shield laws" is poised to become more prevalent across the continent. These legal provisions, designed to protect the privacy and dignity of sexual assault victims during criminal proceedings, have long been implemented in common law jurisdictions. However, their introduction represents a significant shift for many European countries, potentially including Turkey as an EU candidate. This article seeks to provide a comprehensive analysis of rape shield laws, exploring their rationale, various implementation models, and the challenges they present. The first chapter delves into the historical origins and primary objectives of rape shield laws, highlighting their expanding global application. The second chapter offers a comparative examination of different rape shield frameworks, assessing the strengths and weaknesses of each approach. The final chapter critically addresses the controversies and potential pitfalls of these laws, particularly concerning the defendant's right to a fair trial and the principle of equality of arms. By drawing on the experiences of countries with established rape shield laws, this article aims to contribute to the broader discourse on victim protection, providing insights for policymakers and legal practitioners as the EU moves towards this significant legal reform.

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• **Atıf Şekli / Cite As:** Karabulat, Efe Can, "EU is Adopting Rape Shield Laws: Enhancing Victim Privacy at the Expense of Defendants' Rights?", HBV-HFD, 2025, C. 29, S. 2, s. 703-724.
• İntihal / ***Plagiarism***: Bu makale intihal programında taranmış ve en az iki hakem incelemesinden geçmiştir. / *This article has been scanned via a plagiarism software and reviewed by at least two referees.*

Keywords: *Rape shield laws, Victim privacy, Sexual crimes, European Union, Right to have a fair trial.*

ÖZET

Avrupa Birliği, kadınlara yönelik şiddetle mücadeleye odaklanan önemli bir direktifi kabul ederken, "tecavüz kalkanı" kıta genelinde daha yaygın hale gelmeye hazırlanmaktadır. Ceza yargılamaları sırasında cinsel saldırı mağdurlarının mahremiyetini ve saygınlığını korumayı amaçlayan bu kanuni düzenlemeler, uzun süredir ortak hukuk [common law] sistemlerinde uygulanmaktadır. Ancak bu kanunların ihdası, birçok Avrupa ülkesi için önemli bir değişimi anlamına gelmekte olup, aday ülke olarak Türkiye'yi de etkileme potansiyeline sahiptir. Bu makale, "tecavüz kalkanı" hükümlerini kapsamlı bir şekilde analiz etmeyi, bu hükümlerin gerekçesini, farklı uygulama modellerini ve beraberinde getirdiği zorlukları incelemeyi amaçlamaktadır. İlk bölüm, bu hükümlerin tarihsel kökenlerine ve temel amaçlarına odaklanarak, küresel çapta artan uygulamalarını öne çıkarmaktadır. İkinci bölüm, farklı "tecavüz kalkanı" modellerinin karşılaştırmalı bir incelemesini sunarak, her bir yaklaşımın güçlü ve zayıf yönlerini değerlendirmektedir. Son bölüm ise, özellikle sanığın adil yargılanma hakkı ve silahların eşitliği ilkesi bağlamında bu hükümlerin tartışmalı yönlerini ve olası sakıncalarını eleştirel bir şekilde ele almaktadır. Bu makale, "tecavüz kalkanı" hükümlerinin yerleşik olduğu ülkelerin deneyimlerinden faydalanarak, mağdurların korunması konusunda daha geniş bir tartışmaya katkı sunmayı; AB'nin bu önemli reforma doğru ilerlediği süreçte, politika oluşturucular ve hukuk uygulayıcıları için görüşler sağlamayı hedeflemektedir.

Anahtar Kelimeler: *Tecavüz kalkanı, Mağdurun özel hayatının gizliliği, Cinsel suçlar, Avrupa Birliği, Adil yargılanma hakkı.*

INTRODUCTION

As the European Union (EU) adopted the historic directive on combating violence against women, the concept of "rape shield laws" is set to gain broader application across the continent. These legal provisions, which aim to protect the privacy and dignity of sexual assault victims during criminal proceedings, have been widely embraced in common law jurisdictions for decades. However, their introduction will be a new development for many European countries, potentially including Turkey as an EU candidate.

Given the significance of this impending change, it is crucial to develop a comprehensive understanding of rape shield laws — their rationale, various implementation models, and the potential challenges they pose. This paper seeks to provide such an analysis, drawing insights from the experience of

countries that have already grappled with this complex issue.

In the first chapter, the paper will explore the concept of rape shield laws, examining their historical origins, the key purposes they serve, and their expanding scope of application globally. Chapter two will then undertake a comparative examination of the different types of rape shield law frameworks employed in various jurisdictions, highlighting the strengths and weaknesses of each approach.

The third and final chapter will turn a critical eye towards the problems and controversies surrounding rape shield laws, particularly in relation to the defendant's right to a fair trial and the principles of equality of arms. This section will aim to identify potential pitfalls and propose ways to strike a balance between the competing interests of victim protection and fairness to the accused.

It is important to note that, given the significant diversity in legal systems and approaches to rape shield laws across the world, this paper cannot possibly address every nuance and variation. However, it will strive to provide a comprehensive overview, with ample citations for readers seeking more in-depth exploration of specific jurisdictional approaches.

I. THE CONCEPT OF "RAPE SHIELD LAW"

Criminal procedure is not only a burden for the defendant; it is also wearying for victims and witnesses. Especially for people who are sexually assaulted, criminal proceedings are often distressing and anxiety-inducing. Rape is a traumatic event, and criminal proceedings require the victim to relive and talk about it[1]. Reminiscence of a traumatic event can be thought as ripping apart a healing mental wound; it is undoubtedly hurtful in itself.

Because of its negative effects on victim's psyche, criminal proceedings have been referred to as "secondary victimisation" or "revictimisation" by some authors[2]. Hospitalization, police investigation, and testifying in court are all quite traumatic experiences for rape victims, especially when legal and medical professionals are insensitive and not well-trained enough.

Starting in the 1970's, the women's movement endeavoured to compel legal authorities to reassess women's position in legal proceedings and

[1] Hines, p. 879; Bacaksız/Bayzit, p. 387.

[2] Latts/Geiselman, p. 10. Taner, p. 404.

suggested several measures to improve their situation[3]. Because of the sudden rise of rape cases in the US from the late 1960s to the early 1970s, a joint effort to reform rape laws emerged, led by the feminist movement[4]. Among the measures they envisioned, one of them was particularly aimed at protecting victims' privacy in court[5].

Because of its embarrassing nature, it is often difficult to discuss sexual history in court, especially in detail[6]. It becomes much worse if it includes sexual assault[7]. In such cases, victims are usually already devastated and extremely vulnerable to any kind of pressure. They are also unsure how much details they should share to be believed[8], which can lead to panicky and incoherent behavior[9]. Defense attorneys have quickly discovered and used this difficulty against victims by repeatedly bringing up their life choices and sexual histories to undermine their credibility and infer their consent[10], even though these details are irrelevant to the case. In some infamous examples, defense lawyers have shown what the victim was wearing and claimed that they were "*advertising for sex"* or "*asking for getting raped"*[11]. They would question the victim's sexual history with the intent of portraying them as "unchaste"[12]. In the past, this portrayal of "unchaste character" helped defendants receive lesser sentences[13].

These efforts aim to convince the court and/or jury that the victim's sexual autonomy was worthless to begin with. If the defense could prove that the victim regularly engages in and enjoys sex, then it was unlikely that the encounter with the defendant was non-consensual[14]. As a result of these prevalent zealous advocacy attempts to systematically supress sexually assault

3 Rudstein, p. 1-2. Kello, p. 317-346.

4 Torres, p. 135; Zahuar/Trent, p. 306.

5 Ayres, p. 825-826; Koslow, p. 841 et seq.

6 For more info, see Bohmer/Blumberg, p. 393.

7 Taner, p. 461.

8 Taner, p. 475.

9 Şahin/Göktürk, p. 154.

10 McDonough, p. 11-12.

11 Hazelton, p. 35.

12 Hazelton, p. 37.

13 Hire, p. 594. See also Bacaksız/Bayzit, p. 409.

14 Kello, p. 328.

victims from speaking out, the inability of individuals who have been subjected to sexual assault to report the incident -particularly for female victims- due to the potential discussion of their sexual lives and histories in court has emerged as a significant issue[15]. Rape remains a highly underreported crime for various reasons[16], including victim-blaming defense tactics[17].

Needless to say, an individual's life choices or sexual history have no bearing on whether they consented to a certain sexual act or the extent to which they deserve protection under criminal law. Although the idea of sexual "unchastity" is a thing of the past and now rejected[18] for the most part[19], the need to prohibit unnecessary probing into victim's privacy persists. Consequently, provisions known as *rape shield laws*, which prohibit the discussion of an individual's **sexual history** and/or **sexual reputation** in court, have been enacted to protect victims' privacy[20]. Initially, these provisions applied only to criminal court cases, but later on in some jurisdictions, they were expanded to include civil cases as well[21].

These provisions are universally referred to as a "rape shield" because they create a privacy shield around the victim during rape cases to protect them from harrassment[22]. Although it is widely accepted, the term is an example of inferior nomenclature, as it sounds like it is a measure to prevent rape rather than protect victim's privacy[23].

The term "sexual history" of the victim refers to all sexual behaviors of the victim outside of the case at hand. For example, asking the victim if they are living with someone else, how often do they have sex, or how much sexual

[15] McNabb/Baker, p. 43.

[16] For multiple explanations, see Usluadam, p. 375-376.

[17] Torres, p. 137; Bacaksız/Bayzit, p. 388; Huimin, p. 89.

[18] Cassidy, p. 148.

[19] *Huimin* points out in some cultures like China, even though women's situation has improved, old ideas about chastity are still lingering. Huimin, p. 92, It can be argued that it is true for Turkey as well, though it does not have a direct bearing on rape cases. See also Usluadam, p. 400; Bacaksız/Bayzit, p. 408 et seq. for more info.

[20] Duff, p. 216 et seq.; Cavallaro, p. 302.

[21] For more info, see Ayres, p. 826 et seq., Kello, p. 322 et seq.; Hines, p. 880 et seq.

[22] Tuerkheimer, p. 1247.

[23] Tuerkheimer, p. 1247.

experience they have are all means of questioning their sexual history[24].

In some cases, the sexual history of the victim may also include past consensual sexual relations with the perpetrator[25]. Whether these fall under the scope of rape shield laws is a matter of debate[26]. According to the proponents of the strong rape shield idea, the entire sexual history, including relationships with the perpetrator, falls under the scope of the rape shield[27]. This is because "*voluntariness, agreement to sex acts cannot be evidenced from past or future sexual activity*"[28]. Others, however argue that it is illogical to assume consent to present sexual behavior is completely irrelevant to past sexual consent[29]. After all, past experiences can show victim's general inclination towards consenting to sexual acts with the perpetrator[30], even though they do not guarantee it.

Some legal systems explicitly regulate this issue. For example, the old version of Canadian Criminal Code Section 276 explicitly stated that *"no evidence shall be adduced… concerning the sexual activity… with any person* ***other than the accused****"*. However it was amended to *"****whether with the accused*** *or with any other person"* to include sexual activities with the accused.

Asking the victims whether they drink alcohol, go out alone at night, dress in a certain manner, or are widowed[31] are not only tactics aimed at creating the impression that the victim is unreliable and "easily consenting to sexual relations" in a manner unrelated to the case at hand, but are also degrading for the victims. A recent example occured in Türkiye, where a defense lawyer asked a sexual assault victim "*whether she was warned because of [how short] her skirt,"*[32] causing a public outrage.

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[24] Hazelton, p. 40.

[25] For some examples, see Bacaksız/Bayzit, p. 395 et seq.

[26] See Duff, p. 223 onwards for relevant discussions.

[27] Hire, p. 600-601.

[28] Caringella, p. 182.

[29] Duff, p. 224.

[30] Rudstein, p. 34.

[31] Duff, p. 223.

[32] (https://www.zha.com.tr/tecavuz-davasinda-skandal-etek-boyu-sorusu-tepkilerin-odagindaki-avukattan-aciklama-var/, Date Accessed: 02.08.2024.)

The rationale behind these provisions is the evidential value of the victim's character or their past sexual history is outweighed by possible dangers of discussing them in court. Unrelated questions about the victim's character or sexual history distract the court from important evidence, waste time, and more importantly psychologically distress victims and witnesses[33]. In a sense, this kind of questions reverse the roles in court, making it seem as if the victim is being tried for the life they choose to pursue[34].

Rape shield laws serve multiple purposes simultaneously in terms of protecting victims. First, they protect the privacy of victims' private lives by preventing them from having to share details that could be degrading or embarrassing for them in court[35]. Also, they prevent discussions about the victims' character, unrelated to the case at hand, from being used as a tactic to undermine their credibility[36].

Thirdly, by relieving the victims of the psychological burden of having to make such disclosures, these provisions enable them to report sexual crimes to the authorities more easily[37]. It is argued that this facilitates crime prevention as well, as potential perpetrators would know that there is a greater chance for victim to report the crime to the authorities[38],[39].

Emerging for the first time in Michigan in 1974 under the leadership of the feminist movement, rape shield provisions rapidly gained traction across American states. Within two years, nearly half of the states had enacted similar provisions. Currently, all states have rape shield laws in place, with Arizona being the last to enact one[40]. Today, provisions of this kind can also

[33] Rudstein, p. 5.

[34] Bohmer/Blumberg, p. 392-393.

[35] Omar, p. 5.

[36] Duff, p. 219.

[37] Meadows, p. 282-283; McDonough, p. 11-12.

[38] Rudstein, p. 25; Koslow, p. 839.

[39] It is argued that after implementing rape shield laws, rape rates were decreased in the U.S. and reporting rates were increased. Huimin, p. 96. This is a classic example of *ad hoc ergo propter hoc*, since there is no proven causal connection between these statistics. It is impossible to think crime rates in a vacuum and determine a certain provision's effect, because there are countless factors to be accounted for. Besides, rape reporting rates significantly reduced after 2004 in the US when rape shield laws were already in place in almost all states.

[40] McDonough, p. 11.

be found in numerous countries, such as Canada[41], Scotland[42] and South Africa[43],. Evidently, rape shield laws have been widely embraced and viewed positively. Recently, it has been suggested to expand their scope to domestic violence victims as well[44].

The rape shield laws, which have been predominantly implemented in common law countries to date, will soon gain much broader application. The European Union's Directive 2024/1385 *"On Combating Violence Against Women and Domestic Violence"* entered into force in May 2024[45]. The European Parliament and the Comission of the European Council reached an agreement on the Comission's proposal and the directive was hailed as a "historic deal", being the first EU-wide directive to combat violence against women[46]. The Directive also imposes an obligation on member states to enact rape shield provisions to be implemented across all European Union countries. The inclusion of these provisions in the Directive is important not only because it will greatly expand the scope of application of these provisions but also because it closely concerns Türkiye as a candidate country.

Article 20 of the Directive, which imposes the obligation to enact rape shield laws, states: *"Member States shall ensure that, in criminal proceedings, evidence concerning the past sexual conduct of the victim or other aspects of the victim's private life related thereto is permitted only where it is relevant and necessary."*

It must be noted that, before being amended by the Parliament, this provision (formerly article 22) was formulated as follows: *"Without prejudice to the rights of defence, Member States shall ensure that, in criminal investigations and court proceedings, questions, enquiries and evidence concerning past sexual conduct of the victim or other aspects of the victim's private life related thereto are not permitted."*

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41 Wagner, p. 640 et seq.; McNabb/Baker, p. 24 et seq.

42 See Duff, p. 218 et seq. for more info.

43 Omar, p. 2.

44 Ayres, p. 835.

45 For the full text (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401385, Date Accessed: 02.08.2024.)

46 Commission Welcomes Political Agreement on New Rules to Combat Violence Against Women and Domestic Violence, (https://ec.europa.eu/commission/presscorner/detail/en/ip_24_649, Date Accessed: 08.04.2024.)

As will be explained below, there is little practical difference between the two provisions because the protection of the rights of defence would require the same exception where said evidence is relevant and necessary. Nevertheless, this subtle change shows Parliament's cautious attitude towards not violating the defendants' right to a fair trial.

The rationale for this provision is provided in paragraph 48 of the introductory section: *"Presenting evidence of past sexual behaviour, the sexual preferences of the victim and the attire or outfit of the victim to challenge the credibility and lack of consent of victims in sexual violence cases, especially rape cases, can reinforce the perpetuation of damaging stereotypes of victims and lead to repeat or secondary victimisation. Therefore, Member States should ensure that evidence concerning the past sexual conduct of the victim, or other aspects of the victim's private life connected thereto, is only permitted where it is necessary to assess a specific issue in the case at hand or for the exercise of the rights of defence."*

II. DIFFERENT TYPES OF RAPE SHIELD LAWS

To balance the victim's privacy and defendant's right to discover evidence, different types of rape shield provisions have been introduced[47]. Although every jurisdiction has unique rape shield provisions, in general, there are four archetypes: legislative exception, constitutional catch-all, judicial discretion, and evidentiary purpose. All four have different scopes and balancing mechanisms.

In *legislative exception*, also known as the "Michigan Model", presenting evidence regarding the victim's sexual history and character is categorically prohibited, with some exceptions to this prohibition[48]. This method is the most restrictive of the defense's rights and, in this sense, is the most criticized in the context of the right to a fair trial[49].

The exceptions permit the introduction of evidence regarding the victim's sexual history to show specific instances of a victim's sexual behavior if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence or evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual

[47] Hines, p. 884.

[48] Torres, p. 136.

[49] Wagner, p. 642.

misconduct, if offered by the defendant to prove consent or if offered by the prosecutor.

In some cases, exceptions might include a pattern of prior sexual conduct, bias or bad motive that could lead to fabrication of the sexual assault, the alleged perpetrator's belief in the complainant's consent, and instances of prior false accusations of sexual assault by the complainant[50]. This method can be found in the laws of some states in the U.S. and in the former regulation of the Canadian Criminal Code. Because the exception is prescribed by law, it does not leave much room for judges to use margin of appreciation[51].

The constitutional catch-all approach is quite similar to legislative exception, except it includes another exception. In that model, evidence whose exclusion would violate the defendant's constitutional rights is also permissible[52]. It is argued that, in practice, the problem with the constitutional catch-all approach lies in the lack of a comprehensive rule of exclusion and its superfluous nature[53]. In other words, courts usually employ a narrow window for determining violations of defendant's constitutional rights, and these are already covered by other exceptions in relevant provisions.

Judicial discretion refers to the existence of a general prohibition in the law regarding the presentation of evidence or questioning about the victim's sexual history or character, but it grants the judge the discretion to allow the presentation of evidence, enquiries or questions after a pre-trial hearing[54]. For example, in the Canadian Criminal Code, presenting this evidence is generally prohibited, but the judge may permit it if it is not being adduced to support an inference, is relevant to an issue at trial, is of specific instances of sexual activity and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. This method is also applied in many U.S. states[55].

The criteria which judges use to determine whether the evidence is admissible differ between jurisdictions. Relevance, the probative value of the

[50] Torres, p. 136.

[51] Tuerkheimer, p. 1248.

[52] Torres, p. 136.

[53] Cavallaro, p. 299-301.

[54] Steinbuch/Seitz, p. 287.

[55] Rudstein, p. 10. For a very detailed review see also Steinbuch/Seitz, p. 288 et seq.

evidence, or the danger of prejudice may all be used in making a decision[56]. It is argued that, in practice, courts consistently and overwhelmingly outweigh victim's interest[57], effectively rendering judicial discretion insignificant.

In some jurisdictions where the jury system is applied, a different form of this method is observed. Evidence regarding the victim's sexual history or character is evaluated by the court either *in camera* or in the absence of the jury. If the court finds the presentation of the evidence admissible, then it may be presented[58]. In some cases, a written application is also possible. For example, in Scotland, if the defense wishes to present evidence or ask questions related to the victim's sexual history, they must submit a written application to the court in advance, explaining the nature of the evidence and its relevance to the case. The judge then evaluates the application and decides whether to allow the presentation of the evidence or the questions[59].

Evidentiary purpose, also known as "California approach"[60] is a criterion applied in some states of the U.S. As the name suggests, this criterion takes the purpose for which the evidence is presented into account. The victim's sexual history can be used as evidence, sometimes to prove the existence of consent and sometimes to challenge the victim's credibility. Interestingly, in some states, the victim's sexual history can only be used to prove the existence of consent, while in others, it can only be used to challenge the victim's credibility[61].

The "evidentiary purpose" criterion has also faced criticism from multiple perspectives. Firstly, as mentioned above, there are inconsistent practices across different jurisdictions. Furthermore, it is very difficult in practice to distinguish when the sexual history is relevant to proving consent and when it is relevant to challenging the victim's credibility. Consequently, in trials, defense attorneys can base the discussion of the victim's sexual history on whichever purpose is permissible in that jurisdiction[62].

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[56] Rudstein, p. 12.

[57] Zahuar/Jonas, p. 307.

[58] Rudstein, p. 10-11.

[59] Duff, p. 221.

[60] Hire, p. 597.

[61] Tuerkheimer, p. 1250; McDonough, p. 13.

[62] McDonough, p. 13; Tuerkheimer, p. 1258.

This flexibility can undermine the very purpose of rape shield laws, which aim to protect victims from invasive and irrelevant inquiries into their sexual history. A more consistent approach, as advocated by the EU Directive, could help address these criticisms and provide stronger protection for victims.

It should be noted that it is difficult to claim the superiority of one of these practices over the others. There is no consensus on this matter among scholars or practitioners either. Each approach has its own advantages and disadvantages compared to the others. Furthermore, it is argued that transitioning to a uniform practice is more important for the sake of consistency[63].

It is debatable which type of rape shield provision the EU Directive envisions. Initial draft, on the surface of it, was seemingly a type of *legislative exception*, as it prohibits all questions, enquiries and evidence without any consideration. Nevertheless, I would argue that it did not necessarily impose *legislative exception* or any other particular type. Since the article began with *"without prejudice to the rights of defence…",* member states retain the right to interpret necessary balancing measures according to their legal system and implement any of the above-mentioned criteria. For example, it should be possible for a member state to employ an evidentiary purpose limitation, as it serves as a counterbalance to protect defendants' rights.

With the amended provision, the EU Directive envisions a clearer path towards judicial *discretion*, as the evidence is "*permitted only where it is relevant and necessary".* This clearly places the decision under the judge's discretion. That being said, while it is primarily the judge's role to determine whether a piece of evidence is relevant and necessary, there may also be provisions, guidelines, or other legislative rules in place to decide if certain evidence is admissible. Therefore, I would argue that, even though the Directive seemingly envisions judicial discretion, member states can still -at least partially- employ other approaches.

III. PROBLEMS WITH RAPE SHIELD LAWS

While rape shield statutes have been serving well in protecting victim privacy, they also bear some risk of jeopardizing criminal investigations and court cases. The main concern regarding rape shield statutes has always been the defendant's right to a fair trial[64]. It is clear that the inability to present

[63] McDonough, p. 12.

[64] Wagner, p. 637.

certain evidence or ask certain questions to the victim in court poses a threat to the defense's right to a fair trial and is problematic in terms of the principle of equality of arms and the right to discover evidence[65]. Therefore, rape shield statutes have always been a subject of criticism, and various measures have been proposed to safeguard the defense[66].

In a criminal trial, the defense has the right to present evidence and to cross-examine witnesses[67]. As rape shield laws prohibit the defense from presenting certain evidence and asking certain questions to victims and witnesses, they significantly limit the defense's options[68]. It is hard to argue that this is compatible with the right to have a fair opportunity to defend against the State's accusations without reasonable counterbalances[69].

In certain cases, the victim's sexual history becomes important in determining whether the allegation is sincere or the claims are credible. While victim's chastity is generally irrelevant and therefore should not be a matter of discussion in court, their honesty and sincerity certainly are[70]. For example, if a person has previously filed complaints of being sexually assaulted by other individuals, the seriousness of the current allegation should be questioned. However, rape shield laws may prevent the defense from being able to bring up and discuss this matter[71]. As a matter of fact, in the U.S., federal courts have ruled that prior false accusations of rape fall under the scope of rape shield provisions[72].

It should not be forgotten that individuals can lie about being sexually

[65] Meadows, p. 282.

[66] Zahuar/Jonas, p. 306.

[67] Taner, p. 458 et seq.; Karakehya, p. 717.

[68] Zahuar/Jonas, p. 309.

[69] Rudstein, p. 14.

[70] Defense attorneys used to make a false syllogism that "unchaste" women are also more prone to lying and therefore their testimonies are most likely contained lies. For more information see Hazelton p. 38; Cassidy, p. 151. While this is not true, these kinds of tactics should not be suppressed with provisions which prevent courts from scrutinizing victim's credibility.

[71] City of Sacramento v. Fowler, 88 U.S. 119 (1874) and State v. Summitt, 301 N.C. 591, 273 S.E.2d 425 (1981).

[72] Cassidy, p. 153.

assaulted, especially with the intention of taking revenge[73],[74]. Moreover, this is not a rare occurrence. A nine year-long study shows that **nearly half of sexual assault allegations** are either retracted or unfounded[75]. Although some other studies show lower rates of false allegations[76], false rape allegation rates are still **4 to 5 times** higher than for any other crime[77]. In addition, a study published in 2015 found that **73.3%** of men who were help-seekers due to intimate partner violence reported that their partners threatened to make false allegations about them being sexually or physically assaulted, and **40.3%** reported that their partners threatened to make false allegations about them sexually abusing their children[78]. Therefore, questioning the credibility of the victim becomes very important in trials where sexual assault is alleged. Rape shield laws, on the other hand, impose a significant limitation on questioning the credibility of the victim.

Undoubtedly, testifying in court can be highly detrimental to the psychological well-being of individuals who have been sexually assaulted. However, it should not be overlooked that being falsely accused of sexual assault can lead to even greater devastation for the defendant[79]. A 1996 U.S. Department of Justice report states *"Every year since 1989, in about **25 percent** of the sexual assault cases referred to the FBI where results could be obtained (primarily by State and local law enforcement), **the primary suspect has been excluded** by forensics DNA testing*[80]." With such an extremely high rate in mind, it is unfathomable how much suffering false allegations have inflicted upon innocent individuals.

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[73] According *to De Zutter, Horselenberg* and *van Koppen*, there are eight motives for false rape accusation: Material gain, alibi, revenge, sympathy, attention, a disturbed mental state, relabeling, or regret. De Zutter/Horselenberg/van Koppen, p. 457–464. Some authors add "desire/fantasy to be raped" to the list. See Koslow, p. 844 for more detail.

[74] Bacaksız and Bayzit argues that *"[Because the trial is devastating to the complainant for various reasons] it is not exactly logical to assume that the complainant is doing that solely for revenge or extortion."* Bacaksız/Bayzit, p. 389-390. While this line of thinking is certainly well-intentioned and commendable, as I will demonstrate in this paper, it does not fully account for the complexities of the issue.

[75] See Meadows, p. 284-285 for different examples.

[76] See Flowe/Ebbeson/Putcha-Bhagavatula, p. 161 for more information.

[77] De Zutter/Horselenberg/van Koppen, p. 458.

[78] Douglas/Berger, p. 295-309.

[79] Meadows, p. 286.

[80] Connors/Lundregan/Miller/McEwen, p. xxviii.

Some widely known examples, such as "Duke Rape Case", show how vindictive prosecutors and the general populace can be and how inattentive they are to defendants' pleas when it comes to rape allegations[81]. The danger of false rape accusations is very real, and their consequences on a defendant's life are quite overwhelming. In a sense, rape shield laws also carry the risk of facilitating these false accusations.

It should be pointed out that the idea of "victim being tried in court" because of their life choices is problematic to begin with. There is no doubt that discussing sexual history in court -whether it contains sexual assault or not- is a painful experience, but the alleged rape victim's credibility should be under court's scrutiny, like everyone else. This does not mean that the victim is being tried, it merely means the probative value of their testimony is being assessed. It is a burden all victims must bear. Although rape shield laws are not problematic *per se* in that respect, there is a line-drawing problem between necessary protection and overprotection of the victim.

It is also questionable to what extent a victim's desire to protect their privacy in court influences their decision to report the crime. As argued, several factors could have an effect, such as not wanting to go through a criminal trial, fear of being accused by people with "provoking the offender", trying to hide the rape from their parents or partners, fearing retaliation from offender, and so on[82]. None of these factors are directly related to rape shield laws, and it is quite possible that the positive implications of these provisions are exaggerated.

Another objection is about the competing interests of victims and defendants. It is argued that the risk of retraumatizing victims is far outweighed by the risk of putting an innocent defendant in jail, because rape shield laws would prevent them from presenting evidence[83]. From this point of view, it can be deduced that rape shield laws are putting victims' interests ahead of defendants' for no logical reason. However, it must be said this line of thinking is intrinsically flawed, as it assumes an absolute violation of interests by comparing them in such a way. It should, however, be possible to strike a balance between them without causing a major violation of either side's interests. In other words, this should be read as an objection to a legislative

[81] See Koslow, p. 845 for details about the case.

[82] Rudstein, p. 26; Kello, p. 327.

[83] Rudstein, p. 21.

exception type of absolute rape shield laws, rather than to more balanced ones.

CONCLUSION

Decades of experience in many jurisdictions have shown that rape shield laws indeed serve an important function in protecting the privacy and dignity of sexual assault victims. However, as this paper has examined, the implementation of these provisions must be carefully balanced against the fundamental rights of defendants to a fair trial.

The key argument made in this paper is that rape shield provisions should be employed under strict conditions to comply with the defendants' right to a fair trial. Relevant evidence cannot simply be discarded on the grounds that it may be painful for the victim to discuss. The purpose of rape shield is to underscore the irrelevance of victim's sexual history or life choices, not to exclude relevant evidence from the case[84].

At the very least, a system of judicial discretion to determine the relevancy of evidence and questions is essential. Instead of a blanket ban for certain types of evidence or questions, it would be more prudent to employ pre-trial hearings to assess the admissibility of such evidence. Unfortunately, due to public outcry about rape cases and overwhelming public pressure, judicial discretion may sometimes be swayed in favor of the victim, as has been observed in certain jurisdictions[85]. Therefore it is crucial to provide judges with clear instructions on how to make these determinations . Additionally, politicans and public figures play an important role in such cases. They must demonstrate the political will to uphold rule of law and adhere its necessities -rather than yielding to populist demands- to protect judges from public pressure[86].

Ultimately, the right to present evidence does not grant the defense unlimited freedom to introduce any information they wish. Evidence must still be directly relevant to the case at hand[87]. If judges are empowered to carefully review and rule on the relevancy of proposed evidence, rape shield provisions can be compatible with the right to discover and present evidence. As long as the evidence is relevant, judges should not discard it due to rape shield provisions unless there is a compelling reason (i.e. the evidence having very

[84] Tuerkheimer, p. 1250.

[85] Zahuar/Jonas, p. 307.

[86] For a discussion about this interplay in length, see Karabulat, p. 35 et seq.

[87] Karakehya, p. 727; Şahin/Göktürk, p. 510.

little probative value, mutual agreement between the parties, the existence of other available evidence that already proves or disproves the allegations).

Same principles can be applied to inquiries and cross-examinations. Even though it is not possible to prevent cross-examination, judges should have the authority to determine how the victim should be cross-examined[88]. Judges should decide whether a question is relevant to the case by allowing the defense to prove its relevance. It is also possible to conduct *in camera* court sessions to further protect victim's privacy[89]. As a principle, measures that limit the defendant's rights the least should be preffered.

This paper argues against blanket evidentiary purpose limitations. Victim's consent (or lack thereof) and their credibility can and should be challenged in court. I find the classification of prior false rape allegations as falling under rape shield provisions especially alarming. There is a clear distinction between judging victim's *sexual chastity* and their *credibility*. False allegations made to legal authorities fall under the latter[90]. The credibility of alleged victims of sexual assault should be subject to the same level of scrutiny as that applied to victims of other crimes. There is no justification for granting alleged rape victims a higher presumption of credibility compared to other complainants. As such, evidence pertaining to prior false allegations made by the victim should be admissible, as this information is directly relevant to assessing the reliability of their account. Indeed, given the concerning prevalence of false rape allegations, as evidenced by statistical and empirical research, it may be argued that such claims warrant *even closer examination* by the court than other types of criminal allegations.

The relevance of information to a case is ultimately determined by the specific facts of that case. Therefore, it is hard to make a categorical distinction as it may lead to incorrect conclusions in some cases. Nevertheless, I would like to present a variety of evidence that should, in principle, be permissible in criminal court cases.

There are two rough categories of evidence that are a matter of debate regarding rape shield laws. The first concerns the accuser's **sexual history,**

[88] Omar, p. 11.

[89] *Taner* suggests that, in certain sexual crime cases, especially those involving child complainants, statements should be taken in a special setting, and questions should be asked only through experts [in pedagogy or psychiatry] to mitigate secondary victimization. Taner, p. 476; in the same vein, Aydın, p. 177. These are sensible suggestions, so long as the defense has a chance to challenge the claims and be able to ask all the relevant questions.

[90] Cassidy, p. 175.

and the second concerns their **credibility**. Needless to say, their **chastity** should not be a part of criminal procedure.

Regarding the accuser's sexual history, as argued above, past consensual sexual encounters between the accuser and the defendant are indeed relevant and should be admissible, as they have a direct bearingon proving or disproving consent. Similarly, if evidence serves the purpose of proving that the source of semen, other bodily fluid, or the cause of an injury was someone other than the defendant, it should be admissible[91].

Regarding the accuser's credibility, a few additional exceptions should be considered. First, as argued above, evidence proving that the accuser has madet false rape allegations in the past is crucial in determining their credibility. Also, evidence that demonstrates bias, motive, or a mental health condition (such as compulsive lying, schizophrenia etc.) that could lead to the fabrication of evidence should also be admissible.

Evidence showing that the defendant had a mistaken belief inconsent does not fit into these categories, but this paper argues that it should be permissible as well, due to its significance in establishing a mental connection between crime and the perpetrator.

There is an ongoing debate about extending rape shield laws to civil court cases as well. While this extension has benefits, it also poses an even greater risk of violating defendants' rights[92]. It must be pointed out that the EU has adopted a cautious approach by limiting rape shield statute obligations with criminal investigations and court cases. I would argue that this is the right decision, as it leaves more margin to states and allow gradual transition. As discussed above, rape shield laws carry significant risks, and each state will have challenges in adapting them without violating their respective constitutional provisions. Initially employing these provisions solely for criminal investigations will help in that regard.

As the European Union and its member states move towards implementing the new directive on combating violence against women, they would be well-advised to draw lessons from the experiences of other jurisdictions with rape shield laws. By striking the right balance between victim protection and fairness to the accused, these provisions can fulfill their vital purpose without unduly infringing on the defendant's fundamental rights.

[91] Torres, p. 149.

[92] For more info see Hines, p. 881 et seq.

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